

UNIVERSITY COLLEGE LONDON

**‘EU CIVIL PROCEDURE AND
ACCESS TO JUSTICE AFTER THE
LISBON TREATY’**

PERSPECTIVES FOR A COHERENT APPROACH

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Declaration

I, Zampia G Vernadaki, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

.....

Zampia G Vernadaki

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Abstract

In the decentralised EU judicial system, EU institutions should intervene in national procedural regimes to guarantee effective dispute resolution and enforcement of EU law based claims before Member States' courts, using as a yardstick the fundamental right of access to justice (Article 47 CFREU). Pursuant to Article 51 CFREU, EU institutions should promote the application of the right of access to justice, limiting national institutional barriers to accessing courts under fair and efficient proceedings, while respecting their competences. This could limit the distortion of competition in the Internal Market, facilitate commercial activities in the EU, and reduce abusive forum shopping. These positive effects should be weighed against the respect of Member States' legal traditions, the learning effects of procedural diversity, and the incentives for lobbyism. CJEU first approximated Member States' rules on time limits, interim relief, evidential rules, and reparation. However, its factual approach, and its incapacity to appraise 28 different national procedural systems prevent it from establishing systematic and detailed EU civil procedure rules. Moreover, secondary legislative EU measures, such as the IPRED, harmonise national procedures in specific areas of substantive EU law. Their impact is felt more widely in domestic procedural orders, introducing rules of limited effectiveness that fail to strike a definitive balance between the claimants' interests to enforce their EU rights, and the defendants' interests to constrain such enforcement. Even horizontal legislative EU measures that introduce optional EU procedural mechanisms, such as the ESCP, have a limited, mainly disrupting, impact on national procedural systems, applying solely to cross-border disputes, thus leading to multiplicity of procedures in national legal orders. In light of the current discussions for a horizontal EU collective redress mechanism promoting effective access to justice, Article 81(2)(e) TFEU constitutes the better way forward. This provision is amenable to an expansive interpretation, which permits the approximation of national civil procedure laws in order to ensure effective access to justice for both domestic and cross-border EU law disputes.

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List of Abbreviations

AFSJ	Area of Freedom, Security, and Justice
AG	Advocate General
Am.J.Comp.L.	American Journal of Comparative Law
BIICL	British Institute of International and Comparative Law
B.U.L.Rev	Boston University Law Review
B2C	Business to Consumer
CCP	Code of Civil Procedure
CDE	Cahiers de Droit Européen
CEPEJ	European Commission for the Efficiency of Justice
CEPS	Centre for European Policy Studies
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
C.J.Q.	Civil Justice Quarterly
C.L.S.R.	Computer Law & Security Report
CMLR	Common Market Law Reports
CML Rev.	Common Market Law Review
Colum.J.Eur.L.	Columbia Journal of European Law
CPR	Civil Procedure Rules
CUP	Cambridge University Press
C.Y.E.L.S.	Cambridge Yearbook of European Legal Studies
Denv.J.Int'l L.& Pol'y	Denver Journal of International Law and Policy
DG	Directorate General
Duke J.Comp. & Int'l L.	Duke Journal of Comparative & International Law
E.B.L.R.	European Business Law Review
E.R.P.L.	European Review of Private Law
EC	European Community
ECC-Net	European Consumers Centre Network

ECHR	European Convention on Human Rights
ECLR	European Competition Law Review
ECR	European Court Reports
ECtHR	European Court of Human Rights
Ed/Eds	Editor/Editors
Edn	Edition
EEC	European Economic Community
E.H.R.L.R.	European Human Rights Law Review
E.I.P.R.	European Intellectual Property Review
EJCL	Electronic Journal of Comparative Law
Eur. J. L. Reform	European Journal of Law Reform
ELJ	European Law Journal
ELR	European Law Review
EPL	European Public Law
ERCL	European Review of Contract Law
ESCP	European Small Claims Procedure
EU	European Union
EuConst	European Constitutional Law Review
EUI	European University Institute
Eur J Law Econ	European Journal of Law and Economics
EUR	Erasmus University Rotterdam
Fordham Int'l L.J.	Fordham International Law Journal
FRA	European Union Agency for Fundamental Rights
GCLR	Global Competition Litigation Review
Geo.Wash.L.Rev.	George Washington Law Review
Harv.L.Rev.	Harvard Law Review
Hastings Int'l & Comp.L.Rev.	Hastings International and Comparative Law Review
ICLQ	International and Comparative Law Quarterly

ICT	Information Communication Technology
IJHSS	International Journal of Humanities and Social Science
IJPL	International Journal of Procedural Law
IPRED	Intellectual Property Rights Enforcement Directive
J.E.C.L. & Pract.	Journal of European Competition Law & Practice
J.E.P.P.	Journal of European Public Policy
J Intl Econ L	Journal of International Economic Law
J.L.Econ. & Org.	Journal of Law, Economics & Organization
J. Legal Stud.	Journal of Legal Studies
Jour.P.I.L.	Journal of Private International Law
JPL	Journal of Politics and Law
J.Pol.Econ.	Journal of Political Economy
J.S.I.J.	Judicial Studies Institute Journal
LUISS	Luiss Guido Carli
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NIPR	Nederlands Internationaal Privaatrecht
Nw.J.Int'l L. & Bus.	Northwestern Journal of International Law & Business
N.Y.U.J.Int'l Law & Pol.	New York University Journal of International Law & Politics
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
Oxf Rev Econ Policy	Oxford Review of Economic Policy
Para/paras	Paragraph/paragraphs
Pers Soc Psychol Bull	Personality and Social Psychology Bulletin
PIL	Private International Law
PL	Public Law
RberG	Rechtsberatungsgesetz
REALaw	Review of European Administrative Law

Reg	Regulation
Rev.Crit.DIP	Revue Critique de Droit International Privé
RLR	Ritsumeikan Law Review
RTD eur.	Revue Trimestrelle de Droit Européen
S.Cal.L.Rev.	Southern California Law Review
Sc.St.L.	Scandinavian Studies in Law
SMEs	Small and Medium Sized Enterprises
Syd LR	Sydney Law Review
TCR	Tijdschrift voor Civiele Rechtspleging [Civil Justice Review]
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNDP	United Nations Development Programme
Unif. L. Rev.	Uniform Law Review [Revue de Droit Uniforme]
Va.L.Rev	Virginia Law Review
Vand.L.Rev.	Vanderbilt Law Review
Vol/Vols	Volume/Volumes
Web JCLI	Web Journal of Current Legal Issues
YEL	Yearbook of European Law
Yale L.J.	Yale Law Journal
Yrbk Priv Intl L	Yearbook of Private International Law
ZeUP	Zeitschrift für Europäisches Privatrecht
ZZPInt	Zeitschrift für Zivilprozess International

1 Introduction – A Framework for Analysis

1.1 EU civil procedure law between unification and coherence – The Research Aim

The terminological distinctions between unification, harmonisation, and related terms have often been discussed.¹ Unification involves an all-encompassing convergence of procedural rules, whereby national procedural rules on a particular subject are replaced by uniform EU rules of civil procedure.² In contrast, harmonisation is a less rigid term, signaling the gradual convergence of different legal norms in a more flexible manner. It does not result in the production of identical procedural rules, but, rather, the elimination of major differences between different procedural systems.³ In the remit of the EU, harmonisation is often called approximation⁴ or Europeanisation.⁵ As will soon become apparent, in my analysis I mainly use the term ‘EU intervention’ instead of harmonisation. This broad term encompasses all generally used terms presented above. Depending on the degree of EU intervention into national procedural regimes, this intervention can constitute full unification, approximation, or limited modification.

¹ See *inter alia*: S Goldstein, ‘On comparing and unifying civil procedural systems’ in R Cotterrell (eds), *Process and Substance* (Butterworths 1995) 28-29; M Tulibacka, ‘Europeanisation of Civil Procedures: In Search of a Coherent Approach’ (2009) 46 CML Rev. 1534; B Hess, ‘Procedural Harmonisation in a European context’ in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 160; K D Kerameus, ‘Some Reflections on Procedural Harmonisation: Reasons and Scope’ (2003) 8 Unif. L. Rev. 444-445; 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* (A. Longo Editore 2006) 200-201.

² See: Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

³ G Davies, *European Union Internal Market Law* (2nd edn, Cavendish publishing 2003)145.

⁴ See for instance: Articles 114-118 TFEU, chapter 3 ‘Approximation of Laws’; M Storme, *Approximation of Judiciary Law in the European Union* (M Nijhoff 1994).

⁵ See *inter alia*: C Crifo ‘Europeanisation, harmonisation and unspoken premises: the case of service rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)’ (2011) 30(3) C.J.Q. 283-303; Tulibacka, ‘Europeanisation of civil procedures: in search of a coherent approach’ (n 1) 1534; C Hodges, ‘Europeanization of civil justice: trends and issues’ (2007) 26 C.J.Q. 96-123.

Discussions on EU intervention in national civil procedure law go back more than two decades to the Storme Report, which presented the results of a study on the approximation of Member States' rules of civil procedure.⁶ This study found that the partial harmonisation of both national and international civil procedural rules was necessary and feasible.⁷ Considerations on, among other things, the desirability of legal certainty via increased confidence in the existence of equal access to justice, as well as on the requirement for a transparent and effective system of procedural law, which international businesses could use, were said to be in favour of the approximation of Member States' procedural regimes.⁸

Currently, there is no uniform law of civil procedure in the EU. What does exist instead is a regulatory puzzle consisting of three main types of pieces. Firstly, there is a considerable thread of case law of the Court of Justice of the European Union (CJEU) on the enforcement of EU law rights in Member States' courts. Member States have a preliminary competence to define the rules according to which they will enforce EU law in their internal legal order. However, CJEU has found itself obliged to intervene where national procedural rules could not secure the effective protection of EU law rights,⁹ scrutinising diverging national rules on time limits,¹⁰ interim relief,¹¹ evidential rules,¹²

⁶ Storme, *Approximation of Judiciary Law in the European Union* (n 4). The Storme Report was the result of research initiated by an informal working-group consisting of legal experts in the field of procedural law from the then 12 Member States in 1987. In 1988, the working-group signed a contract with the European Commission and continued its research for the compilation of a European Judicial Code on a formal basis. Although this report was never officially adopted, it was nonetheless mentioned in the 'Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation' COM (2002) 746 final, 12: '[the Storme proposal] is a valuable point of reference and source of inspiration'.

⁷ Storme, *Approximation of Judiciary Law in the European Union* (n 4) 61-62.

⁸ *Ibid*, 44-45.

⁹ This case law goes back to the 1970s and the seminal case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989. It deals with various procedural issues, albeit not strictly of civil procedure character.

¹⁰ For example, see case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-04269; case C-338/91 *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-05475.

¹¹ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433; joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* 1991] ECR I-00415.

active or passive standing in the courts,¹³ and reparation.¹⁴ Secondly, the EU legislature has recently developed some sector-specific pieces of secondary EU law, thereby introducing detailed rules on various matters of a procedural nature based on Article 114 TFEU.¹⁵ These rules apply to both domestic and cross-border disputes and touch on fundamental procedural themes, such as legal standing, interlocutory injunctions, discovery rules, and interim relief. They are envisaged as a *sine qua non* in the process of approximation of the relevant EU substantive legislation, and consequently of the Internal Market endeavour.¹⁶ Finally, there is a series of EU legislative measures in the area of civil justice cooperation.¹⁷ These are limited to cross-border litigation and range from private international law uniform measures¹⁸ to autonomous EU procedural mechanisms that apply alongside national ones for domestic disputes.¹⁹

It is against this fragmented background, that I investigate in this thesis whether, when, and how, if at all, Article 47 CFREU on the right of access to justice could be used as a legal tool for a coherent approach to EU civil procedure law in order to

[Footnotes continued on next page]

¹² See for example: case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595; case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651.

¹³ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029; case 158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 01805.

¹⁴ Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357; case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

¹⁵ See *inter alia*: Directive 2004/48/EC on the enforcement of Intellectual Property Rights [2004] OJ L 195/16 (IPRED). Early, often limited, examples of this type of EU regulatory activity can be found in insurance law, labour law, corporate law, e-commerce and communications law, as well as consumer law. See also below, text to footnote (n 8) at page 135.

¹⁶ The Committee on Legal Affairs in the European Parliament has recently 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, asking for further research on this issue: European Parliament, 'Draft Report on enhancing the enforcement of intellectual property rights in the internal market' 2009/2178(INI), 4-5 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.164+01+DOC+PDF+V0//EN&language=EN> accessed 25 March 2013.

¹⁷ Article 81 TFEU.

¹⁸ See for instance: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (Brussels I Regulation).

¹⁹ See for example: 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 L 199/1 (ESCP).

achieve increased constitutional and functional legitimacy of the individual measures. In other words, I examine whether access to justice could be used as a guiding tool for the identification of the appropriate legal competence for EU intervention in civil justice systems, promoting claimants' realistic opportunity to enforce EU rights and obligations, and defendants' possibility to constrain such enforcement.²⁰

1.2 Research Area: Revisiting the Basics of Civil Procedure Law

There is a substantial pedigree of research on civil procedure law on a European basis.²¹ Most of these contributions, however, focus on particular institutions of civil procedure. In contrast, my interest lies in the significance of civil justice for the functioning, effectiveness, and sustainability of the EU legal order, and the extent of the EU competence in the harmonisation of national civil procedural regimes. These fundamental issues presuppose a consideration of the role, objectives, and functions of civil justice in society.²² Before even addressing this issue, there is a need for a demarcation between civil procedure law and substantive private law.

²⁰ On the need to intervene in national 'procedural rules (broadly construed) in the interest of fairness not merely to those citizens of the Union who wish to claim the protection of a Community "right" but also to those citizens who wish to contest such a "right" see, C M G Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22(4) ELR 295, 310.

²¹ See for example: M Cappelletti and B Garth (eds), *Access to Justice and the Welfare State* (EUI 1981); A A S Zuckerman, S Chiarloni, and P Gottwald (eds), *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure* (OUP 1999); J I H Jacob, *The Fabric of English Civil Justice* (The Hamlyn Trust, Stevens & Sons 1987)

http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Fabric_of_English_Civil_Justice.pdf accessed 16 March 2013; M Zander, *The State of Justice* (The Hamlyn Trust, Sweet & Maxwell 2000); B Hess, *Europäisches Zivilprozessrecht* (CF Müller 2010); N Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Vol 10: *Ius Gentium Comparative Perspectives on Law and Justice*, Springer 2012); C Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart Publishing 2008); J Bentham, *The Works of Jeremy Bentham* (Vol 2, published under the Superintendence of his Executor, John Bowring, Edinburgh: William Tait, 1838-1843) <http://oll.libertyfund.org/title/1921-on-2010-06-22> accessed 07 March 2013.

²² 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) 295-301; L Ervo, 'Party Autonomy and Access to Justice' in L Ervo, M Gräns, and A Jokela (eds), *Europeanisation of Procedural Law and the New Challenges to Fair Trial* (European Law Publishing 2009) 24-25.

1.2.1 Private law v. civil procedure law

The distinction between substantive and procedural law is not an easy and straightforward task. Moreover, there is no absolute consensus in the EU as to the entire range of rules that fall in one or the other category. A common problem in all areas of international law, EU law included, is that legal terminology differs greatly from one Member State to the other. Sometimes these differences can be fundamental, whilst others are limited to minimal textual nuances. Broadly speaking, private law encompasses the rules establishing the substantive content of legal relations. The rules introducing the means and actual conditions for the legal protection of these legal relations form the law of civil procedure. In other words, substantive private law creates rights and obligations for the legal subjects, while civil procedure law provides rules for the realisation and effectuation of these legal rights and duties during legal proceedings.²³

The CJEU envisages the distinction between substantive and procedural law as one between ‘rights, which individuals derive from Community law’ on the one hand, and ‘legal proceedings intended fully to safeguard the rights which individuals derive from Community law’, ‘procedural rules for legal proceedings’, and rules to ‘designate the competent courts’ on the other hand.²⁴ Substantive private law encompasses Union law based rights, including all those circumstances and restrictions under which rights come into existence, are assigned or terminated, and also determine the right holder and the person having the corresponding obligations. In contrast, civil procedure law consists of what is often referred to as ‘remedial rules’, and establishes the conditions according to which people can initiate and maintain an action before courts in order to safeguard their rights²⁵ (standard and burden of proof,²⁶ evidential presumptions,²⁷

²³ C H Van Rhee, ‘Civil Procedure: A European Ius Commune?’ (2000) 4 ELR 591.

²⁴ See *inter alia*: *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 14), para 42. For a detailed enumeration see, *inter alia*: M Brealey and M Hoskins, *Remedies in EC law: Law and Practice in the English and EC Courts* (2nd edn, Sweet & Maxwell 1998) 107-108. Kerameus calls rules on judicial organisation as the ‘hardware’ of procedural law, as opposed to remedial and procedural rules *stricto sensu* forming the ‘software’ of civil procedure law: Kerameus, ‘Some Reflections on Procedural Harmonisation: Reasons and Scope’ (n 1) 449.

²⁵ W van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 CML Rev. 524.

heads of damage,²⁸ causation,²⁹ and rates of interest).³⁰ In other words, legal remedies contribute to the metastasis from the theoretical to the practical force of rights, constituting a bridge between extra-judicial behaviour and its judicial assessment.³¹ It also consists of the so-called procedural rules *stricto sensu*; namely, rules on legal proceedings for the pursuance of a remedy before a court of law, as well as rules on the jurisdiction and organisation of the judicial system (jurisdiction to hear a dispute,³² security for costs,³³ limitation periods,³⁴ time limits,³⁵ *ex officio* raising of points of EU law).³⁶

In the same vein, Judge Wilmars distinguished between normative powers on the one hand, relating to the creation of substantive law by the European institutions, and power of sanction, in a broad sense. The latter refers to means of legal coercion, which ensure the respect of the law in cases of conflict regarding its application. These are national rules on the resolution of conflicts, the procedures to be followed, the limitation periods on raising claims and taking action, the admissibility of appeals, the standards and burden of proof, and the possible defenses.³⁷ To put it differently, civil

[Footnotes continued on next page]

²⁶ Case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)* [1997] ECR I-04449.

²⁷ *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (n 12).

²⁸ *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 11) para 88.

²⁹ *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 14) para 43; *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 11) para 65.

³⁰ Case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] ECR 01887; case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-04367.

³¹ K D Kerameus, *Civil Procedural Law – General Part* (Αστικό Δικονομικό Δίκαιο – Γενικό Μέρος Sakkoula 1986) 439-440.

³² Case C-446/93 *SEIM - Sociedade de Exportação e Importação de Materiais Lda v Subdirector-Geral das Alfândegas* [1996] ECR I-00073, para 32; case C-394/93 *Gabriel Alonso-Pérez v Bundesanstalt für Arbeit* [1995] ECR I-04101, para 28.

³³ Case C-20/92 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* [1993] ECR I-03777.

³⁴ *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 9); case 45-76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043.

³⁵ Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599.

³⁶ Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

³⁷ J M de Wilmars, 'L'Efficacité des Différentes Techniques Nationales de Protection Juridique contre les Violations du Droit Communautaire par les Autorités Nationales et les Particuliers' (1981) 1 CDE 390-391. Engström refers to 'enforcement rules', as an umbrella-term for a broad understanding of procedural rules: J Engström, *The Europeanisation of Remedies and Procedures through Judge-made Law: Can a*

procedure law consists of all the formal (procedural *stricto sensu*) or substantial rules, which regulate the various national disputes in every Member State and sanction the observance of (substantive civil) law.³⁸ However, the distinction between substance and procedure is not always easy to make³⁹ and there is considerable interdependence between the two. By way of illustration, many substantive rules provide for the time of bringing a legal action as the starting point for the realisation of some consequences; the running of the statute of limitations is interrupted and the litigation is deemed to be pending (*lis pendens*) in all respects.⁴⁰ Finally, rules on computation of time and the delivery of documents, although traditionally regarded as procedural, may still gain importance in the context of substantive law, for example, when calculating time periods provided for in a contract.⁴¹

1.2.2 The fundamental goals and functions of civil justice

There are two main goals civil justice may be envisaged to promote; on the one hand, there is the conflict resolution objective along with its functional variations,⁴² and on the other hand the law enforcement purpose.⁴³ With the perspective on the necessity to resolve a dispute, civil procedure rules provide parties with a wide range of choices. This involves parties' wide discretion as to the initiation or not of proceedings, to the legal and factual characterisation of issues, and lastly to consider and enter into

[Footnotes continued on next page]

Trojan Horse achieve Effectiveness? Experiences of the Swedish Judiciary (PhD Thesis, European University Institute 2009) 4-11.

³⁸ D U Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A study on the Functionalised Procedural Competence of EU Member States* (Springer 2010) 1-2.

³⁹ C Harlow, 'A common European Law of Remedies?' in C Kilpatrick, T Novitz, and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 72; P H Lindblom, 'On the Distinction between Procedural and Substantive Law' (1974) 18 Sc.St.L. 114.

⁴⁰ K D Kerameus, 'Procedural Implications of Civil Law Unification' in A Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer Law International 2004) 146ff; M Dougan, *National Remedies before the Court of Justice. Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 95: Dougan offers an indicative example of the close relation between substantive EU law and national remedies and procedures that can affect the effective enforcement of EU law in Member States' domestic legal orders.

⁴¹ Kerameus, 'Procedural Implications of Civil Law Unification' (n 40) 151-152.

⁴² Storskrubb (n 22) 296; Ervo (n 22) 24; Goldstein (n 1) 13.

⁴³ S Prechal, 'Community law in national courts: the lessons from Van Schijndel' (1998) 35 CML Rev. 706; S Prechal, 'Judge-made Harmonisation of National Procedural Rules: A Bridging Perspective' in J Wouters and J Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia 2001) 52; Goldstein (n 1) 11-14.

alternative dispute settlement. This perspective brings the function of civil procedure closer to private justice, as courts and judges are viewed as mere mediators.⁴⁴

At the other end of the spectrum, there is the law enforcement function, which can be further divided into a subjective and an objective recourse. Judicial relief, or subjective recourse, aims primarily to protect individual private interests, offering the premises to resort to legal proceedings. The correctness of the decision is a fundamental concern, which will subsequently affect the introduction (or not) of civil procedure rules permitting and facilitating the correct application of the law to the facts of the case as analysed above. This model emanates from the rule of law and its requirement for effective protection of individuals' private rights.⁴⁵ From the perspective of the courts and legal professionals, the focal point here is whether an infringed rule aims at only guaranteeing the interests of the directly concerned private individuals.⁴⁶

In contrast, the objective recourse serves diverse public interests of general legality and is often envisioned as a 'publicisation'⁴⁷ of private litigation, aimed at the maintenance and enforcement of legal standards and obligations, regardless of litigants' individual arguments.⁴⁸ In this context, civil procedure constitutes a behaviour modification means, focused on the defendant and the prevention of the violation of law. In addition, civil procedure can constitute a means for the interpretation and

⁴⁴ On the distinction between state and private justice see, Ervo (n 22) 25. The author suggests that state justice has moved very close to private alternative dispute resolution in Finland with the conspicuous consequence that state courts' role is considerably diminished. She also suggests that such a development is worrisome and that private justice should constitute an additional, alternative option when it comes to conflict resolution. This is in conformity with Article 47 CFREU speaking of effective remedies before courts/tribunals. See also, Goldstein (n 1) 17-18. The author suggests that the impetus for ADR is more efficient conflict resolution.

⁴⁵ S Prechal, *Directives in EC Law* (2nd completely revised edn, OUP 2005) 133; A S S Zuckerman, 'The principle of effective judicial protection in EU law' (Remedies for Breach of EU Law Revisited, King's College London, June 2010) http://ukael.org/past_events_24_3656132649.pdf accessed 16 March 2013.

⁴⁶ Case C-210/98 P *Salzgitter AG, formerly Preussag Stahl AG v Commission of the European Communities and Federal Republic of Germany* [2000] ECR I-05843, Opinion of AG Jacobs, para 142.

⁴⁷ B G Garth, 'Privatization and the New Formalism: Making the Courts Safe for Bureaucracy' (1988) 13 *Law & Social Inquiry* 172.

⁴⁸ Prechal, 'Community law in national courts: the lessons from Van Schijndel' (n 43) 706; Himsworth (n 20) 295; Goldstein (n 1) 14: public policy enforcement is also achieved via actions of individuals and organisations seeking to guarantee that legal obligations are upheld in reality. Goldstein offers the examples of class actions as predominantly deterrence, rather than compensatory, means.

clarification of the law, or a means to control the abuse of power by the legislature and the executive.⁴⁹

These two main trajectories of civil procedure, namely conflict resolution and subjective/objective law enforcement, may be mistaken for opposites. However, the real relation between these fundamental functions of civil procedure is that of co-existence and interaction.⁵⁰ When parties resort to courts, they seek to resolve a dispute and they should therefore have adequate possibilities to participate actively in proceedings. At the same time, when opting for the judicial avenue as a means of dispute resolution, parties cease to be direct opponents and ask a third, neutral party to enforce their entitlements in accordance with the law.⁵¹ From that perspective, civil justice systems are there to equally guarantee claimants' interests in enforcing their rights, the underlying policy considerations, and the defendants' interests to constrain such enforcement.⁵²

Interlinked with the nature of the civil justice systems are the general political and social ambitions, which influence the construction of civil procedural rules. 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.⁵³ For instance, civil procedural rules on, among other things, the initiation of court proceedings, deadlines to provide evidence, and acceptable means of proof have

⁴⁹ Storskrubb (n 22) 298. It should be underscored that depending on a legal order's attitude to the law's function, civil procedure rules on access to appellate procedures may vary considerably. Additionally, the control of power abuse function will rarely be relevant when scrutinising actions by the executive, in legal systems where distinct administrative procedures are in place.

⁵⁰ Ibid, 297: Storskrubb describes P H Lindblom's approach by citing his article: P H Lindblom 'Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta?' ('Courts' growing role in society and procedure's changed functions - empty phrases or facts?') (2004) 3 SvenskJuristtidning 240. See also, Himsworth (n 20) 296.

⁵¹ See, H Genn, *Judging Civil Justice* (The Hamlyn Lectures 2008, CUP 2010) 3.

⁵² Himsworth (n 20) 295.

⁵³ J Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring Edinburgh: William Tait 1838-1843 Vol 2) <http://oll.libertyfund.org/title/1921> accessed 22 March 2013.

as their objective the correct determination of facts and the correct applicability of substantive rules to the facts of each case.⁵⁴

Moreover, civil procedural rules can ensure that disputes are resolved within reasonable timeframes. Rules on time limits may influence the correctness of the decision. On the one hand, quicker court proceedings can ensure that no piece of evidence disappears and that witness testimonies are reliable. 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 realistic way of enforcing one's rights.⁵⁵ On the other hand, proceedings that are finalised too quickly 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.⁵⁶

Another fundamental operation of civil procedural rules is to secure access to court via litigation at a reasonable cost. Procedural rules on, *inter alia*, the amount 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 court. 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.⁵⁷ On the one hand, in expensive judicial systems, the high quality of the judicial process outweighs considerations on the actual amount of court fees. High litigation costs can limit unmeritorious claims⁵⁸ and excessive workload for the courts,⁵⁹ and as such, constitute a conscious decision for many legal systems. On the other hand, lower litigation costs and

⁵⁴ 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) 4.

⁵⁵ 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) 278 http://ec.europa.eu/dgs/health_consumer/library/pub/pub03.pdf accessed 16 March 2013.

⁵⁶ J Leubsdorf, 'Remedies for Uncertainty' (1981) 61 B.U.L.Rev 132; A A S Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 OJLS 360.

⁵⁷ Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' (n 54) 9-10.

⁵⁸ The Greek civil procedure, for instance, suffers from an excess of unmeritorious claims since the litigation costs are low in order to facilitate access to justice.

⁵⁹ Germany suffers from a high volume of litigation, which places strains on the court system.

contingency fees⁶⁰ can lead to wider access to justice and dispute resolution via the judicial avenue.⁶¹

At the initial stages of development of the European Union, the operationalisation of new rights, mainly deriving from the four fundamental freedoms, could be accepted more easily as a one-dimensional process, focusing on the enforcement of those rights. These were rights mainly against the Member States for not respecting individuals' fundamental freedoms in the EU. As a result, it would have made little, if any, sense to also interfere with Member States' procedural rights at whom the Treaty was actually directed. However, the EU has considerably matured and evolved in the meantime. Therefore, EU civil procedure intervention must embody considerations of effective protection of the rights of individuals, enterprises or public bodies on both sides of the dispute following from an EU law based right or obligation. Unless the EU targets its activity towards this further prong of civil procedural protection, EU civil procedure law will keep lacking coherence and functional legitimacy.⁶²

1.3 Research Focus: Dispute Resolution and Enforcement in the EU

In the EU supranational legal order, the judicial system of dispute resolution and private enforcement of EU rights remains largely decentralised, taking place before the

⁶⁰ R Moorhead, P Hurst, and R Musgrove, "Improving Access to Justice" - Contingency Fees: A Study of their operation in the United States of America - Research Paper informing the Review of Costs' (Civil Justice Council report, 2008)

<http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCivil+Justice+Council+Contingency+Fees+Report.pdf> accessed 16 March 2013: they suggest 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.

⁶¹ 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 2003) 48-49.

⁶² Himsforth (n 20) 310-311. On the necessity to observe procedural fairness, see also, C Hodges, 'Competition enforcement regulation and civil justice: what is the case?' (2006) 43 CML Rev. 1381, 1400.

Member States' courts. The famous *Van Gend en Loos*⁶³ case established the foundations of the principle of direct effect providing for the uniform interpretation of the Treaty by national courts and tribunals.⁶⁴ The CJEU held that the EU constitutes a new legal order that creates rights which become part of Member States' legal heritage, not only where these rights are expressly granted by the Treaty, but also by reason of obligations that the Treaty imposes in a clearly defined way upon individuals as well as upon Member States.⁶⁵ Therefore, individuals can rely before national courts on sufficiently precise and unconditional provisions in EU Treaties⁶⁶ and EU regulations⁶⁷

⁶³ Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001, 12. The facts of the case are widely known. Briefly, Van Gend en Loos, a Dutch importer of a chemical product (l'ureeformaldehyde), complained to the tariff administration due to a tax increase from 3 to 8% following a re-classification of the Benelux countries' customs tariff. The tariff administration rejected his complaints and the applicant then turned to the competent Dutch court, the Tariefcommissie, suggesting that the introduction of new customs duties or the increase of the duties applicable in Member States' commercial relations are prohibited by Article 12 EEC ('standstill obligation': repealed by the Amsterdam Treaty because it referred to the 'transitional period').

⁶⁴ Member States were familiar with the notion of direct effect of 'self-executing' international Treaty provisions, both in monist and dualist countries. In dualist countries, where international law needs to be transposed into national law, individuals' possibility to invoke these transformed national provisions before domestic courts is more easily understood and accepted. The problem becomes more prominent in monist countries like the Netherlands, where international law is ranked higher in the hierarchy of laws compared to ordinary national legislation, but the issue of whether an international law provision can be invoked before domestic courts is a matter for national constitutional law to decide. See *inter alia*: M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 74; B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 325-327.

⁶⁵ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 63) 12-13. P Pescatore, 'Van Gend en Loos, 3 February 1963 – A View from Within' in M P Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 5.

⁶⁶ In a series of judgments the Court expanded considerably the doctrine of direct effect to cover Treaty provisions on the common market, even if based on their wording further national or Union implementation was necessary, or even if they granted Member States a power to derogate from their provisions. See *inter alia*: case 28-67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* [1968] ECR 00143; case 13-68 *SpA Salgoil v Italian Ministry of Foreign Trade, Rome* [1968] ECR 00453; case 2-74 *Jean Reyners v Belgian State* [1974] ECR 00631; case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 00455; case 41-74 *Yvonne van Duyn v Home Office* [1974] ECR 01337. On the meaning of sufficiently precise and unconditional see *inter alia*: Prechal, *Directives in EC Law* (n 45) 243-249; T C Hartley, *The Foundations of European Union Law* (7th edn, OUP 2010) 209-214.

⁶⁷ See *inter alia*: case 93-71 *Orsolina Leonesio v Ministero dell'agricoltura e foreste* [1972] ECR 00287; case 39-72 *Commission of the European Communities v Italian Republic* [1973] ECR 00101; case 50-76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR 00137.

and even in directives.⁶⁸ The aim is to safeguard the effectiveness of EU law provisions of primary or secondary EU law against Member States' or other individuals' acts.⁶⁹ Direct effect began as a matter of creation of individual EU law rights enforceable before national courts. It then gradually shifted towards a matter of invocability of certain EU law norms by individuals before national courts. Finally, it became a matter of justiciability,⁷⁰ looking at whether an EU law norm is operational⁷¹ for a national court to apply it either as the governing rule of the case, or as a standard for review of the legality of Member States' actions.⁷²

This decision went against Member States' submissions⁷³ and Advocate General Roemer's opinion,⁷⁴ all arguing that the initial Treaty compact constituted an agreement between sovereign states and was therefore enforceable in accordance with the mechanisms explicitly created in the agreement.⁷⁵ These mechanisms were Articles 169

⁶⁸ See *inter alia*: *Yvonne van Duyn v Home Office* (n 66); case 9-70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 00825; case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 01629.

⁶⁹ W van Gerven, 'Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?' (1995) 32 CML Rev. 679, 680; P Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12(4) OJLS 463-470. See also, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 14).

⁷⁰ For an analysis of 'the justiciable issues in Member States' see, A J Mackenzie Stuart (Lord), *The European Communities and the Rule of Law* (The Hamlyn Trust, Steven & Sons 1977) 44-53. Lord Mackenzie Stuart suggests that the justiciability of a matter before national courts depends on the following five parameters: (a) the separation of powers; (b) the distinction between public and private law; (c) the fear of a "denial of justice"; (d) the factor of constitutional control and (e) national attitudes to the control of administrative acts.

⁷¹ Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-01209, Opinion of AG Van Gerven, para 27.

⁷² Claes (n 64) 75-88; S Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Academy of European Law, European University Institute, OUP 2007) 37-38; De Witte (n 64) 330-331; P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 ELR 17; Engström (n 37) 12-28.

⁷³ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 63) para 11: Germany, the Netherlands, and Belgium made written submissions to the case.

⁷⁴ *Ibid*, Opinion of AG Roemer, 16-30.

⁷⁵ See however: J Bengoetxea, 'The EU as (more than) an international organisation' in J Klabbers and A Wallendahl (eds), *Research Handbook on the Law of International Organisations* (Edward Elgar 2011) 448-463; Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079, paras 19-21.

EEC⁷⁶ and 170 EEC,⁷⁷ vesting the power to police the enforcement of the Treaty provisions in the hands of either another Member State or the Commission.⁷⁸ Consequently, it was argued that there was no need for national courts to deal with the same issue, for the additional reason that this would change the character of the initial Treaty agreement. What is more, Article 173(4) EEC⁷⁹ recognised the possibility for individuals to initiate court proceedings before the CJEU against Community decisions of direct and individual concern to them.⁸⁰

These arguments stem from a broader debate on the objective recourse of civil justice systems for the enforcement of EU law. This goal of civil justice is often juxtaposed with the various mechanisms of public enforcement ensuring the implementation and actual application of EU rules in Member States' legal orders.⁸¹ Important as it might be, public enforcement of EU law is not without problems.⁸² The designated authorities (either at EU or at Member State level) might not have sufficient

⁷⁶ Now Article 258 TFEU.

⁷⁷ Now Article 259 TFEU.

⁷⁸ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 63) 12.

⁷⁹ Now Article 263(4) TFEU.

⁸⁰ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 63) 6-8.

⁸¹ Either the Commission or designated national authorities in every Member State are entrusted with this task. See for instance: Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent [1997] OJ L 144/19, Articles 11 and 15; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance) [2005] OJ L 149/22, Article 11; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L 166/51: this directive focuses in its entirety on public enforcement mechanisms in the area of consumer rights.

⁸² See J Steiner, *Enforcing EC Law* (Blackstone Press Limited 1995) 11-13; Claes (n 64) 90; Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (n 69) 454-458; R Craufurd-Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 289: 'the [EU] mechanisms for enforcement were without real bite, with an emphasis on executive rather than legal supervision by a court of law'; C Kilpatrick, 'The Future of Remedies in Europe' in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 2.

resources to investigate whether 28 Member States⁸³ have violated certain EU laws in the first place; or, even if they do, they might not have adequate resources to fund any enforcement procedures within a Member State.⁸⁴ Moreover, the Commission has considerable discretion⁸⁵ to institute infringement actions against Member States,⁸⁶ which is often directed by political considerations,⁸⁷ mainly the need to be on good terms with the Member States. As a result, it tends to initiate infringement actions only when the violation is clear and significant, usually through means of negotiation.⁸⁸

Private enforcement of EU law mainly before national courts could therefore counterbalance the weaknesses and inefficiencies of public enforcement in the EU. To begin with, it could complement public enforcement mechanisms, relieving the Commission's cumbersome enforcement responsibilities and allowing it to devote more time to its legislative duties.⁸⁹ Private enforcement also reduces the Commission's lack

⁸³ Croatia will be the 28th EU Member State as of 1 July 2013. See, Treaty of Accession of Croatia [2012] OJ L122/10.

⁸⁴ The actual extent of public enforcement (in)efficiencies depends on the particular area of EU law examined. Regarding the area of EU competition law see: Commission, 'Green Paper on Damages actions for breach of the EC anti-trust rules' COM (2005) 672 final, 19 http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf accessed 21 March 2013; R van den Bergh and S Keske, 'Private Enforcement of European Competition Law: Quo Vadis?' (2007) 4 ERCL 471. On the complementary role of public enforcement in damages claims in the area of competition law, see, A Ezrachi and M Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation' (2012) 3(6) J.E.C.L. & Pract. 536.

⁸⁵ See *inter alia*: case 247/87 *Star Fruit Company SA v Commission of the European Communities* [1989] ECR 00291; case T-24/90 *Automec Srl v Commission of the European Communities* [1992] ECR II-20223; Hartley (n 66) 327-328

⁸⁶ Article 258 TFEU. See also Article 259 TFEU regarding the initiation of infringement proceedings by a Member State against another. The same problems arise in this type of proceeding too, only rarely reaching the stage before the CJEU. See also, Steiner (n 82) 161-169. Craig describes it as a conflict of interest problem resembling to the agency capture, deteriorated by the dual roles exercised by the Commission, i.e. the judicial and the legislative. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (n 69) 456.

⁸⁷ The recently adopted resolution regarding the introduction of fast-track infringement procedures through the appointment of an independent Internal Market prosecutor is indicative of the inefficiencies of the currently existing Treaty system of public enforcement of EU law. See, European Parliament, 'Resolution of 22 May 2012 on the Internal Market Scoreboard' 2011/2155(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0211+0+DOC+XML+V0//EN&language=EN> accessed 23 March 2013.

⁸⁸ Article 260 TFEU; case C-387/97 *Commission of the European Communities v Hellenic Republic* [2000] ECR I-05047; case C-278/01 *Commission of the European Communities v Kingdom of Spain* [2003] ECR I-14141.

⁸⁹ See D Curtin, 'The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders' in D Curtin and D O'Keefe (eds), *Constitutional Adjudication in European Community and*

of knowledge of a breach of EU law. Individuals, personally wronged and damaged by the violation of their EU rights have an increased incentive to seek the enforcement of that right in practice.⁹⁰ This contributes to higher enforcement rates of EU law. Additionally, private enforcement can overcome the problem of political delicacies, often halting the Commission and Member States from initiating infringement proceedings.

The justiciability of EU law norms before national courts presupposes the existence and use of a system of procedures, remedies, and causes of action that will allow individuals to invoke directly effective provisions of EU law, either as a source of rights (sword), or as a legality review standard (shield).⁹¹ Article 19 TEU suggests that Member States are responsible for the provision of remedies ensuring effective legal protection in the fields covered by Union law.⁹² In addition, the principle of national procedural autonomy provides that in the absence of EU procedural and remedial rules, Member States are responsible for designating the courts having jurisdiction, determining the rules of procedure according to which national courts will protect EU

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National Law (Butterworth Ltd 1992) 34. On the limits of ‘individual enforcement in EC law’ see: S Weatherill, ‘Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective’ in C Kilpatrick, T Novitz, and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 99-104.

⁹⁰ This derives from the so-called “subjectivation” of EU law provisions conferring rights not only to Member States, but also to private individuals. See, M P Maduro, *We the Court: The European Court and the European Economic Constitution. A Critical Reality of Article 30 of the EC Treaty* (Hart Publishing 1998) 9. See also, Prechal, *Directives in EC Law* (n 45) 129: she speaks of ‘individual rights’ special normative force, a kind of magic’.

⁹¹ De Witte (n 64) 331. See for example : case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-02201; case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-01829; case C-441/93 *Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I-01347.

⁹² Claes (n 64) 682-683: regretting the cryptic formulation of Article 19 TEU, which should have openly mentioned national courts as ‘common courts of Union law’. See also: 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) 117; T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006). Tridimas has opined that this provision has also created a legal basis for the EU to intervene into Member States’ remedial and procedural rules when these are deemed insufficient to ensure effective legal protection of EU rights. See also, A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, OUP 2007) 2: who sees in Article 19 TEU the possibility for CJEU case law on Member States’ remedies and procedures to move away from a ‘rights’ based doctrine to a justification directly based on the said Treaty provision.

rights.⁹³ According to Jacobs, the EU has founded its decentralised enforcement system on the assumption that national remedies and procedural rules could guarantee a sufficient degree of judicial protection of EU law rights.⁹⁴ As a result, Member States' courts are European courts of first instance or of general competence, responsible for the full realisation of the substantive EU legal order, for all cases that are not subject to the jurisdiction of the European Court of Justice.⁹⁵

As a result, many scholars consider EU intervention into national procedural regimes as a parameter of the supremacy principle, often called procedural/structural supremacy/primacy.⁹⁶ Accordingly, national courts should disapply national procedural rules, which prevent them from giving effect to EU law. In other words, substantive supremacy of EU law can have spillover effects on domestic procedural systems to the

⁹³ These national procedures should not be less favourable than those governing the same right of action on a domestic matter are and they should not render impossible in practice the exercise of EU law rights. See, *inter alia*: *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 9) para 5; *Comet BV v Produktschap voor Siergewassen* (n 34), paras 12-13; case 179/84 *Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro* [1985] ECR 02301; case 68/79 *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 00501, para 25; *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 14) para 42.

⁹⁴ F G Jacobs, 'Enforcing Community Rights and Obligations in National Courts: Striking the Balance' in J Lonbay and A Biondi (ed), *Remedies for Breach of EC Law* (John Wiley & Sons 1997) 25-26. See also, Engström (n 37) 2.

⁹⁵ I Maher, 'National Courts as European Community Courts' (1994) 14(2) *Legal Studies* 226-243; C N Kakouris, 'Do the Member States possess Judicial Procedural "Autonomy"?' (1997) 34 *CML Rev.* 1393-1396; J S Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9(5) *ELJ* 601; Claes (n 64) 58-68; T Heukels and J Tib, 'Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 112; see also, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* App no 45036/98 (ECtHR, 30 June 2005), para 164.

⁹⁶ See *inter alia*: De Witte (n 64) 342-343; Delicostopoulos (n 95) 509-613. These views stem mainly from the *Simmenthal/Factortame* tandem emphasising the principle of structural supremacy only in order to further consolidate the mandate for national courts to set aside conflicting national provisions. It is not a coincidence that these cases involved Italy and the UK, two predominantly dualist Member States. See also: A Stone-Sweet, 'Constitutional Dialogues in the European Community' in A M Slaughter, A Stone-Sweet, and J H H Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1998) 316-317; P Craig, 'Report on the United Kingdom' in A M Slaughter, A Stone-Sweet, and J H H Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1998) 195-204; M Cartabia, 'The Italian Constitutional Court Case-law concerning the supremacy of European Law: from the denial of supremacy to the supremacy under condition' in A M Slaughter, A Stone-Sweet, and J H H Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1998) 135-140. For a view against the existence of structural primacy, see: Claes (n 64) 124-135; Prechal, *Directives in EC Law* (n 45) 170-179.

extent that the latter can guarantee the enforcement of substantive rights.⁹⁷ The association of the supremacy principle with Member States' procedural regimes stems from the *Simmenthal* case.⁹⁸ However, if Member States' remedial rules are not sufficient or effective, or procedural rules are too complicated and inefficient, EU citizens might be discouraged from going to court to enforce their EU law rights, or might not be able to enforce properly their EU law based claims before national courts.⁹⁹ As a result, a third principle, that of effective judicial protection,¹⁰⁰ prescribes the scope of such intervention efforts, 'adding flesh to the skeleton of primacy [...] helping to bring it to life'.¹⁰¹

Against this backdrop, I argue that the fundamental right of access to justice (Article 47 CFREU) may be used as the primary yardstick for the future development of EU civil procedure rules. These rules should not be one-dimensional, promoting only one of the two facets of civil procedure law to the detriment of the other. The first paragraph of Article 47 CFREU promotes the subjective recourse of judicial relief for the vindication of private interests established in EU law. Civil procedure here, in the form of effective remedial means, is not identical to conflict resolution as the primary emphasis lies on the in-court legal protection in accordance with the rule of law.¹⁰² The second and third paragraphs of this Article establish a series of procedural guarantees of

⁹⁷ Delicostopoulos (n 95) 609.

⁹⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 00629.

⁹⁹ Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' (n 54) 3-52; Himsworth (n 20) 310-311. Himsworth speaks of three groups of interests involved in the uniform application of EU law discourse: the public interest in guaranteeing equal enforcement of EU law, promoted either via State action or collective action aiming at upholding responsibilities created by EU law; the private interest of an individual in preventing the violation of an EU law provision or to get compensation in case the provision is violated; finally, individuals' private interest to restrain the enforcement of EU measures. This categorisation encapsulates a call for a balanced, coherent, and legitimate approach towards the enforcement of EU law in the interest of fairness of all affected parties.

¹⁰⁰ This is confirmed in the recent case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, where domestic procedural rules on the provision of legal aid to legal persons was examined in the light of Article 47 CFREU and the right to a fair trial. See also, Hess, 'Procedural Harmonisation in a European Context' (n 1) 169-171.

¹⁰¹ A Arnulf, 'The principle of effective judicial protection in EU law: an unruly horse?' (2011) 36(1) ELR 51. See also, P Haapniemi, 'Procedural Autonomy: A Misnomer?' in L Ervo, M Gräns, and A Jokela (eds), *Europeanisation of Procedural Law and the New Challenges to Fair Trial* (European Law Publishing 2009) 95.

¹⁰² See, 'Explanations relating to the Charter of Fundamental Rights' [2007] OJ C 303/17, 30.

fair trial, aimed at both parties to the dispute and as a result, are there not only for the enforcement of civil rights and obligations, but also for the non-vindication of such rights.¹⁰³ In other words, the right to an effective remedy and a fair trial is seen as a means to materialise the dual goal of civil justice systems in the EU, prescribing the scope of future EU initiatives in civil procedure law. To this end, the wording of Article 47 CFREU, and its judicial (through the CJEU and ECtHR case law) teleological interpretation¹⁰⁴ offer ample room for a concrete examination of existing approaches to civil procedure harmonisation¹⁰⁵ and identification of the better way forward.¹⁰⁶

1.4 Research perspective: The EU right of access to justice

The pioneers in the effective access to justice movement were Cappelletti and Garth, conceiving access to justice as a fundamental principle enabling citizens to vindicate their substantive rights.¹⁰⁷ Other scholars have seen access to justice as the demand for equal treatment of prospective litigants before the courts,¹⁰⁸ aimed at reducing barriers due to costs, duration, and difficulties of communication in judicial proceedings. In the late 1970s and 1980s, access to justice was perceived as part of the legal services modern welfare states provide for the ‘weaker parties’.¹⁰⁹ Since the 1990s, a consensus emerged that a wide range of procedures adapted to the specific types of

¹⁰³ Ibid.

¹⁰⁴ See below, ‘2 The Right of Access to Justice in the EU: In Search of a New Role’ 39.

¹⁰⁵ See below, ‘4 Civil procedure law in the EU: the role of the CJEU case law’ 98; ‘5 Sectoral v Horizontal EU Civil Procedure Law: A Constitutional Conundrum?’ 133.

¹⁰⁶ See below, ‘6 The Horizontal Approach to EU Civil Procedure Law Reconceptualised: Achieving Greater Coherence’ 184.

¹⁰⁷ M Cappelletti and B Garth, ‘Access to Justice and the Welfare State: An Introduction’ in M Cappelletti and B Garth (eds), *Access to Justice and the Welfare State* (EUI 1981) 1.

¹⁰⁸ See *inter alia*: R Moorhead and P Pleasence, ‘Access to Justice after Universalism: Introduction’ (2003) 30 *Journal of Law and Society* 1; R L Sandefur, ‘Fulcrum point of equal access to justice: legal and non-legal institutions of remedy’ (2009) *Loyola of Los Angeles Law Review* 949, 951: ‘different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems’.

¹⁰⁹ Cappelletti and Garth (n 107).

litigation at stake had to supplement access to justice.¹¹⁰ Overall, the right to effective access to justice incorporates fundamental considerations of procedural and social justice and is not limited to requirements of procedural economy and efficiency.¹¹¹ As a result, access to justice refers to all stages prior to the initiation of court proceedings, the trial process, and the post-trial phase of execution of judgments.¹¹² It also refers to a number of actors, such as litigants, judges, lawyers, and state organs.

In the EU, the right of access to justice first appeared under the principle of effective judicial protection and the CJEU *Johnston* case.¹¹³ In this case, the Court argued that effective judicial protection in the EU constitutes a general principle of law, derived from Member States' constitutional traditions and the European Convention on Human Rights and Fundamental Freedoms.¹¹⁴ However, the term 'access to justice' hardly existed in EU law,¹¹⁵ and has been advocated mainly in the context of consumer

¹¹⁰ B Hess, 'EU Trends in Access to Justice' in C H van Rhee and A Uzelac (eds), *Civil Justice between efficiency and quality: from Ius Commune to CEPEJ* (Intersentia 2008) 189-190.

¹¹¹ For more recent studies from long-established international institutions, such as the World Bank, the Council of Europe, the European Commission, or from individual stakeholders, such as consortiums of academics and professionals confirming the wide scope of the right of access to justice, see *inter alia*: Commission, 'Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union' (Final Report, 2007) http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf accessed 06 March 2013; C Hodges, S Vogenauer, and M Tulibacka, *The Costs and Funding of Civil Litigation* (Hart Publishing 2010); CEPEJ, *European judicial systems: Efficiency and quality of justice* (Council of Europe Publishing 2010); Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Professional Training Series No. 9/Add.1, United Nations 2008) 113 <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf> accessed 05 March 2013; Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report by the Access to Justice Taskforce Attorney-General's Department, 2009) <http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf> 17 March 2013; The International Bank for Reconstruction and Development/The World Bank, *Doing Business 2011: Making A Difference for Entrepreneurs* (The World Bank and the International Finance Corporation 2010) <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf> accessed 03 March 2013.

¹¹² On the various stages of a broadly conceived right to access to justice from legal protection to enforcement and civil society oversight, see: UNDP, *Access to Justice. Practice Note* (2004) 6 http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf accessed 02 March 2013.

¹¹³ *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 12).

¹¹⁴ *Ibid*, para 18.

¹¹⁵ In the international arena the term access to justice has been used and defined in a few instances, such as in Article 9 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-

protection in cross-border litigation.¹¹⁶ As a result, access to justice remained an obscure and uncertain concept in the EU, considered by many scholars as a vague term, inappropriate for use as a yardstick or benchmark for the review of law, and even more so for the adoption of any legislative measures. Accordingly, access to justice was often used as a term solely synonymous with access to courts, or with effective remedies, due process, fair trial, or simply with judicial protection and redress.¹¹⁷

Consequently, access to justice was hardly used as a benchmark for the over-enforcement of EU law, taking into account all relevant interests, namely the interests of the defendant in the non-enforcement of EU law¹¹⁸ and the general interest of the justice system in delivering just and equitable results.¹¹⁹ However, as long as the actual meaning and scope of the right to access to justice is not properly defined and assimilated, all efforts to promote only certain aspects of this right will lead to greater fragmentation of civil justice systems, undermining the rule of law and compromising the good functioning of democratic societies.¹²⁰

After the entry into force of the Amsterdam Treaty, a genuine European Area of Justice was created that '[...] must ensure that individuals and businesses can approach courts and authorities in any Member State as easily as in their own and not to be prevented or discouraged from exercising their rights by the complexity of the legal and administrative systems in the Member States'.¹²¹ However, it was only after the introduction of the European Charter and, mainly, after the enactment of the Lisbon

[Footnotes continued on next page]

Making and Access to Justice in Environmental Matters, and in Article 13 of the 2006 Convention on the Rights of Persons with Disabilities.

¹¹⁶ Commission, 'Green Paper on Legal Aid in Civil Cases: The Problems Confronting the Cross-border Litigant' COM (2000) 51 final.

¹¹⁷ See, FRA, *Access to justice in Europe: an overview of challenges and opportunities* (Publications Office of the European Union 2011) 16 http://fra.europa.eu/fraWebsite/attachments/report-access-to-justice_EN.pdf accessed 02 March 2013.

¹¹⁸ To this effect see, case C-450/06 *Varec SA v Belgian State* [2008] ECR I-00581, para 52.

¹¹⁹ See *inter alia*: Himsworth, (n 20) 291; Genn (n 51).

¹²⁰ See, C Rozakis, 'The Right to a Fair Trial in Civil Cases' (2004) 4 J.S.I.J. 96-106; *Delcourt v. Belgium* App no 2689/65 (ECtHR, 17 January 1970), para 25.

¹²¹ Commission, 'Communication from the Commission to the Council and the European Parliament - Biannual Update of the Scoreboard to review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union' COM (2000) 782 final, point 3.1.

Treaty that access to justice was established in EU law discourse. Article 47 (3) CFREU refers to the availability of legal aid as an element of effective access to justice. In addition, Article 67(4) TFEU imposes on Union institutions the duty to facilitate access to justice, whereas Article 81(2)(e) TFEU recognises the need for the adoption of approximation measures in the area of judicial cooperation in civil matters with the aim of promoting effective access to justice.

Article 47 CFREU¹²² draws inspiration from the European Convention, combining the protection provided by two distinct Convention rights, namely Article 6 ECHR on the right to a fair trial¹²³ and Article 13 ECHR on the right to an effective remedy. Accordingly, the Strasbourg Court has produced abundant case law on the various procedural parameters of this right: the doctrine of reasonable length of proceedings;¹²⁴ the conditions for a fair hearing;¹²⁵ and guarantees of judicial impartiality.¹²⁶ Judicial elaboration of this article has given expression to a common, primary conception of justice and fair trial within the European countries,¹²⁷ and it is generally accepted that this right is also part of Member States' legal cultures and constitutional traditions.¹²⁸ However, there is a significant distinction between the mere

¹²² Article 47 CFREU on the 'Right to an effective remedy and to a fair trial' reads as follows:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 47 CFREU has codified the principle of effective judicial protection: joined cases T-439/10 and T-440/10 *Fulmen (T-439/10) and Fereydoun Mahmoudian (T-440/10) v Council of the European Union* [2012] OJ C 133/24, para 87.

¹²³ It should be noted that the text of Article 6 constitutes only the starting point, which the extensive ECtHR case law has further explicated and substantiated.

¹²⁴ *König v. Germany* App no 6232/73 (ECtHR, 28 June 1978), para 96; *Di Mauro v. Italy* App no 34256/96 (ECtHR, 28 July 1999), para 23.

¹²⁵ *Artico v. Italy* App no 6694/74 (ECtHR, 13 May 1980), para 32; *J.J. v. The Netherlands* App no 21351/93 (ECtHR, 27 March 1998), para 43.

¹²⁶ *Golder v. United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), paras 34-37; *Sramek v. Austria* App no 8790/79 (ECtHR, 22 October 1984), para 42.

¹²⁷ Kerameus, 'Procedural Implications of Civil Law Unification' (n 40) 154-156.

¹²⁸ *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 12) para 18.

legal recognition of Articles 6 and 13 ECHR and their actual implementation.¹²⁹ This is aggravated by the lack of an enforceable nature of ECtHR judgments, allowing at the end of the day differing levels of implementation and legislation adaptation from one Member State to another.

It is against this background, I advocate the use of Article 47 CFREU procedural guarantees as the starting point for the development of EU civil procedure law. The Charter of Fundamental Rights of the European Union (CFREU) has codified the right of access to justice, which, after the enactment of the Lisbon Treaty, has gained the legal status of primary EU law, binding EU institutions and Member States.¹³⁰ This right associates effective remedies with in-court justiciability and secures access to justice for everyone ‘whose rights and freedoms guaranteed by the law of the Union are violated’.¹³¹ It also sets the fundamental procedural aspects of the right to access the courts, namely fair and public hearing, reasonable length of proceedings, and the independence and impartiality of the judging court/tribunal.¹³² Rather recent CJEU case law refers to this provision with an increased frequency, even in cases where initial references for a preliminary ruling do not raise an issue of application of the relevant right.¹³³ The key difference with the ECtHR case law is that the EU constitutes a *sui*

¹²⁹ L van Puyenbroeck and G Vermeulen, ‘Towards minimum procedural guarantees for the defence in criminal proceedings in the EU’ (2011) 60 (4) ICLQ 1017.

¹³⁰ Article 6 TEU.

¹³¹ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609, para 19; *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 12); case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 04097; case C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* [1992] ECR I-06313; A W Heringa and L Verhey, ‘The EU Charter: Text and Structure’ (2001) 8 MJ 27.

¹³² See: joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08)*, *Filomena Califano v Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-02213, para 61; Draft Charter of Fundamental Rights of the European Union [2000] Charte 4473/00, 41; case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 01339, para 23; joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc and Others v Commission of the European Communities*. [2003] ECR II-00001, paras 120-122; EU Network of Independent Experts on Fundamental Rights, ‘Commentary of the Charter of Fundamental Rights of The European Union’ (2006) 361 http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf accessed 23 March 2013.

¹³³ *DEB v Bundesrepublik Deutschland* (n 91). See also, Hess, ‘Procedural Harmonisation in a European Context’ (n 1) 166.

generis legal order,¹³⁴ with increased central enforcement capacity compared to other international organisations.¹³⁵ More importantly, Article 47 CFREU establishes a more extensive framework of protection of fundamental procedural guarantees in case of violation of EU law.¹³⁶

1.5 Methodological Approach and Main Research Questions

In this thesis, I investigate the role of civil procedure law in the functioning of the supranational legal order. My research angle is essentially European and primarily institutional, investigating which EU institutions are better suited to employ the right of effective access to justice as a guiding tool for the future development of a coherent EU civil procedure law. Since I focus on civil procedure, in my analysis I will mainly look at private law cases. However, I will adopt a broader scope of investigation where the distinction between criminal, administrative, and civil cases is not of material importance. This will be mainly the case with the CJEU case law on national procedural autonomy and remedial means. In addition, I will examine a few indicative pieces of EU secondary legislation, introducing civil procedure rules at an EU-wide level. The common denominator among these legislative instruments is their legal basis in the EU

¹³⁴ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 63) 12; *Bengoetxea* (n 75) 448-465; F C Mayer, 'Van Gend en Loos: The Foundation of a Community of Law' in M P Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 19-21; G Di Federico, 'Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty' in G di Federico (ed), *The EU Charter of Fundamental Rights from Declaration to Binding Instrument* (Vol 8: *Ius Gentium: Comparative Perspectives on Law and Justice*, Springer 2011) 17; G Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe' (2002) 8 *Colum.J.Eur.L.* 39.

¹³⁵ Article 260 TFEU; Article 267 TFEU: the decentralised enforcement of EU law through the reference for a preliminary ruling and the ensuing necessity for Member States' domestic courts to give the final judgment also increases the enforceability prospects, since at the end of the day it is the State's own institutions that deliver the judgment.

¹³⁶ For a detailed comparison between Articles 6 and 13 ECHR and 47 CFREU see below, '2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection' 50. However, bear in mind the UK-Poland Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union on the rather limited practical effects of which see, *inter alia*: D Anderson and C C Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout, and S Ripley (eds), *EU Law after Lisbon* (OUP 2012) 166-169.

Treaties as well as their orientation towards the approximation of certain areas of EU civil procedure. I will address the actual effect of these instruments on civil procedure law harmonisation and access to justice. Finally, I will analyse existing law (descriptive analysis) only to support the ways in which it needs to be reformed and systematised based on the right of access to justice in the EU (normative analysis).¹³⁷

To this end, I have broken down my thesis in six main sub-topics:

- i. May the fundamental right to effective access to justice be used as tool for the development of EU civil procedure rules? Is there an obligation for EU institutions to promote access to justice in the first place? In addition, is this right determinate enough regarding the envisaged level of protection to prescribe the scope of EU regulatory action? (Chapter 2)
- ii. When should the EU develop civil procedure rules that promote access to justice? Which are the policy perspectives justifying the development of EU civil procedure law? Are there any countervailing considerations that may limit the significance and practical realisation of any harmonisation efforts? (Chapter 3)
- iii. To what extent, if at all, do existing modes of civil procedure harmonisation and particularly CJEU *ad hoc* procedural rules promote greater access to justice in the EU? Is a legislative approach for the development of EU civil procedure rules better suited to promote access to justice in the supranational legal order? (Chapter 4)
- iv. Which particular form of action may better accommodate considerations of effective access to justice in the EU: secondary procedural rules applicable to specific areas of substantive EU law, as in the example of IPRED, or horizontal procedures for all civil matters having ‘cross-border implications’, as in the example of ESCP? What lessons can be learnt for the promotion of access to justice via EU civil procedure rules

¹³⁷ See *inter alia*, A D’Amato, *Jurisprudence: A descriptive and Normative Analysis of Law* (Martinus Nijhoff Publishers 1984).

- based on current discussions for a coherent approach to collective redress? (Chapter 5)
- v. What is the right way forward for the development of coherent civil procedure rules promoting the right to effective access to justice? What is the appropriate legal basis for intervention into Member States' procedural systems in a systematic and comprehensive way? What are the particular normative implications for the relevant legal basis? (Chapter 6)
 - vi. Concluding Remarks (Chapter 7)

2 The Right of Access to Justice in the EU: In Search of a New Role

2.1 Introduction

In the introductory chapter, I argued that civil procedure rules are mixed goods, simultaneously concentrating features of both public and private goods. They can 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.¹ In other words, civil procedure regulation has a law enforcement focus, on top of its conflict resolution character.² It is not only a matter for private parties to regulate the procedure along the lines of a private justice model;³ 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 the law.⁴

In the EU supranational legal order, the judicial system of dispute resolution and private enforcement of EU law 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 law.⁶ As Member States' procedural regimes are considerably divergent, EU institutions intervene, more and more often, in national procedural regimes to secure effective EU law enforcement in an equivalent manner across the EU. Therefore, access

¹ S Delabuyère, '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) 22-23.

² 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.

³ 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.

⁴ See above, '1.2.2 The fundamental goals and functions of civil justice' 19.

⁵ Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

⁶ M Claes, *The National Courts Mandate in the European Constitution* (Hart Publishing 2006) 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) 117; T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006).

to justice provides the yardstick for a balanced approach. On the one hand, it facilitates effective enforcement of EU law rights via the establishment of the necessary procedural guarantees to allow for a realistic opportunity of judicial redress through recourse to court. On the other hand, it also allows for fundamental considerations of procedural efficiency and fairness to make their way in civil dispute resolution, catering for the rights of defence and the good administration of justice. Opting for one side only leads to a fragmentary and incomplete procedure, lacking any legitimation and functionality.⁷

In this chapter, I will attempt to explain the meaning, scope, and content of the right to effective access to justice in the EU, further exploring its role for the future development of EU civil procedure law. I will first look at the provisions of Article 51 CFREU regarding the passive personal scope of application⁸ of the Charter rights, and subsequently of the right of access to justice. This analysis will offer an initial answer to the main research question, namely whether EU institutions should use the right to an effective remedy, and a fair trial in the EU (Article 47 CFREU) as a guiding tool for the future development of civil procedure rules.⁹ I will investigate the actual level of protection under Article 47 CFREU in the second part of this chapter. For that purpose, I will focus on the actual wording of this article, also looking at the relevant CJEU case law on the principle of effective judicial protection, and the Strasbourg case law on the ECHR counterparts of the right of access to justice, namely Articles 6 and 13 ECHR. In doing so, I will identify the range of procedural obligations incumbent on EU institutions for the promotion of the right of access to justice when developing civil

⁷ See, E Storskrubb, *Civil Procedure and EU law. A Policy Area Uncovered* (OUP 2008) 311: identifying in the themes of fair trial and access to justice the potential for the policy area of civil justice cooperation to 'break free from its schematic premises'. See also, M Ross, 'Effectiveness in the EU Legal Order: Beyond Supremacy to Constitutional Proportionality' (2006) 31 ELR 476, 495-496, suggesting that the principle of effectiveness performs a dual role in establishing the point of intervention in national procedural regimes, as well as the extent of remedial review by the national courts.

⁸ Term first used by Curtin and Ooik as opposed to active personal scope of application. The former refers to the persons bound to respect and promote the application of the Charter. The latter refers to the persons vested with the Charter rights and freedoms. See, C Curtin and R van Ooik, 'The sting is always in the tail. The personal scope of application of the EU Charter of Fundamental Rights' (2001) 8 MJ 102, 103.

⁹ See however, A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 CML Rev. 1333.

procedure rules in the EU. I will summarise the main findings of this analysis at the end of the chapter.

2.2 The constitutionalisation of the right of access to justice and repercussions for EU civil procedure law

European constitutionalism reached its apogee with the drafting and subsequent binding force of the EU Charter. From a substantive perspective, the EU Charter fits within the European constitutional picture because it compiles and reiterates the fundamental values of the autonomous EU legal order. From a formalistic point of view, the binding character of the Charter, equivalent to primary EU law, leads to increased democratic legitimacy for the EU legal order.¹⁰ This section will sketch the general framework of and the politics behind the development of an EU fundamental human rights policy. On the one hand, the Union's desire to have a say in the area of fundamental human rights, and on the other hand, Member States' determination to maintain their autonomy and sovereignty in that same area has resulted in the drafting of a Charter document that lacks clarity and coherence.¹¹ The analysis in this part will offer some tools for the overall interpretation of the right of access to justice in the EU and the appraisal of the possibility for this right to be used as a guiding principle for the future development of civil procedure rules in the EU. To this end, I will read the access

¹⁰ Article 6(1) TEU; Pernice sees in the legally binding character of the Charter the creation of a "new explicit normative foundation" for Union action in the area of freedom, security and justice in, I Pernice, 'The Treaty of Lisbon and Fundamental Rights' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (European Community Studies Association of Austria Publication Series, Vol 11, Springer 2008) 236-239; C N Kakouris, 'The Judicial Protection of Individual Rights in the European Communities' (1993) 16 *Hastings Int'l & Comp.L.Rev.* 539.

¹¹ On the ambiguous nature of EU fundamental rights protection and subsequently of the EU Charter of Fundamental rights see, *inter alia*: G de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26 *ELR* 126-138; Draft Charter of Fundamental Rights of the European Union – Horizontal questions (Information Note) [2000] *Charte* 4111/00, Body 3, paras 6 and 20; P Carozza, 'The Member States' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) 35-39; M P Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in T K Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart Publishing 2003) 269.

to justice provisions of Article 47 CFREU in context, namely in the light of the Charter's horizontal clauses and the general provisions of Article 6 TEU.

2.2.1 A proactive view

Historically, Member States perceived the development of fundamental rights in the EU as a constitutional limit to further expansion of EU law and to the promotion of European integration. According to this traditional view, fundamental rights serve a defensive function, namely restraining EU interference with individual liberty. Therefore, individuals are vested with justiciable rights against the EU in cases of proved violations of these rights. In this context, initial CJEU case law rejected claims related to fundamental rights protection, either because fundamental rights did not constitute general principles of EU law, or and most importantly, because this could restrain EU powers.¹²

However, in order to avoid a situation where national courts would review EU measures against their domestic fundamental rights,¹³ CJEU shifted its case law, explicitly recognising fundamental rights as general principles of EU law. These principles accrued from Member States' common constitutional traditions and from

¹² See: case no 1-58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] ECR 17; joined cases 36, 37, 38-59, and 40-59 *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community* [1960] ECR 00423; case 40-64 *Marcello Sgarlata and others v Commission of the EEC* [1965] ECR 00215; Tridimas, *The General Principles of EU Law* (n 6) 301. See however, G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 465-497, examining the earliest steps of EU engagement with human rights protection during 1951-1952 as depicted in the 1952 Comité d'études sur une constitution européenne, and the 1952-53 draft Treaty on a European Political Community. These documents set the foundations of an EU policy on human rights protection, whereby EU institutions had a prominent monitoring, and review role in the application of human rights within the Member States. Additionally, a close constitutional relationship between the EU and the ECHR and their respective courts was established, whereas the EU human rights policy extended to both internal and external EU policies and relations.

¹³ See: Bundesverfassungsgericht decision of 18 October 1967, EEC Regulations Constitutionality Case, BVerfGE 22, 293: in view of the lack of human rights protection in the EU, the transfer of powers from Germany to the EU should be filtered through domestic constitutional fundamental rights provisions; case 2 BvL 52/71 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Bundesverfassungsgericht) judgment of 22 May 1974 [1974] 2 CMLR 540, 551; case 183 *Frontini v. Ministero delle Finanze, Italian Constitutional Court of 27/12/73* reported in [1974] 2 CMLR 383-90; J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights seriously?' (1992) 29 CML Rev. 670; E F Defeis, 'Human Rights and the European Court of Justice: An Appraisal' (2007) 31(5) *Fordham Int'l L.J.* 1110.

international human rights treaties to which Member States participated.¹⁴ However, as these principles bound EU institutions in accordance with the structure and objectives of the Union, they were autonomous from their initial sources of inspiration and characteristic of the Union's human rights policy.¹⁵ Consequently, as fundamental rights made their way into the Treaties, instead of leading to the limitation of the EU competences as Member States initially were hoping for, they actually expanded the reach of the then existing EU competences, allowing more vigorous and systematic scrutiny of national measures implementing or derogating from Union law.¹⁶

Specifically, for the EU, fundamental rights constituted a means to facilitate EU integration, setting it free from its purely economic and schematic premises, opening up the prospects for the gradual creation of a European political identity.¹⁷ This alternative view focuses on the positive function of fundamental rights, imposing a duty on the EU to remedy institutional deficiencies by making appropriate provisions for the protection of fundamental rights. Unlike the individualised, retrospective, and breach-dependant function of traditional fundamental rights, the alternative approach perceives fundamental rights as fulfilling a collective, proactive role, aiming at gradual institutional change and freedom enhancement.¹⁸ While judicially enforceable individual rights constitute an undoubtedly essential element in guaranteeing fundamental rights in the supranational legal order, the EU institutions need to complement them by appropriate legislative action addressing the institutional

¹⁴ See: case 29-69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 00419; case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125, para 4; case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 01365; case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491, para 13; case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727, para 15.

¹⁵ See, Tridimas, *The General Principles of EU Law* (n 6) 304: 'respect for the same right does not mean reaching the same outcome on the facts'.

¹⁶ Carozza (n 11) 38.

¹⁷ On the fundamental role of human rights in the EU see for example: 1973 European Council Declaration on European identity; 1978 Declaration of the Council on Democracy in Copenhagen; 1977 Joint Declaration of the European Parliament, Council, and Commission of the European Communities [1977] OJ C103/1; various Council Declarations and Resolutions on Racism and Xenophobia; 1989 Declaration of Fundamental Rights and Freedoms by the European Parliament [1989] OJ C120/51.

¹⁸ S Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' (2006) 12(1) ELJ 41-60.

challenges for the implementation of these individual rights. As a result, the defensive and proactive functions of fundamental rights should be seen as indispensable aspects of the EU regulatory system. To perceive them as opposites only undermines the overall level of fundamental rights protection in the EU.¹⁹ In this light, individualised fundamental rights are effectively integrated, playing a prescriptive, guiding role for the future operation of EU policy.²⁰

This duality in the EU fundamental rights policy was maintained in the Charter and can be evinced in its general provisions, and mainly Article 51 CFREU, providing that EU institutions and Member States when implementing Union law should ‘*respect the rights, observe the principles and promote the application thereof*’.²¹ Therefore, it draws a distinction between ‘respect’ for the rights (defensive function) and ‘promotion’ of their application (proactive function).²² Applying this provision to the right to effective remedy and fair trial, it follows that EU institutions and Member States should systematically and consistently scrutinise their legislation for compliance with the right to effective remedy and fair trial, abstaining from activities that could actively, or

¹⁹ See, S Simitis et al., *Affirming fundamental rights in the European Union: time to act* (Office for Official Publications for the European Communities 1999) 19 <http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european-union-pbCE2199181/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L> accessed 1 January 2013.

²⁰ See, G de Búrca, ‘The Constitutional Challenge Of New Governance In The European Union’ (2003) 28(6) ELR 814–839.

²¹ See, G De Búrca, ‘Fundamental Rights and Citizenship’ in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (EUI Robert Schumann Centre 2003) 21. For a presentation and analysis of the various versions of Article 51 CFREU before the final adoption of the Charter see, *inter alia*: P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 CML Rev. 954-956.

Article 51 CFREU currently reads as follows:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

²² P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (4th edn, OUP 2008) 415: they refer to Commissioner Vitorino’s speech on the future of fundamental rights in Europe, who explicitly argued that the Charter rights should have a positive effect in the promotion of human rights via the creation of policies related to them.

passively, violate it (defensive function).²³ Additionally, they should adopt legislative measures within the remit of their competences, to ensure that EU citizens enjoy effective access to justice of the standard and calibre required by Article 47 CFREU (proactive function).²⁴

As will become apparent below,²⁵ Article 47 CFREU introduces a whole range of positive obligations for an effective remedy before a tribunal: legal aid; a fair trial through equality of arms and adversariality; a public hearing; the timely execution of judgments; a reasonable length of the proceedings; and, for independent and impartial tribunals established by law. It also establishes certain limitations to State action in the form of negative duties for non-interference. These involve mainly the right of access to courts and its legitimate limitations through procedural rules on time limits, legal standing, evidentiary rules, and rules on notification and service of documents. The CJEU case law on the principle of effective judicial protection and the ECtHR case law on Articles 6 and 13 ECHR confirm that both categories of duties stemming from Article 47 CFREU constitute justiciable individual rights that right bearers can invoke before national courts in cases of violation. This right forms a unified ensemble, whereby the distinction between negative and positive duties deriving from the same

²³ On the obligation to check the compatibility of EU legislative proposals against Charter fundamental rights see: Commission ‘Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring’ (Communication) COM (2005) 172 final; Commission, ‘Impact Assessment Guidelines’ SEC (2009) 92 http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf accessed 16 March 2013; Commission, ‘Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights’ COM (2009) 205 final.

²⁴ J F Akandji-Kombe, *Positive obligation under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, No.7, Council of Europe 2007) 62 <http://www.echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> accessed 22 March 2013; S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 9-62; Explanations Relating To the Charter of Fundamental Rights [2007] OJ C303/17, 33; Draft Charter of Fundamental Rights of the European Union [2000] Charte 4473/00 CONV 49, 48; J H H Weiler and S C Fries, ‘A Human Rights Policy for the European Community and Union: The Question of Competences’ in P Alston, M Bustelo, and J Heenan (eds), *The EU and Human Rights* (OUP 1999) 155: ‘abstaining from taking action is just as likely to cause an obstruction to fundamental human rights as would a positive violation’. See also, case C-68/95 *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-06065, para 40.

²⁵ See below, ‘2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection’ 50.

very right, is not always a straightforward process. It would also be rather arbitrary if judges enforced one – negative – and not the other – positive – side of the same coin.²⁶

While justiciable individual rights are significant for the practical and effective protection of fundamental rights, they come with certain limitations.²⁷ Specifically, the justiciability of individual rights is solely concerned with the protection of an individual's self-realisation and freedom of choice and action. It completely disregards the collective and institutional function of fundamental rights in a democratic society, whereby the failure to guarantee fundamental rights is not necessarily attributable to individual perpetrators. Finally, *ad hoc* court judgments are inherently limited in responding to the institutional and distributive intricacies of fundamental rights.²⁸ As a result, the creation of an individually justiciable right of access to justice should be complemented by legislative actions, implementing and further safeguarding the various parameters of this individual right.

Instead of perceiving Article 47 CFREU as a limitation to future EU instruments in civil procedure law, only looking at potential violations and breaches, this Article should be seen as a tool for the development of more systematic and coherent EU civil procedure law. In other words, EU institutions should not only respect Article 47 CFREU, but they should primarily promote its application through the measures adopted in the area of civil procedure law. Nevertheless, EU institutions can legislate only in the areas where the EU has exclusive or shared competence as specified in the Treaties (principle of conferral).²⁹ The preamble of the Charter explicitly provides that EU institutions should consider fundamental rights in the context of the principle of

²⁶ For further analysis and argumentation on the justiciability of positive human rights see, *inter alia*: Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (n 24) 92-123; EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of The European Union' (June 2006) 395-396 http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf accessed 16 March 2013; Tridimas, *The General Principles of EU Law* (n 6) 367.

²⁷ On the limitations of CJEU civil procedure rules to promote the right of access to justice in the EU, see below, '4.3 Recasting CJEU case law on national procedural autonomy: lessons learned for civil procedure harmonisation in the EU' 123.

²⁸ See, Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' (n 18) 48.

²⁹ Articles 4(1) and 5(1) TEU. See also, A Arnull, 'From Charter to Constitution and beyond: fundamental rights in the new European Union' (2003) Win PL 780-781.

subsidiarity.³⁰ Moreover, Article 51(1) CFREU stresses that the Charter binds EU institutions and bodies in conformity with the principle of subsidiarity. Subsidiarity presupposes that there is shared EU competence, but also that action at state level may be more beneficial in terms of the effect and scale of a proposed EU measure.³¹

The Charter mentions repeatedly that fundamental rights should not lead to new EU powers not established in the Treaties.³² One could thus theorise that the reference to subsidiarity paves the way for the future impact of the Charter rights, whereby the EU has competence for all Charter rights and the principle of subsidiarity comes at a second stage of control to limit inappropriate use of this competence. Given the experience in other federal systems, this seems probable.³³ Despite the possibility of such development in the future, I adopt a more pragmatic approach in accepting there is no general EU competence regarding fundamental rights. There are, however, certain Treaty articles that constitute either straightforward competence bases for specific fundamental rights³⁴ or other competence bases bearing directly to fundamental human rights. EU institutions can use these Treaty competences in order to promote the protection of fundamental rights within the EU.³⁵

This is exactly the meaning of the ‘promote the application’ phrase in Article 51(1) CFREU; it recognises that there is more to fundamental rights protection than a

³⁰ Charter of Fundamental Rights of the European Union (CFREU) [2012] OJ C326/02, Preamble.

³¹ Article 5(3) TEU.

³² Article 51(2) CFREU; see also, Article 6(1) TEU.

³³ See T von Danwitz, ‘The Charter of Fundamental Rights of the European Union between Political Symbolism and Legal Realism’ (2000-2001) 29 *Denv.J.Int'l L.& Pol'y* 304-305. Danwitz mentions the examples of the United States, Canada, Switzerland, and Germany, where the adoption of a strong fundamental rights jurisdiction on the federal level resulted in the creation of uniform legal standards and significant harmonisation effects across the countries.

³⁴ See for example Article 19 TFEU (then Article 13 TEC) used as a legal basis for Council Directive 2000/43/EC on the equal treatment of persons irrespective of racial or ethnic origin [2000] OJ L180/22, and Council Directive 2000/78/EC on a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³⁵ See *inter alia*: Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (n 21) 945-994; M P Maduro, ‘The Double Constitutional Life of the Charter of Fundamental Rights of the European Union’ in T K Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart Publishing 2003); O de Schutter, ‘The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination’ (Jean Monnet Working Paper 07/04) 19-20
<http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040701.pdf> accessed 31 January 2013.

mere passive duty of non-violation, which may have to be supported through appropriate EU regulatory action.³⁶ This reading of Article 51(1) CFREU is not in tension with Article 51(2) CFREU, which provides that the Charter ‘does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. The reason is that under the current constitutional scheme, EU institutions may implement and secure most of the Charter rights based on the existing attribution of competences. Consequently, Charter rights may constitute a guiding tool for the adoption of certain initiatives at EU level, influencing their design and implementation.³⁷

What is more, effective access to justice constitutes, as of December 2009, an explicit justification for the approximation of Member States’ laws in the field of civil justice cooperation based on Articles 67 and 81 TFEU.³⁸ Specifically, the Charter provides in its preamble that the establishment of the area of freedom, security, and justice (FSJ) is fundamental for the placement of individuals at the heart of the EU activities. Judicial cooperation in civil matters is an autonomous part of the FSJ area and plays an important role in ensuring respect for Charter rights. Moreover, according to Article 67(4) TFEU, the Union should facilitate access to justice in the field of judicial cooperation in civil matters. There is a straightforward interdependence between judicial cooperation in civil matters and access to justice as a fundamental procedural right in the EU.³⁹ Finally, Article 81(2)(e) TFEU explicitly recognises effective access to justice as a legitimate objective to be promoted via EU approximation measures.

Attaching Article 47 CFREU to the legal basis of Article 81(2)(e) TFEU could offer adequate impetus for the creation of a new generation of civil procedural rules, leading to binding decisions, offering adequate relief to the petitioner, while respecting the fundamental procedural guarantees of fair trial, timely adjudication, and impartial

³⁶ See, De Schutter (n 35) 19-20.

³⁷ *Ibid*, 16.

³⁸ See M E Méndez-Pinedo, ‘Access to Justice as Hope in the Dark: in Search for a New Concept in European Law’ (2011) 1(19) *IJHSS* 9-10.

³⁹ J Monar, ‘Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the ‘Area of Freedom, Security and Justice’?’ (2005) 1 *EuConst* 226, 231: the reference in the preamble is simply a good will affirmation and an explicit mandate would have been preferable and more effective.

judgment.⁴⁰ Since EU institutions have the competence to regulate this policy area of civil justice cooperation, they should also ensure they protect the right to effective access to justice, upon which this policy directly encroaches, in a consistent, succinct way, and at an EU-wide scale.⁴¹ Besides, since the primary addressees of the Charter are the EU institutions, there is a further impetus for action at EU rather than State level when it comes to the protection of effective access to civil justice in the EU.⁴² These considerations should be kept in mind in the subsequent chapters where existing instances of civil procedure law harmonisation will be examined through the spectrum of the promotion of the right to effective access to justice, as detailed in the remainder of this chapter.⁴³

Furthermore, according to Article 52(4) CFREU, the right of access to justice should be construed in conformity with analogous national provisions accruing from Member States' common constitutional traditions.⁴⁴ If Member States' constitutional traditions envisage a more limited level of protection of the right of access to justice, the potentially wider scope of Article 47 CFREU may be compromised, and its guiding function for the adoption of EU civil procedure rules may be weakened. However, the duty of harmonious interpretation does not suggest that the resulting fundamental right in the EU will be identical to the analogous right established in Member States'

⁴⁰ On the possibility to promote human rights in the EU based on existing competences see, *inter alia*: P Alston and J H H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in Alston (ed), *The EU and Human Rights* (1999) 3; Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' (n 11) 289; Carozza (n 11) 49.

⁴¹ See, Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (n 40) 27.

⁴² See: Carozza (n 11) 49-50: the Charter could affect Member States' domestic legislation even in areas not covered by Union competence. This could happen in cases where national courts adopt a dynamic interpretation of their national human rights provisions, in accordance with the content and scope of the Charter Articles; A W Heringa and L Verhey, 'The EU Charter: Text and Structure' (2001) 8 MJ 17-20. See for instance, Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2010) 748 final.

⁴³ See below, '4 Civil procedure law in the EU: the role of the CJEU case law' 98; '5 Sectoral v Horizontal EU Civil Procedure Law: A Constitutional Conundrum?' 133.

⁴⁴ Article 52(4) CFREU: 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'.

constitutional legal orders. It only ensures that the Union does not adopt a lowest common denominator approach for rights recognised by both national constitutions and the Charter. In other words, the aim of harmonious interpretation is to identify common fundamental rights between the EU and Member States, and taking into account the varying degree of protection of these rights at domestic levels, to establish a high standard of fundamental rights' protection at EU level.⁴⁵

Finally, it should be underscored that the second paragraph of Article 52 CFREU, providing that Charter rights based on Treaty provisions should be exercised under the conditions and limits defined in the Treaty, does not create particular problems either.⁴⁶ The right to an effective remedy and a fair trial is relevant to Article 81 TFEU, but is not based on that provision. Limitations imposed on, for example, civil matters with cross-border implications, do not have a direct bearing on the interpretation and scope of Article 47 CFREU.⁴⁷ Quite on the contrary, what I advocate in this thesis is that the limitations of Article 81 TFEU be reviewed with reference to and in consideration of Article 47 CFREU.⁴⁸ As a result, these limitations could not compromise the use of the right to effective access to justice as a guiding tool for EU action in the area of civil justice cooperation.

2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection

⁴⁵ Explanations Relating To the Charter of Fundamental Rights (n 24), 34; P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 234; Tridimas, *The General Principles of EU Law* (n 6) 366-367.

⁴⁶ See, J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Hart Publishing 2003) 19.

⁴⁷ On the interpretation of Article 52 CFREU see inter alia, S Peers, 'Taking Rights Away? Limitations and Derogations' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) 162-171.

⁴⁸ See below, '6.3.2 Reconsidering the general premises of EU civil justice cooperation' 199. See also, G Sanna, 'Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters' in G di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 173-174.

In the previous section, I argued that the feasibility of a proactive stance by the EU legislature in the area of Article 47 CFREU is guaranteed due to the existence of legal competence, explicitly centred on the right of access to justice, namely Article 81(2)(e) TFEU. In this section, I will identify the range of obligations Article 47 CFREU imposes on EU institutions for the future development of EU civil procedure rules. To that end, I will also examine the CJEU case law on the principle of effective judicial protection, embodied in Article 47 CFREU, even prior to the enactment of the 2009 Lisbon Treaty.⁴⁹ In addition, I will look at the Strasbourg case law on Articles 6 and 13 ECHR on the rights to a fair trial and effective remedy respectively. This case law has interpreted these provisions teleologically, substantiating their wording, and also establishing further implied positive duties. The Lisbon Treaty explicitly provides that the European Convention rights constitute general principles of the Union's law.⁵⁰ Similarly, Article 52(3) CFREU provides that Charter rights corresponding to ECHR rights should generally have the same meaning and scope. Article 53 CFREU and the explanatory memorandum explicitly state that one should take into account the standards developed in the Strasbourg Court's case law in order to establish the minimum level of human rights protection that the corresponding Charter rights should secure,⁵¹ and CJEU traditionally recognises the Strasbourg case law.⁵² However,

⁴⁹ See *inter alia*: case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-09579, para 61; case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-02271, paras 37-38; case C-12/08 *Mono Car Styling SA, in liquidation v Dervis Odemis and Others* [2009] ECR I-06653, para 47; case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-08015, para 58; case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* [2011] OJ C 298/6, para 49; joined cases T-439/10 and T-440/10 *Fulmen (T-439/10) and Fereydoun Mahmoudian (T-440/10) v Council of the European Union* [2012] OJ C 133/2, para 87. In addition, the official explanations on Article 47 CFREU embrace this principle via reference to the fundamental CJEU case law that established it in the first place, namely *Johnston*, *Heylens*, and *Borelli*. See, Explanations Relating To the Charter of Fundamental Rights (n 24).

⁵⁰ Article 6(3) TEU.

⁵¹ Explanations Relating To the Charter of Fundamental Rights (n 24) 33. See also: Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in Charte 4422/00 Convent 45 (Presidency Notes) [2000] Charte 4423/00 CONV 46; Draft Charter of Fundamental Rights of the European Union – Comments of the Council of Europe observers on the draft Charter of Fundamental Rights of the European Union (Cover Note) [2000] Charte 4961/00, Contrib 356.

complete streamlining of the EU right of access to justice under Article 47 CFREU with the relevant ECtHR case law on Articles 6 and 13 ECHR can only be effectively envisaged after the accession of the European Union to the European Convention.⁵³ This however does not suggest that Article 47 CFREU should be seen as ‘the mere sum of the provisions of Articles 6 and 13 of the ECHR’.⁵⁴

Along these lines, individualised complaints mechanisms before the CJEU and ECtHR are effectively integrated in the proactive collective institutional promotion of the right of access to justice, serving a prescriptive role and providing the normative guidelines within which the EU civil justice policy must operate.⁵⁵ Essentially, this gets down to two fundamental functions. On the one hand, the relevant CJEU and ECtHR case law explicates to a certain extent the specific facets of the core elements of civil justice systems, substantiating the competing interests, namely those of the claimant to access courts, the defendant for procedural fairness, and the good administration of

[Footnotes continued on next page]

⁵² See *inter alia*: case 36-75 *Roland Rutili v Minister for the Interior* [1975] ECR 1219, para 32. *Liselotte Hauer v Land Rheinland-Pfalz* (n 14) para 15; case C-185/95 P. *Baustahlgewebe GmbH v Commission of the European Communities* [1998] ECR 8417, para 21.

⁵³ See *inter alia*: G Di Federico, ‘Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty’ in G di Federico (ed), *The EU Charter of Fundamental Rights from Declaration to Binding Instrument* (Vol 8, *Ius Gentium: Comparative Perspectives on Law and Justice*, Springer 2011) 42; ‘Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention’ provides the possibility for the Union to accede the European Convention in Article 17. For general arguments in favour of the accession see: F van de Berghe, ‘The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?’ (2010) 16(2) *ELJ* 112–157; H C Krüger, ‘The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview’ in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) xxi-xxv; Commission, ‘Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols’ (Communication) SEC (90) 2087; European Parliament, ‘Resolution on the drafting of a European Union Charter of Fundamental Rights’ A5-0064/2000 http://www.europarl.europa.eu/charter/docs/pdf/a5_0064_00_en_en.pdf accessed 17 March 2013. For arguments against the necessity to accede the ECHR see: F J Jacobs, ‘The European Convention on Human Rights, The EU Charter of Fundamental Rights and The European Court of Justice: The impact of European Union accession to the European Convention on Human Rights’ http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf accessed 12 March 2013; R C A White, ‘The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?’ in A Arnall, P Eeckhout, and T Tridimas (eds), *Continuity and Change in EU law, Essays in Honour of Sir Francis Jacobs* (OUP 2008) 146-150.

⁵⁴ Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* [2011] OJ C 298/6, Opinion of AG Cruz Villalón, para 39.

⁵⁵ See, De Búrca, ‘The Constitutional Challenge Of New Governance In The European Union’ (n 20).

justice for procedural efficiency. On the other hand, it prompts EU institutions to strike a balance between these competing interests, limiting them in a legitimate and proportionate fashion. As a result, considerations of effective remedy and fair trial do not involve a wholesale unification of Member States' procedural systems. However, 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.

2.3.1 Right to an effective remedy before a tribunal

The first paragraph of Article 47 CFREU originates from Article 13 ECHR on the right to an effective remedy before a national authority.⁵⁶ However, unlike its ECHR counterpart, which is limited to Convention rights only, Article 47(1) CFREU requires that its addressees, primarily EU institutions,⁵⁷ secure access to justice for everyone 'whose rights and freedoms guaranteed by the law of the Union⁵⁸ are violated', rendering justiciable a variety of social and economic rights.⁵⁹

2.3.1.1 The requirement for judicial review

EU institutions should guarantee the right to an effective remedy before a court and not simply before a national authority.⁶⁰ As a result, access to executive authorities

⁵⁶ This was a positive obligation imposed on Contracting States, which was first explicated in: *Silver and Others v. the United Kingdom* App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983), para 113.

⁵⁷ See, 'Explanations Relating To the Charter of Fundamental Rights' (n 24) 32: '[...] the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity'.

⁵⁸ See, Commission, *2010 Report on the Application of the EU Charter of Fundamental Rights* (Publications Office of the European Union 2011) 77 http://fra.europa.eu/fraWebsite/attachments/charter-applic-report-2010_EN.pdf accessed 20 March 2013: in non- EU law related cases, the right to an effective remedy is guaranteed by the national authorities, including the courts, according to the national law.

⁵⁹ *Heringa and Verhey* (n 42) 27; Draft Charter of Fundamental Rights of the European Union (n 24) 41; case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para 19; case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651; case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 04097; case C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* [1992] ECR I-06313; case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-03425, para 29; joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc and Others v Commission of the European Communities* [2003] ECR II-1.

⁶⁰ In the remit of the European Convention, the standard applicable to non-judicial authorities for remedies to be deemed effective is rather rigorous and often analogous guarantees of independence and

does not fulfill the obligation to provide an effective remedy in case of violation of Union law. The tribunal with jurisdiction over the matter should possess judicial functions, issuing binding decisions.⁶¹ In *Johnston v Chief Constable*,⁶² the Court conceived the right to effective judicial review as an indispensable aspect of the principle of effective judicial protection. According to Article 53(2) of the 1976 Sex Discrimination Order, giving effect to EU directive 76/207,⁶³ a certificate produced by the Secretary of State constituted conclusive evidence that an act was done to safeguard national security, or public safety, or public order.⁶⁴ This resulted in rendering a decision by the Chief Constable of the Royal Ulster Constabulary judicially unreviewable, depriving Mrs Johnston of any remedy and any possibility to assert her EU rights by judicial process.⁶⁵ The Court declared the domestic (Northern Irish) evidential rule of procedure inapplicable, and demanded that effective judicial review is offered to the litigant. Based on Article 6 of Directive 76/207, the CJEU established a right to an effective judicial remedy and a subsequent duty on Member States to take measures that enable individuals to rely effectively on their EU rights before national courts.⁶⁶ This reflected a general principle of law, underlying the Member States' constitutional traditions, also laid down in Articles 6 and 13 ECHR.⁶⁷

Nevertheless, the right to effective judicial review is not absolute and certain national limitations can be tolerated. By way of illustration, the Court found in *Brahim Samba Diouf* that the non-availability of judicial review of preparatory administrative

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impartiality with those applicable to judicial authorities are envisaged by the Strasbourg Court: *Klass and Others v. Germany* App no 5029/71 (ECtHR, 6 September 1978), para 67; *E and Other v. the United Kingdom* App no 33218/96 (ECtHR, 26 November 2002), para 112.

⁶¹ Under the ECHR regime, this guarantee is only established for the right to a fair trial under Article 6(1): *Bentham v. Netherlands* App no 8848/80 (ECtHR, 23 October 1985).

⁶² *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 59).

⁶³ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.

⁶⁴ Sex Discrimination (Northern Ireland) Order 1976, Article 53(1).

⁶⁵ *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 59) para 20.

⁶⁶ *Ibid*, para 17. See also, case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union (UPA)* [2002] ECR I-06677, para 41.

⁶⁷ *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (n 59) para 18.

acts does not violate the substance of this right, provided the final decision, based on the said preparatory acts, is judicially reviewable.⁶⁸ Even if these preparatory acts limit the period available to bring an action before the courts, also limiting the levels of jurisdiction available to the litigant, the core of the right to an effective remedy before a tribunal, is not violated, to the extent that access to courts is not impossible in practical terms.⁶⁹ Legitimate considerations regarding the necessity for swift procedures in asylum applications can justify such limitations, which do not disproportionately erode the essence of the fundamental right to effective remedy.⁷⁰

Interlinked with the requirement for judicial review is the obligation for national administrative authorities to provide prospective litigants with reasoned decisions. In the *Heylens* case,⁷¹ the French authorities refused to recognise a Belgian football trainer's diploma, preventing him from practising his profession in France. The CJEU ruled that the free movement of workers in the EU constitutes a fundamental right in the EU legal order, and therefore national authorities' decisions refusing the benefit of that right to EU nationals, should be subject to judicial scrutiny.⁷² To this end, the competent national authorities should provide individuals with specific reasons for their decision, so that the harmed individual could decide the best possible way to defend his/her EU fundamental rights.⁷³ For individuals to have a realistic opportunity to contest administrative decisions affecting their EU rights,⁷⁴ they should be aware of the main lines of reasoning and argumentation in the administrative decision, in order to

⁶⁸ *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* (n 49) paras 37-45.

⁶⁹ *Ibid*, Opinion of AG Cruz Villalón, para 63.

⁷⁰ *Ibid*, paras 53-54.

⁷¹ *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* (n 59).

⁷² *Ibid*, para 14.

⁷³ *Ibid*, para 15; case T-49/07 *Sofiane Fahas v Council of the European Union* [2010] ECR II-05555, para 60; case C-75/08 *The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government* [2009] ECR I-03799, para 59.

⁷⁴ See also, case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395.

challenge it appropriately in terms of points of law and/or fact before the competent national courts.⁷⁵

2.3.1.2 The obligation to provide an ‘effective’ remedy

The first paragraph of Article 47 CFREU also requires that EU institutions provide remedies capable of offering practical and adequate relief where EU law has been violated. The test applied is rather rigorous, looking at both the procedural characteristics of the remedies and the overall opportunity for relief they offer, also looking at the administrative and judicial system of each Member State as a whole.⁷⁶ *Von Colson*⁷⁷ opened up the way for the recognition of the requirement for practically and adequately effective remedies. In this case, the German authorities had chosen the remedy of compensation in cases of violations of Council Directive 76/207 on the equal treatment of men and women as regards access to employment, vocational training and promotion and working conditions. Specifically, national sanctions consisted of the award of compensation only for the travel expenses incurred by the plaintiff in pursuing her application for a post where access to employment conditions breached the above Directive. However, these procedural rules lacked any deterrent effect by guaranteeing the compensation of purely nominal amounts of damages, thus not being capable of securing adequate relief for the damages actually incurred by the plaintiff.⁷⁸

Although a single remedy may not suffice for adequate relief, a combination of different remedies under domestic law may do so. For example, where a national remedy for nullity or reinstatement violates the principle of effective judicial protection,

⁷⁵ See also: joined cases C-372/09 and C-373/09 *Josep Peñarroja Fa* [2011] ECR I-01785, paras 62-64; case C-186/04 *Pierre Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale* [2005] ECR I-03299, para 36. In the ECtHR context, *Chevrol v. France* App no 49636/99 (ECtHR, 13 May 2003), para 82.

⁷⁶ *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* (n 49) para 46. See also in the context of the Strasbourg case law: *Chahal v. the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996), paras 150-151; *Smith and Grady v. the United Kingdom* App no 33985/96 and 33986/96 (ECtHR, 27 September 1999); *Conka v. Belgium* App no 51564/99 (ECtHR, 5 February 2002); *Iatridis v. Greece* App no 31107/96 (ECtHR, 25 March 1999).

⁷⁷ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 23.

⁷⁸ *Ibid.*, para 28.

imposing unreasonably short limitation periods, an alternative remedy to damages should be available to make good the loss inflicted.⁷⁹ Moreover, in the *Unibet* case, the Court suggested that interim relief constitutes a necessary corollary of effective judicial protection.⁸⁰ Interim relief should be available in all cases where the admissibility of an action to protect EU rights is either certain, or uncertain, or despite being inadmissible, EU law raises doubts as to its inadmissibility. This positive requirement stems from the necessity for the right to effective remedy to have a practical value through the provision of a binding final judgment.⁸¹ Along these lines, Advocate General Kokott inferred a right to injunctive relief from Articles 47 CFREU and 19 TEU in her opinion in the ongoing *Krizan* case.⁸² The Advocate General also openly associated the right to effective interim relief with the right of access to justice as established in Article 9(4) of the Aarhus Convention, constituting part of the EU law.⁸³

2.3.2 Right to a Fair Trial

The second and third paragraphs of Article 47 CFREU originate in Article 6(1) ECHR, setting the fundamental procedural aspects of the right of access to justice in civil and criminal proceedings. However, the scope of Article 47 CFREU is broader than that of the relevant ECHR provision, in that the procedural guarantees of access to justice are not limited to disputes relating to civil rights and obligations or criminal charges.⁸⁴ This corresponds to the communitarian nature of the EU legal order, which

⁷⁹ Case C-63/08 *Virginie Pontin v T-Comalux SA* [2009] ECR I-10467, para 76.

⁸⁰ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (n 49) paras 37 and 72.

⁸¹ First established in the ECtHR case law, *H v. France* App no 10073/82 (ECtHR, 24 October 1989), para 58 (the principle of effectiveness).

⁸² Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* [2013] OJ C63/2, Opinion of AG Kokott, paras 172-173.

⁸³ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

⁸⁴ On the meaning of ‘civil’ rights in the ECHR context see, *Deumeland v. Germany* App no 9384/81 (ECtHR, 29 May 1986), paras 59-74. On the broader scope of Article 47 CFREU see, EU Network of Independent Experts on Fundamental Rights, ‘Commentary of the Charter of Fundamental Rights of The European Union’ (2006)

http://ec.europa.eu/justice/doc_centre/rights/charter/docs/network_commentary_final%20180706.pdf accessed 23 March 2013. The procedural guarantees of Article 47 (2) CFREU are also applicable to arbitration bodies, case C-63/01 *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions. And Motors Insurers' Bureau* [2003] ECR I-14447. The same holds true for

complies with the rule of law, and which views access to justice as one of the constitutive elements of the EU supranational structure.⁸⁵ It also constitutes a further indication of the higher level of protection of the right to an effective remedy and a fair trial, compared to the relevant guarantees under Articles 6 and 13 ECHR.⁸⁶

2.3.2.1 The requirement for access to the courts

The Strasbourg court first established that an individual must be able to bring a claim before a court of law for the determination of the ECHR rights or obligations, without facing any inappropriate legal and practical impediments. However, this requirement is not absolute and can be limited, provided the limitation pursues a legitimate aim and is proportional in the means it employs to achieve this aim.⁸⁷ With this in mind, the CJEU found in *Alassini* that national rules imposing the mandatory out-of-court settlement of disputes between end-users and providers of electronic communications services prior to the initiation of court proceedings did not necessarily

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actions against the Union institutions: joined cases 100/80 to 103/80 *Musique Diffusion Francaise and Others v Commission of the European Communities* [1983] ECR 1825; case C-315/99 P *Imeri Europea v Court of Auditors of the European Communities* [2001] ECR I-5281, para 28; case C-135/92 *Fiskano v Commission of the European Communities* [1994] ECR I-2885; case C-142/87 *Kingdom of Belgium v Commission of the European Communities* [1990] ECR I-959; case C-78/01 *Bundesverband Güterkraftverkehr und Logistik eV (BGL) v Bundesrepublik Deutschland* [2003] ECR I-9543.

⁸⁵ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 01339, para 23; *Philip Morris International, Inc and Others v Commission of the European Communities* (n 59) paras 120-122.

⁸⁶ A Ward, 'Access to Justice' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) 140. However, it should be underscored that more and more judges in Strasbourg share the opinion that even if the disputed matter falls within hardcore prerogatives of public authorities, the application of the procedural guarantees of Article 6 ECHR, will do no harm; neither change that public law character: *Ferrazzini v. Italy* App no 44759/98 (ECtHR, 12 July 2001), para 8, dissenting opinion of Mr Lorenzen joined by Mr Rozakis. See also, the joint concurring opinion of Judges Tulkens, Maruste, and Fura-Sandström in case *Martinie v. France* App no 58675/00 (ECtHR, 12 April 2006): 'For our part, we think that the *raison d'être* and justifications for the exclusion of certain categories of public servants from the guarantees of a fair trial should now be fundamentally reviewed in the light of Article 47 of the Charter of Fundamental Rights of the European Union [...]'.
⁸⁷ *Ashingdane v. United Kingdom* App no 8225/78 (ECtHR, 28 May 1985), paras 111-113. Such legitimate exceptions have been established based on the nature of the litigant, namely a minor, a bankrupt, a person of unsound mind, and vexatious litigants: *M v. the United Kingdom* (1987) 52 DR 269; *X. and Y. v. Netherlands* App no 8978/80 (ECtHR, 26 March 1985); *H. v. United Kingdom* App no 9580/81 (ECtHR, 8 July 1987).

violate the right of access to courts.⁸⁸ Extra-judicial procedures are justifiable based on the interests of the good administration of justice, alleviating some of the burden of the court system. They are equally beneficial to the parties of the dispute providing an alternative means of dispute resolution, swifter and less costly, compared to judicial proceedings.⁸⁹

However, out-of-court settlement processes should not be binding on prospective litigants, in order to offer them the possibility of transferring their dispute to the judicial avenue. Additionally, out-of-court settlement should not substantially prolong the resolution of the dispute, nor inflict substantial costs on the litigant. On the contrary, it should allow for the suspension of the period for the time barring of claims, being available to litigants via both electronic and non-electronic means, also taking into account the possibility for temporary protection in urgent cases.⁹⁰ Unless these qualifications are respected, the essence of the right to a court would be severely undermined, resulting in a negation of any possibility to judicially enforce one's EU law rights.⁹¹

Additionally, the Court found in *Pontin* that national limitation periods could also affect the right of access to courts. Although such rules can be justified based on the necessity for legal certainty, good administration of justice, and protection of the interests of the defence, they should not be prohibitively short, rendering access to courts impossible in practical terms.⁹² The following parameters are of particular relevance: the significance of the decisions for the parties concerned; the complexities

⁸⁸ Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08)*, *Filomena Califano v Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-02213.

⁸⁹ *Ibid*, paras 63-64.

⁹⁰ *Ibid*, paras 54-58.

⁹¹ *Ibid*, para 65.

⁹² *Virginie Pontin v T-Comalux SA* (n 79) para 60. In the context of the ECtHR case law, see: *Brumărescu v. Romania* App no 28342/95 (ECtHR, 28 October 1999) para 61; *Bujnita v. Moldova* App no 36492/02 (ECtHR, 16 January 2007), para 23; *Ryabykh v. Russia* App no 52854/99 (ECtHR, 24 July 2003), paras 51-52. See also, H J Hellwig, 'Is it really possible to render fair justice faster?' (Conference jointly organised by the European Commission and the Council of Europe: 'Towards an ideal trial: A few examples of the most successful judicial civil proceedings in Europe', Brussels, November 18-20, 2004) 4-6 http://www.cbbe.eu/fileadmin/user_upload/NTCdocument/speech_hellwig_182011_1184147495.pdf accessed 13 March 2013.

of the procedures and of the applicable legislation; and, the number of persons who may be affected.⁹³ As a result, rules on the separation of claims and submission under different courts and procedures in case of claims falling under the same head of action should be scrutinised against the necessity for timely and practical adjudication of EU law rights and obligations. If national procedural rules lead to further procedural complications, perplexing adjudication, increasing its length and costs involved, they must be set aside, and initial jurisdiction for one of the claims must be expanded to all claims.⁹⁴

In addition, in *Mono Car Styling* the Court found that a national rule imposing several preparatory steps for an individual to initiate courts proceedings did not limit disproportionately the right of access to courts. In establishing this finding, it looked at the collective character of the EU right of information and consultation in case of collective redundancies; this right has serious repercussions for the future employment of many people. Therefore, the additional possibility for individual judicial action against an employer that has violated his obligations to inform and consult workers in collective redundancies can legitimately be limited via imposition of certain preparatory steps. Such a limitation cannot be regarded as disproportionate to the collective interests pursued, since it does not erode the essence of the right to court.⁹⁵

Finally, the Strasbourg case law on Article 6 ECHR has also established that the requirement not to impede access to courts would have no practical value, if not accompanied by a positive obligation on States to enforce final and binding judicial decisions within a reasonable time. However, the execution of a judgement may be delayed for some time,⁹⁶ especially where execution requires the participation of the

⁹³ Case C-349/07 *Sopropé - Organizações de Calçado Lda v Fazenda Pública* [2008] ECR I-10369, para 40.

⁹⁴ Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-02483, paras 51-53. See *inter alia*, Zuckerman, 'The principle of effective judicial protection in EU law' (n 2).

⁹⁵ *Mono Car Styling SA, in liquidation v Dervis Odemis and Others* (n 49) paras 46-52.

⁹⁶ *Burdov v. Russia* App no 59498/00 (ECtHR, 7 May 2002), para 34; *Kyrtatos v. Greece* App no 41666/98 (ECtHR, 22 May 2003), para 32: 7 years for the adoption of necessary measures for the execution of a final court judgment was disproportionate and violated Article 6(1) ECHR; *Jasiūnienė v. Lithuania* App no 41510/98 (ECtHR, 6 June 2003): failure to execute a court judgment after more than 8 years.

applicant, who nonetheless remains inactive.⁹⁷ More importantly, this execution cannot be canceled due to lack of essential State funds in case of a dispute with a state authority.⁹⁸ However, in horizontal relations, namely between private individual parties, the lack of funds may justify the failure to enforce a judgment.⁹⁹ Overall, the criteria for the timely enforcement of judgments are more relaxed compared to those applicable for the reasonable length of judicial proceedings.¹⁰⁰ Still, certain considerations regarding the complexity of the case and the parties' conduct are relevant on both occasions.¹⁰¹

2.3.2.2 The obligation for a fair hearing

The right to a fair hearing consists of several fundamental procedural guarantees for the due process of the law. These guarantees are not immediately evident in the text of Article 47 CFREU, and have mainly been construed judicially through the extensive case law of the CJEU and ECtHR. They involve the right to equality of arms and to adversarial proceedings.¹⁰² Nevertheless, there is only a broad requirement for adversarial processes and adversarial and inquisitorial legal systems can usually comply with this guarantee of fair trial in Article 47 CFREU.¹⁰³

The notion of a fair hearing includes the notion that parties to judicial proceedings have knowledge of and comment on all evidence produced or observations submitted by the other party.¹⁰⁴ This principle of adversarial proceedings reinforces the

⁹⁷ *Užkurėlienė and others and others v. Lithuania* App no 62988/00 (ECtHR, 7 April 2005), paras 35-36.

⁹⁸ *Burdov v. Russia* (n 96) paras 34-38.

⁹⁹ *Fuklev v. Ukraine* App no 71186/01 (ECtHR, 7 June 2005), paras 84-86.

¹⁰⁰ See below, '2.3.2.4 The 'reasonable time' requirement' 64.

¹⁰¹ By analogy from ECtHR case law, *Užkurėlienė and others and others v Lithuania* (n 97) paras 31-37.

¹⁰² See: joined cases C-439/05 P and C-454/05 P *Land Oberösterreich and Republic of Austria v Commission of the European Communities* [2007] ECR I-07141, para 36; case C-287/02 *Kingdom of Spain v Commission of the European Communities* [2005] ECR I-5093, para 37; case C-199/99 P *Corus UK Ltd v Commission of the European Communities* [2003] ECR I-11177, paras 19-25, 41-43, 50-59.

¹⁰³ By analogy from the ECHR regime see, D Vitkauskas and G Dikov, 'Protecting the right to a fair trial under the European Convention on Human Rights' (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012) 45

http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb12_fairtrial_en.pdf 13 March 2013.

¹⁰⁴ Although the Commission is not a court, CJEU judgments on the principles of adversariality and equality of arms in proceedings before the Commission are relevant: joined cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980] ECR 03125; *Musique Diffusion Francaise and Others v Commission* (n 84). In the context of the ECHR regime see,

appearance of the fair administration of justice.¹⁰⁵ Accordingly, only access to materials of fundamental importance should be granted, whereas restrictions to less significant materials can be accepted.¹⁰⁶ Member States are free to set rules on the admissibility of evidence and domestic courts are free to assess this evidence.¹⁰⁷ However, in order to confirm the fair character of the proceedings as a whole, one must have regard to the nature of the evidence admitted and the way in which it was taken are relevant under Article 47. Finally, the defendant's participation in proceedings can exceptionally be excluded as a whole (debarment order), for fear of delaying tactics, where he has been ordered to disclose certain information (disclosure order) and he has failed to do so within the provided timeframe (unless order). To that end, the defendant should have been vested with a reasonable opportunity, both in terms of time and place, to express his opinion before the issuance of the orders, after the examination of the merits of the claim, and provided he also has the possibility to challenge these orders, based on the need to protect certain professional secrets.¹⁰⁸

Closely related to the right to adversarial proceedings is the parties' right to equality of arms. In rough lines, the equality of arms demands that all parties to judicial proceedings have a reasonable chance to present their case to the court under conditions that do not disadvantage them substantially vis-à-vis their opponents, thereby attempting to strike a fair balance between the parties.¹⁰⁹ As a result, if none of the parties gets access to evidence adduced by the Court on its own initiative, no violation of the principle of equality of arms can viably be established. However, this constitutes

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Ruiz-Mateos v. Spain App no 12952/87 (ECtHR, 23 June 1993), para 63, where the applicants' request to make submissions before the Constitutional Court was denied.

¹⁰⁵ See, *Ismeri Europea v Court of Auditors* (n 84) para 28. In the context of ECtHR case law, *Borgers v. Belgium* App no 12005/86 (ECtHR, 30 October 1991), para 24.

¹⁰⁶ By analogy from ECtHR, *McMichael v. the United Kingdom* App no 16424/90 (ECtHR, 24 February 1995), paras 78-82: denial of access to social reports deemed "vital" in the context of child-care proceedings and examined by the courts.

¹⁰⁷ *Fiskano v Commission* (n 84); *Belgium v Commission* (n 84); *BGL v Bundesrepublik Deutschland* (n 84). In the ECHR context, *Schenk v. Switzerland* App no 10862/84 (ECtHR, 12 July 1988).

¹⁰⁸ Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-2563, paras 41-46.

¹⁰⁹ By analogy from ECtHR, *Brandstetter v. Austria* App no 11170/84, 12876/87, 13468/87 (ECtHR, 28 August 1991).

a violation of the right to adversarial proceedings and the requirement to get knowledge of and comment on all evidence collected.¹¹⁰ Similarly, parties should have the opportunity to cross-examine witnesses,¹¹¹ to reply to written submissions to the national court made by the counsel for the State,¹¹² and to call a witness.¹¹³

2.3.2.3 The requirement for a public hearing

The requirement for a public hearing constitutes a distinct guarantee directly inferred from the wording of Article 47 CFREU. Nonetheless, this provision has mainly been elaborated in the context of the Strasbourg case law on Article 6(1) ECHR and the more general reference to the fairness of proceedings.¹¹⁴ Specifically, ECtHR has found that the guarantee for a public hearing encompasses the demand for the proceedings to include oral submissions¹¹⁵ and the presence of all parties, and of the public/media wishing to follow the case. As a result, litigants vest confidence in the judicial system and the fair administration of justice.¹¹⁶ In order to secure public scrutiny, judgments must be pronounced publicly, either reading them out in the court, or depositing them in the court registry enabling the public to review the rationale and principles behind them.¹¹⁷ Consequently, it is not sufficient that the domestic court reads out only the operative part of the decision during a public hearing, sending a full written copy of a judgment exclusively to the parties, without the public having access to the archives of the court registry.¹¹⁸

¹¹⁰ See, case C-338/00 P *Volkswagen AG v Commission of the European Communities* [2003] ECR I-9189, para 109. In the context of the ECHR regime, *Krčmář and Others v. the Czech Republic* App no 35376/97 (ECtHR, 3 March 2000).

¹¹¹ By analogy from ECtHR, *X v. Austria* (1972) 42 EHRR CD 145.

¹¹² By analogy from ECtHR, *Ruiz-Mateos v. Spain* (n 104).

¹¹³ By analogy from ECtHR, *Dombo Beheer B.V. v. The Netherlands* App no 14448/88 (ECtHR, 27 October 1993): only one of the parties was offered the opportunity to call a witness, the other party being denied such a chance because the court mistakenly identified the witness with the applicant party.

¹¹⁴ *Ekbatani v. Sweden* App no 10563/83 (ECtHR, 26 May 1988).

¹¹⁵ *Fredin v. Sweden* (no 2) App no 18928/91 (ECtHR, 23 February 1994), para 21.

¹¹⁶ *Axen v. Germany* App no 8273/78 (ECtHR, 8 December 1983), para 25; *Stallinger and Kuso v. Austria* App no 14696/89, 14697/89 (ECtHR, 23 April 1997), para 51; *Diennet v. France* App no 18160/91 (ECtHR, 26 September 1995), para 34.

¹¹⁷ *Pretto and others v. Italy* App no 7984/77 (ECtHR, 8 December 1983), para 26; *Werner v. Austria* App no 21835/93 (ECtHR, 24 November 1997); *Szucs v. Austria* App no 20602/92 (ECtHR, 24 November 1997).

¹¹⁸ *Ryabykh v. Russia* (n 92).

The right to a public hearing is not absolute and on many occasions can be limited or even waived.¹¹⁹ Specifically, parties' presence in civil proceedings is not always necessary,¹²⁰ and proceedings do not always have to be oral. Also, there are many exceptions to the public accessing and following the case and the judgment delivered either inside the courtroom, via the mass media, or the court's registry.¹²¹ For instance, there is no necessity for a public hearing for the granting of an invalidity pension, due to the technical character of the disputed issue.¹²² Overall, the public and the media may be fully or partially excluded from a trial in the interests of morals, public order or national security in a democratic society, juveniles or the parties' private life, or in the interests of justice in special circumstances.¹²³

2.3.2.4 The 'reasonable time' requirement

A fair trial should according to Article 47 CFREU have a reasonable length.¹²⁴ The underlying rationale, especially in civil proceedings, is that delayed judgments can compromise the effectiveness and the credibility of the entire judicial system in resolving disputes and enforcing private rights and obligations.¹²⁵ This relates to the requirement for legal certainty and the necessity to end a situation of prolonged insecurity with respect to a person's civil law position. This is to the interest of all

¹¹⁹ *Håkansson and Sturesson v. Sweden* App no 11855/85 (ECtHR, 21 February 1990), para 66.

¹²⁰ *Shtukurov v. Russia* App no 44009/05 (ECtHR, 27 June 2008), paras 69-76; *Kremzow v. Austria* App no 12350/86 (ECtHR, 21 September 1993).

¹²¹ *B and P v. the United Kingdom* App no 36337/97, 35974/97 (ECtHR, 24 April 2001), paras 36, 39: this was an application for residency orders in respect of children. The 1998 Children Act's presumption that such proceedings should be conducted in private was not found to violate the right to public hearing because it can be seen as a specific reflection of the general exceptions in Article 6(1) ECHR. *Fischer v. Austria* App no 16922/90 (ECtHR, 26 April 1995), para 44; *Koottummel v. Austria* App no 49616/06 (ECtHR, 10 March 2010), paras 18-21.

¹²² *Schuler-Zraggen v. Switzerland* App no 14518/89 (ECtHR, 24 June 1993), para 58.

¹²³ Article 6(1) ECHR.

¹²⁴ For and in-depth empirical analysis of the requirements for reasonable duration of proceedings, the Strasbourg case law and the reasons for judicial delays in the various Contracting States see, F Calvez, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights* (Report adopted by the CEPEJ at its 8th plenary meeting, Council of Europe Publishing 2007) http://www.coe.int/t/dghl/cooperation/cepej/delais/Calvez_en.pdf accessed 19 March 2013.

¹²⁵ See: *Baustahlgewebe GmbH v Commission* (n 52) paras 26-47; joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) and Others v Commission of the European Communities* [2002] ECR I-08375, paras 164-235; case C-194/99 P *Thyssen Stahl AG v Commission of the European Communities* [2003] ECR I-10821, paras 154-156.

parties to civil proceedings, as well of the judicial system as a whole. Accordingly, in *Belvedere Costruzioni Srl.*, national procedural rules provided for the automatic conclusion of proceedings pending before the tax court of third instance. The CJEU examining this provision, using Article 47 CFREU, found that VAT related EU law obligations could not result in unreasonably long adjudications of tax disputes in this area, lasting for more than 10 or 14 years, when the tax authorities had been unsuccessful at first and second instance.¹²⁶

CJEU has found that the criteria to consider the reasonableness of the duration of court proceedings include: the complexity of the case; the applicant's conduct; the conduct of the State's judicial authorities; and, the importance of the case for the applicant.¹²⁷ These criteria are not exhaustive and the justification of the length of the proceedings in the light of one of them does not necessitate the exhaustion of the remaining parameters.¹²⁸ The Strasbourg case law has further elaborated these parameters. To begin with, the complexity of the case flows from both its factual circumstances and the legal issues it raises.¹²⁹ For instance, a case can be deemed complex when it is capable of having wide-ranging repercussions for the domestic case law of a Member State.¹³⁰ Other parameters to be considered are the number of accused people,¹³¹ the number of witnesses, the need for evidence on commission,¹³² and the complexities in the investigation stage.¹³³ Even particularly complex cases can have an unreasonable duration all circumstances considered.¹³⁴

¹²⁶ Case C-500/10 *Ufficio IVA di Piacenza v Belvedere Costruzioni Srl* [2012] OJ C 151/6, paras 23-28.

¹²⁷ See, case C-403/04 P *Sumitomo Metal Industries Ltd (C-403/04 P) and Nippon Steel Corp. (C-405/04 P) v Commission of the European Communities* [2007] ECR I-00729, paras 115-123. By analogy from ECtHR case law: *König v. Germany* App no 6232/73 (ECtHR, 28 June 1978), para 99; *Buchholz v. the Federal Republic of Germany* App no 7759/77 (ECtHR, 6 May 1981), para 49.

¹²⁸ See: *Limburgse Vinyl Maatschappij and Others v Commission* (n 125) para 188; *Thyssen Stahl v Commission* (n 125) para 156.

¹²⁹ *Triggiani v. Italy* App no 13509/88 (ECtHR, 19 February 1991), para 17.

¹³⁰ *Katte Klitsche de la Grange v. Italy* App no 12539/86 (ECtHR, 27 October 1994), para 62.

¹³¹ *Angelucci v. Italy* App no 12666/87 (ECtHR, 19 February 1991), para 15.

¹³² *Andreucci v. Italy* App no 12955/87 (ECtHR, 27 February 1992), para 17.

¹³³ *Manzoni v. Italy* App no 11804/85 (ECtHR, 19 February 1991), para 18.

¹³⁴ *Ferrantelli and Santangelo v. Italy* App no 19874/92 (ECtHR, 7 August 1996), paras 38-42.

Next, the applicant's conduct is important because if he deliberately does not show diligence in undertaking the procedural actions relevant to him, if he employs delaying tactics,¹³⁵ or if he does not take advantage of possibilities offered by the domestic legal order for shorter proceedings,¹³⁶ he obviously cannot complain for the violation of his right to a hearing within a reasonable time. Making full use of all defence procedures, however, does not constitute a delaying tactic,¹³⁷ and there is no responsibility on the applicant's part to contribute to the expeditious conclusion of proceedings.¹³⁸ Also, judicial authorities' conduct needs to be investigated mainly against the principle of the proper administration of justice and the courts' duty to deal appropriately with the cases before them,¹³⁹ taking adequate measures in order to avoid unnecessary delays.¹⁴⁰ Decisions for adjournment or for taking evidence and for the joining of more cases may offer significant indications.¹⁴¹ Likewise, the repeated re-opening or remittance of a case from one court to another (the so-called yo-yo practice) is often considered as a serious aggravating circumstance, even if the overall duration of the proceedings does not appear excessive.¹⁴² Overall, civil cases may call for

¹³⁵ *Beaumartin v. France* App no 15287/89 (ECtHR, 24 November 1994), para 33: despite applicants' deliberate delaying tactics, the Strasbourg court found a violation of the right to a hearing within a reasonable time because the first hearing in the domestic court took place only 5 years after the institution of proceedings.

¹³⁶ *Unión Alimentaria Sanders SA v. Spain* App no 11681/85 (ECtHR, 7 July 1989), para 35.

¹³⁷ *Kolomiyets v. Russia* App no 76835/01 (ECtHR, 22 February 2007), paras 25-31.

¹³⁸ *Eckle v. the Federal Republic of Germany* App no 8130/78 (ECtHR, 15 July 1982), para 82; *Ceteroni v. Italy* App no 22461/93, 22465/93 (ECtHR, 15 November 1996), para 24.

¹³⁹ See, case C-523/04 *Commission of the European Communities v Kingdom of The Netherlands* [2007] ECR I-3267, Opinion of AG Mengozzi, paras 57-60. In the context of ECtHR case law, *Boddaert v. Belgium* App no 12919/87 (ECtHR, 12 October 1992), para 39.

¹⁴⁰ By analogy from ECtHR: *Vernillo v. France* App no 11889/85 (ECtHR, 20 February 1991), para 38; *Zimmerman and Steiner v. Switzerland* App no 8737/79 (ECtHR, 13 July 1983), para 29; *Bottazzi v. Italy* App no 34884/97 (ECtHR, 28 July 1999), para 22: the court found that Italian courts systematically violate the reasonable duration of proceedings, so that the accumulation of breaches constitutes a 'practice' incompatible with the Convention. Additionally, no reference to practical or financial problems can justify a structural problem with excessive length of proceedings: *Salesi v. Italy* App no 13023/87 (ECtHR, 26 February 1993), paras 20-25.

¹⁴¹ See, *Impact v Minister for Agriculture and Food and Others* (n 94) paras 47-53. In the ECHR context: *Ewing v. the United Kingdom* (1989) 56 DR 71; *Zimmerman and Steiner v. Switzerland* (n 140); *Guincho v. Portugal* App no 8990/80 (ECtHR, 10 July 1984); *Buchholz v. Germany* (n 127).

¹⁴² By analogy from the ECtHR, *Svetlana Orlova v. Russia* App no 4487/04 (ECtHR, 30 October 2009), paras 42-52. See also, case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I- 10239, para 45: lack of court competence.

expeditious proceedings where they are of particular importance to the applicant in terms of their special quality or irreversibility,¹⁴³ such as in child care cases,¹⁴⁴ employment disputes,¹⁴⁵ and personal injury cases.¹⁴⁶

2.3.2.5 The requirement for an ‘independent and impartial tribunal established by law’

An important corollary to a public and fair hearing within reasonable time is that this takes place before an independent and impartial tribunal established by law.¹⁴⁷ The requirements for independence, impartiality, and establishment of courts by law, are distinct, although closely related, and often considered together with no particular differentiation. To begin with, this provision requires that EU institutions set up various disciplinary or administrative disputes handling bodies that bear the characteristics of a “tribunal” – even if they are not so called officially – being permanent, with compulsory jurisdiction, having an *inter partes* procedure and applying rules of law.¹⁴⁸ The rationale behind this provision is that the judging authorities are regulated by law originating directly from the legislature, and are independent from the discretion of the executive.¹⁴⁹ In setting up independent courts and tribunals, EU institutions should consider the following parameters: their members’ appointment procedures;¹⁵⁰ the duration of their

¹⁴³ By analogy from the ECtHR, *H v. the United Kingdom* (n 87) para 85.

¹⁴⁴ By analogy from the ECtHR, *Hokkanen v. Finland* App no 19823/92 (ECtHR, 23 September 1994), para 72: custody case.

¹⁴⁵ By analogy from the ECtHR, *Obermeier v. Austria* App no 11761/85 (ECtHR, 28 June 1990), para 72: suspension from work case.

¹⁴⁶ By analogy from the ECtHR, *Silva Pontes v. Portugal* App no 14940/89 (ECtHR, 23 March 1994), para 39: compensation for serious injuries in accident case.

¹⁴⁷ Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-08613, paras 47-53; case T-351/03 *Schneider Electric SA v Commission of the European Communities* [2007] ECR II-2237, para 181.

¹⁴⁸ See: case 61-65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261; case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, para 23. By analogy from ECtHR case law, *H v. Belgium* App no 8950/80 (ECtHR, 30 November 1987), paras 50-55.

¹⁴⁹ See: case C-24/92 *Pierre Corbiau v Administration des contributions* [1993] ECR I-1277, para 15; case C-516/99 *Walter Schmid* [2002] ECR I-4573, para 36. By analogy from ECtHR case law: *Zand v. Austria* (1978) 15 DR 70; *Lavents v. Latvia* App no 58442/00 (ECtHR, 28 November 2002).

¹⁵⁰ See: joined cases C-9/97 and C-118/97 *Raija-Liisa Jokela and Laura Pitkärant* [1998] ECR I-6267, para 20. In the ECHR context: *Campbell and Fell v. the United Kingdom* App no 7819/77; 7878/77 (ECtHR, 28 June 1984), para 79; *Zand v. Austria* (n 149) para 77.

professional duties;¹⁵¹ any guarantees against external pressure;¹⁵² and, whether the bodies appear as independent to the public.

Also, according to ECtHR case law, impartiality of the judging court entails the absence of prejudiced or biased decisions. This can be ascertained via the application of two cumulative tests;¹⁵³ the subjective test,¹⁵⁴ namely the personal prejudice or actual bias of a judge, and the objective test,¹⁵⁵ investigating whether there are sufficient guarantees to dilute any legitimate doubts as to the judge's impartiality. The subjective approach needs proof of bias and rightly appointed judges are deemed impartial until otherwise proved.¹⁵⁶ To illustrate, a judge's comments to the press before the conclusion of the trial, pre-empting the court's decision towards conviction or partial acquittal, and omitting any reference to the chance for total acquittal could constitute an indication of such personal bias.¹⁵⁷

The objective test establishes a less onerous burden of proof for the applicant; an appearance of bias or a legitimate doubt as to the lack of bias is sufficient from the point of view of an ordinary reasonable observer.¹⁵⁸ For instance, a judge may be deemed partial in cases where her husband has personal interests in the adjudicated matter.¹⁵⁹ However, the mere rehearing where a first instance decision is quashed on appeal and sent back to the first instance judges to reconsider it does not raise any concerns in terms of judges' objective impartiality.¹⁶⁰ This double test of impartiality should be applied to juries and lay judges who sit with professional judges for the determination

¹⁵¹ See: *Raija-Liisa Jokela and Laura Pitkärant* (n 150) para 20: removal from office.

¹⁵² See: case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz* [1999] ECR I-551, para 21; case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539, para 36.

¹⁵³ *Piersack v. Belgium* App. no 8692/79 (ECtHR, 1 October 1982), para 30.

¹⁵⁴ *Hauschildt v. Denmark* App no 10486/83 (ECtHR, 24 May 1989).

¹⁵⁵ *Piersack v. Belgium* (n 153).

¹⁵⁶ *Hauschildt v. Denmark* (n 154) para 47.

¹⁵⁷ *Lavents v. Latvia* (n 149).

¹⁵⁸ *Piersack v. Belgium* (n 153).

¹⁵⁹ *Sigurdsson v. Iceland* App no 39731/98 (ECtHR, 10 July 2003), paras 37-46.

¹⁶⁰ *Thomann v. Switzerland* App no 17602/91 (ECtHR, 10 June 1996), para 35.

of civil or criminal proceedings,¹⁶¹ as well as to specialist courts and practitioners in the specialist field appointed as members of the tribunal.¹⁶²

2.3.2.6 The obligation to provide legal aid

The third paragraph of Article 47 explicitly recognises a right to legal aid to ensure effective access to justice. This right is a corollary of the right to a fair trial and, though not mentioned explicitly in the text of Article 6(1) ECHR, it is traditionally recognised by the relevant Strasbourg case law, in cases where according to domestic law representation by a legal professional is mandatory, or in complex or of special nature cases (implied positive obligations).¹⁶³ Accordingly, neither the occasional assistance by volunteer lawyers, or the extensive judicial assistance and latitude granted to the applicants as litigants in person, could substitute a competent and sustained representation by an experienced lawyer deemed necessary due to the complexity of the case.¹⁶⁴

More recently, CJEU also explicitly recognised the possibility for legal aid not only in cases where lawyer assistance is needed, but also in cases where dispensation from advance payment of court fees is necessary for effective judicial protection under Article 47 CFREU.¹⁶⁵ In the *DEB* case, the Court confirmed that commercial companies, under certain circumstances, could be entitled to legal aid to secure access to justice.¹⁶⁶ In other words, Article 47 CFREU secures access to courts and thus legal aid for both natural and legal persons. This presumably suggests that EU institutions or

¹⁶¹ *Sander v. the United Kingdom* App no 34129/96 (ECtHR, 9 May 2000).

¹⁶² *Langborger v. Sweden* App no 11179/84 (ECtHR, 22 June 1989).

¹⁶³ *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979), paras 25-26; *Aerts v. Belgium* App no 25357/94 (ECtHR, 30 July 1998), para 60; *McVicar v. the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002), para 50; *Glaser v. the United Kingdom* App no 32346/96 (ECtHR, 19 September 2000), para 99.

¹⁶⁴ *Steel and Morris v. the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 69.

¹⁶⁵ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 59. DEB, a German commercial organisation, sued the German government for non-implementation of EU directives, but lacked funds for the advance payment of court fees and for lawyer representation. The company applied for legal aid that was refused because of a public interest provision in German law.

¹⁶⁶ *Ibid.*

Member States cannot totally negate the right to legal aid to legal persons.¹⁶⁷ On the other hand, any limitations imposed on Article 47 should conform to the authorised limitations under the Convention and the Strasbourg Court case law on Article 6 and 13 ECHR.¹⁶⁸ National courts will have to decide whether the national rules for granting legal aid to legal persons undermine the essence of the right to a court, or whether they pursue a legitimate and proportionate aim.¹⁶⁹ In making this assessment, the national court may consider the form of the legal person, namely whether it is a commercial company or a non-profit making organisation, the partners or shareholders' financial capacity, and their ability to secure funds for the institution of legal proceedings.¹⁷⁰

The nature and scope of the right to legal aid varies considerably across the Member States. It ranges from the provision of free or low-cost legal services (advice and representation);¹⁷¹ to partial or total exemption from or covering of court fees;¹⁷² and to direct financial assistance to cover any litigation costs, such as lawyers' fees, court charges, reimbursement of witnesses, expert's fees, costs in case of cost shifting

¹⁶⁷ Ibid, paras 38-42. See also: J Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty. Reflection in the light of case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH' (2011) 4(2) REALaw 53, 66; P Oliver, 'Case C-279/09, DEB v Germany Judgment of the European Court of Justice (Second Chamber) of 22 December 2010, nyr.' (2011) 48 CML Rev. 2023, 2035.

¹⁶⁸ Article 52(3) CFREU; Explanations Relating To the Charter of Fundamental Rights (n 24) 33.

¹⁶⁹ *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (n 165) paras 60, 62: this judgment has expanded the EU legal aid landscape, which was initially perceived in a rather narrow manner. Specifically, Council Directive 2002/8/EC of 27 January 2003, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid (OJ L 26/41), was limited to cross-border disputes and to natural persons lacking sufficient resources to secure effective access to justice in civil and commercial matters, provided their application was not manifestly unfounded. Still, decisions rejecting such applications should be duly reasoned providing for their review.

¹⁷⁰ Ibid.

¹⁷¹ All Member States provide financial assistance for legal representation and/or legal advice in criminal and/or other non-criminal cases. For an accurate picture of the various legal aid schemes in the EU Member States see, CEPEJ, *European judicial systems: Efficiency and quality of justice* (Council of Europe Publishing 2010) 49-52

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2> accessed 19 March 2013.

¹⁷² All Member States with the exception of Cyprus and Bulgaria. One should bear in mind also that France, Spain, and Luxembourg provide free access to all courts.

rules.¹⁷³ The rules for the determination of the eligibility criteria also vary involving means or merits tests, or a combination of both, or none of the two.¹⁷⁴ More importantly, the Strasbourg court established in its seminal *Airey* case that impediments to access to courts due to financial considerations could also be addressed, for instance, via simplified procedures, such as small claims.¹⁷⁵ Accordingly, in some Member States there are certain alternative or complementary measures to legal aid schemes such as legal expenses insurance, contingency fees, success fees, and third party litigation funding.¹⁷⁶

2.4 Summarising Main Remarks

The above analysis has shown the width and depth of an apparently ‘innocent’ provision, that of Article 47 CFREU. It should be underscored that the categories of procedural guarantees identified and analysed above are not watertight, and many issues and themes falling under one heading on one occasion, may be associated with another category at a different instance.¹⁷⁷ What is more, there are various limitations to the scope and level of protection guaranteed by Article 47 CFREU. A balanced analysis shows that these limitations can only marginally affect a broad understanding of Article 47 CFREU, especially taking into account the existing EU competence on civil justice

¹⁷³ Belgium, Slovenia, and Spain: technical experts’ fees; Bulgaria, Estonia, Latvia, Lithuania, and UK-Scotland: costs for the preparation of documents for the filing of a case; Greece: cost of other legal professionals such as notaries, bailiffs. On the costs of civil proceedings see *inter alia*, C Hodges, S Vogenauer, and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing 2010) 11-20.

¹⁷⁴ This is the exceptional case of France.

¹⁷⁵ *Airey v. Ireland* (n 79).

¹⁷⁶ For more information on these alternative measures see, *inter alia*: C Hodges et al, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (n 173) 20-28.

¹⁷⁷ For example, legislative intervention in the administration of justice that can affect the judicial determination of a particular case, affecting the balance between the parties, can be dealt within the ambit of the equality of arms principle for a fair trial, as well as under the right to a court, or even to an independent court. See, C Rozakis ‘The Right to a Fair Trial in Civil Cases’ (2004) 4 J.S.I.J. 96, 102.

cooperation that directly impacts the right to effective access to justice (Article 81(2)(e) TFEU).¹⁷⁸

I have thus argued that EU institutions may adopt legislative measures in order to reduce obstacles and difficulties that individuals face when resolving their disputes, enforcing their EU law rights before national courts. In the remaining chapters, I will investigate further the main argument, namely that access to justice may be used as a yardstick for the future development of EU civil procedure measures. Therefore, I will look at various examples of EU intervention in national procedural regimes examining whether they can realistically promote access to justice in the EU. Specifically, I will look at the creation of civil procedure law in the CJEU case law on national procedural autonomy (Chapter 4), as well as at examples of sectoral and horizontal secondary instruments of EU civil procedure law (Chapter 5) from an access to justice perspective.

Before embarking on this investigation though, I will address another preliminary question: when should EU institutions provide civil procedure rules that promote the application of the right of access to justice? In other words, which are the policy parameters that render such 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, the next chapter offers the broad lines along which such *in concreto* justification for legislative action in civil justice will have to take place.

¹⁷⁸ See, Maduro (n 11) 286, 289.

3 Civil procedure law in the EU: unravelling the policy considerations

3.1 Introduction

‘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

In the previous chapter, I examined the right of access to justice in the EU. Using Article 47 CFREU as a departure point, I attempted to sketch the scope of a key right that is steadily gaining momentum in the supranational legal order. I argued that this is a broad right, capable of affecting many facets of a civil procedure regime in the process of facilitating the enforcement of EU law rights and obligations before national courts and tribunals, safeguarding the rule of law in the EU legal order. I suggested that this right be linked to the legal basis of Article 81(2)(e) TFEU, guiding EU institutions’ legislative activities in the area of EU civil procedure law. This tactic has the potential to promote a fundamental goal. That is, to facilitate the enforcement of EU law rights and obligations, by adopting solutions that consider all interests involved, mainly those of the defendant and of the good administration of justice, and preventing a situation of over-enforcement of EU law regardless of any countervailing considerations.²

This chapter seeks to shed some more light on the desirability and feasibility of civil procedure harmonisation for the promotion of access to justice in the supranational legal order. I will address this preliminary question before moving on with the examination of my main research question, namely the appropriate legal basis for civil procedure harmonisation. As a result, this chapter will offer a basis for the analysis of

¹ M Tulibacka, ‘Europeanisation of Civil Procedures: In Search of a Coherent Approach’ (2009) 46 CML Rev. 1555.

² On the involvement of these interests in remedial and procedural CJEU case law see: C M G Himsworth, ‘Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited’ (1997) 22(4) ELR 291, 310-311.

the broader research project. I will argue that civil procedure law constitutes a broad area, with cultural, economic, social, and historical overtones, which need to be given due regard to achieve a coherent approach.³ In this highly controversial environment, the fundamental right to effective remedy and fair trial should tie all policy parameters together.

Specifically, I will explore the premises of EU intervention in national civil procedural regimes in two steps. At an initial level, I will 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 harmonisation of national procedural regimes. To this end, I will 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 limitation of forum shopping. At a second level, I will endeavour to detect feasibility considerations that may limit the scope of EU intervention into national procedural regimes. In order to offer an overview of the stakes involved in the process of civil procedure law convergence in the EU, I will 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. As usual, I will offer a summary of the main findings in the final part of the chapter.

3.2 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. I suggest that any efforts to intervene in national civil procedural regimes should be based on the learning outcomes

³ J I H Jacob, *The Fabric of English Civil Justice* (Hamlyn Trust, Stevens & Sons 1987) 3.

achieved in the remit of private law approximation.⁴ Therefore, in this section, I will examine whether, if at all, the above arguments could yield some valid results in the area of civil procedure law harmonisation. This will reveal the actual ramifications and limitations of these parameters in the remit of the effective dispute resolution and enforcement of EU law, and the ensuing future harmonisation of national procedural regimes.

3.2.1 A level playing field in the Internal Market

National civil procedural rules on, for example, the 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,⁵ hampering the smooth functioning of the Internal Market. 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 an unequal footing if one of them has access to efficient and effective procedures while the other does not.⁶

To illustrate, imagine two companies resorting to the judicial avenue in order to enforce a commercial contract.⁷ Company A does business in Italy, renowned for its

⁴ W Kennett, *Enforcement of Judgments in Europe* (OUP 2000) 305.

⁵ Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' COM (2005) 87 final.

⁶ Ibid 5; 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) 32; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1; 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, 14-16.

⁷ The International Bank for Reconstruction and Development/The World Bank, *Doing Business 2011: Making A Difference for Entrepreneurs* (The World Bank and the International Finance Corporation 2010) 70, 75 <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf> accessed 03 March 2013. The possibility to enforce contracts swiftly, at reasonable costs and without complicated procedures, plays an important role in a country's competitive advantage in the global economy. See also, K H Bae and V Goyal, 'Creditor Rights, Enforcement, and Bank Loans' (2009) 64(2) *The Journal of Finance* 823: empirical research also shows that banks respond to the poor enforceability of contracts by reducing loan amounts, shortening loan maturities, and increasing loan spreads. In other words, companies' access to credit can vary depending on the contract enforcement performance of the country where the company has commercial activity. Van Rhee sees in that interrelation between economic activities and appealing litigation systems increased possibilities of spontaneous approximation of procedural rules in competing legal orders: C H van Rhee,

judicial delays, whereas Company B develops its commercial activity in the Netherlands, a country with swift judicial proceedings.⁸ In this theoretical 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 parameters constitute serious procedural disincentives, affecting parties' willingness to go to the courts,⁹ and rendering the Internal Market economic freedoms deceptive and unenforceable. The creation of EU civil procedure rules could curtail substantial differences between the various procedural regimes, promoting an Internal Market level playing field via businesses' equal access to justice.¹⁰

The European Small Claims Procedure¹¹ may be seen as a step in this direction. By introducing a common European procedure, proportional to the value of the litigation, ESCP has contributed to the creation of a level playing field for creditors and debtors throughout the European Union. In other words, EU intervention in national procedural regimes has tackled the distortion of competition due to disparities in the functioning of the procedural means afforded to litigants to pursue low value claims in different Member States.¹²

[Footnotes continued on next page]

'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) 48.

⁸ 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) 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.

⁹ 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).

¹⁰ See however below the limitations of this argument: '3.2.4 Assessment' 81.

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

¹² 'Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed up Small Claims Litigation' (n 6). Whether this has really been the case, will be analysed below, '5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure' 150.

3.2.2 Economics of Legal Certainty

In the international environment, largely divergent procedural systems can increase uncertainty as to the benefits from cross-border commercial activity.¹³ 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.¹⁴ This relates to the assessment 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. Intervention into Member States' civil procedural laws via the provision of EU rules could bring about greater neutrality and considerable limitation of transaction costs in cross-border commerce in the Internal Market.¹⁵

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 could be attributed to their limited familiarisation with the general requirements of litigation. It also relates to the procedural diversity in the EU and the subsequent uncertainty as to the rules and outcomes of cross-border dispute resolution.¹⁶ Consequently, citizens may avoid litigation across the borders,¹⁷ leaving

¹³ For a detailed analysis of the costs associated with legal diversity due to uncertainty in the area of substantive contract law see *inter alia*, 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) 30-37. These involve costs of information collection, of legal disputes, of 'beneficial charges' to speed up procedures, of lodging complaints, making warranty claims, and exchanging goods.

¹⁴ 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.

¹⁵ In the context of 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 2005) 16-17; 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (n 14) 9. For a detailed analysis of the costs, which procedural approximation can reduce see: L E Ribstein and B H Kobayashi, 'An Economic Analysis of Uniform States Laws' (1996) 25(1) J. Legal Stud. 138-140. These costs are inconsistency, information, drafting, instability, litigation costs, and externalities.

¹⁶ 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 costs of learning about litigation over various many cases. Even judicial resolution of small claims 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

their EU rights unenforced, and making themselves easier prey for sellers and producers.¹⁸ In the end, this will result in restrained cross-border commercial activity, limited investment, consumption, and income, and limited growth rate, hampering the smooth functioning of the Internal Market.¹⁹ Therefore, intervention into Member States' procedural rules might limit uncertainty, boosting cross-border trade via increased access to cross-border civil justice in the EU.²⁰

The most recent affirmation of the interrelation between unitary markets and civil procedure law convergence is that of Switzerland and, as of 1 January 2011, the application of a unified code of civil procedure.²¹ The rationale behind this enormous reformative initiative was the necessity to reduce all artificial dividing lines cutting across the Swiss cantons that created impediments.²² Empirical evidence supports the correlation between economic growth and procedural rules of a given jurisdiction, by

[Footnotes continued on next page]

have procedural primacy. See, M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 497; F James, G C Hazard, and J Leubsdorf, *Civil Procedure* (Ch. 6, §6.4, Foundation Press 1999).

¹⁷ Commission, 'Report: Civil justice in the European Union' (Special Eurobarometer 292, 2008) http://ec.europa.eu/public_opinion/archives/ebs/ebs_292_en.pdf accessed 10 March 2013: 83% of the respondents have never engaged in cross-border litigation and neither believes that they will do so in the future. Moreover, over half of the respondents believe that access to cross-border civil justice is either very difficult (20%) or fairly difficult (35%).

¹⁸ See also, 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 17 March 2013.

¹⁹ 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* (Europa Law Publishing 2005) 170: problems to the functioning of the Internal Market derive from divergences in *inter alia*, procedural regimes. See also, Wagner, 'Economic Analysis of Cross-border Legal Uncertainty: the example of the European Union' (n 13) 51.

²⁰ 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' (1995) 53 *E.R.P.L.* 79; M Tartuffo, 'Drafting Rules for Transnational Litigation' (1997) *ZZPInt* 449, 450. See further on the issue of legal uncertainty and centralisation: S Delabryère, '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) 19-44.

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) 247. This weakens considerably the relevant argumentation developed by Goldstein back in 1995: S Goldstein, 'On comparing and unifying procedural systems' in R Cotterrell (ed), *Process and Substance* (Butterworths 1995) 36.

allowing increased predictability of court decisions. For instance, researchers have found that among others, the timeliness and the predominantly written character of procedures lead to more transactions and higher investment levels.²³

In addition, according to a recent business survey, the great majority of businesspersons associate the variety of procedural systems in the EU with financial considerations (52%); EU intervention in national judicial systems may result in costs reduction (36%) and greater legal certainty, limiting the need to consult local legal practitioners (33%). This is in conformity with the survey's findings that businesses actively choose the legal forum of adjudication (90%), consciously avoiding certain jurisdictions, basing their choice on a series of procedural guarantees, such as the fairness of the outcome (4.38/5), judges' and courts' quality (4.39/5),²⁴ speedy dispute resolution (4.15/5),²⁵ and predictability of the outcome (4.32/5). The majority of those surveyed (60%) do not envisage procedural diversity as a significant trade barrier that would impede them from developing commercial activities in certain jurisdictions. This conforms to the preliminary active choice of jurisdiction that businesses undertake. Overall, procedural variety will not impede cross-border trade. However, greater alignment of civil justice systems (38%), or even harmonisation (either at cross-border level only (25%), or at domestic as well (22%)) will result in considerable savings for businesses.²⁶

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 03 March 2013.

²⁴ See above, '2.3.2.5 The requirement for an 'independent and impartial tribunal established by law'' 67.

²⁵ See above, '2.3.2.4 The 'reasonable time' requirement' 64.

²⁶ 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 08 March 2013. For further analysis of the meaning and importance of the survey findings see, S Vogenauer and C Hodges, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Hart Publishing forthcoming August 2012). It should be underscored that the survey entails perception, not performance, data limited only to businesses' views. Perception data reflects the law in action. Being that as it may, the accuracy of the data and its utility is limited due to respondents' information availability and overall external influences, such as law marketing, etc.: C Kern, 'Perception, Performance, and Politics: Recent Approaches to the Qualitative Comparison of Civil Justice Systems' (Civil Justice System in Europe:

3.2.3 Forum Shopping

Procedural diversity between EU Member States can have another negative consequence, commonly referred to as forum shopping.²⁷ 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.²⁸

By way of illustration, forum shopping in consumer contracts could potentially encourage companies to search for the 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 to this jurisdiction.²⁹ This may considerably curtail effective enforcement of substantive EU rights, circumventing litigants’ access to justice. The discussion on the race to the bottom is relevant; the race to the bottom could lead to a competition of jurisdictions whereby only the one with the lower enforcement standards survives.³⁰ This is the so-called ‘Delaware Effect’, named after the competition among corporate laws of different U.S. states that led to corporate regulation in favour of the promoters and directors deciding on companies’ incorporation to the detriment of mainly minority shareholders’ protection in the State

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Implications for Choice of Forum and Choice of Contract Law, St Anne’s College, March 2008)

http://denning.law.ox.ac.uk/iecl/eventdetail.php?events_ID=1656 accessed 08 March 2013.

²⁷ Diversity in procedural rules for the enforcement of laws constitutes according to Bell the *raison d’être* of forum shopping: A S Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 25.

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* (A. Longo Editore 2006) 199-200.

²⁹ In the example of consumer contracts, one should bear in mind that according to Articles 17 and 18 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) [2012] OJ L351/1, consumers should be sued in the courts of their habitual residence, unless otherwise agreed after a dispute has arisen (Article 19). However, (online) contractual terms often entail jurisdiction clauses rendering competent to hear future disputes the courts of a State other than that of the consumer’s habitual residence.

³⁰ H Sinn, ‘The Selection Principle and Market Failure in Systems Competition (MS)’ (1997) 66 *Journal of Public Economics* 247-274.

of Delaware.³¹ Once again, intervention into Member States' procedural regimes might address these problems.³²

3.2.4 Assessment

Without nullifying the validity and importance of these arguments, one cannot fail to 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, namely free movement of goods, persons, capital, and services. Civil procedure law is auxiliary to substantive law and gains significance mainly when the enforcement of substantive law is under discussion.³³ This does not suggest that civil procedure law is secondary or second-class law. As Jacobs has put it, '[t]he supremacy of procedure is the practical way of asserting the primacy of the law, the practical way of securing the rule of law, for the law is ultimately to be found and applied in the decisions of the courts in actual cases'.³⁴ In other words, differing procedural rules across the Member States could only indirectly distort competition among businesses, also complicating risk management for cross-border trade.³⁵ In contrast, it is only substantive EU law provisions, giving rise to diverse rights and obligations, such as 'the prohibition between Member States of customs duties on

³¹ In the context of tort law harmonisation: 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. See also, H Søndergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process' (2006) E.B.L.R. 1081-1082. Nevertheless, it has also been suggested that this competition has led to a constant process of institutional innovations, even speaking about a 'race to the top' or the 'California effect': W L Cary, 'Federalism and Corporate Law: Reflections Upon Delaware' (1974) 83 Yale L.J. 663; P Genschel & T Pfimfer, 'Regulatory Competition and International Co-operation' (1997) 4 J.E.P.P. 626.

³² P H Lindblom, 'Harmony of the legal spheres: A Swedish view on the construction of a unified European procedural law' (1997) E.R.P.L. 23-24.

³³ Jacob, *The Fabric of English Civil Justice* (n 3) 63-67.

³⁴ *Ibid*, 66.

³⁵ That access to courts is instrumental for the effective application of Union law rights enunciating the principle of the Internal Market is explicit in the 1992 Sutherland report. See, P Sutherland, *The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market* (The Sutherland Report, EU Commission - Working Document 1992) 12-15 <http://aei.pitt.edu/1025/> accessed 2 March 2013.

imports and exports and of all charges having of equivalent effect'³⁶ that have directly as their object the smooth functioning of the Internal Market.

The new formulation of Article 81 TFEU (ex Article 65 TEC) on civil justice cooperation also testifies in favour of the same conclusion, considerably downgrading the importance of the Internal Market reference for judicial cooperation in civil matters, disassociating this policy area from the free movement of persons.³⁷ This finding has two main repercussions. On the one hand, Internal Market considerations should not have more weight compared to other EU policies giving rise to private law rights and obligations. On the other hand, as will be analysed in another chapter of this thesis,³⁸ the Internal Market cannot serve as a legal basis for EU intervention in national procedural regimes, at least not in the current formulation of the Lisbon Treaty and certainly not as the sole basis for EU competence.

Furthermore, the limitation of transaction costs due to the introduction of EU civil procedure rules in all Member States will be accompanied by the creation of additional implementation and adaptation costs in all legal orders, as well as costs following from the limitation of the variety of options and the possibility for learning effects from different procedural paradigms.³⁹ For intervention to be rational from an economic point of view, the balance between the efficiencies caused by the reduction of transaction costs and the creation of an economy of scale on the one hand, and the extra

³⁶ Article 28 TFEU.

³⁷ This and other changes to the overall formulation of Article 81 TFEU will be analysed in detail in Chapter 6 of this contribution in an attempt to identify what should be the way forward in civil justice cooperation.

³⁸ For further analysis see below, '6.3.1 Recasting the relationship between Articles 81 and 114 TFEU: harmonisation through the backdoor?' 196.

³⁹ However, one should bear in mind that costs associated with uniformity, namely lack of learning efficiencies and legal arbitrage, refer to a full/total harmonisation of civil procedure scenario, where no chance for regulatory deviation will be left to Member States, diminishing procedural systems' flexibility to sense and address new needs. According to Sun and Pelkmans, the reason why literature insists on perceiving regulatory competition and EU intervention as enemies, rather than allies, is because they take into account the pre-1992 EC practice of a rigid, total harmonisation approach based on full unanimity in the Council. J M Sun and J Pelkmans, 'Regulatory Competition in the Single Market' (CEPS Working Document No. 84, 1994) 28-29; W Kerber, 'Inter-jurisdictional Competition within the European Union' (2000) *Fordham Int'l L.J.* 233; Wagner, 'Economic Analysis of Cross-border Legal Uncertainty: the example of the European Union' (n 13) 37-42.

costs of adaptation to newly imposed rules on the other hand will have to be positive. Currently, there is no extensive empirical data supporting this positive balance.

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 case of Delaware, the introduction of lenient rules related to company incorporation rules only, and could result in economic efficiencies for that State due to attraction of foreign companies and the subsequent incorporation fees.⁴⁰ However, procedural regimes of low quality only generate further costs, such as the increased need for appeal procedures, further impeding effective enforcement of rights and obligations.⁴¹

3.3 The Feasibility of EU Intervention into National Civil Procedural Law

The previous section looked at three fundamental policy parameters capable of justifying the harmonisation of civil procedure rules in the EU. In particular, intervention in national procedural regimes, with the aim of securing effective dispute resolution and enforcement of EU law, actively promoting the right of access to justice in the EU, could contribute to the functioning of the Internal Market through the elimination of the distortion of competition. What is more, it could lead to increased legal certainty and transparency of procedural orders, facilitating economic activities for

⁴⁰ These efficiencies are also questionable, since imbalanced corporate regulation in Delaware, not adequately protecting minority shareholders' interests, would result in decrease of potential investors in Delaware corporations.

⁴¹ One should consider that a race to the bottom in certain sectors, such as in intellectual property rights enforcement, could yield increased income for the local legal professionals via increased recourse to the particular judicial system. However, Ogus suggests that a race to the bottom is a rational option only in cases of activities producing significant cross-border effects, affecting only marginally the domestic affairs: A Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law' (1999) 48 ICLQ 408, 415.

all actors in the Internal Market. Finally, it could also limit the incentives for abusive forum shopping.

Important as these policy considerations may be, they are not absolute or completely uncontested. Specifically, divergences in Member States' enforcement regimes do not constitute the sole, and certainly not the most significant, source of distortion of competition in the Internal Market. Equally, though common procedural rules correlate 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 lead to additional costs for the 'competing' judicial systems.

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, conflicting interests, posing feasibility questions for the harmonisation of civil procedure law, come to the fore. This feasibility enquiry could offer some initial criteria for EU intervention in national procedural regimes for the facilitation of effective dispute resolution and enforcement of EU law. These criteria should be further filtered through the prism of the fundamental right of access to justice for the final scope of harmonised rules to be established.⁴²

3.3.1 Legal Tradition

Member States' legal traditions have been shaped and reshaped over time as a result of varying historical, institutional, social, economic, and political influences.⁴³ National civil procedural rules form part of States' legal tradition, reflecting their convictions about proper court organisation of the judicial system in delivering timely

⁴² For further analysis see below, '6.4 What is needed? The principles of subsidiarity and proportionality' 208.

⁴³ M Taruffò, 'Harmonisation in a Global Context: The ALI/UNIDROIT Principles' in X E Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T. M. C. Asser Press 2012) 209.

and fair judgments.⁴⁴ Member States' procedural regimes differ greatly and the differences can be fundamental.⁴⁵ Starting with the Civil – Common (originating in England) Law divide, the most crucial differences are threefold: the role of the judge; the function of appellate procedures; and, the civil litigation trial.⁴⁶ Specifically, in civil law countries, professional judges play a primary role in the development of the evidence and the legal characterisation 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 the 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.⁴⁷

Consequently, cultural sensitivities involved in choices of procedural regimes may be so great that EU intervention into Member States' law of civil procedure may be impossible, or so complicated, that its net results may not render it desirable for individual Member States. Furthermore, it might disrupt Member States' legal culture, depriving procedural systems of their richness and benefit. The end-result may be the disruption of individual civil procedure regimes, compromising the potential for

⁴⁴ K D Kerameus, 'Procedural Harmonisation 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) 26; P Legrand, 'On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations' (2002) 1 *E.R.P.L.* 63.

⁴⁵ On the systemic differences between civil and common-law jurisdictions see, *inter alia*: Legrand, 'On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations' (n 44) 61-76; Goldstein, 'On comparing and unifying civil procedural systems' (n 22) 3-28. But see, 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 2008) 71. Dismissing the common-civil law dichotomy, Uzelac draws a distinction between Mediterranean and non-Mediterranean judicial systems, which is also a distinction between well-functioning judicial systems and unreliable and ineffective ones.

⁴⁶ For an extensive, historical, and comparative analysis of the differences and similarities between the Common and Civil law judicial systems see, *inter alia*: M Cappelletti and B G Garth, *Introduction – Policies, Trends, and Ideas in Civil Procedure* (International Encyclopedia of Comparative Law, J C B Mohr and M Nijhoff Publishers 1987) 5-13, 23-42.

⁴⁷ 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.

effective private enforcement of both EU and domestic substantive rights and obligations.

3.3.2 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 producers of a legal system are rivals and compete just like producers of goods and services compete in usual markets.⁴⁸ Regulators offer favourable procedural regimes in order to increase domestic industries' competitiveness and attract foreign business activity.⁴⁹ 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.⁵⁰

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",⁵¹ litigants choose specific procedural systems over others, signalling their preferences for civil procedure regulation and 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,⁵² sensing and addressing new needs in the society.⁵³

⁴⁸ 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) 1; Søndergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process' (n 31) 1076-1077; D Geradin and J A McCahery, 'Regulatory Co-opetition: Transcending the Regulatory Competition Debate' (TILEC Discussion Paper 2005-020, 2005) 1.

⁴⁹ Adapted to regulatory competition in civil procedure: K Gatsios & P Holmes, 'Regulatory Competition' in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Vol 3, Macmillan 1998) 271.

⁵⁰ Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law' (n 40) 408.

⁵¹ C M Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64(5) *J.Pol.Econ.* 416-424.

⁵² H Siebert & M J Koop, 'Institutional Competition Versus Centralisation: Quo Vadis Europe ?' (1993) 9(1) *Oxf Rev Econ Policy* 15-30.

⁵³ This is the so-called 'learning effect' of legal diversity. For the applicability of this argument in EU contract law, see: G Wagner, 'The Economics of Harmonisation: The Case of Contract Law' (2002) 39 *CML Rev.* 1012; Kerber, 'Inter-jurisdictional Competition within the European Union' (n 39) 233.

EU intervention into national procedural regimes might 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.⁵⁴ Similarly, it is doubtful whether centrally imposed procedural rules, even of exceptionally high quality, could remedy the limitation of learning effects associated with procedural diversity.⁵⁵ 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 regarding the specificities and actual needs of their procedural systems and can proceed to an approximation of their procedural rules with those of other legal orders. On the other hand, the approximating result might be less effective at a supranational, EU, level due to limited possibilities for such in-depth knowledge of the various procedural regimes. This in turn might lead to unsystematic convergence of civil justice systems, creating more problems in the enforcement of EU rights and obligations before national courts than purported to resolve in the first place.⁵⁶

3.3.3 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.⁵⁷ These pressure groups have only dispersed powers when they operate in an environment of procedural diversity, solely influencing

⁵⁴ J S Parker, 'Comparative Civil Procedure and Transnational "Harmonisation": A Law-and-Economics Perspective' (2009) *George Mason Law & Economics* (Research Paper No. 09-03) 1-32 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325013 accessed 25 March 2013.

⁵⁵ 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) 78.

⁵⁶ Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law' (n 50) 415-416; Miller suggests that the lack of efficiency may result from the employment of elites for the creation of centralised EU rules of civil procedure. G P Miller, 'The Legal-Economic Analysis of Comparative Civil Procedure' (1997) 45 *Am.J.Comp.L.* 917-918.

⁵⁷ 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; S George and I Bache, *Politics in the European Union* (2nd edn, OUP 2006); Wagner, 'The Economics of Harmonisation: The Case of Contract Law' (n 53) 1000; R Van den Bergh, 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' (2000) 53(4) *KYKLOS* 448-451; Kennett, *Enforcement of Judgments in Europe* (n 4) 306: talking about enforcement agents and their varying role and strength per Member State.

domestic procedural regimes. In cases 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.⁵⁸ Instead of lobbying with 28 different regulators, they would have to lobby with a central, EU authority, while simultaneously affecting all Member States.⁵⁹

3.3.4 Countervailing Considerations

Although these feasibility criteria encapsulate serious considerations on the actual role and functions 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 Member States' legal tradition. For example, rules on calculation of periods and deadlines in civil litigation, on service of process and on initiation of proceedings by writ, mainly serve the objective of prompt administration of the trial, providing the infrastructure for organised systems of civil procedure.⁶⁰ Even if the EU alters these technical rules, Member States will still get the chance to have another form of juridical administration that might be more efficient and effective than their original one,⁶¹ not influencing negatively their national legal tradition or the effectiveness of rights and obligations enforcement.

In addition, civil procedure rules are not always worth maintaining simply because they form part of a State's legal tradition.⁶² For example, many civil law EU countries have been traditionally hostile to the introduction of collective compensatory

⁵⁸ Søndergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process' (n 31) 1079; Van den Bergh, 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' (n 57) 448-449. In the area of environmental liability law harmonisation see, *inter alia*: M Faure and K de Smedt, 'Harmonisation of environmental liability legislation in the European Union' in A Marciano and J M Josselin (eds), *From Economic to Legal Competition. New Perspectives on Law and Institutions in Europe* (Edward Elgar 2003) 78-79.

⁵⁹ W Kerber, 'The Theory of Regulatory Competition and Competition Law' (July 2008) <http://ssrn.com/abstract=1392163> accessed 23 March 2013.

⁶⁰ Kerameus, 'Procedural Harmonisation in Europe' (n 44) 404-405; Van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective' (n 7) 49.

⁶¹ Kerameus, 'Procedural Harmonisation in Europe' (n 44) 404-405.

⁶² S Weatherill, 'Why object to the Harmonisation of Private Law by the EC?' (2004) E.R.P.L. 652: two indicative examples of such choices not worth maintaining, either at a local or at a European level, are anti-Semitism and economic bigotry. See also, Kennett, *Enforcement of Judgments in Europe* (n 4) 311: 'it would be a pity if the existence of an anachronistic, unprincipled and in many ways ineffective domestic system was used as an argument to combat reforms of a European origin'.

relief in their judicial systems, for fear it could promote a culture of litigation. However, in the realm of the European Union, business practices breaching EU law provisions increasingly tend to lead to dispersed loss, where each of a large number of victims suffers an individually small loss. Opting for individual private enforcement of these rights does not constitute a realistic and effective means of redress since the costs and the general litigation requirements are disproportionate to the actual harm caused, usually of only a few tens or hundreds of euros.⁶³ Besides, in case compensation for unlawful business practices affecting large numbers of harmed people could only be resolved via the filing of the corresponding number of individual lawsuits, Member States' national courts would face a complete standstill and backlog, undermining any aspirations of timely and fair justice. As a result, the promotion of effective access to judicial enforcement and dispute resolution of EU law may outweigh concerns regarding Member States' legal cultural identity, pointing towards further EU intervention into national procedural regimes.⁶⁴

Additionally, despite considerable divergences in Member States' fundamental characteristics of civil procedural regimes, the civil/common law dichotomy becomes less striking with time.⁶⁵ For instance, both in English civil procedure and in continental European jurisdictions, judges become more and more active in the actual management of the cases before them, taking up the role of case-managers in civil proceedings.⁶⁶

⁶³ Commission, 'Public Consultation: Towards a Coherent European Approach to Collective Redress' (Staff Working Document) SEC (2011) 173, 3. See, H W Micklitz and A Stadler, 'The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure' (2006) E.B.L.R. 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.

⁶⁴ For a further analysis of collective redress from an access to enforcement and dispute resolution perspective see below, '5.4 What is next? Towards a coherent approach to collective redress' 165.

⁶⁵ Lindblom, 'Harmony of the legal spheres: A Swedish view on the construction of a unified European procedural law' (n 32) 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 2000) 7: suggesting that even the term 'Common Law' has continental origins in the French word '*commun*' and the Norwegian one '*lov*'.

⁶⁶ A remaining difference is that in England, judges deal with the formal aspects of the civil proceedings, whereas in many continental European countries judges also deal with the substance of the case. Lord Woolf, *Access to Justice: Final Report* (1996) <http://www.dca.gov.uk/civil/final/index.htm> accessed 04

What is more, the Woolf reforms limited and streamlined pre-trial disclosure in the English judicial system. At the same time, many continental European jurisdictions investigate the prospects of introducing limited discovery provisions in their domestic procedural regimes.⁶⁷ Overall, the civil/common law disparities have subsided considerably over the last decades, proving the possibility for convergence and approximation of legal orders. As Andrews has put it: '[...] the Common Law or Civil Law tradition is not an immutable genetic stamp'.⁶⁸ Recent empirical data are inconclusive as to the existence, or not, of systematic differences between civil and common-law countries.⁶⁹ The civil/common law dichotomy has no influence whatsoever on the complexity, the cost, and the length of civil proceedings, the three parameters that are indicative of a judicial systems' efficiency.⁷⁰

[Footnotes continued on next page]

March 2013. See also, C H Van Rhee, 'The Development of Civil Procedural Law in Twentieth-Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in C H Van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 11-25. The 1898 Austrian Zivilprozessordnung and the 1999 English Civil Procedure Rules are the most important reference points in the approximation of civil/common law jurisdiction regarding the role of the judge.

⁶⁷ Lord Woolf, *Access to Justice: Final Report* (n 66); 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) 40-41.

⁶⁸ N Andrews, 'A modern procedural synthesis: the American Law Institute and UNIDROIT's 'Principles and rules of transnational civil procedure'' (2009) TCR 52-58 (cited in Van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective' (n 67) 40).

⁶⁹ H Spamann, 'Legal Origin, Civil Procedure, and the Quality of Contract Enforcement' (2010) 166(1) *Journal of Institutional and Theoretical Economics* 149

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1452744 accessed 13 March 2013. Spamann uses as a reference point the World Bank Doing Business 2004 Report, which concluded that civil law countries are more formalistic, with more delays and costs compared to common law countries. The International Bank for Reconstruction and Development/The World Bank, *Doing Business 2004 – Understanding Regulation* (World Bank and OUP 2004)

<http://rru.worldbank.org/Documents/DoingBusiness/2004/DB2004-full-report.pdf> accessed 13 March 2013. However, the author suggests that the World Bank based its findings on flawed data and that in reality there is no correlation between procedural efficiency and the civil/common law divide. Be that as it may, his analysis, as well as subsequent *Doing Business Reports* with correct data, have a limited scope. Firstly, they focus on a single case scenario, leaving aside the entire range of issues occurring in civil litigation. More importantly, this scenario refers to first instance cases only. They have not considered the foundational differences between civil/common law systems, such as the possibility for appeal proceedings, which is believed to occur more often in civil law countries, extending the temporal and financial limits of litigation.

⁷⁰ M Zander, 'Why Lord Woolf's Proposed Reforms of Civil Litigation should be Rejected' in A A S Zuckerman and R Cranston (eds), *Reform of Civil Procedure. Essays on "Access to Justice"* (Clarendon Press 1995) 80.

Turning to the economic theory of federalism and competition of jurisdictions, one should not overlook some of the unrealistic assumptions it rests upon.⁷¹ For regulatory competition to be a successful option, prospective civil litigants should be able to profit by procedural diversity in the EU, namely through the choice of the more efficient procedural system.⁷² 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 fully understand the impact of the various procedural rules, making informed decisions.⁷³ However, this is not an easy and straightforward possibility in the case of 28 competing systems of civil procedure in the EU.⁷⁴

It is important to make a basic distinction here; large international companies, having the resources to engage legal teams on a permanent basis, could 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 identify the procedural system of dispute resolution and enforcement of rights and obligations, which is most beneficial for them. In contrast, individual litigants and small and medium sized companies usually will lack the money, time, or legal foundations to make relevant choices of procedural rules and profit from competition among jurisdictions.⁷⁵ The reason is that they will not be in a pragmatic position to gain information about different legal systems, assess this information, and impose their

⁷¹ For a detailed analysis of regulatory competition's limitations see, *inter alia*: D C Esty and D Geradin, 'Regulatory Co-opetition' (2000) 3(2) J Intl Econ L 240-248 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=228441 accessed 25 March 2013.

⁷² One should bear in mind that such choice is limited in cross-border transactions by the Brussels I Regulation provisions on exclusive jurisdictions of Article 22 (for example for matters related to immovable property). For the various sources of impediments to litigants' mobility, see: Van den Bergh, 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' (n 57) 442.

⁷³ In the context of European Contract law, see: 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (n 14) 9.

⁷⁴ Special Eurobarometer 292 (n 17): 'The survey highlights the fact that getting involved in a civil justice matter abroad is a frightening, complicated and unknown prospect for most Europeans'; K D Kerameus, 'Procedural Implications of Civil Law Unification' in A Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer Law International 2004) 155.

⁷⁵ 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.

actual will on their counterparts, especially when these are the above-mentioned large, multinational companies.⁷⁶

This last submission 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 at least for one of the parties to a dispute.⁷⁷ Indeed, in the example of a big company having a dispute with a small one, if all parameters of civil procedure are unregulated, the dispute might result in the imposition of the least favourable procedural regime for the small company. Nevertheless, this theoretical scenario might entail efficiencies for consumers and SMEs, if it can combine lower judicial standards with lower prices and lower costs.⁷⁸ Furthermore, less intrusive suggestions might address the challenges stemming from the inequality between the parties. For example, one could think of the role of information intermediaries⁷⁹ - legal journals, pro-bono lawyers, online legal services, and consumer organisations could offer advice on national civil procedure systems depending on the type of dispute arising. In that case, even less advantaged individuals and small companies could take into account this information and benefit from regulatory competition and mobility from one jurisdiction to the other when enforcing their rights.

In addition, EU law could contribute to increased information flow on the various procedural systems via the standardisation of legal procedural terminology. This

⁷⁶ See J T Johnsen, 'Vulnerable groups at the legal services market' in A Uzelac and C H van Rhee (eds), *Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality, and Efficiency of Civil Adjudication* (Intersentia 2009) 32-34. Johnsen speaks of legal illiteracy and distinguishes between professional and non-professional buyers of legal services. In the first category, one can find businesses and industries, as well as rich individual litigants. In the second category, one can group ordinary and poor people, as well as small firms and independent self-employed individuals.

⁷⁷ M Storme, *Approximation of Judiciary Law in the European Union* (M Nijhoff 1994) 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: *Feldbrugge v. The Netherlands* App no 8562/79 (ECtHR 29 May 1986); *Neumeister v. Austria* App no 1936/63 (ECtHR, 27 June 1968).

⁷⁸ See however, Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law' (n 40) 408. See also: M Cohen, 'Commentary' in E Eide and R Van den Bergh (eds), *Law and Economics of the Environment* (Juridisk Forlag 1996) 170. Cohen suggests the creation of minimum quality standards at centralised level for reasons of 'equality, justice, or pure paternalism'; Weatherill, 'Why object to the Harmonisation of Private Law by the EC?' (n 62) 656.

⁷⁹ On the role of information intermediaries see: T F Cotter, 'Some Observations on the Law and Economics of Intermediaries' (2006) 67 Mich. St. L. Rev. 67-82; S Grundmann, 'Information, party autonomy and economic agents in European Contract Law' (2002) 39 CML Rev. 269-293.

could prove beneficial for a substantial communication between and cross-fertilisation of the various legal orders, enabling the accurate identification of differences and similarities between procedural systems, increasing possibilities for mobility through choice of forum.⁸⁰ Currently, such common terminology is missing and common-law lawyers use terms that civil-law lawyers cannot fully understand and vice versa. An indicative historic example is the use of the terms ‘trial’ and ‘pre-trial’ in a 1991 publication entitled ‘Civil Procedure in EC Countries: An Industry Report’. This report based its findings on a questionnaire survey sent to the then 12 EU Member States asking information on their civil litigation systems. These questionnaires followed the English (common law) procedural terminology, hence confusing continental correspondents and leading to inaccurate and at times misleading answers.⁸¹

Nevertheless, there are many costs attached to the creation of sufficient information resources, their maintenance, and their constant updating. Additionally, it is still not certain whether litigants would indeed devote the essential time to consult these resources, and even if they did so, whether they would be able to comprehend all the legal issues and necessary comparisons involved.⁸² Finally, it is still debatable whether people would prefer to move to a foreign, more favourable jurisdiction to solve their disputes. Moving to another country to solve their disputes would mean additional costs, psychological burden, and loss of time. It is highly unlikely that individual consumers and small businesses would ever decide to pursue the enforcement of EU

⁸⁰ Van den Bergh, ‘Towards an Institutional Legal Framework for Regulatory Competition in Europe’ (n 57) 442-443. However, not all diverging terms are susceptible to standardisation. This can only be envisaged in cases of diverging procedural terminology aimed at regulating similar issues more or less. In this case, maintaining distinct terms only complicates the situation, blurring litigants’ capacity to find valuable information on the various judicial systems, subsequently choosing the forum for dispute adjudication. Evidently, the example of trial constitutes a systematic difference between civil and common-law jurisdictions and is not suitable for future standardisation. The example demonstrates the gravity of procedural terminology in reinforcing regulatory competition between jurisdictions. It also demonstrates in an indirect way the inherent limitations of the inter-jurisdictional competition theory in the remit of the European Union.

⁸¹ See: Goldstein, ‘On comparing and unifying civil procedural systems’ (n 22) 3, citing: D McIntosh and M Holmes, *Civil Procedure in EC Countries: An Industry Report* (Lloyd’s of London Press 1991).

⁸² On people’s ‘functional illiteracy’ that deprives them of the possibility to take advantage of information on legal problems and their remedies see: M Zander, *The State of Justice* (The Hamlyn Trust, Sweet & Maxwell 2000) 33-34.

rights or obligations in a foreign jurisdiction.⁸³ Only multinational companies could consider the additional costs attached to litigation in a foreign country acceptable in case great amounts of money were at risk.

Additionally, cultural and linguistic differences among EU Member States could limit the effectiveness of regulatory competition. The interpretation and actual meaning of a rule is much dependent on Member States' legal tradition and language; the same rule may lead to diverse results due to cultural and linguistic nuances attached to it, and prospective litigants cannot always make an informed choice as to the most beneficial system. This argument becomes more apparent if we think of the economics of federalism in the US. In this nation, regulatory competition has led to the improvement of the states' legal systems via the creation of more efficient and attractive rules.⁸⁴ Cultural and linguistic diversity inherent in the EU is missing at the other end of the pond.⁸⁵

Finally, the various pressure groups and the procedural interests they promote could influence national civil procedural regimes in a manner detrimental for the enforcement of EU law, the protection of individual rights, and the observance of obligations. 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

⁸³ See, 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 13 March 2013. Of the 100 companies surveyed, only 5% were SMEs with employees between 10-249 people. The overwhelming majority of respondents (95%) were large companies with personnel over 250 people. This supports the idea that only large companies take advantage of procedural mobility between Member States. What is more, only 2% of the 26.691 individual respondents have been involved in cross-border litigation and among them 19% were self-employed people, including business owners: Commission 'Civil Justice Report' (Special Eurobarometer 351, 2010) 22-26 http://ec.europa.eu/public_opinion/archives/ebs/ebs_351_en.pdf accessed 14 March 2013.

⁸⁴ For similar arguments in the field of European Contract Law Harmonisation, see: Vogenauer, 'The Spectre of a European Contract law' (n 44) 21-22.

⁸⁵ Wagner, 'The Economics of Harmonisation: The Case of Contract Law' (n 53) 1008ff; B H Kobayashi and L E Ribstein, 'The Economics of Federalism' (2006) George Mason University Law and Economics Research Paper Series 6: the existence of a common language all over the US, the existence of common mass media and of common history diminishes the impact of any cultural differences among the various States. Such common background is lacking in the EU, perplexing the situation of simultaneous existence of more than 28 procedural regimes.

expensive judicial regime, depriving citizens of the possibility to enforce their EU rights via recourse to the courts. The fact that the judicial avenue will be equally expensive for domestic rights enforcement has no repercussions.⁸⁶

Harmonisation of national procedural regimes could secure effective enforcement of ‘losing’ interest groups’ EU rights via increased access to justice. For example, consumer interests in the formation of the various national civil procedural rules usually experience less negotiating power compared to producer interests. The latter have better organisation structures and more effective interest organisational ability at the domestic level, prevailing in the lobby challenge, potentially causing biased civil procedural rules at the expense of the losers (consumers).⁸⁷ Lacking any EU intervention, there is a risk of discrimination in favour of domestic producers.

3.4 Synopsis

In the decentralised judicial system of the EU, national procedural regimes are of tremendous importance for the dispute resolution and enforcement of EU law. Therefore, EU intervention in Member States’ civil procedural rules for the promotion of access to justice could be deemed desirable for the limitation of the distortion of competition due to economic operators’ access to judicial systems of diverging quality and efficiency. Additionally, it could increase 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 reduce incentives for abuse of forum

⁸⁶ 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 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). For further analysis of the principle of national procedural autonomy see below, ‘4.2 Judge-made EU civil procedure rules and the principle of national procedural autonomy’ 99.

⁸⁷ In the area of competition law, see: O Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar 2008) 106; Geradin and McCahery, ‘Regulatory Co-opetition: Transcending the Regulatory Competition Debate’ (n 48) 10.

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, despite the correlation between common procedural rules and increased economic growth, their overall economic benefit, the implementation costs included, 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.

Similarly, EU institutions should consider some additional parameters, which could compromise the value of the harmonisation 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 potential for regulatory innovation and experimentation.⁸⁸ 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. Additionally, national rules on the administration of trials and general court infrastructure can easily be harmonised, whereas even fundamental procedural choices may have to be revised in light of the right of access to justice. This is the 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.

In the remainder of the thesis, I will look at existing modes of EU intervention in national procedural regimes. I will first examine some landmark CJEU case law on national procedural autonomy and the principles of equivalence and effectiveness

⁸⁸ Kerber, 'Inter-jurisdictional Competition within the European Union' (n 39) 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* (Hart Publishing 2002); Goldstein, 'On comparing and unifying civil procedural systems' (n 22) 43.

(Chapter 4). In addition, I will look at various secondary, both sectoral and horizontal, legislative measures introducing civil procedure rules in the EU (Chapter 5). My aim is to identify the potential of these modes of intervention in national procedural systems to contribute to the development of coherent EU civil procedure rules promoting the right of access to justice. Based on the findings of these two chapters, I will then analyse what in my opinion constitutes the better solution for a coherent EU civil procedure law under the current Treaty scheme (Chapter 6).

4 Civil procedure law in the EU: the role of the CJEU case law

4.1 Introduction

The previous chapter argued that EU intervention in national procedural regimes for the promotion of access to justice might be desirable for the creation of a level playing field for dispute resolution and EU law enforcement in the Internal Market. Economic acceleration could also be associated with procedural efficiency and fairness of civil justice systems for the enforcement of EU law rights and obligations. Finally, the restriction of possibilities for forum shopping and the ensuing race to the bottom is fundamental for the functioning of the supranational legal order. These efficiencies are not absolute, and should be weighed against various political, historical, and economic countervailing interests. These include Member States' legal traditions and potential resistance to change, efficiencies from regulatory differentiation and experimentation, and the impact of lobbyism on rule setting at a centralised level.

In this chapter, I will further consolidate my argument on the role of the right of access to justice in the development of EU civil procedure law. Adopting a pragmatic viewpoint, I will investigate the development of EU procedural law via the case law of the CJEU. CJEU paved the way for the effective and measured enforcement of EU law in national legal orders. I will focus on the CJEU case law in the broader area of European remedial and procedural law in order to offer an objective insight into the rationale, fashion, and scope of EU interventionism in the area of national procedural law. I will examine whether, if at all, this case law echoes the procedural guarantees of the right of access to justice of Article 47 CFREU, broadly construed. For the purposes of this chapter, I will not distinguish between administrative, criminal, or civil procedure law cases, since the relevant case law is rather homogenous.

With this in mind, I will commence my analysis with some fundamental case law on national procedural autonomy, focusing on the principles of equivalence and effectiveness. My objective is to investigate the impact of this case law on national procedural systems; how has the Court employed the principles of equivalence and

effectiveness in order to harmonise national procedural systems? In the second part of the analysis, I will reassess the impact of the CJEU case law on national procedural autonomy from the perspective of the promotion of the right of access to justice: Is the EU judicature after all the appropriate institutional body to create a coherent and systematic EU civil procedure law? I will summarise the main findings of the analysis in the final section of the chapter.

4.2 Judge-made EU civil procedure rules and the principle of national procedural autonomy

In the decentralized model of justice, EU rights and obligations are primarily adjudicated before national courts. To the extent that an issue governed by EU law does not fall within the CJEU's jurisdiction, it is for Member States' courts to hear the dispute on that issue.¹ The Court envisages the principle of procedural autonomy as a state of affairs where EU and national procedural laws closely cooperate in the areas falling within the scope of EU law. Where there are no EU rules on the procedural aspects of an EU law related dispute, Member States are responsible to designate the courts having jurisdiction and to determine the rules of procedure according to which EU rights will be protected.² However, this is only a compromise; effective enforcement of EU law rights and obligations is the ultimate goal and procedural autonomy should be adapted to this objective.

The onset of the debate on the recognition of national procedural autonomy by the CJEU goes back more than four decades in a set of cases regarding charges imposed by Member States in breach of EU Treaty provisions.³ In this section, I will analyse the

¹ See above, '1.3 Research Focus: Dispute Resolution and Enforcement in the EU' 23.

² See: case 179/84 *Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro* [1985] ECR 2301; case 68/79 *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501, para 25; joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357, para 42.

³ E Storskrubb, 'What Challenges Will European Procedural Harmonisation Bring?' (Toronto Conference of International Association of Procedural Law, 2009) 2. Kakouris denies that national procedural autonomy constitutes a manifestation of Member States' sovereignty in: C N Kakouris, 'Do the Member

CJEU milestones in the area of national procedural and remedial autonomy as evinced through the principles of equivalence and effectiveness. I will break down the analysis into many sub-sections in accordance with the national remedial or procedural rule reviewed by the Court each time, only to show that the content, scope, and effect of these principles have expanded with the time, embracing more and more aspects of national procedural and remedial regimes. As Brown has put it,

Enforcement takes us into the whole paradigm of judicial procedure. This includes not only questions of standing, time limits, appropriate form of actions [...], but also to preliminary issues of access of justice. Here I would include an adequate system of legal aid and advice, and a court system not so congested that justice delayed amounts to justice denied. [...] Then, once a judgment is secured in the national court, it is of little worth unless there exist effective processes for its execution.⁴

4.2.1 The principle of equivalence: a brief evaluation

The national priority over procedural rules is subject to an important condition; national procedural rules cannot be less favourable when applied to EU law related disputes than when applied to similar actions of domestic nature (principle of equivalence). On the identification of a similar domestic action, three characteristics must be considered - the purpose, the cause of action, and the basic elements of the national procedural rules under scrutiny.⁵ Accordingly, an action based on a national

[Footnotes continued on next page]

States possess Judicial Procedural Autonomy?’ (1997) 34 CML Rev. 1389. Kilpatrick suggests that we should be talking about ‘national remedial autonomy’ rather than *procedural*: this is due to the lack of a clear distinction *inter se* of procedures and remedies as distinctive parts of a legal claim in: C Kilpatrick, ‘The Future of Remedies in Europe’ in C Kilpatrick, T Novitz, and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 4. Delicostopoulos and Gerven suggest that we should be talking about ‘national procedural competence’ allowing for a more flexible conception of Member States’ responsibility in procedural issues in: J S Delicostopoulos, ‘Towards European Procedural Primacy in National Legal Systems’ (2003) 9(5) ELJ 601; W Van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 CML Rev. 502.

⁴ L N Brown, ‘National Protection of Community Rights: Reconciling Autonomy and Effectiveness’ in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (John Wiley & Sons 1997) 70.

⁵ Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835, para 44; case C-78/98 *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* [2000] ECR I-3201, para 61.

statute implementing the Union law principle on the requirement for equal pay between men and women for equal work does not constitute an adequate comparator to an action based directly on the Treaty principle, being essentially the same, single action.⁶

In *Palmisani*, the domestic rule imposed a time limit to claim damages for state liability for the belated transposition of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The applicant suggested that this time limit was more restrictive compared to limitation periods applicable to civil non-contractual liability. However, the Court found, taking into account the purpose and special characteristics of the rules under discussion, that a valid comparison could only be established if the national rules for civil non-contractual liability could also be applied to actions against public authorities for unlawful conduct.⁷

In *Transportes Urbanos*⁸ a national time limit applied to the right of taxpayers to deduct VAT. As taxpayers had to calculate VAT themselves, it was possible to ask the competent authorities to rectify their calculations within a specific limitation period and return, where applicable, any overpayments. That time had lapsed before the claimant asked for damages due to unduly paid VAT in breach of the Sixth Council Directive 77/388/EEC⁹ as amended by Council Directive 95/7/EC of 10 April 1995.¹⁰ The breach of the aforementioned EU law by the relevant Spanish national legislation had been previously established by the Court in *Commission v Spain*.¹¹ The Court found that the claimant's action for damages against the State under EU law was comparable to domestic actions for damages against the State arising from the incompatibility of

⁶ *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* (n 5) para 48.

⁷ Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale* [1997] ECR I-4025, paras 38-39.

⁸ Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* [2010] ECR I-00635.

⁹ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ 1977 L 145/1.

¹⁰ Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax - scope of certain exemptions and practical arrangements for implementing them [1995] OJ L102/18.

¹¹ Case C-204/03 *Commission of the European Communities v Kingdom of Spain* [2005] ECR I-8389.

legislation with the Spanish Constitution, which served the same purpose, namely to secure compensation for the loss suffered by the person harmed as a result of an act or an omission of the State. Had the violation of legislation been established by the Spanish Constitutional Court, the lapse of the limitation period for the correction of self-assessments would have been immaterial, and would not have inhibited the action for damages against the State.¹² Consequently, this time limit could not be upheld for EU law based claims either.

Once national courts have established the comparable actions to be considered, they should also compare the national procedural rules applicable to these actions. In doing so, they should scrutinise the role of the national procedural rule in the entire procedure, determining its non-discriminatory character based on an objective analysis and consideration of the function and special features of the national procedural rule before the various national courts.¹³ By way of illustration, in *Asturcom*¹⁴ the Court compared the procedural rules applicable to an EU action for the annulment of arbitration awards as opposed to those applicable to a similar domestic action. It found that a national provision giving discretion to courts to consider of their own motion the compatibility of an arbitration award with national rules of public policy should be applied for the investigation of the compatibility of an arbitration award with EU rules having the same status. Based on the nature and importance of the underlying public interest in the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,¹⁵ Article 6 of the Directive should be considered as having a public policy status imposing a duty on national courts to consider, *suo motu*, the compatibility of an arbitration award with the said Directive provisions.¹⁶

The principle of equivalence only promotes the equality of treatment with regard to remedies available in a single Member State. As Bobek suggests, undertaking such a

¹² *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* (n 8) paras 42-45.

¹³ *Rosalba Palmisani v Istituto nazionale della previdenza sociale* (n 7); *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* (n 5) para 44; *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* (n 5) para 62.

¹⁴ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579.

¹⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

¹⁶ *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (n 14) paras 52-59.

comparative activity is virtually impossible for various reasons, mainly due to the lack of comparable national actions, CJEU's competence limitations in interpreting national law, as well as the practical hurdles of limited resources for a valid comparative activity by CJEU.¹⁷ The Court hardly ever performs this comparison, and does so only when the referring court asks expressly for that and provides the relevant, necessary information on domestic regimes.¹⁸ In addition, it is often suggested that the principle of equivalence opts for the cohesion of national legal orders, which is scrutinised in each case. In doing so, it points towards further procedural and remedial diversity across the EU when it comes to the enforcement of EU law.¹⁹ However, this is only partially accurate. The application of the principles of equivalence and effectiveness is cumulative, in the sense that it is not enough that national procedural systems treat EU and domestic claims alike, but also effectively, without rendering the exercise of EU rights particularly difficult.²⁰ As a result, the principle of equivalence may lead to further procedural diversity in the EU only where its application could secure a higher standard of rights protection than what would have been necessary under the principle of effectiveness.²¹

4.2.2 Interpreting the principle of effectiveness

Unlike the principle of equivalence, the requirement of effectiveness addresses the differing levels of judicial protection applied across the various Member States.

¹⁷ M Bobek, 'Why There is no principle of "procedural autonomy" of the member states' in H W Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 305. See also, C M G Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22(4) ELR 295, 309.

¹⁸ See *inter alia*: case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, Opinion of AG Mancini, para 11; case C-62/93 *BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greek State* [1995] ECR I-1883, Opinion of AG Jacobs, paras 58-60; case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale* [1997] ECR I-4025, Opinion of AG Cosmas, paras 25-38; case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-7835, Opinion of AG Léger, paras 26-79; *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* (n 5) para 57; *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* (n 12) paras 33-48.

¹⁹ 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) 55-56; Bobek (n 17).

²⁰ See for instance, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (n 18). For the opposite opinion, namely that the relation between effectiveness and equivalence is of 'inclusive disjunction' see: Bobek (n 17).

²¹ See, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (n 16) para 47. See also, Engström (n 19) 58-59.

Accordingly, national procedural conditions should not be framed in such a way that they render the enforcement of EU rights and obligations impossible in practice or excessively difficult (principle of effectiveness).²² This principle does not necessarily always result in setting aside national procedural rules.²³ In the absence of EU provisions harmonising procedural rules, Member States' primacy to provide procedural rules for the enforcement of EU rights does not extend to the introduction of new remedies in national legal orders to ensure the applicability of EU law.²⁴ Nevertheless, every type of remedy available under domestic law must also always be made available for EU law provisions; the conditions of admissibility and procedure of these national remedies should be appropriately expanded and modified for the effective enforcement of EU law rights and obligations. The line between the creation of new remedies and the modification of existing ones is a thin one. This will become apparent in the analysis of the CJEU case law on diverse national remedial and procedural provisions in the remainder of this section. More importantly, this analysis will shed some light on the justification for EU intervention in national regimes, be it via the setting aside or the modification of existing rules.

4.2.2.1 Limitation periods and retrospective claims

In a set of cases, the CJEU has reviewed various national procedural rules on limitation periods. In doing so, the Court has undertaken a balancing activity in order to identify the national procedural and remedial rules that impede the effective enforcement of EU law rights and obligations. Using as a yardstick the right of access to

²² Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989, para 5.

²³ M Dougan, 'Enforcing the Single Market: The Judicial Harmonisation of National Remedies and Procedural Rules' in C Barnard and J Scott (eds), *The Legal Foundations of the Single Market: Unpacking the Premises* (Hart Publishing 2002) 172; S Prechal and N Shelkopyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 5 E.R.P.L. 589.

²⁴ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 01805, para 44. The CJEU was asked whether a trader, whose activities are protected by the EU policy on common customs tariff, had the right to require German authorities to apply import duties to his third party competitors and whether he could rely on that right in proceedings before the German courts against these competitors. See also, joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029.

justice and, particularly the right of access to courts,²⁵ the Court has examined national procedural rules imposing limitation periods for the institution of court proceedings or for the retroactive effect of certain claims based on EU law rights and obligations, investigating whether these limitations pursue a legitimate aim in a proportional fashion.²⁶ Therefore, where the limitations erode the essence of the right of access to courts, rendering practically impossible the enforcement of the relevant EU law right or obligation, the Court has intervened in the national legal order, setting aside the national rule,²⁷ amending it,²⁸ or even creating a new rule of procedure.²⁹

Specifically, in the seminal case *Rewe v Landwirtschaftskammer Saarland*,³⁰ a claim was made for the repayment (with interest) of charges having an effect equivalent to custom duties within the meaning of Article 13(2) EEC (later repealed). The Agricultural Chamber for the Saar recognised the unlawful character of the charges, but returned that the appellants did not qualify for a refund since the time limits for contesting the validity of administrative acts specified by national law³¹ had elapsed. On a reference for a preliminary ruling, the CJEU established the principle of national procedural autonomy, subjecting it to the principles of equivalence and effectiveness.³² Accordingly, the Court found that the German procedural rule on time limits did not render the pursuance of EU rights impossible in practice. It laid down reasonable time frames for contesting the administrative act imposing charges to the litigants in breach

²⁵ See text, case law, and references above, ‘2.3.2.1 The requirement for access to the courts’ 58. According to Prechal and Widdershoven time limits should be dealt with by the court under the principle of effective judicial protection as impinging on the right of access to courts in: S Prechal and R Widdershoven, ‘Redefining the Relationship between ‘Rewe-effectiveness’ and Effective Judicial Protection’ (2011) 4(2) REALaw 31, 48.

²⁶ *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 22).

²⁷ Case C-246/96 *Mary Teresa Magorrian and Irene Patricia Cunningham v Eastern Health and Social Services Board and Department of Health and Social Services* [1997] ECR I-07153, para 47.

²⁸ Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-04269, para 24: the two year limitation cannot start running prior to the implementation of the relevant Directive.

²⁹ *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* (n 5) paras 69-70.

³⁰ *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 22) para 5.

³¹ Code of Procedure before the Administrative Courts, Article 58.

³² See also: case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, para 13; *Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro* (n 2); *Hans Just I/S v Danish Ministry for Fiscal Affairs* (n 2) para 25; *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 2) para 42.

of EU law. What is more, these time limits were the same for domestic and EU law violations. Adding that the existence of reasonable time limits can contribute to legal certainty for both the taxpayers and the administration, the Court upheld the German procedural rule.³³

In contrast, in *Preston*³⁴ the Court found that considerations of legal certainty could not justify the national procedural rules asking employees to raise claims concerning membership of an occupational pension scheme within six months after the termination of the employment contract. Where there was a practice to employ the same person for the same employer periodically or intermittently, under successive legally separate contracts, such a time restriction was disproportionate to the demand for legal certainty as to the point of termination of the employment relationship.³⁵ Access to the courts for the enforcement of the right to equal pay would require many distinct claims before the courts, which would unnecessarily inconvenience the prospective litigants, also putting a burden on the judicial system. As a result, CJEU offered alternative starting points of the limitation period for the institution of proceedings based on claims for membership in an occupational scheme. Specifically, the Court suggested that one should look for the cessation of one of the basic features of a stable employment relationship, namely, either the lack of periodicity, or the signature of a contract that does not relate to the same employment as the one to which a specific pension scheme applies.³⁶

In addition, where applicants base their EU rights on a specific directive, national limitation periods for bringing proceedings could start to run only as from the date of the proper implementation of that directive in the Member State; this was

³³ *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 22). See also: *Rosalba Palmisani v Istituto nazionale della previdenza sociale* (n 7) para 25 (one year limitation period in damages claims); Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599, para 16 (60-day period to lodge an appeal).

³⁴ *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* (n 5).

³⁵ *Ibid*, paras 68-72.

³⁶ *Ibid*, 69-70.

established in the *Emmott* case.³⁷ Ireland had failed to implement Directive 79/7³⁸ containing a prohibition against discrimination on the grounds of sex. An Irish married female citizen, receiving lower disability benefit compared to that provided to married men, applied for judicial review in order to recover the benefits to which she claimed to be entitled as of the 23 December 1984, the date by which the above directive should have been incorporated in Ireland's domestic legal order. However, the Irish Minister of Social Welfare responded that the proceedings were out of time according to a national procedural rule limiting the period to apply for judicial review.³⁹ The Court found that under the specific circumstances of the case,⁴⁰ the defaulting State could not rely on an individual's delay in initiating proceedings against that State to secure the rights he/she derives from a directive that was not implemented within the proper deadline. National procedural rules on time limits cannot be applied prior to the implementation of the respective directives, regardless of how long ago these directives should have been incorporated into national law.⁴¹ Otherwise, the right of access to courts for judicial review would become illusory and the EU law right provision superfluous.⁴²

The situation is different where national procedural rules impose a limitation on the backdating of financial claims. National time limits restricting the period for which arrears of a social benefit (e.g. benefit for incapacity to work) should be paid are acceptable, even if a directive creating that right to arrears has not been properly implemented in that Member State.⁴³ For instance, to the extent that private national rules simply restrict the period for which arrears of benefits should be paid,⁴⁴ promoting legal certainty within Member States' legal orders, without limiting disproportionately

³⁷ *Theresa Emmott v Minister for Social Welfare and Attorney General* (n 28).

³⁸ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

³⁹ Order 84, Rule 21(1), of the Rules of the Superior Courts 1986.

⁴⁰ *Theresa Emmott v Minister for Social Welfare and Attorney General* (n 28) para 17.

⁴¹ *Ibid*, paras 21-23.

⁴² In a different, public law setting and in disputes between Member States and the EU Institutions, see: case C-336/09 P *Republic of Poland v European Commission* [2012] OJ C 258/2.

⁴³ Case C-338/91 *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-05475; case C-410/92 *Elsie Rita Johnson v Chief Adjudication Officer* [1994] ECR I-5483.

⁴⁴ *Elsie Rita Johnson v Chief Adjudication Officer* (n 43) para 30.

the right of access to courts,⁴⁵ these time limits can be upheld. In the *Steenhorst-Neerings* and *Johnson* cases, considerations of preserving the financial balance of the social security system and checking the annually modified eligibility conditions for social benefits justified the limitation of the temporal scope of the relevant EU right to social benefits.⁴⁶

In extreme scenarios, national time limits could result in absolute deprivation of the litigants' right to equal treatment in social security. In these cases, the right of access to courts is totally negated since practically the litigant cannot lodge a complaint for the enforcement of his EU law right. In the *Magorrian* case,⁴⁷ a national rule limited the right to be admitted to an occupational scheme (a voluntary contracted-out pension scheme) to two years prior to the initiation of proceedings. Such a national provision resulted in the applicants being denied additional pension benefits for the entire period between 1976, the year they were first admitted to the scheme, and 1990, that is, two years before the commencement of proceedings for backdated benefits. Such a national limitation period is disproportionate to any considerations of legal certainty of the domestic legal order as it restricts claims for future pension benefits essentially dependent on past service. Such temporal limitations result in the erosion of the core of the relevant EU substantive right, taking away any chance for effective remedy when these EU rights have been violated.⁴⁸

4.2.2.2 Compensation and the payment of interest

The EU legal order is integrated into Member States' legal systems, requiring national courts to uphold EU rules affecting both States and their nationals. It is often the case that prior State action is necessary for individuals to be able to reap the full benefit of their EU rights. CJEU managed to intervene in Member States' domestic

⁴⁵ Case C-188/95 *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet)* [1997] ECR I-6783, Opinion of AG Jacobs, paras 48-52, 72.

⁴⁶ The national procedural law in cases *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* (n 43) and *Elsie Rita Johnson v Chief Adjudication Officer* (n 43) set a time limit of 12 months prior to the initiation of the claim for the payment of arrears of benefits. See also, *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet)* (n 45) para 74.

⁴⁷ *Mary Teresa Magorrian and Irene Patricia Cunningham v Eastern Health and Social Services Board and Department of Health and Social Services* (n 27).

⁴⁸ *Ibid.*, paras 37-47.

procedural regimes to secure compliance with EU law obligations, imposing a new remedy - that of reparation for losses related to state liability due to violation of EU laws.⁴⁹ By establishing the constitutive conditions of the state liability, the Court created a remedy to be available in all Member States. The necessity for this new remedy derived from the fundamental right of access to justice, and more specifically the need for an effective remedy in case of violation of EU law rights and obligations. This is particularly evident in cases of EU law rights and obligations with no direct effect, for which no national remedies can be used.⁵⁰

Specifically, CJEU found in *Francovich and Bonifaci* that Italian courts were under the duty to offer effective redress to the plaintiffs, awarding them damages for the loss suffered due to Italy's breaching their EU rights by failing to implement Directive 80/987⁵¹ on the Protection of Employees in the event of their Employers' Insolvency.⁵² State liability is inherent in the system of the Treaty and the EU legal order⁵³ provided that three constitutive conditions are fulfilled; namely, the result required by the directive includes the conferral of rights to individuals, the content of which can be discernible by reference to the provisions of the said directive, and there is causal link between the breach of Member States' duty to implement the said directive and the loss or damage suffered by the individual.⁵⁴

⁴⁹ T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 529; E Szyszczak, 'European Community Law: new remedies, new directions?' (1992) 55(5) MLR 690, 696.

⁵⁰ J Steiner, 'From direct effects to *Francovich*: shifting means of enforcement of Community law' (1993) 18(1) ELR 3.

⁵¹ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23.

⁵² *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 2) paras 33-34: Italy did not take any steps to implement Directive 80/987/EEC, and in February 1989 the CJEU verified via Article 169 EC (now 258 TFEU) infringement proceedings that Italy had failed to fulfil its obligations in this respect. Two years later, the plaintiffs sued their insolvent former companies and the State, for arrears of salary, seeking payment or compensation. See also, case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24).

⁵³ *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 2) paras 35-37.

⁵⁴ *Ibid*, paras 39-40.

Similarly, individuals' EU rights may be breached by an action of any organ of the Member State, such as the introduction or the maintenance of domestic legislation violating the said EU rights.⁵⁵ A remedy for damages to the individual that suffered loss or damage due to that act should be available.⁵⁶ Under international law, States constitute single entities with regard to breaches of their international commitments. Consequently, this principle must apply *a fortiori* in the EU legal order since all State authorities, including the judiciary, the executive, and the legislative, should conform to EU law.⁵⁷

Finally, provided that the breach of the EU rule is sufficiently serious, the right to damages should be offered to individuals, even if the said EU rule has direct effect, with damages constituting the 'necessary corollary' rather than a substitute for direct effect.⁵⁸ To this end, the following parameters should be considered for the award of damages: the clarity of the EU rule;⁵⁹ the discretion left to public authorities; the intentional or involuntary damage caused; and, the infiltration of an excusable or inexcusable error of law.⁶⁰

⁵⁵ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24).

⁵⁶ *Ibid*, para 32.

⁵⁷ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651, para 32.

⁵⁸ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24) paras 22 and 55. See also: A Komninos, 'New Prospects for the Enforcement of EC Competition Law: Courage v Crehan and the Community Right to Damages' (2002) 39 CML Rev. 455; J Steiner, 'The Limits of State Liability for Breach of European Community Law' (1998) 4(1) EPL 69, 74. See however: case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* [1996] I-02553; joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-04845: the culpability test applied was more lax due to the lack of legislative action and subsequently wide discretion on the part of the Member States.

⁵⁹ See, case C-392/93 *The Queen v H. M. Treasury, ex parte British Telecommunications plc* [1996] ECR I-01631, paras 42-45.

⁶⁰ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24) paras 56-57. See also: case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 00975, para 11; joined cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-05063.

In *Köbler*, the Court opened the way for the recognition of a right to reparation against the State in case of breach of EU law rights by the national judiciary;⁶¹ rulings of last instance courts no longer constitute the final litigation step. Individuals can turn to lower national courts for the award of reparation for losses suffered as a result of breach of EU law by the higher national court.⁶² Article 41 ECHR also recognises state liability; there is a right to reparation when the infringement of the ECHR is attributable to a national court of last instance.⁶³ Subjecting last instance courts' rulings to further judicial review does not jeopardise judicial authority. On the contrary, it enhances the quality of the EU legal system and of judicial control;⁶⁴ CJEU and national courts of last instance are indispensable constituents of the single EU legal order. There is a hierarchical rather than co-operational relationship between these courts, whereby the final decision of whether the national judiciary has breached EU law is one for the CJEU to make.⁶⁵

Nonetheless, the Court left the executive conditions for the exercise of the relevant remedy before national courts to Member States' domestic procedural regimes provided these conform to the principles of equivalence and effectiveness.⁶⁶ In that sense, a German remedial rule providing that when the legislature adopts a law that

⁶¹ Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239: Mr Köbler brought an action for damages before the Regional Court of Vienna on grounds of breach of EU law by the Austrian Supreme Court.

⁶² Tridimas, *The General Principles of EU Law* (n 49) 525. It is often suggested that *Köbler* has promoted greater dispersal of judicial power at national level. However, it would be against Articles 6 ECHR and 47 CFREU (requirement of fair trial and impartiality of the tribunal or court) to have the higher court that has issued the litigated decision for which reparation is being asked from a lower court at first instance, to be adjudicating the case in appeal proceedings. See also: case C-185/95 P. *Baustahlgewebe GmbH v Commission of the European Communities* [1998] ECR I-08417, Opinion of AG Léger, para 67; case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, Opinion of AG Léger, para 111-112; G Anagnostaras, 'The Principle of State Liability for Judicial Breaches: The Impact of European Community Law' (2001) 7(2) EPL 281.

⁶³ See also, *Dulaurans v. France* App no 34553/97 (ECtHR, 21 March 2000).

⁶⁴ *Gerhard Köbler v Republik Österreich* (n 61) para 43.

⁶⁵ See to the same effect: case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177: CJEU condemned Italian legislation substantially restricting state liability for damage caused by a last instance court.

⁶⁶ See: case 60-75 *Carmino Antonio Russo v Azienda di Stato per gli interventi sul mercato agricolo (AIMA)* [1976] ECR 00045; *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (n 22); *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* (n 24).

conflicts with a higher-ranking law, such as EU law, only the individuals to whom the legislative act or omission refers can have a right to reparation, contradicts the fundamental right of access to justice.⁶⁷ Although restrictions to the right of standing of would-be litigants are acceptable provided they pursue a legitimate aim in a proportional manner, these restrictions cannot be upheld, if they are too wide, eroding the essence of the right to an effective remedy. Along these lines, a limitation of the right to reparation only to individuals to whom a legislative act refers renders reparation extremely difficult, since legislative acts are usually directed to the public and not to identifiable people or groups of people.⁶⁸

In addition, in a set of cases for the reimbursement of charges levied in breach of EU law, the Court opined that – in light of the substantive EU provision prohibiting charges having an effect equivalent to customs duties – in principle a right to reimbursement must be available under national law. Nevertheless, secondary issues to reimbursement, such as the payment of interest, are to be defined by the national procedural law.⁶⁹ That being said, judging the national remedy of compensation payable to victims of sex discrimination, the Court held that fixing *a priori* upper limits to the amount of compensation that can be awarded for these cases could not secure adequate reparation for the loss and damage suffered due to discriminatory dismissal from a

⁶⁷ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24) paras 69-72.

⁶⁸ In the ECHR context, see: *Golder v. United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 35; *Chevol v. France* App no 49636/99 (ECtHR, 13 February 2003); *Ashingdane v. United Kingdom* App no 8225/78 (ECtHR, 28 May 1985), paras 111-113.

⁶⁹ Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595, para 12; case 26-74 *Société Roquette frères v Commission of the European Communities* [1976] ECR 00677; case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] ECR 01887, para 12. See also: case 265/78 *H. Ferwerda BV v Produktschap voor Vee en Vlees* [1980] ECR 00617, para 10; joint cases 66, 127 and 128/79 *Amministrazione delle Finanze v Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi* [1980] ECR 01237, para 18; case 54/81 *Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 01449; joined cases 205 to 215/82 *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* [1983] ECR 02633; case 39-70 *Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-St. Annen* [1971] ECR 00049, para 4: here the CJEU explicitly suggested that no recourse to national rules should take place except to the extent necessary to carry out EU law provisions. See, Kakouris, ‘Do the Member States possess Judicial Procedural Autonomy?’ (n 3) 1395-1396.

job.⁷⁰ Such national remedial rules must be set aside, and full compensation must be provided to people whose EU right to real equality of opportunity (according to Directive 76/207) has been violated. Such full compensation must take into account losses due to the passing of time, awarding interest, where necessary.⁷¹

Similarly, in *Marshall II*, the award of interest was held as an indispensable part of the effective judicial protection of EU rights.⁷² It is only the calculation of that interest that is left to the national procedural rules. This is consistent with the right to an effective remedy as established in Article 47(1) CFREU and its Strasbourg counterpart Article 13 ECHR. Both the procedural characteristics of a specific remedy as well as its capacity to offer adequate relief for the violation of the EU right should be considered for the right to effective access to justice to be ensured.⁷³ Consequently, setting fixed compensation limits regardless of the loss suffered and of the allegedly violated EU provision cannot be deemed adequate relief.⁷⁴

It is difficult to justify the Court's stance in the *ex Sutton* case⁷⁵ where the payment of interest was said to be dependent on the compensatory or restitutionary character of the EU law originated claim. The requirement to pay interest, following from the right to an effective remedy, seeks to guarantee that the pecuniary relief offered is adequate to render good the violation of the EU right. This is probably the reason why the Court left open the possibility to be awarded interest for the passage of time on the basis of further actions for damages due to state liability.⁷⁶ Accordingly, national procedural rules excluding the loss of profit as a head of damage for which

⁷⁰ Case C-271/91 *Marshall v Southampton and South-West Hampshire AHA* [1993] ECR I-4367, para 30.

⁷¹ *Ibid.*, para 31. See also, case C-63/01 *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau* [2003] ECR I-14447, paras 70-71.

⁷² *Marshall v Southampton and South-West Hampshire AHA* (n 70) para 31. To the same effect: case C-63/01 *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau* [2003] ECR I-14447, Opinion of AG Alber, para 45: 'interest does indeed form part of a claim for compensation'.

⁷³ See above, '2.3.1.2 The obligation to provide an 'effective' remedy' 56.

⁷⁴ *Ibid.*

⁷⁵ Case C-66/95 *The Queen v Secretary of State for Social Security, ex parte Eunice Sutton* [1997] ECR I-02163.

⁷⁶ *Ibid.*, paras 23 and 35.

reparation can be granted in case of breach of EU law cannot be accepted. Especially in the area of commercial litigation, this rule could render the reparation of damage practically impossible.⁷⁷ Similarly, the award of exemplary damages for breach of EU law should be available if such damages are awarded for claims founded on domestic law.⁷⁸

In the aftermath of *Francovich* and *Brasserie du Pêcheur and Factortame*, the Court further expanded the remedy of reparation to include private parties' liability for breach of EU law in the area of EU competition law, thus imposing obligations on non-state entities. Advocate General van Gerven first raised this point in the *Banks* case;⁷⁹ where an individual violates EU law, causing damages to another person, there should be a remedy for reparation for the loss suffered.⁸⁰ It was then in *Courage Ltd v Crehan*⁸¹ that the Court took position on that issue. *Courage*, a brewery holding a 19% share of the United Kingdom market in sales of beer, concluded two 20-year-leases for the use of public houses with *Inntrepreneur Estates Ltd*. The lease agreements contained an exclusive purchase obligation under which the lessee had to purchase a fixed minimum quantity of beer from the lessor. In an action brought by the lessor to recover unpaid deliveries of beers, the lessee argued that the agreement was contrary to Article 81 EC (now Article 101 TFEU), counter-claiming damages. However, according to English law, a party to an illegal contract cannot claim damages from the other party to the contract. The CJEU suggested that the common law rule could not be upheld, as that would jeopardise the effective application of Article 101 TFEU.⁸² It found that there is a right to a civil remedy in private relationships inherent in the EU legal order.⁸³

⁷⁷ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24) para 87.

⁷⁸ *Ibid*, para 89.

⁷⁹ Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-1209.

⁸⁰ *Ibid*, Opinion of AG Van Gerven, para 43.

⁸¹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

⁸² *Ibid*, para 26.

⁸³ *Ibid*; Tridimas, *The General Principles of EU Law* (n 49) 546. See also, Dougan, 'Enforcing the Single Market: The Judicial Harmonisation of National Remedies and Procedural Rules' (n 23) 175-177. Subsequent academic literature has argued that individual liability should be expanded to other areas of EU law, imposing similar directly effective obligations of non-violation to other individuals as those

Moreover, in *Muñoz* it found that this right is also existent where Union provisions impose obligations on a private party, giving rise to implied rights of action to individuals adversely affected by the failure of another individual to comply with EU obligations.⁸⁴ Since such a remedy needs to be effective, it might lead to a right to injunctive relief or to reparation based on the circumstances of the violation. Additionally, the potential pool of beneficiaries is considerably wide, ranging from consumers and employees to representative associations and trade unions.⁸⁵ After all, enforcement refers to the entire paradigm of judicial procedure: this includes not only issues of standing, time limits, appropriate forms of action, but also preliminary issues of access to justice.⁸⁶

4.2.2.3 Interim relief

EU intervention in national procedural and remedial regimes for the purposes of guaranteeing the effective enforcement of EU law rights and obligations reached its apogee in a set of cases on interim measures. CJEU has found that individuals have the right to be awarded interim relief to protect their position while their EU law rights/obligations are being clarified.⁸⁷ The effective enforcement of EU law could be impaired if a rule of national law could prevent a court from granting interim relief. Even if, under domestic law, national courts have no power to award interim relief and

[Footnotes continued on next page]

introduced by the competition provisions of Articles 101 and 102 TFEU. This is the case of Article 45 TFEU on the freedom of movement for workers, Article 56 TFEU on the freedom of services, and Article 157 TFEU on the principle of equal pay between men and women. See *inter alia*: W van Gerven, 'Crehan and the Way Ahead' (2006) 17 EBLR 269; S Drake, 'Scope of Courage and the principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice' (2006) 31(6) ELR 841.

⁸⁴ Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR I-7289.

⁸⁵ On the distinction between EU law rights and EU law obligations and its impact on national procedural autonomy see, *inter alia*: Van Gerven, 'Crehan and the Way Ahead' (n 83).

⁸⁶ Brown (n 4) 70.

⁸⁷ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433: British companies whose directors and shareholders were mostly Spanish nationals, challenged the Merchant Shipping Act 1988 that changed the registration system for the British fishing vessels on the ground that the 1988 Act was incompatible with various provisions of EU law, asking for an interim relief to be issued until the final judgment. The House of Lords recognised that the appellants would suffer irreparable damage if interim relief were refused; also explaining that issuing interim relief against the Crown was prohibited by national law.

this holds true for national and EU law related disputes, this remedy should still be made available to individuals when it comes to the legal protection of their EU rights.⁸⁸ The requirement for availability of interim relief derives from the right to an effective remedy, ensuring the enforceability of the final court judgment and through that the effective enforcement of EU law rights or obligations under discussion, preventing a Pyrrhic victory for the applicant.⁸⁹

Where the existence and enforcement of an EU law right is raised before a national court, and a reference for a preliminary ruling is submitted according to Article 267 TFEU, it will be too long a period of time before CJEU will be able to rule on the existence and enforcement of that EU right. Consequently, it will also be a long time before the national court will be able to deliver its decision on the merits of the case. During this time, the applicant may suffer irreparable damage, rendering completely worthless and void of any practical value its recourse to justice in the first place.⁹⁰ Interim relief constitutes a ‘fundamental and indispensable instrument of any judicial system’ which does not wish to have an irreversible effect on the effective enforcement of a private right by its beneficiary.⁹¹

The right of individuals to be awarded interim relief to protect their position while their EU law rights are being clarified was upheld in *Factortame*.⁹² In that case, the House of Lords recognised that the appellants would suffer irreparable damage if interim relief was refused, but it explained that issuing interim relief against the Crown was prohibited by national law. The CJEU ruled that when the sole obstacle to the

⁸⁸ Ibid, para 21.

⁸⁹ See text, case law, and references above, ‘2.3.1.2 The obligation to provide an ‘effective’ remedy’ 56.

⁹⁰ S A Apter, ‘Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?’ (2003) 7 EJCL <http://www.ejcl.org/72/art72-1.html> accessed 25 March 2013.

⁹¹ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, Opinion of AG Tesouro, para 19. See also, G Anagnostaras, ‘The incomplete state of Community harmonisation in the provision of interim protection by the national courts’ (2008) 33(4) ELR 586-597.

⁹² *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 87).

award of interim relief and to the subsequent effective enforcement of EU rights and obligations is only a national rule, this rule should be set aside.⁹³

In addition, the Court established in *Zuckerfabrik* that national courts should make available the remedy of interim relief not only where they are asked to suspend the enforcement of a national measure adopted in breach of EU law, but also in case of secondary EU provisions, held to be invalid.⁹⁴ In the latter case, national courts should look at the following four cumulative criteria to decide whether temporary suspension of national rules implementing EU law should actually be awarded in the case before them.⁹⁵ Firstly, national courts must have serious doubts on the validity of EU secondary law. Secondly, they must refer this validity question to the CJEU asking for a preliminary ruling under Article 267 TFEU. Thirdly, there must be an urgent situation, capable of inflicting serious and irreparable damage to the applicants. Lastly, national courts must also take due regard of the Union interests.⁹⁶

That being said, domestic rules on interim relief should be applicable where the suspension of a national law on grounds of alleged incompatibility with EU law is requested. Following the principle of procedural autonomy, these rules should respect both the principle of equivalence and that of effectiveness.⁹⁷ Nevertheless, it is clear that such an approach would lead to differential outcomes from one Member State to another resulting in the same EU rule receiving different scope and interpretation depending on whose states' domestic rules of interim relief have been applied.⁹⁸

⁹³ Ibid, para 23.

⁹⁴ Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-00415, para 20: it seems that the CJEU views national rules and EU provisions as indispensable parts of the same legal order, the EU legal order. See also: case C-465/93 *Atlanta Fruchthandelgesellschaft mbH nad other v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3781; A Arnall, *The European Union and its Court of Justice* (OUP 2006) 294.

⁹⁵ E Sharpston, 'Interim Relief in the National Courts' in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (John Wiley & Sons 1997) 48-50; case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR-I-2271, Opinion of AG Sharpston: it is only the EU that has the competence to declare EU rules unlawful.

⁹⁶ See: Delicostopoulos (n 3) 608; Apter (n 90).

⁹⁷ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (n 95) para 93.

⁹⁸ See also, A Arnall, 'Case Law' (2007) 44 CML Rev. 1778.

4.2.2.4 Evidentiary rules and the duty to raise EU points of law *ex officio*.

In *San Giorgio*, the Court held that the Italian national rules of evidence, requiring negative written proof, should be put aside since they systematically placed the burden of proof upon the taxpayer to establish that the unlawfully imposed charge had not been passed on.⁹⁹ Even if the national evidentiary rule results in the same level of judicial protection with regard to taxpayers' claims arising from an infringement in national tax law, this rule cannot be upheld if it renders the reparation of charges levied contrary to EU law excessively difficult, and the relevant remedy practically ineffective.¹⁰⁰

Similarly, national procedural rules, establishing evidential presumptions that unlawfully imposed charges had been passed on, cannot be accepted under the principle of effectiveness. Such national provisions deprive the litigant of the opportunity to prove that the situation is different, also rendering impossible the reimbursement of these charges, inhibiting the enforcement of the relevant EU law right.¹⁰¹ Even *de facto* evidential presumptions, resulting from the practice of the judiciary¹⁰² or the administrative authorities,¹⁰³ are unacceptable since at the end of the day they have the same restricting effect on the remedy of reimbursement of unlawful charges levied contrary to EU law.¹⁰⁴

The Court has found that the principle of effectiveness does not always impose a duty on national courts to raise a plea based on a Union provision of their own motion. This will depend on the importance of the Union provision for the supranational legal order, and on the parties' genuine opportunity to raise a plea based on Union law before

⁹⁹ *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (n 69) para 18.

¹⁰⁰ *Ibid*, para 17; case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S* [1995] ECR I-01275, para 24; case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)* [1997] ECR I-04449, paras 22-27; *Hans Just I/S v Danish Ministry for Fiscal Affairs* (n 2) para 15.

¹⁰¹ Joined cases C-192/95 to C-218/95 *Société Comateb and Others v Directeur général des douanes et droits indirects* [1997] ECR I-165, paras 25-26. See also the text, case law, and references above, '2.3.1.2 The obligation to provide an 'effective' remedy' 56.

¹⁰² Case C-129/00 *Commission of the European Communities v Italian Republic* [2003] ECR I-14637, paras 32-33.

¹⁰³ Case C-343/96 *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-00579.

¹⁰⁴ Case C-147/01 *Weber's Wine World Handels-GmbH and Others v Abgabenberufungskommission Wien* [2003] ECR I-11365, paras 113-114.

a national court.¹⁰⁵ More importantly, a national rule that limits the capacity of the Supreme Court to raise issues of EU law *suo motu* can be justified by the adversarial character of the domestic judicial system. The adversarial character of civil proceedings depicts a principle regarding the relations between the State and the individual that is prevalent in many Member States and the EU,¹⁰⁶ furthering the rights of the defence, as well as the requirement for reasonable length of the proceedings,¹⁰⁷ which are inherent in the EU fundamental right of access to justice.¹⁰⁸

Specifically, in *Kraaijeveld*, the Court suggested that parties to civil suits are responsible for presenting to the court all facts and pieces of evidence, with the court being responsible to intervene only in exceptional cases when the public interest demands so and to the extent that this is necessary to ensure effective judicial protection of EU rights.¹⁰⁹ Accordingly, the possibility for a national court to annul arbitration awards in case of failure to observe EU rules of public policy, such as Article 81 EC (101 TFEU), should be open.¹¹⁰ Even if the applicant did not raise the EU right point of law during the arbitration proceedings, the national court reviewing the arbitral award must consider *suo motu* the enforcement of Article 101 TFEU regarding competition in the Internal Market.¹¹¹ This is the more necessary taking into account the incapacity of arbitral tribunals to lodge a reference for a preliminary ruling regarding the EU law right

¹⁰⁵ Joined cases C-222/05 to C-225/05 *J. van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233, Opinion of AG Maduro, para 29.

¹⁰⁶ Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705, para 21. See also, Kakouris, ‘Do the Member States possess Judicial Procedural Autonomy?’ (n 3) 1404.

¹⁰⁷ *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (n 106) para 21.

¹⁰⁸ See above, ‘2.3.2.2 The obligation for a fair hearing’ 61.

¹⁰⁹ Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403, para 58; See also: Delicostopoulos (n 3) 607; S Prechal, ‘Community law in national courts: the lessons from Van Schijndel’ (1998) 35 CML Rev. 589, 697.

¹¹⁰ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, paras 36-37: Treaty provisions essential for the functioning of the Internal Market have a public policy status for those States that adopt public policy considerations in their domestic legal orders. For a critical analysis of the public policy definition in *Eco Swiss* see, *inter alia*: S Prechal and Shelkopyas ‘National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond’ (2004) 5 E.R.P.L. 589, 600-609.

¹¹¹ See also, case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-01477, para 23.

under discussion.¹¹² Otherwise, the enforcement of the relevant provision would become ineffective, despite its public policy status.

The same holds true where a national adjudicating body is prevented as a matter of national procedural law to submit a reference for a preliminary ruling on an EU point of law in accordance with Article 267 TFEU. A national rule providing that a litigant has 60 days' time to raise arguments that had not been previously invoked in the original complaint, or that the Director had not raised of his own motion is not objectionable *per se*. Nevertheless, things get more complicated when the original complaint has been submitted before the Director of the national tax authorities and the 60-day period to lodge new claims on appeal has already expired by the time the appeal procedure actually starts and the applicants have the opportunity to bring forward the allegation about an EU point of law.

Firstly, the Director of the national tax authorities does not constitute a 'court or tribunal' in the meaning of Article 177 (now 267 TFEU).¹¹³ Consequently, he could not ask for a preliminary ruling on an EU law point. The first court in the procedure that could refer for a preliminary ruling was the Cour d'Appel. Additionally, according to the Belgian judicial organisation no other national court would be able to consider *suo motu* the compatibility of the national measure with Article 52 TEC (now 49 TFEU) at a later stage of the proceedings. The Belgian national law, though not objectionable in itself, under the circumstances of the case it negatively affected the proper functioning of the preliminary rulings, undermining the principle of effectiveness of EU law.¹¹⁴ The possibility for national courts to refer an EU law point to the CJEU constitutes a fundamental aspect of the EU legal order and a denominator of the judicial protection that is offered in there; EU Treaty provisions should be given a uniform interpretation regardless of the national circumstances in which they have to be applied.¹¹⁵ This

¹¹² Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 01095.

¹¹³ See Case C-24/92 *Pierre Corbiau v Administration des contributions* [1993] ECR I-1277.

¹¹⁴ *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33) paras 16-21.

¹¹⁵ *Eco Swiss China Time Ltd v Benetton International NV* (n 110) para 40.

finding combined with the lack of any possible justification on grounds of fundamental principles of the judicial system, such as that of legal certainty and good administration of justice, resulted in the Belgian rule to be overridden by considerations of effectiveness of EU law.¹¹⁶

The combination of the possibility for the judging national authority to directly make a reference for a preliminary ruling with the demand for effective application of EU law has been heavily criticised. Even if the authority handling the original application does not have direct access to the 267 TFEU mechanism, the national courts that will review the case at a second stage will be able to make such a reference for a preliminary ruling, so long as the parties have raised at first instance points of compatibility of a national provision with an EU rule.¹¹⁷ Nevertheless, access to courts should always be available when it comes to the enforcement of EU law rights and obligations of a fundamental nature¹¹⁸ having a binding (competition law)¹¹⁹ and directly effective character (freedom of establishment).¹²⁰ It is the necessity to secure judicial review of EU rights and obligations that lies behind the Court's case law on national courts' duty to raise points of EU law *suo motu*.¹²¹ Even if the interested party has not raised that fundamental EU law right in the extra-judicial proceedings, such as

¹¹⁶ *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33) para 20.

¹¹⁷ See, G de Búrca, 'National procedural rules and remedies: the changing approach of the Court of Justice' in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (John Wiley & Sons 1997) 44; C F Jacobs, 'Enforcing Community Rights and obligations in national courts: striking the balance' in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (John Wiley & Sons 1997) 32; M Hoskins, 'Tilting the balance: supremacy and national procedural rules' (1996) 21(5) ELR 374. See also, *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau* (n 72) para 53.

¹¹⁸ See *inter alia*, case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097, para 14.

¹¹⁹ Article 101 TFEU; *Eco Swiss China Time Ltd v Benetton International NV* (n 110); *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfondsvoor Fysiotherapeuten* (n 106).

¹²⁰ Article 49 TFEU; *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33). See also, Prechal, 'Community law in national courts: the lessons from Van Schijndel' (n 108) 698.

¹²¹ See: T Heukels, 'Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfondsvoor Fysiotherapeuten*; and Case C-3 12/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, both judgments of the Court of 14 December 1995 (full Court), not yet reported' (1996) 33 CML Rev. 337, 352-353.

before the Director of the national tax authorities,¹²² or an arbitral tribunal,¹²³ national courts reviewing the decision of these extra-judicial bodies should be able to raise *suo motu* issues of enforcement of fundamental EU law rights. In that case, even if access to the preliminary procedure might not be possible, the judging organ comes with adequate guarantees regarding effective judicial protection and effective enforcement of binding and directly effective EU rights.¹²⁴ This interpretation conforms to Article 47 CFREU and the right to an effective remedy before a court or tribunal for all EU law rights and freedoms.¹²⁵

Similarly, national courts can examine *suo motu* contractual clauses conferring exclusive jurisdiction on the courts of the supplier's principle place of business in the context of Directive 93/13 on unfair terms in consumer contracts.¹²⁶ The EU right under discussion consists in consumers' right not to be bound by unfair contractual terms.¹²⁷ The above jurisdiction clause can be deemed unfair in the sense that it renders consumers' access to the courts more difficult and complicated, increasing the imbalance between suppliers and consumers. This can occur due to the extra costs associated with the necessity for consumers to move to the supplier's domicile to enter an appearance, which might deter them completely from initiating court action, or from putting forward certain points of defence for fear that this could prolong the trial, leading to yet more costs.¹²⁸ National courts' duty to consider the unfairness of such a

¹²² *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33).

¹²³ *Eco Swiss China Time Ltd v Benetton International NV* (n 110). On arbitral tribunals' role see, *inter alia*: *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* (n 112).

¹²⁴ See also: Prechal, 'Community law in national courts: the lessons from Van Schijndel' (n 109) 696; A P Komninos, 'Case C-126/97, *Eco Swiss China Time Ltd. V. Benetton International NV*, Judgment of 1 June 1999, Full Court' (2000) 37 CML Rev. 469. See also, M Brealey and M Hoskins, *Remedies in EC law: Law and Practice in the English and EC Courts* (2nd edn, Sweet & Maxwell 1998) 113-114.

¹²⁵ See above, '2.3.1 Right to an effective remedy before a tribunal' 53.

¹²⁶ Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (n 15).

¹²⁷ *Ibid*, Article 6.

¹²⁸ Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Others* [2000] ECR I-04941, para 22. See also: case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875; case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SLElisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, paras 36-39; case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Györf* [2009] ECR I-04713, paras 23-25, 30-32; *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (n 16) paras 52-59.

jurisdictional clause *suo motu* follows from the right of access to justice for the enforcement of EU law rights and obligations.

4.3 Recasting CJEU case law on national procedural autonomy: lessons learned for civil procedure harmonisation in the EU

In the previous section, I focused on the principles of equivalence and effectiveness as a means for CJEU intervention into Member States' domestic procedural and remedial regimes for the enforcement of EU law rights and obligations. I argued that CJEU has developed civil procedure rules permeated by access to justice considerations. This is discernible in the procedural themes it has affected, namely limitation periods, evidentiary rules, interim and compensatory relief. It is also apparent in the recognition of the necessity for a balancing activity between the basic procedural principles served by national procedural systems, such as the protection of the rights of the defence, the principle of legal certainty, and the proper conduct of procedure, and the effectiveness of EU law.¹²⁹ In doing so, the impact of CJEU case law on national procedural regimes has varied in degree, ranging from non-intervention, the setting aside of incompatible national rules, and modification of others, to the creation of new remedies, where deemed appropriate. As a result, the CJEU has offered an initial affirmative approach to the EU 'competence-competence' question in the area of procedural law. The critique expressed in this last section of this chapter should not be seen as an attempt to downgrade the important role the CJEU has played so far in the creation of EU civil procedure law. It only wishes to question the suitability and capacity of CJEU to develop a coherent system of EU civil procedure law that actively

¹²⁹ *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (n 106) para 19; case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* [2002] ECR I-8003, para 33; case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837; case C-224/97 *Ciola v Land Vorarlberg* [1997] ECR I-2517; *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau* (n 72) para 45; *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33).

promotes all aspects of the right of access to justice and strikes a balance between competing interests.

What should be clarified once and for all at this point is that the entire CJEU case law on national procedural autonomy has one single starting point and justification; that is, the effective enforcement of EU law where private individuals are seen as driving forces and primary paragons for the realisation of the objectives and aims of the EU supranational endeavor.¹³⁰ Kakouris, in his leading article on Member States' judicial procedural autonomy, denied the existence of a principle of national procedural autonomy as a whole. Using as a justification the lack of any explicit reference to this term in the then existing CJEU case law, he suggested that national procedural laws are ancillary to the supranational legal order, promoting its objectives and purposes.¹³¹ However, what Kakouris failed to realise is that the enforcement of EU law cannot be the overarching principle in all cases and in an unqualified manner.

Given the CJEU institutional mandate,¹³² and the principles of subsidiarity and proportionality, the Court has systematically limited its intervention into national procedural and remedial regimes to an essential minimum level.¹³³ As a result, the Court has mainly imposed minimum procedural standards applicable for the enforcement of the adjudicated EU law rights, leaving intact the procedural regimes applicable in strictly internal cases.¹³⁴ Even where it has been more daring, imposing new remedies where these were not available under domestic law not even for domestic disputes, such as in the case of interim relief, it has still been reluctant in specifying all the elements of these remedies, leaving considerable discretion to national courts. In the example of interim relief, CJEU only specified the constitutive conditions for granting interim relief, without offering detailed explanations as to the repercussions and effect of these

¹³⁰ See *inter alia*: M Accetto and S Zleptning, 'The Principle of Effectiveness: Rethinking its Role in Community Law' (2005) 11(3) EPL 375; Prechal and Widdershoven (n 25) 40.

¹³¹ Kakouris, 'Do the Member States possess Judicial Procedural Autonomy?' (n 3) 1390; Bobek (n 17): also denies completely the existence of the principle of national procedural autonomy.

¹³² Article 19 TEU.

¹³³ See, joined cases C-430 and 431/93 *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, Opinion of AG Jacobs, para 27.

¹³⁴ See, W Van Gerven, 'Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies?' (1995) 32 CML Rev. 679, 700.

rules, also leaving rules for the making and examination of the application for interim relief to national procedures.¹³⁵

The same is true for the remedy of damages for state or individual liability.¹³⁶ There is strong interdependence between the heads of damage, or the limitation periods, and the need for culpability and causal link.¹³⁷ Leaving the former to Member States' domestic procedural regimes and the latter to EU institutions cannot easily be justified.¹³⁸ This is all the more difficult, when seen in the remit of the fundamental right of access to justice and the need for effective remedies, offering adequate relief. The essence of this right can be eroded by both constitutive and executive conditions for reparation.¹³⁹

What is more, CJEU has mainly focused on the need for enforcement of EU law through an empowered claimant. Therefore, it has adjudicated on access to courts and effective remedies issues, such as limitation periods, evidentiary rules, compensation, interim relief, and *ex officio* raise of EU law points, delegating matters of procedural fairness and efficiency to Member States.¹⁴⁰ Even when the Court intervened in the area of the fundamental principle of equality of arms and adversariality of proceedings, the emphasis was still placed on the necessity for EU law enforcement especially in case of

¹³⁵ *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* (n 94) para 26.

¹³⁶ See *inter alia*, Van Gerven, 'Of Rights, Remedies and Procedures' (n 3) 502.

¹³⁷ Steiner, 'The Limits of State Liability for Breach of European Community Law' (n 58) 95-98.

¹³⁸ See *inter alia*: Van Gerven, 'Of Rights, Remedies and Procedures' (n 3) 501; Himsworth (n 17).

¹³⁹ The use of minimum standards has been a common theme in all modes of development of EU civil procedure rules, including secondary, sectoral, and horizontal EU legislation. This has compromised the possibilities to promote access to justice in a systematic fashion. See below, '5.2.2 Limitations of the IPRED' 145; '5.3.2.2 Minimum procedural standards' 160.

¹⁴⁰ See for instance, case C-276/01 *Joachim Steffensen* [2003] ECR I-03735, para 78:

It is for the national court to assess whether, in the light of all the factual and legal evidence available to it, the admission as evidence of the results of the analyses at issue in the main proceedings entails a risk of an infringement of the adversarial principle and of the right to a fair hearing. In the context of that assessment, the national court will have to examine, more specifically, whether the evidence at issue in the main proceedings pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on its assessment of the facts and, should this be case, whether Mr Steffensen still has a real opportunity to comment effectively on that evidence.

fundamental Union provisions, such as in competition law.¹⁴¹ This becomes even more apparent in the principle of equivalence. There, more protective national procedural rules for the enforcement of domestic law are also deemed desirable for EU law, without due consideration of the defendant's competing interests in restraining such enforcement and the interests of the good administration of justice in procedural efficiency.¹⁴²

Overall, the impact of the CJEU case law on national procedural regimes is intentionally limited and sketchy even in the most so-called interventionist phases of its development. CJEU can only investigate national procedural rules on an *ad hoc*, retrospective basis. This is in turn highly dependent on lawyers' willingness to challenge national procedural and remedial rules in the remit of EU law enforcement, and on national courts' readiness to ask CJEU for a preliminary ruling. Therefore, the premises of its intervention in national legal orders are essentially limited and inappropriate. Lacking the resources and competence to examine national legal regimes in a systematic and detailed fashion, it risks causing more harm than good, leading to fragmented solutions.¹⁴³

As a result, CJEU case law on national procedural and remedial autonomy is difficult to explain normatively, as it is rather inconsistent and contradictory, and in any

¹⁴¹ That the procedural rule of reason introduced in *Van Schijndel* has not led to a minimalist approach is confirmed by Prechal: S Prechal, 'Community law in national courts: the lessons from *Van Schijndel*' (1998) 35 CML Rev. 681, 705-706.

¹⁴² See for instance, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24) para 89: exemplary damages. See also, *Himsworth* (n 17) 310-311.

¹⁴³ For similar CJEU case law shortcomings in the area of EU Administrative Law see, *inter alia*: O M Puigpelat, 'Arguments in favour of a general codification of the EU administrative procedure' (Note, European Parliament 2011) 16

[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 04 December 2012:

[...] due to its specific nature and institutional function, case-law lacks the necessary instruments and perspective to create a complete and coherent body of procedural rules matching up to the multiple functions – *which are not just limited to defending individual rights and interests (emphasis added)* – [...] In an EU with consolidated democratic institutions, the role of case-law must be to solve the interpretative problems that may be thrown up by procedural rules, and not to produce such rules.

case widely fluctuating.¹⁴⁴ For example, although *Rewe v Hauptzollamt Kiel* explicitly stated that the Treaty was not intended to create new remedies in national legal orders,¹⁴⁵ *Unibet* confirmed that new remedies may have to be introduced where there are no national remedies to enforce EU law rights even indirectly.¹⁴⁶ In *Peterbroeck*¹⁴⁷ national courts were deemed obliged to raise EU law points *suo motu*, whereas in *Van Schijndel*¹⁴⁸ the Court did not impose such a duty on national courts. In damages actions, a one-year limitation period is considered reasonable,¹⁴⁹ whereas in restitution claims this limitation period increases by up to five-years.¹⁵⁰ In *San Giorgio* the payment of interest was regarded of secondary importance to the effectiveness of the remedy of compensation,¹⁵¹ whereas in *Marshall II* it was deemed an indispensable aspect of the right to effective judicial protection,¹⁵² only to conclude in *ex Sutton* that the payment of interest depends on the restitutionary or compensatory character of the claim.¹⁵³

After all, CJEU intervenes based on the decentralised enforcement scheme envisaged by the creators of the Treaties. Its role is rather delicate, striking a balance with its enforcement counterparts, namely the national courts. If the rules of the enforcement game in the EU should change, this is certainly a task for the Commission, the Council, and the Parliament, under their respective legislative functions, to undertake systematically and coherently.¹⁵⁴ Therefore, it has repeatedly called on the

¹⁴⁴ See: A Ward, 'Effective Sanctions in EC Law: A Moving Boundary in the Division of Competence' (1995) 1(2) ELJ 205; Bobek (n 17).

¹⁴⁵ *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* (n 24) para 44.

¹⁴⁶ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (n 49) para 41.

¹⁴⁷ *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (n 33).

¹⁴⁸ *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (n 106).

¹⁴⁹ Case C-90/94 *Haahr Petroleum Ltd v Åbenrå Havn and Others* [1997] ECR I-4085.

¹⁵⁰ *Rosalba Palmisani v Istituto nazionale della previdenza sociale* (n 7).

¹⁵¹ *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (n 69).

¹⁵² *Marshall v Southampton and South-West Hampshire AHA* (n 70).

¹⁵³ *The Queen v Secretary of State for Social Security, ex parte Eunice Sutton* (n 75).

¹⁵⁴ Steiner, 'The Limits of State Liability for Breach of European Community Law' (n 58) 109; R Craufurd-Smith, 'Remedies for breaches of EU law in national courts: Legal variation and selection' in P Craig and G de Búrca (ed), *The Evolution of EU Law* (1st edn, OUP 1999) 318-319; J Bridge, 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States' (1984) 1 ELR 28, 39-42; G Cumming, M Freudenthal, and R Janal, *Enforcement of*

EU legislature to take up its role and provide a coherent, holistic, and systematic approach, inspired by the right of access to justice, carefully considering competing interests, contributing, ultimately, to the functioning and realisation of the supranational legal order through the respect and promotion of the rule of law.¹⁵⁵

Despite the limited impact on the harmonisation of procedural law in the EU, and the pre-eminent law enforcement perspective, CJEU case law on national procedural autonomy has nonetheless sketched the right way forward for the EU legislature, which should promote access to justice when developing common civil procedure rules. This becomes more apparent in recent CJEU case law on national procedural autonomy, where the principles of effectiveness and effective judicial protection are used almost interchangeably by the Court.¹⁵⁶ For instance, in the *Arcor* case, the CJEU rephrased the principle of national procedural autonomy suggesting that in the absence of relevant Union rules, ‘it is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and *effectiveness of judicial protection*,¹⁵⁷ the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review [...]’.¹⁵⁸ Under this formulation, the initial *Rewe* principle of effectiveness and the *Johnston* principle of effective judicial protection have apparently merged to create a broader, higher principle of effectiveness of judicial protection.¹⁵⁹

[Footnotes continued on next page]

Intellectual Property Rights in Dutch, English and German Civil Procedure (Kluwer Law International 2008) 9: this inherent limitation of CJEU case law in intervening coherently and systematically in national procedural regimes is described by the authors of the book as a ‘constitutional weakness’.

¹⁵⁵ See *inter alia*: *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* (n 69) para 12; *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* (n 69) para 44; *Dilexport Srl v Amministrazione delle Finanze dello Stato* (n 103) para 25.

¹⁵⁶ See also, A Arnulf, ‘The principle of effective judicial protection in EU law: an unruly horse?’ (2011) 36(1) ELR 51, 55.

¹⁵⁷ Emphasis added.

¹⁵⁸ Case C-55/06 *Arcor AG & Co. KG v Bundesrepublik Deutschland* [2008] ECR I-02931, para 170.

¹⁵⁹ See also, case C-411/10 *N. S. v Secretary of State for the Home Department* [2011] OJ C 49/8, Opinion of AG Trstenjak, para 161: ‘The minimum content of the right to an effective remedy includes the requirements that the remedy to be granted to the beneficiary must satisfy the principle of effectiveness’.

More importantly, the recent *Impact* case explicitly mentions that the principles of equivalence and effectiveness are but the embodiment of the principle of effective judicial protection of EU law rights.¹⁶⁰ In *Alassini*, the Court used the principles of equivalence and effectiveness and of effective judicial protection interchangeably, associating them openly with the right to effective remedy and fair trial of Article 47. It is against this fundamental right that it then undertook a balancing activity investigating whether limitations to this right pursue a legitimate aim in a proportional manner that does not render the right of access to justice a mere theoretical possibility.¹⁶¹ Indeed the Court in this case first examined the national procedural rule imposing a mandatory attempt for out-of-court settlement, from the perspective of the principle of effectiveness, and secondly from that of effective judicial protection. Having said that, the considerations developed with regard to both principles were identical, namely whether such a national procedural provision prohibits access to courts, imposing additional costs on prospective litigants, also negatively affecting the period for time barring claims before the courts, and prolonging the final resolution of a dispute, due to its unreasonable length.¹⁶²

In doing so, the Court made the first step towards the streamlining of its case law on national procedural and remedial autonomy with Article 47 CFREU. It has also opened up the way for the development of a more coherent and consistent body of future case law, where the principles of effectiveness and effective judicial protection will be subsumed in light of the constitutionalisation of the fundamental right of access

¹⁶⁰ Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-02483, para 47; see also: case C-63/08 *Virginie Pontin v T-Comalux SA* [2009] ECR I-10467, para 44; *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (n 49) para 43. On the close relationship between the principle of effectiveness and effective judicial protection as a predecessor of the right of access to justice in the EU, see: P Haapaniemi ‘Procedural Autonomy: A Misnomer?’ in L Ervo, M Gräns, and A Jokela (eds), *Europeanisation of Procedural Law and the New Challenges to Fair Trial* (European Law Publishing 2009) 106-108; P Oliver, ‘Case C-279/09, *DEB v Germany* Judgment of the European Court of Justice (Second Chamber) of 22 December 2010, nyr.’ (2011) 48 CML Rev. 2033, 2038-2039; Prechal and Widdershoven (n 25) 45.

¹⁶¹ Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* [2010] ECR I-02213, para 63.

¹⁶² *Ibid*, paras 54-57.

to justice.¹⁶³ Effective access to justice constitutes the gatekeeper for a systematic communication and cooperation between diverse legal orders in a *sui generis*, quasi-federal construct such as that of the European Union.¹⁶⁴ This constitutes a crucial finding which the EU legislature should carefully consider so as to come up with concrete, coherent, and complete rules of EU civil procedure law. Even so, the CJEU case law will always be a valuable guiding tool for the adoption of general procedural rules by the EU legislature.¹⁶⁵

The enactment of the Lisbon Treaty and the constantly increasing role of the fundamental right of access to justice render this possibility the more realistic and probable. According to Article 67(4) TFEU, the Union should facilitate access to justice in the field of judicial cooperation in civil matters. There is a straightforward interdependence between judicial cooperation in civil matters and access to justice as a fundamental procedural right in the EU. Additionally, Article 81(2)(e) TFEU explicitly recognises effective access to justice as a legitimate objective to be promoted via EU approximation measures. Therefore, I argue that the fundamental right of access to justice may serve as the appropriate yardstick for the interpretation and development of EU civil procedure in a systematic and coherent way.¹⁶⁶ A first step to this end may be the prospective EU instrument on procedural minimum standards to be delivered in 2013.¹⁶⁷ Provided these standards are formed based on the relevant CJEU case law and, where applicable, ECtHR case law, this will bring about more coherence and consistency in the area of EU civil procedure law, influencing domestic procedural regimes in matters covered by Union law.¹⁶⁸

¹⁶³ See, B Hess, 'Procedural Harmonisation in a European Context' in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 169.

¹⁶⁴ Accetto and Zleptning (n 130) 382.

¹⁶⁵ Arnall, 'The principle of effective judicial protection in EU law: an unruly horse?' (n 156) 68

¹⁶⁶ See, E Storskrubb, 'Civil Justice – A New Comer and an Unstoppable Wave?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011).

¹⁶⁷ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe's citizens' (Action Plan Implementing the Stockholm Programme) COM (2010) 0171 final, 23.

¹⁶⁸ See, Hess, 'Procedural Harmonisation in a European Context' (n 163) 170.

4.4 A Recap

In the absence of EU procedural and remedial law, national legal regimes should assist with the enforcement of EU rights and obligations. The Court needs to strike a balance between the EU law aim of effectively enforcing EU rights and obligations, and the specific role that domestic procedural rules play in Member States' legal orders. In reviewing national procedural rules for guaranteeing the effective and equivalent enforcement of EU law, CJEU has approximated Member States' procedural regimes. This has happened in a rather restrained and negative way, asking national courts to disapply certain ineffective or discriminatory procedural provisions, or to expand their scope of application for the adjudication of EU law rights and obligations too. Only exceptionally, has the Court asked national courts to create a new remedy where there are no national remedies to enforce EU law rights even indirectly.¹⁶⁹

Overall, CJEU has not actively harmonised national procedural regimes via the imposition of new procedural and remedial rules at a centralised EU level. Except for some basic guidance, it has mainly asked national courts to take up this active role. The essentially factual approach of the Court as well as its incapacity to consider relevant remedial and procedural rules in 28 Member States prevent it from establishing detailed rules of EU civil procedure.¹⁷⁰ Despite its limited harmonising impact, the CJEU case law on national procedural autonomy has clearly sketched the methodological approach for the future development of comprehensive EU civil procedure law. This may be achieved using the right of access to justice as a yardstick, promoting the effective enforcement of EU law rights and obligations in parallel with considerations of procedural fairness and efficiency of procedural systems.

Against this backdrop, I have argued for a reinforced presence and activity of the EU legislature in the area of EU civil procedure law based on the fundamental right of

¹⁶⁹ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (n 49) para 41.

¹⁷⁰ See also, M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 391-395.

access to justice. I believe that Article 81(2)(e) TFEU constitutes the competence-basis EU institutions could legitimately use to harmonise national procedural systems for the effective enforcement of EU law rights and obligation in accordance with the procedural guarantees for effective remedies and fair trial in Article 47 CFREU.¹⁷¹ Even so, the CJEU case law will always be valuable as a guiding principle and as a vehicle for further interpretation and justification of EU legislation on civil procedure rules promoting the right of access to justice.¹⁷²

In the next chapter, I will investigate in more detail the suitability and potential of the EU legislature in promoting coherent and systematic solutions in civil procedure law. I will focus on some examples of EU legislation containing procedural rules in certain sectors of EU activity, such as the Intellectual Property Enforcement Directive (IPRED). I will also look at horizontal secondary instruments introducing autonomous EU procedures, such as the European Small Claims Procedure (ESCP). My aim is to examine to what extent these modes of EU intervention into national procedural regimes actually harmonise civil procedure law, also identifying any potential limitations for the systematic promotion of the right of access to justice in the EU. I will argue that although these pieces of legislation are a step in the right direction for a comprehensive approach to EU civil procedure law, they lack the completeness and consistency, necessary to achieve conceptual clarity, systematic fullness, and formal unity. Having said that, current discussions on a coherent approach to collective redress in the EU offer some preliminary indications as to the right way forward in civil procedure harmonisation.

¹⁷¹ See: Brown (n 4) 71: ‘Or is there not here a role for action under the Third Pillar of the Maastricht Treaty concerned with Justice and Internal Affairs?’; P Carozza, ‘The Member States’ in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) 49-50: the Charter could affect Member States’ domestic legislation even in areas not covered by Union competence. This could happen where national courts adopt a dynamic interpretation of their national human rights provisions in accordance with the content and scope of the Charter Articles. See also, A W Heringa and L Verhey, ‘The EU Charter: Text and Structure’ (2001) 8 MJ 17-20; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’ COM (2010) 748 final.

¹⁷² Arnulf, ‘The principle of effective judicial protection in EU law: an unruly horse?’ (n 156) 68

5 Sectoral v Horizontal EU Civil Procedure Law: A Constitutional Conundrum?

5.1 Introduction

In the previous chapter, I examined the role of CJEU case law in the development of civil procedure rules in the EU. Focusing on the principle of national procedural autonomy and its constituent facets, the principles of equivalence and effectiveness, I argued that the Court has tried to intervene in national procedural regimes, striking a balance between the effective enforcement of EU law rights and obligations and the interests of the defence and the good administration of justice. This balancing activity is inherent in the fundamental right of access to justice as codified in Article 47 CFREU. Despite instances of significant intervention in national procedural regimes, the Court has always been aware of its limited capacities in considering thoroughly the legal systems of all Member States. As a result, it has often asked the EU legislature to take up its role in the area of civil justice.¹

Therefore, in this chapter, I will focus on the activities of the EU legislature in the area of civil procedure law. Currently, legislative harmonisation of civil procedure in the EU is primarily achieved through secondary, sector-specific rules. These rules aim to ensure equal and effective enforcement of substantive EU provisions in the various Member States. Examples of this type of EU regulatory activity can be found in insurance law, labour law, intellectual property law, corporate law, e-commerce, communications law, and consumer law.² Going through the entire *acquis communautaire*, however, in order to find out all examples of *ad hoc* procedural

¹ See, case 130/79 *Express Dairy Foods Ltd v Intervention Board for Agricultural Produce* [1980] ECR 1887, para 12: ‘In the *regrettable* [emphasis added] absence of Community provisions harmonising procedure and time-limits [...] It is not for the Court to issue general rules of substance or procedural provisions *which only the competent institutions may adopt* [emphasis added]’.

² For concrete examples see, *inter alia*: T Andersson, ‘Approximation of Procedural Law in Europe’ in M Storme (ed), *Procedural Laws in Europe: Towards Harmonisation* (Maklu 2003) 55-58; J Stuyck, ‘Enforcement and Compliance: An EU Law Perspective’ in R Brownsword, H W Micklitz, and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 513ff.

provisions in EU legislation would be both time-consuming and cumbersome, without adding any value to the discussion. Instead, I will focus on a recent example of secondary EU legislation introducing EU civil procedural rules in national procedural regimes. Particularly, Directive 2004/48/EC on the enforcement of Intellectual Property Rights (IPRED) constitutes the first legal framework directly regulating procedural aspects at a European Union level.³ IPRED has brought about substantial amendments in Member States' internal procedural systems and has had a negative impact on access to justice in some Member States.⁴

In addition, I will look at yet another mode of EU civil procedure legislative intervention, namely via horizontal secondary EU instruments, aimed at facilitating dispute resolution in civil matters, regardless of a specific subject matter or area of EU activity. I will investigate whether this mode of EU intervention can lead to greater coherence in EU civil procedure law, allowing for a systematic and constitutionally legitimate consideration of the right of access to justice. To this end, I will focus on the recent European Small Claims Procedure (ESCP)⁵ as an example of the practical implications of a horizontal approach for a coherent EU civil procedure law.

In the final part of the chapter, I will look at the current developments⁶ for the creation of an EU collective redress system for damages actions in the areas of EU

³ 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 L 195/16.

⁴ P M M van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure' (2007) 3 TCR 65-70 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392006 accessed 18 October 2012. The Netherlands constitutes a good example of the impact of the IPRED on Member States' domestic systems of civil procedure. For example, an enactment to amend the Dutch Code of Civil Procedure in relation to the addition of a new title on the enforcement of intellectual property rights was submitted to the Dutch Lower House on the 19th of December 2005. Additionally, a severe drop in IP court trials was monitored due to an alteration of the rules on costs allocation: instead of compensating the winning party's fees at a fixed rate – as it was provided in the Dutch Code of Civil Procedure – the IPRED introduced the compensation of actual legal costs, rendering trial costs less predictable. The amendment to the Dutch Code of Civil Procedure was the insertion of a new chapter on Intellectual Property Rights whereby the exceptional rule on cost allocation was introduced.

⁵ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (ESCP) [2007] OJ L199/1.

⁶ Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM (2008) 165 final. See also, Commission, 'White paper on damages actions for breach of the EC antitrust rules' (staff working document) SEC (2008) 404 that entails the authentic interpretation of the White Paper. A draft

competition and consumer law. The future adoption of EU competition and/or consumer collective redress mechanisms will have a potentially significant impact on EU citizens' effective access to justice, a right that is difficult to exercise efficiently when it comes to private enforcement of competition rules or of consumer rights.⁷ More importantly, although initial discussions favoured a sectoral approach to collective redress, the recent Commission public consultation, entitled 'Towards a Coherent Approach to Collective Redress', and subsequent deliberations on the topic have adopted a more nuanced perspective, combining elements of both a horizontal and sectoral approach.

5.2 Sectoral EU civil procedure rules: the example of IPRED

IPRED has introduced detailed rules on various matters of procedural nature, applicable to both domestic and cross-border disputes, based on Article 114 TFEU and the relevant provisions on the approximation of laws in the Internal Market. It constitutes a secondary, sector-specific piece of EU legislation, entailing *ad hoc* rules of civil procedure in the area of IP rights enforcement,⁸ aimed at ensuring that existing EU

[Footnotes continued on next page]

directive also leaked to the public, which was never adopted. Finally see, Commission, 'Green Paper on Consumer Collective Redress' COM (2008) 794 final.

⁷ 'White Paper on Damages actions for breach of the EC antitrust rules' (n 6) 2-3; 'Green Paper on Consumer Collective Redress' (n 6) 3-5.

⁸ Early, often limited, examples of this type of EU regulatory activity can be found in the area of EU consumer law. See for instance: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Articles 11 'Enforcement', 12 'Courts and administrative authorities: substantiation of claims', and 13 'Penalties'); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19 (Article 11 'Judicial or administrative redress'); Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30. See more broadly in the area of EU commercial law: Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1 (Article 10 'Recovery procedures and unchallenged claims'); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 (Articles 18 'Court Actions' and 20 'Sanctions'). In the area of labour law, see: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (Articles 17 'Defence of Rights', 18 'Compensation or Reparation', and 19 'Burden of Proof'). Finally, in the area of public procurement law, see: Directive

substantive IP rights are enforceable across the Member States.⁹ The directive preamble emphasises that disparities among Member States' mechanisms of enforcing IP rights 'are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that IP rights enjoy an equivalent level of protection throughout the EU.'¹⁰ 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 IP legislation.¹¹ The preamble goes on to suggest that enforcement disparities harm the effectiveness and efficiency of EU substantive law on IP, also leading to a fragmented Internal Market. Significant issues of civil justice, such as interim relief and evidentiary rules, are regulated in a different manner for the various subject matters falling within the remit of EU regulatory competence.¹² Subsequently, specific action at EU level is needed for Member States' IP rights' enforcement regimes to be approximated.¹³

My aim in this section is twofold. Firstly, I will argue that IPRED provisions transcend their strict sectoral remit, essentially affecting fundamental aspects of Member States' national civil procedure rules. Secondly, I will suggest that in doing so, IPRED has over-emphasised the law enforcement function of civil justice systems, and in doing so, has downgraded the importance of procedural fairness and efficiency in judicial proceedings. More importantly, the sectoral approach has a restrictive effect on

[Footnotes continued on next page]

2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31 (Article 2a 'Standstill period').

⁹ IPRED (n 3) recitals 9-10.

¹⁰ Ibid, recital 8.

¹¹ 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 requires further research on the issue: European Parliament, 'Draft Report on enhancing the enforcement of intellectual property rights in the internal market' 2009/2178(INI), 4-5

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.164+01+DOC+PDF+V0//EN&language=EN> accessed 25 March 2013.

¹² G Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' in X E Kramer and C H van Rhee (ed), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 102-106.

¹³ IPRED (n 3) recital 9.

the potential for IPRED to promote effectively the enforcement of EU law too. As a result, the following subsections should not be seen as an attempt for a comprehensive critique of all individual provisions and procedural rules established in the Directive.

Accordingly, I will barely address IPRED provisions that can more easily be justified under the sector-specific scheme of IP rights protection, as they are less normatively significant from a civil procedure law perspective. These involve rules on corrective measures,¹⁴ permanent injunctions, and alternative measures.¹⁵ The award of damages constitutes a broader procedural theme,¹⁶ which in the area of IP rights protection calls for particular modulations, especially with regard to their quantification. Finally, the calculation and proof of losses in sales for the award of damages call for specific provisions on the disclosure of information¹⁷ on, *inter alia*, the quantities of infringing goods or services produced, manufactured, delivered, received or ordered, and the price obtained for these goods or services.¹⁸

¹⁴ These have been modelled on *inter alia*, Article 87(2) of the Belgian Law on Copyright and Neighbouring Rights.

¹⁵ Alternative measures have been based on the German copyright provision: §100 UrhG ‘Entschädigung’.

¹⁶ See above, ‘4.2.2 Interpreting the principle of effectiveness’ 103.

¹⁷ Article 8 IPRED was actually based on pre-existing IPR provisions in some Member States, such as in Germany: § 19 MarkenG ‘Auskunftsanspruch’.

¹⁸ Commission, ‘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’ (Staff Working Document) SEC (2010) 1589, 11. That being said, the rule is partly inspired by the English equitable Norwich Pharmacal (disclosure) Orders, an institution not explicitly regulated in CPR and which remains rather blur and difficult to use. This remedial relief is not limited to IP rights adjudication and has a very broad spectrum of application regardless of the legal nature of the wrongdoing. Although specific provisions for the protection of intellectual property rights may be justified (such as the expansion of this right to intermediaries) the broader right to information may conflict with the right to privacy and confidentiality, in which case general guarantees against the abuse of this right may have been rational at a horizontal, EU level of action. See, *inter alia*: *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1974] A.C. 133; J Bellamy, ‘Professional Liability Claims: Norwich Pharmacal Proceedings and Human Rights’ (Presentation to the Professional Negligence Lawyers’ Association, 25.06.09) http://www.39essex.com/docs/articles/Norwich_Pharmacal_Presentation_Paper_PNLA.pdf accessed 22 October 2012.

5.2.1 An instrument for harmonising core aspects of civil procedure?

According to recital 11, IPRED does not harmonise civil procedure rules. It is only aimed at complementing, and to some extent expanding,¹⁹ the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter TRIPS Agreement) to which the Member States and the EU are already signatories, bound by its provisions on the means of enforcing IP rights.²⁰ In other words, IPRED provisions are primarily inspired by the TRIPS Agreement having the objective to bring greater homogeneity in Member States' IP rights enforcement regimes, as these have already been affected by this international agreement. However, IPRED has also introduced certain provisions embodying core civil procedure rules, albeit applicable to the enforcement of IP rights only. This is mainly envisaged in Articles 6-7 IPRED on pre-trial evidentiary rules, Article 9 IPRED on provisional and precautionary measures, and Article 14 IPRED on costs allocation rules.

To begin with, Articles 6 and 7 of the IPRED impose various obligations on Member States to adopt measures for the collection and preservation of evidence in cases of infringement of intellectual property rights. These measures should provide for the possibility for judicial authorities to order the presentation of evidence in the opposing party's control, which are essential for the substantiation of an infringement claim. In cases of violations on a commercial scale, courts can also ask for the communication of banking, financial, or commercial documents in the opposing party's control. Along the same lines, there are provisions for the preservation of evidence even prior to the commencement of legal proceedings, in the form of provisional evidentiary measures. These include the acquisition of detailed descriptions of the infringing goods,

¹⁹ The additional, non-TRIPS originating, IPRED provisions are standing opportunities for trade associations and professional defence bodies, power to seize documentary evidence and infringing goods, a right to information re the source of infringing goods, pre-trial injunctions including against intermediaries, seizure of assets in bank accounts for the payment of damages, recall of infringing goods, alternative methods for the calculation of damages, legal costs rule, and the obligation for publicity.

²⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights' COM (2003) 46 final, 8. See also, Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1.

as well as the physical seizure of these infringing goods, and of ‘materials and implements used in the production and/or distribution of these goods’ and associated documents. Regardless of relevant points of criticism,²¹ IPRED provisions on the taking and preservation of evidence touch upon the core of civil procedure law; these Articles are material for the gathering and maintenance of evidence to prove the infringement of an IP right, which would otherwise be difficult.

Article 9 IPRED follows a similar rationale, touching on core procedural matters, namely the forms and requirements for the award of interim remedial relief. Courts must be able to issue interlocutory injunctions for the prevention or discontinuation of an impending infringement of an intellectual property right, or for the provision of guarantees for the reimbursement of the right-holder in cases of continued infringement. Other forms of interim relief can be ordered, such as the seizure or delivery up of the goods suspected of infringing an intellectual property right, the precautionary seizure of the movable and immovable property of the alleged infringer, and the communication of bank, financial or commercial documents, or appropriate access to the relevant information. For the award of these forms of interim relief, the applicant-right-holder must provide all reasonably available evidence to the judicial authorities, proving with a sufficient degree of certainty that his or her rights are being infringed or that such an infringement is imminent.

Finally, the procedural character of the IPRED becomes even more apparent in Article 14 and its provisions on the reimbursement of legal costs. These involve among others, lawyer's fees, as well as expenses incurred by the successful party, such as investigation costs and costs for expert opinions. According to the same Article, the losing party should reimburse legal costs in full, provided they are reasonable and proportionate and equity or the economic situation of the other party allow this.

A possible explanation for such a sector-specific approach could be the sensitivity of the issues from a legal culture perspective. By limiting pre-trial

²¹ Mainly due to the lack of clarity on the meaning of the phrase ‘in the control of the opposing party’, what constitutes confidential information, and infringement of commercial scale. See also below, ‘5.2.2 Limitations of the IPRED’ 145.

evidentiary rules, provisional measures, and costs allocation rules to one area of substantive law, Member States can more easily accept potential deviations from their general civil procedure rules on the same matters.²² However, even where Member States have separate proceedings for the enforcement of IP rights, there are direct connections between these sectoral rules and the general civil procedural rules. This becomes more evident when looking at the origins of the sector-specific procedural provisions in the IPRED. Particularly, Articles 6 and 7 IPRED have been modelled on various existing national civil procedure rules of general application, following the ‘best-practices approach’.²³ Articles 6 and 7 IPRED largely originate in England and Wales, and the so-called *Anton Piller*²⁴ and *Doorstep* orders.²⁵ Similar provisions can be found in many other jurisdictions, such as in the Netherlands and Articles 843a and 700-770c CCP on the disclosure and preservation of evidence. What is more, the second paragraph of Article 9 IPRED on the possibility of precautionary seizure of movable and immovable property and other assets is inspired by English civil procedure rules, specifically, part 25.1(1)(f) CPR on interim remedies and ‘freezing injunctions’, also known as *Mareva* injunctions.²⁶ Finally, Article 14 IPRED embodies a common procedural rule existing in most Member States irrespective of the adjudication or not of an IP right.²⁷

EU legislature should not dispose of all these fundamental themes in a few Articles of a sector-specific directive, using as an excuse that IPRED is not about civil

²² See, M Tulibacka, ‘Europeanization of Civil Procedures: in Search of a Coherent Approach’ (2009) 46 CML Rev. 1527, 1547.

²³ Commission, ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 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, 5: the actual IPRED provisions have been based on the most effective practices in national regimes.

²⁴ Part 25.1(1)(h) Civil Procedure Rules; *Anton Piller KG v Manufacturing Processes Ltd.* [1976] 1 Ch. 55, [1976] R.P.C. 719.

²⁵ *Universal City Studios Inc. v Mukhtar & Sons* [1976] F.S.R. 252.

²⁶ *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd’s Rep. 509. See also, ‘Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights’ (n 20) 22.

²⁷ See for instance: Title 5 and Section 91 of the German Code of Civil Procedure (ZPO); Chapter 21 of the Greek Civil Procedure Code (ΚπολΔ); Part 44 of the English Civil Procedure Rules (CPR).

procedure harmonisation, but rather the enforcement of IP rights law. Such a tactic would presumably lead to a situation where evidentiary rules, provisional measures, and reimbursement of legal costs rules would have to be developed anew in the various areas of EU substantive legislation, unnecessarily complicating civil justice systems. This becomes evident in the context of damages actions for antitrust cases. I will explore the discussions in this area below.²⁸ For the time being, I should mention that one of the issues a potential future sectoral instrument on antitrust damages would have to tackle is that of evidentiary and disclosure rules, of the type provided in IPRED.²⁹

It should be underscored that such a sectoral approach allows the gradual creation of EU civil procedure law on a trial and error basis; only after procedural rules have been tested in particular areas of law will they be generalised to cover additional substantive matters.³⁰ Member States' general procedural rules have been used and tested over the years, with judicial authorities interpreting them, also striking a more or less satisfactory balance between the parties' conflicting interests.³¹ As a result, producing general EU procedural rules on these core matters may be a mission impossible due to the various parameters and interests to be considered. Presumably, sectoral rules raise fewer challenges.

In my opinion, however, such an approach may lead to unnecessary multiplication of effort, and potential inconsistencies between the procedural rules in the various sectoral instruments. This in turn may lead to further fragmentation of EU civil procedure rules, complicating civil justice systems, hardly promoting access to justice in the EU in case of violation of EU law rights or obligations. Furthermore, such an *ad hoc*

²⁸ See below, '5.4 What is next? Towards a coherent approach to collective redress' 165.

²⁹ See *inter alia*: 'White Paper on Damages actions for breach of the EC antitrust rules' (n 6) 2-3; 'Green Paper on Consumer Collective Redress' (n 6) 4-5; P Buccirossi et al., *Collective Redress in Antitrust: Study* (European Union 2012) 89 <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=74351> accessed 22 October 2012. That this sectoral practice on core procedural themes will eventually call for an additional harmonising comprehensive instrument, see: B Hess, 'Procedural Harmonisation in a European Context' in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 165.

³⁰ See, Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' (n 12) 118.

³¹ W James and J Smith, 'The IP enforcement directives further legislation really necessary to level the playing field? A UK perspective' (2004) 20(5) C.L.S.R. 356, 361-362.

approach to core procedural rules may compromise their overall quality. Assuming that the limitation of the substantive scope of application of a rule will render the drafting process and the balancing of the interests involved less challenging is unjustified. Sectoral disclosure rules are not less fundamental for the promotion of the interests of the claimant to establish the violation of his/her IP rights; the interests of the defendant to not unnecessarily disclose business secrets; and, the interests of the good administration of justice not to be unreasonably costly, for instance due to the need to screen all documents for legal privilege.

This may be demonstrated in the example of the IPRED provision on costs allocation. Specifically, the losing party should bear, in principle, the legal costs and other expenses, provided these are reasonable and proportionate and are not against equity.³² This provision is fundamental from an access to justice point of view, influencing the possibility to access the courts asking for a judicial remedy.³³ Especially in the remit of IP rights protection, legal costs are often very high, comprising costs for technical experts,³⁴ translation costs, and costs associated with ‘test purchases’.³⁵ Overall increased legal expenses are associated with the need to acquire proper and reliable evidence to initiate infringement proceedings,³⁶ and as such are of fundamental importance for access to courts in IP cases. The new rule rendered unpredictable the estimation of the final costs of initiating a court procedure³⁷ and deterred risk-averse parties from initiating court proceedings for the enforcement of their IP rights due to higher legal costs in the event of defeat. As a result, although this IPRED proviso aimed at compensating winning litigants, it nonetheless led to a severe drop in the number of

³² Article 14 IPRED.

³³ See above, ‘2.3.2.1 The requirement for access to the courts’ 58.

³⁴ For instance, patent agents or Internet investigators.

³⁵ These are aimed at confirming an infringement of IP rights or at gathering evidence for the establishment of an infringement.

³⁶ ‘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’ (n 18) 24.

³⁷ Van der Grinten (n 4).

IP cases in the Netherlands and Poland where, under the previously existing system, parties' legal costs were compensated at a fixed rate.³⁸

Accordingly, it is no coincidence that some of the first attempts to produce EU and international civil procedure rules on disclosure and preservation of evidence, interim relief, and costs allocation have followed a general, non-substantive law specific approach. The first comprehensive attempt to create EU discovery rules goes back to the 1994 Storme Report on a draft European Code of Civil Procedure. Article 4 of the Storme draft Directive imposed limited disclosure obligations on defendants or third parties, to provide claimants with a list of the documents in their possession, custody, or power, which are relevant to the disputed issue, and which have not previously been communicated to these claimants. This obligation must be provided for in national legislation or be ordered by the competent court, after the parties to the dispute have been heard. What is more, Article 4.2.1 recognises the possibility for the defendant to lodge a claim of privilege against disclosure or communication of certain documents in accordance with the provisions of the national legislation. Similarly, the competent court may relieve the defendant of the obligation to disclose certain documents, if it considers that such an action would unduly harm the defendant.³⁹

Moreover, Article 10 of the Storme draft Directive specified: the potential types of provisional measures awards;⁴⁰ the requirements for granting provisional remedies; the primarily *inter partes* character of the procedure; court jurisdiction regarding the application for provisional remedies; the availability of appellate review; the variation or withdrawal of the remedy; the absence of *res judicata* and the possibility for

³⁸ See *inter alia*, Tulibacka, 'Europeanization of Civil Procedures: in Search of a Coherent Approach' (n 22) 1548.

³⁹ M Storme, *Approximation of Judiciary Law in the European Union* (Kluwer Academic Publishers 1994) 97.

⁴⁰ It should be mentioned that in 2009, the Commission tendered a study on minimum standards for provisional measures: Commission, 'Study on minimum standards of procedural law' (Contract Notice 2009/S 107-153954) <http://ted.europa.eu/udl?uri=TED:NOTICE:153954-2009:TEXT:EN:HTML> accessed 05 December 2012. The Commission has also submitted its proposal for a European procedure for the preservation of bank accounts: Commission, 'Proposal for a Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters' COM (2011) 445 final.

annulment of the judgment; and, the enforcement of provisional measures.⁴¹ Finally, Part 9.1 of the Directive confirmed the losing party pays principle, leaving national procedural laws to determine the amount of recoverable legal costs. Part 9.2 is slightly more specific compared to Article 14 IPRED in that it recognises the possibility for non-reimbursement taking into account the losing party's good faith or the uncertainty of the applicable law, without offering further explanations as to the meaning of these provisions.⁴²

The ALI/UNIDROIT principles on transnational civil procedure rules in commercial matters have also identified the importance of discovery rules for the smooth functioning and effectiveness of procedural systems. They provide, in Article 16, a measure of limited discovery under the supervision of national courts. The court should, upon claimants' request, order defendants, or third parties to disclose relevant, non-privileged, and reasonably identified evidence in their control or possession.⁴³ Additionally, Article 8 of the ALI/UNIDROIT principles⁴⁴ contains provisions on the concept and types of provisional relief, the requirements for the award of provisional measures, the rules of procedure, including the possibility for *ex parte* order in urgent situations and where fairness so demands, as well as the duty for compensation in case of unduly granted provisional relief.⁴⁵ The overall scope of the ALI/UNIDROIT principles is undoubtedly more restricted, compared to that of the Storme proposal, focusing primarily on cross-border commercial disputes.⁴⁶ Nevertheless, the regulatory ambit of its rules on provisional and protective measures is again broader compared to the IPRED and its confinement to a single field of EU action.⁴⁷

⁴¹ Storme, *Approximation of Judiciary Law in the European Union* (n 39) 203-207.

⁴² *Ibid*, 143.

⁴³ ALI/UNIDROIT, 'Principles of Transnational Civil Procedure Law' (2004) 4 *Unif. L. Rev.* 758, 788-790.

⁴⁴ *Ibid*, 772-774.

⁴⁵ *Ibid*.

⁴⁶ This is opposed to the draft Storme directive rules, designed to be applicable to both domestic and cross-border civil disputes.

⁴⁷ For a more detailed analysis of all regional and universal efforts for approximation of provisional and protective measures see *inter alia*, X E Kramer, 'Harmonisation of Provisional and Protective Measures in Europe' in M Storme (ed), *Procedural Laws in Europe. Towards Harmonisation* (Maklu: Antwerpen/Apeldoorn 2003) 305-319.

Finally, Article 25 of the ALI/UNIDROIT principles contains a general provision on legal costs, introducing the loser pays principle for the reimbursement of all reasonably incurred legal expenses. In the second paragraph, it offers some exceptions to the general rule. For instance, the reimbursement of the winning party's costs may be denied altogether, or substantially limited, to cover only the costs associated with the genuine issues of the dispute. Similarly, winning parties may also be ordered to pay the losing party's legal costs in cases of procedural misconduct, which is apparent when they have been unreasonably disputatious or have raised unnecessary issues.⁴⁸

5.2.2 Limitations of the IPRED

The trend towards sectoral harmonisation of core civil procedure rules presumably stems from the necessity to circumvent opposition by Member States due to intervention into their national procedural regimes. However, the sectoral character of IPRED and its insistence on a law enforcement rationale, rather than harmonisation, have not been capable of veiling the unavoidable interconnections between IP-specific procedural rules on disclosure of evidence, provisional measures, and costs allocation, and the general, national rules on the same procedural themes. As a result, the effects of core IPRED provisions may be felt wider in the national civil justice system. This explains the non-sector specific character of past European and international attempts for the creation of civil procedure rules on the same matters.

The sectoral approach, evinced in the IPRED, is problematic for another reason; by denying its harmonisation impact on national civil procedure rules, it essentially over-emphasises the EU law enforcement objective in drafting the relevant sector-specific rules. This tactic cannot promote greater access to justice in the EU based on due consideration of the interests of the claimant in enforcing his claims and those of the defendant in constraining such enforcement, and of the good administration of justice in efficient proceedings. One important clarification is essential before proceeding with the analysis further. Recital 32 confirms that IPRED seeks to comply

⁴⁸ ALI/UNIDROIT (n 43) 802.

with fundamental rights and principles as enshrined in the CFREU. Article 47 CFREU has codified the right of access to justice, so IPRED should at least respect its provisions, refraining from introducing rules that could actively violate them. Additionally, Article 51 CFREU confers the duty to promote the application of the Charter rights on EU institutions. I have argued that this provision calls for positive actions by EU institutions to contribute practically to the realisation of the access to justice guarantees, complementing individual adjudication to this point.⁴⁹ It is this proactive view for the promotion of the right of access to justice I will investigate further in this section.

Against this backdrop, Article 2(1) IPRED, allowing Member States to introduce or maintain measures that are ‘more favourable for right holders’, is problematic. In the area of substantive law, such minimum standards may be more easily accepted. However, in the procedural arena, the core procedural matters regulated in the IPRED, touch on the fundamental right of access to justice. Giving the possibility to Member States to individually and unjustifiably tilt the balance in favour of the right holders with regard to the chance to gather evidence, seek the disclosure of information, or the freezing of the opposing parties’ assets, hardly promotes the application of the right of access to justice in the field of EU law. This is not an absolute right, and many limitations can be accepted to the extent they do not erode the core of that right. However, an unqualified mandate to Member States to provide a procedural regime that is explicitly more favourable for the right holder cannot be easily justified.

Having said that, Article 2(1) IPRED should be read in conjunction with Article 3 IPRED, providing among others that:

Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays [...] shall also be effective,

⁴⁹ See above, ‘2.2 The constitutionalisation of the right of access to justice and repercussions for EU civil procedure law’ 41.

proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

This provision imposes a general obligation on Member States to adopt implementing measures in the area of IP rights litigation that actively secure the fairness of the proceedings, and which strike the right balance between the interests of the claimant and the defendant. They should also promote the accessibility of the judicial recourse, guaranteeing reasonable legal costs, complexity, and duration of proceedings. Finally, they should ensure the practical effectiveness of the actual remedial means.⁵⁰

In other words, IPRED delegates the promotion of the right of access to justice to the discretion of Member States. This stems from the sectoral approach of IPRED, and the ensuing law enforcement rationale, which does not permit EU legislature to consider both functions of civil procedure law, and which arguably are effectively enunciated in the right of access to justice, hence promoting procedural fairness and efficiency on top of access to courts for the vindication of individual rights. In promoting the right of access to justice in the EU, the drafters of the IPRED procedural rules should have opted for a particular balance of conflicting interests, limiting, where necessary, the equality of arms between the parties or the right to an effective remedy in a legitimate and proportionate manner.⁵¹ Allowing Member States to individually and arbitrarily reverse this balance makes no sense; the initial balance is either capable of promoting the EU ideas on the right of access to justice or not. If these rules need to change to better reflect this EU idea of the right balance between stakeholders in the area of IP rights protection, this should be done at an EU level.⁵²

This can be illustrated with the case of Article 7 IPRED. Specifically, the seizure of evidence on provision of securities is very broad, prone to irreversibly damaging the defendants' interests, constraining innovations based on existing IP rights under the

⁵⁰ G Cumming, M Freudenthal, and R Janal, *Enforcement of Intellectual Property Rights in Dutch, English and German Civil Procedure* (Kluwer Law International 2008) 65.

⁵¹ See, Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' (n 12) 110.

⁵² *Ibid.*

threat of prosecution of ‘harmless’ cases as opposed to more serious IP rights infringements. The problem is that big companies can afford the securities asked by the judicial authorities for the seizure of evidence, abusing this possibility in order to drive smaller competitive companies out of business by the time the lack of any infringement can be proved.⁵³ In addition, in Article 6 IPRED, the main device to guarantee equality of arms and the fairness of the proceedings, namely the defence of confidential information, is disposed of without further ado.⁵⁴

The reason for the limited effectiveness of the IPRED provisions is their conceptualisation and promotion through the Internal Market legitimation tool. Arguably, this was done to veil the general procedural character of the rules, so that these could be extended to domestic disputes, as opposed to solely cross-border ones under Article 81 TFEU.⁵⁵ Although, in my view, the attempt to intervene in national procedural regimes in both domestic and cross-border disputes is commendable, the legal basis chosen, and the ensuing sectoral approach of minimum standard setting, has limited the Directive’s reach. This is due to the impossibility of properly considering procedural matters, drafting rules capable of actively promoting effective access to justice considerations in the EU.⁵⁶

The inherent limitations of the sectoral approach in promoting access to justice even for the purpose of the enforcement of EU law becomes clearer by looking at the current discussions on the review of the IPRED. Specifically, on 26 of April 2012, the European Commission and the Presidency jointly organised a conference on the review

⁵³ S M Kierkegaard, ‘Taking a sledgehammer to crack the nut: The EU Enforcement Directive’ (2005) 21 C.L.S.R. 488, 493.

⁵⁴ ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights’ (n 23) 9: according to Article 18 IPRED, Member States shall provide the Commission with a report on the implementation of the Directive by the end of April 2009. This report found that many provisions of the Directive needed further refinement, such as the procedures to gather and preserve evidence, including the right balance between the right to evidence and protection of parties’ privacy.

⁵⁵ See, E Storskrubb, *Civil Procedure and EU Law, A Policy Area Uncovered* (OUP 2008) 303-304; T Andersson, ‘Harmonisation and Mutual Recognition: How to handle Mutual Distrust?’ in M Ardenas, B Hess, and B Oberhammer (eds), *Enforcement Agency Practice in Europe* (BIICL 2005) 246.

⁵⁶ See also, Van der Grinten (n 4) 14.

of the IPRED provisions. Among the various issues discussed, many participants underscored the necessity for the revised IPRED to cater for SMEs' access to courts through the establishment of an accessible system for funding litigation.⁵⁷ This matter goes to the heart of Member States' procedural regimes but also to the heart of the requirement for effective enforcement of IP rights; unless SMEs and individual right holders can access courts to seek the termination of an on-going infringement or to prevent an imminent one, substantive EU legislation on this broad area will remain ineffectual. Legal costs and litigation funding opportunities are of paramount importance from the perspective of access to the litigation process.⁵⁸ However, the concerns expressed in the conference included the unsuitability of a sectoral legislative piece, such as IPRED, to regulate fundamental procedural matters such as the costs and funding of litigation, and strike a fair balance between the interests of the claimant, the defendant, and the good administration of justice.⁵⁹

That the issue of litigation funding is not particular to IP rights adjudication cases will be discussed below,⁶⁰ when I will examine the on-going discussions in the area of collective redress. An extensive debate has taken place with regard to the funding mechanisms for group actions and specifically with regard to the availability of contingency fees, or professional litigation funding companies. This is only natural, especially in the current environment of deep economic crisis in the EU, constantly squeezing budgets for legal assistance purposes, pushing towards alternative and less burdensome for the national budgets, solutions, deemed even more important in all categories of claims with high litigation costs.

I contend that only a general Treaty legal basis could offer adequate constitutional and functional legitimacy for the creation of EU civil procedure rules effectively promoting EU law enforcement and dispute resolution objectives, duly

⁵⁷ Commission, 'Report on Commission/Presidency Conference of 26 April 2012 on the Enforcement of Intellectual Property Rights: the Review of Directive 2004/48/EC' AF/na - ARES (2012) 712109 http://ec.europa.eu/internal_market/iprenforcement/docs/conference20120426/summary_en.pdf accessed 11 October 2012.

⁵⁸ See above, '2.3.2.6 The obligation to provide legal aid' 69.

⁵⁹ *Ibid.*

⁶⁰ See below, '5.4.2.3 Financing the EU collective redress mechanism' 176.

considering the right of access to justice. Therefore, I have identified this potential in Article 81(2)(e) TFEU, offering a general legal basis for civil justice cooperation through the approximation of Member States' laws and regulations for the promotion of effective access to justice. Nonetheless, as will become apparent below, this proposition presupposes a joint reading of the said Treaty provision and Article 47 CFREU on the right to an effective remedy and a fair trial, presumably leading to an expansive interpretation of the 'cross-border implications' requirement in the first paragraph of Article 81 TFEU.⁶¹

5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure

In the previous section, I argued that unless the fundamental procedural guarantees stemming from the right of access to justice are duly considered, there could be no realistic prospect for effective private enforcement of law. A sectoral approach essentially inhibits this possibility by not offering adequate legitimacy to EU institutions to consider the fundamental parameters of the right of access to justice. Producing rules applicable solely to a specific category of claims, without any justification for this limitation, leads to the replication of provisions in national procedural regimes, adding to the complexity of litigation. More importantly, minimum sectoral intervention is problematic for the additional reason that it fails to provide a definitive balance of conflicting interests, with serious risks of over-enforcement of EU substantive legislation, undermining procedural fairness and the efficiency of the justice system, also guaranteed under the right of access to justice.

I contend that a systematic, horizontal consideration of the right of access to justice in the area of private enforcement of EU law is needed. Therefore, in this

⁶¹ On the current limitations of Article 81 TFEU horizontal approach for the adoption of EU civil procedure rules through the example of ESCP see below, '5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure' 150. On the implications of the joint reading of Articles 81 TFEU and 47 CFREU for the interpretation of the 'cross-border implications' provision see below, '6.3.2.2 'Cross-border implications'' 202.

section, I will consider a recent indicative example of horizontal EU civil procedure rules, namely the EU Small Claims Procedure (ESCP). The preparatory works for the introduction of the ESCP go back to the 1999 Tampere Conclusions. Accordingly, the need to improve access to justice was emphasised to be achievable through, for example, the drafting of ‘special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims’.⁶² The need to simplify and speed up the settlement of cross-border litigation in small claims was reiterated in the 2000 Mutual Recognition Programme,⁶³ whilst the 2004 Hague Programme urged the active pursuance of the work on small claims.⁶⁴

The necessity for an EU small claims procedure stems from the lack of proportionality between the cost, complexity, and duration of proceedings in cases of low value claims, leading to insurmountable obstacles to legal proceedings. Especially in the cross-border environment, costs can be even higher, due to the translation of documents, travel expenses, the necessity to employ two lawyers – one from the claimant’s jurisdiction and one from the foreign one where the adjudication of the dispute takes place – and greater length of proceedings.⁶⁵ Accordingly, the EU small claims procedure was introduced with the aim of facilitating effective access to justice in the EU through the simplification and speeding up of civil litigation.⁶⁶ The majority of the EU Member States had some form of small claims proceedings, either via

⁶² European Parliament, ‘Tampere European Council 15 and 16 October 1999 Presidency Conclusions’ (Tampere Milestones), Part B(V), paras 1.9.30 http://www.europarl.europa.eu/summits/tam_en.htm accessed 22 March 2013.

⁶³ Council, ‘Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters’ [2001] OJ C12/1, 4.

⁶⁴ Council, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ [2005] OJ C53/1, 13.

⁶⁵ 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, 49. See also, Commission, ‘Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Extended Impact Assessment’ (staff working document) SEC (2005) 351, 15. The legal costs for a cross-border claim with a value of € 2.000 could vary from €980 to €6.600. In terms of duration of civil proceedings, these could last between 4 and 24 months depending on the Member State where litigation takes place.

⁶⁶ ‘Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Extended Impact Assessment’ (n 65) 8; Commission, ‘Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Comments on the Specific Articles of the Proposal’ SEC (2005) 352, 2.

specific procedural rules, or via the possibility for simplification of the ordinary proceedings in case of small claims.⁶⁷ However, these rules were substantially different from one Member State to the other, with deviations in areas such as the monetary threshold for a claim to be regarded a small claim to the actual type and the scope of claims for which these rules are available in national legal orders. In the EU legal order, these deviations can be rather problematic; the existence of more efficient judicial systems in one Member State compared to another constitutes a distortion of competition in the Internal Market, as economic operators cannot compete on equal footing.⁶⁸

ESCP applies to civil and commercial matters excluding revenue, customs, administrative matters, and State liability for acts and omissions in the exercise of State authority.⁶⁹ In terms of substantive matters, ESCP largely repeats the provisions of Article 1 of the Brussels I Regulation, excluding from its regulatory scope: legal capacity issues; property rights in matrimonial relationships; maintenance obligations; wills and succession; bankruptcy; social security; and arbitration.⁷⁰ It also excludes matters relating to employment law; immovable property tenancies; privacy violations and personality rights.⁷¹ Further, ESCP applies only to monetary or non-monetary claims not exceeding €2.000 at the initiation of the procedure,⁷² and is only available as an optional procedure for cross-border dispute resolution cases,⁷³ existing in parallel with Member States' domestic small claims procedures.⁷⁴

⁶⁷ See: The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report (2007)* 197 http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf accessed 25 March 2013. According to the findings of this study, only five out of the 27 Member States do not have some form of small claims procedure: Cyprus, Finland, Hungary, Latvia, and Slovakia.

⁶⁸ Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' (Explanatory Memorandum) COM (2005) 87 final, 6. See also above, '3.2.1 A level playing field in the Internal Market' 75.

⁶⁹ Article 2 ESCP.

⁷⁰ Article 2(2)(a)-(e) ESCP.

⁷¹ Article 2(2)(f)-(h) ESCP.

⁷² Article 2(1) ESCP. On the actual calculation of the value of the claim, see Recital 10 ESCP.

⁷³ Article 3 ESCP.

⁷⁴ Recital 8 ESCP.

This part will analyse whether the EU small claims regulation embodies effective access to justice overtones. I will firstly provide some background information on the adoption and drafting of the Regulation, only to demonstrate that it has been modelled on the traditional international procedural law rationale. Moving on, I will focus on the key provisions of the Regulation in the context of the fundamental right of access to justice, in order to assess the potential of the Regulation to contribute towards greater coherence in EU civil procedure law. I will argue that ESCP constitutes a valuable first step in the right direction, which is nonetheless compromised by the unjustifiably narrowly perceived and construed legal basis of Article 81 TFEU. I will investigate this theme in more detail in Chapter 6.

5.3.1 Key features of the Small Claims Procedure in the Context of the Right of Access to Justice

ESCP contains various provisions pertinent to PIL, enshrined in its territorial, substantive, and personal scope of application, as well as in provisions for the co-ordination and communication of foreign legal orders.⁷⁵ However, as will become clear in this sub-section, ESCP does not constitute a traditional instrument of private international procedural law. The majority of its provisions introduce genuine EU civil procedure rules on fundamental aspects of the judicial process, from the institution of proceedings through the enforcement of the court judgment. In other words, ESCP has introduced rules for the entire enforcement phenomenon, facilitating effective dispute resolution and with it, enforcement of EU law rights and obligations, using as a yardstick the right to an effective remedy and a fair trial.

⁷⁵ According to Carruthers, North, and Fawcett, Private International Law is that part of a national legal order that comes into operation whenever the court is faced with a claim that contains a foreign element. PIL prescribes the conditions for a court to entertain such a claim (jurisdiction), determines the particular municipal system of law for the review of parties' substantive rights (applicable law), and specifies the circumstances for the recognition and enforcement of a foreign judgment in the domestic legal order. See, J J Fawcett, J M Carruthers, and P North, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 3-4. On the gradual shift from harmonising private international law to harmonising civil procedure law in the EU see, *inter alia*: X E Kramer, 'Harmonisation of Civil Procedure and the Interaction with Private International Law' in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 121.

ESCP has introduced the technique of standard forms for the institution of proceedings: the claimant should lodge a standard claim form with the competent court;⁷⁶ the defendant should respond to the claim, using the standard answer form;⁷⁷ finally, the claimant should respond to potential counterclaims lodged by the defendant via the standard claim form.⁷⁸ This technique facilitates access to courts via simplified procedural rules.⁷⁹ Additionally, ESCP comes with specific language requirements for the standard forms⁸⁰ and enclosed documents,⁸¹ guaranteeing fair, timely, and adversarial proceedings, and offering the parties a realistic opportunity to be informed about and comment on all relevant documents, lodging counter-claims where appropriate.⁸²

Additionally, ESCP has introduced a streamlined judicial process,⁸³ contributing to the requirement for timely justice, beneficial for all parties to the dispute, and the general good administration of justice.⁸⁴ Depending on the complexity of the case, the conclusion of the EU small claims procedure can take place within as little time as 30 days from receipt of the response from the defendant. This timeframe can substantially increase in cases of the submission of counterclaims, if an oral hearing is deemed necessary,⁸⁵ or if evidence taking or submission of further details by the parties becomes essential.⁸⁶

ESCP has also introduced a pre-eminent written procedure for the adjudication of presumably simple, low value claims.⁸⁷ This could contribute to the reduction of the

⁷⁶ Article 4 ESCP; Annex I ESCP.

⁷⁷ Article 5(3) ESCP.

⁷⁸ Article 5(6)(b) ESCP.

⁷⁹ In the context of ECHR: *Golder v. United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 35; *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979); *Chevrol v. France* App no 49636/99 (ECtHR, 13 February 2003).

⁸⁰ Article 6(1) ESCP.

⁸¹ Article 6(2), (3) ESCP.

⁸² In the ECHR context: *Ruiz-Mateos v. Spain* App no 12952/87 (ECtHR, 23 June 1993), para 63. See also above, '2.3.2.2 The obligation for a fair hearing' 61.

⁸³ Article 5(2)(b), (3), (4), (6)(b) ESCP. See however, Article 14 ESCP.

⁸⁴ See text, case law, and references above, '2.3.2.4 The 'reasonable time' requirement' 64.

⁸⁵ This translates in another 30 days to summon the parties and extra 30 days to deliver a judgment.

⁸⁶ Article 7 ESCP: this cannot prolong proceedings for more than an additional 30-days' time.

⁸⁷ Article 5(1) ESCP.

costs associated with oral hearings and invite of experts and witnesses, also reducing the length of proceedings.⁸⁸ Nevertheless, Article 5 ESCP provides certain exceptions to the written procedure principle. This could happen if the judging court considers that an oral hearing would be more appropriate for the resolution of the dispute, or if the litigants themselves lodge such a request, provided the court shares their views on the necessity for an oral hearing.⁸⁹ As the right to an oral hearing is not absolute,⁹⁰ ESCP rightfully limits this possibility, but maintains ample room for an oral hearing in complicated cases, allowing parties to be present at the proceedings, and explain the circumstances of the case in more detail.⁹¹ More importantly, if the court does not share the litigants' views on the necessity for an oral hearing, it must offer a reasoned refusal, which also contributes to the fairness of the proceedings.⁹²

In an attempt to limit legal expenses, by simplifying the procedure, the ESCP does not require representation by a legal professional.⁹³ In order to encourage claimants not to employ legal representatives, ESCP does not oblige them to provide the competent court with any legal assessment of their claim. On the contrary, it is for the court to construe the legal classification and ramifications of each claim, which also assists parties with procedural matters.⁹⁴ However, the possibility to employ a lawyer is always open in complicated cases, with the costs shifting rule in Article 16 ESCP guaranteeing that in case of success the losing party will reimburse the winning party's lawyer fees.⁹⁵

⁸⁸ According to Article 9(1) ESCP, judging courts may take into account written witness-, expert-, or party-statements.

⁸⁹ The claimant is specifically asked in point 8.3. of the Claim form A whether he/she would rather an oral hearing, whereas point 3. in the Answer form C offers the same possibility for the defendant too. See also, Article 8 ESCP on the use of Modern Communication Technology for the conduct of oral hearings.

⁹⁰ For more information on the public hearing as a constituent element of the right of access to justice, see text, case law, and references above, '2.3.2.3 The requirement for a public hearing' 63.

⁹¹ Even in oral hearings, ESCP remains preoccupied with access to justice requirements for timely and at reasonable cost proceedings. According to Article 9 ESCP and Recital 20 ESCP, in case of oral hearings the court may accept evidence via means of modern information and communication technology, hence using the 'simplest and least burdensome method of taking evidence'.

⁹² See also, Hess, *Europäisches Zivilprozessrecht* (C.F. Müller 2010) 577-578.

⁹³ Article 10 ESCP.

⁹⁴ Article 12(1), (2) ESCP.

⁹⁵ Unless the legal costs are disproportionate to the claim or unnecessarily incurred.

Furthermore, ESCP court judgments should be enforceable in the domestic legal order, regardless of any possibility for appeal, and without the provision of security for that purpose.⁹⁶ ESCP thus creates legal certainty, guaranteeing the finality of civil proceedings, giving an end to the dispute (*res judicata*).⁹⁷ Nevertheless, ESCP has introduced certain possibilities for judicial review where there has been no proof of receipt for the service of essential documents, the service of documents did not take place in sufficient time for the defendant to prepare his case without any fault on his/her part, or the defendant failed to lodge a defence due to *force majeure*. Provided the defendant acted promptly, the competent court might declare the initial judgment null and void and reconsider the case anew.⁹⁸ This provision depicts strong considerations of procedural fairness and equality of arms, guaranteeing that the defendant will not be severely disadvantaged by the final judgment rendered through the small claims procedure.⁹⁹

Linked with the demand for legal certainty is the need to execute final judgments, which is essential to guarantee the practical value of the right to a court.¹⁰⁰ ESCP promotes the acceleration of dispute resolution and the reduction of the legal costs via the abolition of the recognition and enforcement procedures. Similarly, the exhaustive determination of the acceptable grounds for refusal of enforcement in a foreign jurisdiction contributes to swift and at reasonable cost proceedings.¹⁰¹ If a litigant challenges the judgment or if it is still possible to challenge it, enforcement

⁹⁶ Article 15 ESCP.

⁹⁷ In the ECHR context: *Bujnita v Moldova* App no 36492/02 (ECtHR, 16 January 2007), para 23: quashing a final judgment without new evidence is against Article 6(1) ECHR.

⁹⁸ Article 18 ESCP; Recital 31 ESCP.

⁹⁹ On the principle of equality of arms see text, case law, and references above, '2.3.2.2 The obligation for a fair hearing' 61.

¹⁰⁰ On the requirement for timely execution of judgments as an aspect of the right of access to courts see text, case law, and references above, '2.3.2.1 The requirement for access to the courts' 58.

¹⁰¹ According to Article 22(1) ESCP, this can occur only in cases of conflict with an earlier judgment issued by the courts of an EU Member State or third country, provided it involved the same parties and the same cause of action, and that the litigants could not have raised this conflict before the courts of the Member State that issued the contested decision.

proceedings may take the form of protective measures, may continue provided the litigant offers adequate security, or even proceed without further ado.¹⁰²

5.3.2 Restrictions of the ESCP

The EU legislature has tried to consider ESCP in a holistic fashion, including all procedural elements of material importance for the private enforcement of claims and the resolution of disputes. It has provided rules for the simplified commencement of proceedings through standard forms, ICT opportunities, practical assistance to litigants, and the streamlining of proceedings. In doing so, it has filtered individual provisions through the right to a fair trial, catering for both the claimants' and the defendants' rights to procedural efficiency and fairness. Therefore, it has provided litigants with a realistic opportunity for an oral hearing, adopting defendant-centred rules on the service of documents, and providing them with the possibility for judicial review of the judgment.¹⁰³

Despite positive steps for the promotion of effective access to justice in the EU, ESCP raises serious concerns too. These are mainly associated with the legal basis and mode of EU intervention in national procedural regimes for the creation of the ESCP. Specifically, the limitation of the application of the ESCP to cross-border disputes, as an alternative to national small claims procedures compromise the overall positive ramifications of the ESCP for the fundamental right of access to justice, sapping the future success and coherence of the EU procedure as a whole.

5.3.2.1 Cross-border-disputes limitation

ESCP applies solely to cross-border disputes. Presumably, this limitation follows from the general policy area on civil justice cooperation and Article 81 TFEU referring to civil matters with 'cross-border implications'.¹⁰⁴ It is also in line with the private international law orientation that initial measures in the policy area used to have. However, if a strict PIL perspective had been adopted, the only rational EU provision

¹⁰² Article 23 ESCP.

¹⁰³ See X E Kramer, 'The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation' (2008) 2 ZeuP 370.

¹⁰⁴ On the actual meaning and interpretation of the 'cross-border' reference in Article 81 TFEU see below, '6.3.2.2 'Cross-border implications'' 202.

would have been the one following from mutual recognition of judicial decisions, through the abolition of the exequatur. This is essentially what the Legal Service of the Council of the European Union has also opined with regard to the legal basis of Article 65 EC for the introduction of an autonomous procedure in Member States.¹⁰⁵

Accordingly, it is striking that ESCP proves particularly ineffective with regard to cross-border disputes, since the provisions aimed at costs limitation and expeditious proceedings do not seem far-reaching enough in the cross-border environment. For instance, using standard forms to initiate proceedings could be tremendously effective in domestic disputes over EU law rights, where there would be no language barriers. In the cross-border environment however, despite the considerable simplification of proceedings due to the introduction of the standard forms, the necessity to fill them in a foreign language could increase expenses rendering official document translation necessary.¹⁰⁶ Nonetheless, language requirements seem less problematic in the context of Article 21(2)(b) ESCP and the enforcement of foreign judgments, as many Member States accept judgments in English, or English and one or more other languages.¹⁰⁷

The cross-border limitation is problematic from another perspective too: apparently purely domestic disputes (where both litigants are habitually resident in the same Member State of the court seized) might still have ‘cross-border implications’ if the winning party seeks enforcement of the decision in a foreign jurisdiction.¹⁰⁸ What is

¹⁰⁵ Council, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure – Legal basis’ (Opinion of the Legal Service) 10748/05, 5-6.

¹⁰⁶ According to the recent ECC-Net Report on the application of the ESCP in the Member States for the enforcement of cross-border consumer claims, 24% of the respondents indicated that ESCP is ‘subject to various charges (ranging from €15-200), such as stamp-duty, expert fees, or translation costs, as claims together with supporting documents, in some cases, should be translated into a different language’: ECC-Net, ‘European Small Claims Procedure Report’ (2012) 21
http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf accessed 13 December 2012.

¹⁰⁷ See, European Judicial Atlas in Civil Matters,
http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_courtsappeal_en.jsp?countrySession=15&#statePage0 accessed 15 February 2013: Czech Republic (Slovak and English); Estonia (English); Finland (Swedish and English); France (English, German, Italian, and Spanish); Ireland (English); Luxembourg (German and French); Malta (English); Slovenia (Italian and Hungarian).

¹⁰⁸ ‘Green Paper on a European Order for Payment Procedure and on Measures to simplify and speed up Small Claims Litigation’ (n 65) 6; European Economic and Social Committee, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure’ (Opinion) [2006] OJ C 88/61, 63: the EU small claims procedure should apply to domestic disputes in

more, parties habitually residing in a Member State other than the Member State whose court is seized of the dispute will have access to the simplified and swift EU small claims procedure. On the contrary, litigants residing in the same Member State of the court seized of the matter might not have any opportunity for a simplified procedure even if the dispute relates to the same EU legal matter.¹⁰⁹ By limiting the application of the ESCP to cross-border disputes, the application of the right to an effective remedy is equally limited to the adjudication of EU rights between litigants habitually residing in different Member States. This contradicts the explicit wording and rationale of Article 47(1) CFREU, considerably curtailing EU citizens' right to effective remedy under equal conditions regardless of the Member State they reside in.¹¹⁰ It constitutes an unjustifiable source of fragmentation of civil procedure law, leading to multiplicity of procedures and grave uncertainties.¹¹¹

Evidently, the predecessor provision of Article 81 TFEU, namely Article 65 EC, had different content at the time of drafting and introduction of the ESCP. The same holds true for the Charter and Article 47 CFREU, which acquired binding force and the status of primary EU law only after the enactment of the Lisbon Treaty in 2009. I will examine these developments in more detail in the next chapter,¹¹² investigating the implications of the post-Lisbon legal basis of Article 81 TFEU for the systematic

[Footnotes continued on next page]

order to justify the necessity for such an optional mechanism. This refers to the number of cases that it will address that will be of a low amount unless domestic disputes are also included in the procedure's regulatory scope. See also, 'Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Extended Impact Assessment' (n 65) 12-13. Storskrubb also mentions the example of a claimant wishing to commence EU small claims proceedings against two defendants, one of whom domiciles locally while the other resides in another Member State. She argues that the EU small claims procedure is applicable only with regard to the defendant residing abroad, leaving only domestic (if any) small claims procedures as a possible avenue with respect to the defendant domiciled in the same Member State as the claimant. However, in my opinion, this case falls within the scope of Article 3(1) ESCP on the meaning of 'cross-border cases', providing that at least one party to the dispute should domicile or habitually reside in a Member State other than that of the court seized of the matter. See, Storskrubb (n 55) 273.

¹⁰⁹ See: C M G Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22(4) ELR 291, 309; M Storme, 'Improving Access to Justice in the Europe' (2010) *Teka Kom. Praw.* – OL PAN 207, 214.

¹¹⁰ Tampere Milestones (n 62) point 5.

¹¹¹ See, J Hill, *Cross-Border Consumer Contracts* (OUP 2008) 169.

¹¹² See below, '6 The Horizontal Approach to EU Civil Procedure Law Reconceptualised: Achieving Greater Coherence' 184.

promotion of access to justice considerations, leading to greater coherence in EU civil procedure law. It will be interesting to see whether legislators will take into account these developments in the upcoming revision of the Small Claims Regulation.¹¹³

5.3.2.2 Minimum procedural standards

Consistent with the methodology of PIL instruments and the mutual recognition programme, ESCP sets certain minimum procedural standards that all Member States should respect, such as rules for the service of documents, for judicial review, reimbursement of legal costs, etc. This implies that the final format of the EU small claims procedure will be considerably different from one Member State to the other,¹¹⁴ leading to divergent levels of access to justice for the safeguarding of the same EU rights from one Member State to the other. This situation not only fails to promote effective access to justice in the EU, but also obscures civil proceedings in the Member States even more, rendering it difficult to undertake an overall estimation of the most beneficial procedure for the resolution of a dispute.

To begin with, considerations of fairness of the trial and protection of the litigants' interests can justify certain expansions of procedural time limits for the various steps of the judicial process. Timely justice should also cater for the correctness and accuracy of the decision. However, the reference in the ESCP to 'exceptional circumstances' that might obstruct courts from conforming to the procedural time limits

¹¹³ Article 28 ESCP. See also, Select Committee on European Union, 'Minutes of Evidence: Examination of Witness Georg Haibach (Questions 1-19)' (2005) <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/118/5101902.htm> accessed 21 March 2013. Georg Haibach (DG Justice, Freedom, and Security, Commission) expressly stated that accepting a limitation of the Regulation to cross-border cases only should not prejudice future legal interpretation of the legal basis of Article 65 EC (now 81 TFEU) by the Commission. G Haibach, 'The Commission Proposal for a Regulation Establishing a European Small Claims Procedure: An Analysis' (2005) 4 E.R.P.L. 596-597. However, judging from the questions in the on-going Consultation on the application of the ESCP, the review of its territorial scope is not of primary concern. See, Commission, 'Public consultation on the European Small Claims Procedure' http://ec.europa.eu/justice/newsroom/civil/opinion/files/20130318/small_claims_en.pdf accessed 31 March 2013.

¹¹⁴ 'Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Extended Impact Assessment' (n 65) 17: 'the participants' experience of (the European Small Claims Procedure) and the costs borne by the parties will vary from Member State to Member State because the issues not directly addressed by the Regulation will be subject to national laws which vary widely'.

established seems too broad and might lead to abuse of this exception. This is probably the reason why the initial Commission proposal provided for a maximum length of small claims proceedings, of no more than six months from receipt of the claim.¹¹⁵ The recently launched Public Consultation on the application of the ESCP addresses this issue in Question 6, seeking views on the lack of sanctions for non-observance of the various time limits by national courts.¹¹⁶

In addition, the grounds for judicial review involve solely restrictive circumstances (such as inappropriate service of documents or proceedings and *force majeure* or exceptional circumstances) that have prevented the defendant from properly responding to the claim. I have argued that this provision embodies fundamental considerations of fair trial through the respect of the rights of the defence to be heard.¹¹⁷ However, ESCP provides no further specifications with regard to the interpretation and application of Article 18 ESCP.¹¹⁸ As a result, the provisions of this Article will vary considerably across the Member States, depending on national understandings, sapping the possibilities for qualified enforcement emanating from the right to an effective remedy and to a court and filtered through the guarantees of procedural fairness and good administration of justice.

Interlinked with the possibility for judicial review in the ESCP is the availability of appeal avenues. Although the right of access to justice does not require the existence of appeal proceedings as such, where appeal rights are provided, the guarantees of procedural fairness and good administration of justice should also be applicable.¹¹⁹ Unfortunately, Article 17 ESCP makes no provision regarding appeal possibilities other

¹¹⁵ ‘Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Comments on the Specific Articles of the Proposal’ (n 66) 6.

¹¹⁶ ‘Public consultation on the European Small Claims Procedure’ (n 113) 6.

¹¹⁷ See to that effect, Recital 31 ESCP.

¹¹⁸ X E Kramer, ‘Small claim, simple recovery? The European small claims procedure and its implementation in the member states’ (2011) 12(1) ERA Forum 119, 127
<http://www.springerlink.com/content/88w50426x5135h38/fulltext.pdf> accessed 27 March 2013.

¹¹⁹ By analogy from ECHR: *Delcourt v. Belgium*, App No. 2689/65 (ECtHR, 17 January 1970), para 25: Article 6 ECHR does not include a right to appeal. However, when a legal order provides such a right, this should comply with the procedural guarantees of a fair trial.

than it is for national procedural rules to regulate that.¹²⁰ Member States should inform the Commission of the existence or lack of such a possibility. It follows that, under the current scheme, ESCP will have considerable deviations from one Member State to the other, affecting both the overall duration of the proceedings as well as the overall costs.¹²¹ In other words, diverging appeal rules are problematic in terms of effective and equitable redress of small claims.¹²²

This is exacerbated by another parameter; it is unclear whether the main procedural rules regulating the first instance judicial process should also apply to appeal proceedings.¹²³ Kramer mentions the example of an *exequatur* and the question whether judgments pursuant to appeal proceedings will also constitute European titles enforceable without an *exequatur*. However, as ESCP entails no provisions on appeal proceedings, national appeal procedures would essentially result in a European title.¹²⁴ Another example comes from the appeal rules in Austria. Specifically, a party to the first instance ESCP dispute can lodge an appeal in writing within four weeks. A lawyer must sign this appeal, also representing the party lodging the appeal at the subsequent appeal proceedings. This provision is in conflict with the optional lawyer representation

¹²⁰ See, ‘Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Comments on the Specific Articles of the Proposal’ (n 66) 7.

¹²¹ See: Kramer, ‘The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation’ (n 103) 369; M Loos, ‘Individual Private Enforcement of Consumer Rights in Civil Courts in Europe’ in R Brownsword, H W Micklitz, L Niglia, and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 507. Specifically, according to information on EU Judicial Atlas in Civil matters, in France there is a possibility for an extraordinary appeal before the Court of Cassation. In Spain, appeal can take place within 25 days after the first instance judgment. In Germany, appeals can be lodged within 1 month after the notification of the first instance judgment. In Italy, there is a possibility for an appeal against the first instance judgment within 30 days, and an appeal in cassation within 60 days. In Sweden, appeals should be lodged with 3 weeks and appeals in cassation within 4 weeks. In Bulgaria, appeals can be lodged within 2 weeks and appeals in cassation within 4 weeks. In both Romania and Hungary, appeals should be lodged within 15 days, whereas in Slovenia, the time limit for appeal is 8 days and another 8 days for appeals in cassation.

¹²² Kramer, ‘Small claim, simple recovery? The European small claims procedure and its implementation in the member states’ (n 118) 126-127.

¹²³ This is with the exception of the loser pays rule, which explicitly applies to appeal proceedings too.

¹²⁴ Kramer, ‘Small claim, simple recovery? The European small claims procedure and its implementation in the member states’ (n 118) 126-127.

scheme of the ESCP, aimed at the limitation of adjudication costs, and through that, the promotion of access to justice in disputes with low value claims.¹²⁵

Finally, Article 16 ESCP provides that, in principle, the loser pays the costs of the proceedings. The court or tribunal can limit the winning party's costs reimbursement where these have been disproportionate to the disputed claim or unnecessarily incurred. This minimum rule is rather problematic when seen in the context of the overall objective of the ESCP to provide simple, expedited and at reasonable costs proceedings. Cost allocation systems are of tremendous importance from an access to justice perspective, as they influence litigation expenses and litigants' incentive to pursue meritorious claims. However, Article 16 ESCP is not specific enough and can lead to great divergences from one Member State to the other. Even recital 29 ESCP, which offers some further indications as to the occasions where cost shifting may be limited, such as in case of unnecessary or disproportionate use of a lawyer, or requirement for document translation, is not determinate enough. Considerable differences in such a fundamental parameter of access to justice could affect the overall effectiveness and success of the ESCP, and its capacity to facilitate the enforcement of EU law.¹²⁶ This is presumably the reason why under an earlier version of the ESPC, the losing party who had not employed legal assistance himself was exempted from the obligation to reimburse the successful party's lawyer expenses.¹²⁷

5.3.2.3 An optional instrument as a transitional system?

The EU small claims procedure exists in parallel with Member States' domestic small claims mechanisms and procedural rules, leaving the latter untouched. This is the least intrusive measure, since it vests Member States with the obligation to make this mechanism available for cross-border disputes only. This leads to a multiplication of

¹²⁵ See, European Judicial Atlas in Civil Matters (n 107).

¹²⁶ Loos (n 121) 506. On the distinction between uniformity and effectiveness as the *raison d'être* for EU intervention in national procedural and remedial regimes see, *inter alia*: M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 220-225. Dougan recognises that a minimum harmonisation approach for the promotion of the effective application of substantive EU law in domestic legal orders may require a high level of EU intervention in the domestic systems of judicial protection.

¹²⁷ 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' (Explanatory Memorandum) (n 68) 16.

national procedural rules for small claims dispute resolution; one can discern national small claims rules applicable to domestic and/or cross-border disputes, as well as EU originated rules applicable to cross-border disputes only.

Literature often refers to optional instruments as a ‘29th regime’ on top of Member States’ procedural regimes.¹²⁸ However, speaking of a ‘2nd regime’, alternative to national procedural systems, would be more accurate.¹²⁹ This suggests that Member States need to provide that alternative, EU-originated regime, in their national legal orders in the form of an additional, second set of procedural rules that litigants can choose for the resolution of their disputes.¹³⁰ This is particularly important in the realm of procedural law, where, unlike substantive law, parties can hardly influence the *lex fori*. Citizens can then choose, either *ex ante* or *ex post*, whether they will pursue dispute resolution in a specific Member State pursuant to the domestic small claims procedures, or to the EU-originated small claims mechanism.¹³¹

Presumably, litigants will be in a position to compare the available alternatives in national legal orders and subsequently make the most beneficial choice. Litigants should be able to form a rough opinion on the most effective procedure, based on the key elements of small claims procedures, such as legal representation, expected duration, written procedure, and enforcement procedure. As a result, the introduction of the optional instrument could be seen as a transitional civil procedure system, enabling

¹²⁸ See for example in the context of EU contract law: Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ COM (2010) 348 final, 9-10.

¹²⁹ In the context of EU contract law: M Behar-Touchais, ‘Interplay between an optional instrument and national laws’ (PE 425.645, 2010) 16-17
<http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Behar-Touchais%20EN.pdf> accessed 27 March 2013.

¹³⁰ Many Member States have attempted to make the EU small claims procedure available in their national legal orders via detailed implementation laws fully incorporated in their domestic procedural systems: England and Wales (Part 78 CPR and 78 PD); France (Articles 1382–1392 CPC); Germany (§§1097–1109 ZPO). Other Member States have adopted a separate implementation act: the Netherlands (Articles 1-11, Uitvoeringswet verordening Europese procedure voor geringe vorderingen); Ireland (S.I. No. 533 of 2008). On the issue of implementation of the EU small claims procedure see, Kramer, ‘Small claim, simple recovery? The European small claims procedure and its implementation in the member states’ (n 118) 119–133.

¹³¹ On the added value of multiple choice in private law via optional instruments see, J M Smits, ‘Optional Law: A Plea for Multiple Choice in Private Law’ (2010) 17(4) MJ 350-352.

a tailored, customised litigation of civil disputes that can accommodate diverse interests,¹³² thus allowing for a gradual integration of national procedures.¹³³ However, the findings of the recent ECC Net report on the application of the European Small Claims Procedure do not support this view.¹³⁴ Specifically, the report shows that the ESCP is not widely known, among either the prospective litigants, or the national judges that will have to apply it.¹³⁵ As a result, the standard forms are not available on either the courts' premises or their websites in many Member States (Article 4(5) ESCP),¹³⁶ whereas prospective litigants often cannot get the practical legal assistance, which Article 11 ESCP purportedly guarantees.¹³⁷ These findings suggest that ESCP does not yet constitute a realistic alternative prospective litigants could opt for.¹³⁸ Having said that, it will be interesting to see whether the on-going Consultation on the ESCP will come up with similar findings, and if so, how it will try to address them.¹³⁹

5.4 What is next? Towards a coherent approach to collective redress

The EU introduced the ESCP with the objective of facilitating equivalent access to justice via the simplification of procedural rules, the limitation of the length of civil proceedings and subsequently, the reduction of the legal costs involved. Current discussions on the introduction of an EU mechanism of collective redress are also aimed

¹³² 'Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure: Extended Impact Assessment' (n 65) 18: other factors that will weigh in the choice of the existing or new small claims procedure are the treatment of evidence, the process of enforcement, and potential uncertainties.

¹³³ M Storme, 'A Single Civil Procedure for Europe: A Cathedral Builders' Dream' (2005) 22 RLR 87, 93.

¹³⁴ 'European Small Claims Procedure Report' (n 106).

¹³⁵ Ibid: 47% of the courts and the judges had no knowledge about the application of the ESCP (Chart No. 1).

¹³⁶ In 41% of the investigated courts, the standard forms were not available at all (Chart No. 2).

¹³⁷ In 41% of the participating Member States there was no assistance available (Chart No. 3).

¹³⁸ The report is based on questionnaires filled in by national European Consumer Centres after contacting national courts either onsite or via telephone and pursuant to meetings with competent judges. The questionnaires were drafted by a working group, composed by ECC Italy, Lithuania, Estonia, and Poland, and validated by DG SANCO and DG JUSTICE. No further quantitative and qualitative criteria and methodological information are provided, which compromises the actual value of the report.

¹³⁹ 'Public consultation on the European Small Claims Procedure' (n 113).

at facilitating effective access to justice in the EU.¹⁴⁰ Collective redress rests upon the realisation that in certain cases, violations of EU law rights and obligations can have negative repercussions for many individuals in the same, or various, Member States. Business practices breaching EU law provisions can inflict a loss that is collectively large, but individually small because it is dispersed. Judicial enforcement of these rights on an individual basis is neither a realistic nor an effective means of redress due to disproportionately high litigation costs compared to the actual harm caused.¹⁴¹ Such a scenario would also be detrimental to the overall efficiency of the judicial system, where damages claims stemming from the same unlawful business practices overload national courts.

The term ‘collective redress’ is a broad one, encompassing litigation aiming at the termination of unlawful practices, as well as at compensation for the harm caused by such practices.¹⁴² For the purposes of the current analysis I will only focus on the latter, namely the compensatory collective redress. I will submit that recent developments in this area indicate a shift towards greater horizontality in civil procedure harmonisation in the EU, inspired by an effort to promote effective access to justice considerations in addressing the key challenges for a future EU instrument of collective redress, namely the opt-in or opt-out character of proceedings and the subsequent binding effect of court decisions, the rules of legal standing, the funding of collective proceedings, and the reimbursement of legal costs.

5.4.1 On horizontality

The initial EU approach to collective redress was sector-specific, with the Commission preparing separate legislative proposals in the area of competition law, and also investigating the prospects for distinct provisions for consumer claims.

¹⁴⁰ Commission, ‘Public Consultation: Towards a Coherent European Approach to Collective Redress’ (Staff Working Document) SEC (2011) 173.

¹⁴¹ Ibid, 3. See, H W Micklitz and A Stadler, ‘The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure’ (2006) E.B.L.R. 1476-1477.

¹⁴² ‘Public Consultation: Towards a Coherent European Approach to Collective Redress’ (Staff Working Document) (n 141); ‘An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report’ (n 67) 260.

Specifically, it issued a Green¹⁴³ and a White¹⁴⁴ Paper on damages actions in anti-trust cases investigating among others, the necessity for representative and opt-in collective actions in parallel with individual actions.¹⁴⁵ It also adopted a Green Paper on consumer collective redress.¹⁴⁶ The principal consideration behind these developments has been the necessity to ensure that citizens and businesses can reap the benefits of the Internal Market and the Area of Justice¹⁴⁷ enforcing their rights guaranteed under EU law all over the EU as easily as in their domestic legal systems.

However, 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 the private enforcement of EU rights in both competition and consumer protection cases. Anti-competitive practices may inflict small losses on many individuals, as could unfair commercial practices by affecting many consumers. Individual private enforcement in both these areas of EU law may not be a realistic option due to, *inter alia*, the costs involved. More importantly, there is an 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 into account all of these commonalities.¹⁴⁸ This will also facilitate the establishment of EU civil procedure rules that will operate harmoniously with the remaining domestic provisions of States' civil procedures.¹⁴⁹

Therefore, the latest Commission Public Consultation on collective actions for damages and the report of the European Parliament on the same issue openly call for

¹⁴³ Commission, 'Green Paper on Damages actions for breach of the EC antitrust rules' COM (2005) 672 final.

¹⁴⁴ 'White Paper on Damages actions for breach of the EC antitrust rules' (n 6).

¹⁴⁵ 'White Paper on Damages actions for breach of the EC antitrust rules' (Staff Working Document) (n 6) 21.

¹⁴⁶ 'Green Paper on Consumer Collective Redress' (n 6).

¹⁴⁷ Commission 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (Communication) COM (2010) 2020, 19-21; Council, 'The Stockholm Programme — An open and secure Europe serving and protecting citizens' [2010] OJ C 115/01.

¹⁴⁸ Van der Grinten (n 4) 14.

¹⁴⁹ This is verified in the recently launched public horizontal consultation entitled 'Public Consultation: Towards a Coherent European Approach to Collective Redress' (Staff Working Document) (n 141) 4-5.

coherence and horizontality.¹⁵⁰ The 2012 Commission programming is also quite indicative of the way forward in the area of collective redress. It had envisaged the release of a horizontal instrument on collective redress as a means of recourse to the courts for the private enforcement of law by the end of 2012. This horizontal instrument would focus on all key parameters of this remedy *lato sensu*, presumably offering some initial answers to access to justice questions, such as rules on the identification of claimants, standing, costs recovery, and funding opportunities.¹⁵¹

What is more, according to an earlier version of the Commission programme for 2012,¹⁵² a sector-specific instrument in antitrust actions for damages was also envisaged by the end of December 2012. This was primarily aimed at offering effective damages actions in competition law cases mainly via provisions such as those on the gathering of evidence and disclosure of information, limitation periods in cases of follow-on actions, and the determination of damages.¹⁵³ Further, the sector-specific legislative instrument would clarify and benchmark the relationship between public and private enforcement, especially with regard to leniency programmes.¹⁵⁴ It appears that mainly competition law-related specificities would be dealt with in this sector-specific instrument,¹⁵⁵ which would apparently have a rather limited scope. For instance, according to this earlier

¹⁵⁰ See, European Parliament, ‘Resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ 2011/2089(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0012+0+DOC+PDF+V0//EN> accessed 18 February 2013. The Resolution ‘[s]tresses that any horizontal instrument must cover all aspects of obtaining damages collectively’. See also, Andersson (n 55) 250.

¹⁵¹ Commission ‘Commission actions expected to be adopted 27/09/2012 – 31/12/2012’ 3 http://ec.europa.eu/atwork/pdf/forward_programming_2012.pdf 31 October 2012.

¹⁵² I refer to a version I came up across on 31 October 2012, a copy of which I have on my personal files archive.

¹⁵³ A Italianer, ‘Public and private enforcement of competition law’ (Speech delivered on the 5th International Competition Conference, Brussels, 2012) 6-7 http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf accessed 31 October 2012.

¹⁵⁴ ‘Commission actions expected to be adopted 27/09/2012 - 31/12/2012’ (n 151) 1. See also, European Competition Network, ‘Protection of leniency material in the context of civil damages actions’ (Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012) http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf 31 October 2012.

¹⁵⁵ One should bear in mind that the discussions on damages actions for antitrust cases have recognised the similarity of stakes between the evidentiary and disclosure rules in the IPRED and those entailed in a prospective legislative proposal for antitrust cases only. See, *inter alia*: ‘White Paper on Damages actions for breach of the EC antitrust rules’ (n 6) 4-5; Buccirossi et al (n 29) 89; B Hess, ‘Procedural Harmonisation in a European Context’ (n 29) 165.

version of the 2012 programme, the Commission would deal with the quantification of damages in a separate non-legislative document.¹⁵⁶

Such a development in the area of collective redress is important for a coherent and systematic approach to core civil procedure matters. Accordingly, fundamental procedural issues regarding collective redress will be considered in a general fashion, offering an answer to access to justice considerations and balances involved, taking into account national legal traditions and domestic provisions. As a result, only the truly antitrust-specific procedural matters for effective damages will be tackled in a sectoral fashion. Unfortunately, the Commission failed to deliver any of the above-presented initiatives by the end of 2012. Additionally, under the current version of the 2013 Programme there is no reference to collective redress schemes or actions for damages in antitrust cases. Having said that, according to the DG Competition Management Plan for 2013, the Commission will continue working ‘towards the adoption of a legislative proposal on antitrust damages actions, aimed at optimising the balance between public and private enforcement of antitrust rules’.¹⁵⁷ In addition, according to the DG Justice Management Plan for 2013, one of the main policy outputs for 2013 will be the release of the general principles of the EU framework for collective redress, albeit in a non-legally binding format, namely through a Communication and Recommendation.¹⁵⁸

5.4.2 Striking a balance?

Apart from the gradual promotion and consolidation of a general approach to collective redress, current discussions on this mechanism for the enforcement of EU law are important for another reason; they are driven by fundamental considerations of access to justice in the EU. Therefore, they focus on the necessity to actively promote the application of the right of access to justice through concrete provisions tackling the

¹⁵⁶ ‘Commission actions expected to be adopted 27/09/2012 - 31/12/2012’ (n 151) 25: ‘Commission Communication on quantification of harm in antitrust damages actions’.

¹⁵⁷ Commission, ‘Management Plan 2013 DG Competition’ 4
http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp_en.pdf accessed 18 February 2013.

¹⁵⁸ Commission, ‘Management Plan 2013 DG Justice’ 23
http://ec.europa.eu/atwork/synthesis/amp/doc/just_mp_en.pdf accessed 18 February 2013.

fundamental institutional deficiencies of national procedural systems.¹⁵⁹ Some Member States do not possess any form of collective compensatory relief.¹⁶⁰ More importantly, collective redress mechanisms, where existent, are considerably divergent from one Member State to the other. Differences can be seen in areas of law in which such a possibility exists,¹⁶¹ the actual types of collective redress and the subsequent rules on legal standing for the initiation of such proceedings,¹⁶² the actual legal effect of a judgment on the members of the group in collective proceedings,¹⁶³ and the funding systems for collective proceedings.¹⁶⁴ Therefore, I will argue that concrete procedural provisions will have to be devised in those broad areas to strike the right balance between the interests involved in such a process. These provisions will support the

¹⁵⁹ See above, '2.2 The constitutionalisation of the right of access to justice and repercussions for EU civil procedure law' 41.

¹⁶⁰ These include Belgium, Cyprus, Czech Republic, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Poland, Slovakia, and Slovenia. See, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 271.

¹⁶¹ For instance, in Sweden there is no limitation as to the material scope of collective redress mechanisms. On the contrary, in Italy collective procedures are limited to tort liability, unlawful commercial practices or anti-competitive behaviour, and contract terms. In Portugal, collective redress is available for disputes arising out of public health, environment, consumer protection, cultural heritage, and public property issues. See: D Fairgrieve and G Howells, 'Collective Redress Procedures – European Debates' (2009) 58 ICLQ 401; 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 278-281.

¹⁶² For example, in the UK, individual litigants can initiate collective procedures provided they are not in a state of conflict of interest with the remaining members of the group. Also in Sweden and Spain, both individuals and associations can commence collective proceedings, whereas in the Netherlands, Austria, and Bulgaria only private, accredited organisations can bring collective claims. In Finland and Denmark, only public authorities can initiate collective procedures. See: 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 281-285; 'Public Consultation: Towards a Coherent European Approach to Collective Redress' (Staff Working Document) (n 141) 4.

¹⁶³ For instance in Austria, Spain, and Sweden only persons that have opted in the collective proceedings are bound by the court decision. In contrast, in Portugal and the Netherlands all people harmed by the same business practices are bound by the decisions, unless they have expressly asked for their exclusion from the class. Similarly, in group-actions, court decisions are binding on all members of the group (Sweden, the UK, and Portugal). In representative actions, court decisions bind those members of the class that validly assigned their claims to the representative body (the Netherlands, Austria, and France). Finally, in test cases, court judgments solely bind the parties directly involved in the proceedings, whereas the decision does not constitute a legal precedent binding courts adjudicating on future similar claims (Germany).

¹⁶⁴ In opt-in models for representative action, the representative organisation usually bears the costs for notifying and bundling the members of the class. In Germany, Austria, Spain, and Sweden the 'losing party pays' rule is maintained for collective actions. In Portugal and Netherlands, every party to the dispute bears its legal costs individually, whereas the court determines the apportionment of procedural costs between the parties.

enforcement of EU law rights and obligations through the promotion of the claimants' interests, the interests of the defence, and the good administration of justice.

5.4.2.1 Identifying the claimants: to opt in or to opt out, or both?

Collective actions enable multiple claimants to join their individual claims and institute a single legal action against the same defendant. Unless claimants have a realistic opportunity to participate in such actions, collective redress will not constitute an effective means of enforcement of rights and obligations. Comparative research¹⁶⁵ shows that this is essentially a choice between two basic options - an opt-in or an opt-out system. In opt-in systems, there is a clearly defined group of claimants, who have affirmatively confirmed their participation to a collective action. On the contrary, the group of claimants is open in opt-out systems, with potential claimants automatically becoming parties to a collective action. Still, they have the possibility to be excluded from proceedings, if they expressly declare their wish to do so within the designated time.

The rationale behind opt-in systems is that litigants should be aware of proceedings binding on them.¹⁶⁶ This being true, identifying all claimants who have suffered harm and informing them about the prospective collective proceedings is a complicated and often difficult task due to limited knowledge and access to information, as well as increased notification costs. Opt-in systems are not particularly inclusive, since quite often many potential claimants are not informed about the group action, or are not informed within the provided cut-off period of the requirement to affirm their participation in the dispute.¹⁶⁷

This raises serious concerns from an access to justice point of view; opt-in systems might curtail prospective claimants' opportunity to participate to a collective

¹⁶⁵ See *inter alia*: 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 287-293.

¹⁶⁶ J A Jolowicz, 'Group Litigation, Damages, and Judicial Control by Civil Courts' in M Andenas (ed), *Judicial Review in International Perspective* (Kluwer 2000) 483.

¹⁶⁷ European Economic and Social Committee, 'Defining the collective actions system and its role in the context of Community consumer law' (Own-initiative opinion) [2008] OJ C 162/113; R Mulheron, 'Some Difficulties With Group Litigation Orders - And Why A Class Action Is Superior' (2005) 24 C.J.Q. 54; 'Green Paper on Consumer Collective Redress' (n 6) 13.

action, enforcing their rights and receiving effective redress for the harm incurred.¹⁶⁸ This is more serious where private claims are of a very low value, rendering the prospect of pursuing them individually unrealistic. Individuals' incentive to institute legal proceedings usually results from a cost-benefit analysis. Where the correlation between the various costs involved in legal proceedings and the expected payoff is positive, there is room for a rational initiative to pursue claims judicially.¹⁶⁹ In view of the low participation rate opt-in systems can usually achieve, claimants' right of access to justice could only marginally be promoted.

On the other hand, opt-out systems are more inclusive, essentially increasing the possibility of access to courts to vindicate one's rights.¹⁷⁰ It is nonetheless often suggested that opt-out systems abrogate the fundamental freedom to choose to involve oneself, or not, in litigation and under what circumstances. The right of access to justice does not constitute a procedural obligation and people who enjoy this right should be

¹⁶⁸ Civil Justice Council, 'Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC (2011) 173 Final)' 10 http://ec.europa.eu/competition/consultations/2011_collective_redress/cjc_en.pdf accessed 01 March 2013. The point raised by the Civil Justice Council is that the option between opt-in and opt-out systems is not a straightforward one and the Commission should promote a more flexible approach. For example, collective actions in cases of torts involving many harmed people such as in rail or air accidents, in industrial accidents or holiday and clinical negligence claims, it is often easy to find the whole list of adversely affected people (for instance through travel booking forms) and ask them to opt-in to a collective action. The larger the number of harmed people, and the more difficult it is to find out who they really are, the choice for an opt-in procedure should give way to opt-out systems that would render redress more efficient and effective for all affected parties. Bear also in mind the recently confirmed plans to introduce a limited opt-out collective actions regime, with safeguards, for competition law in the UK. The regime would apply to both follow-on and standalone cases, with cases to be heard only in the Competition Appeal Tribunal. See, Department for Business, Innovation, & Skills, 'Private actions in competition law: A consultation on options for reform - government response' (January 2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf accessed 10 March 2013.

¹⁶⁹ See *inter alia*: CEPS, EUR, and LUISS, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (Final Report for the European Commission contract DG COMP/2006/A3/012) 175

http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf accessed 20 March 2013; W M Landes and R A Posner, 'Private Enforcement of Law' (1975) 4 J. Legal Stud. 1.

¹⁷⁰ Professor Hodges mentions the case of US opt-out systems where members of the class in reality have to opt-in to a settlement to claim their entitlement to the compensation fund. See, C Hodges, 'Response To Consultation: Towards a Coherent European Approach to Collective Redress' (2011) 20 http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf accessed 01 March 2013.

able to choose on every occasion whether they wish to exercise that right.¹⁷¹ Likewise, they should be able to choose the form of litigation that best suits their interest, either individually or collectively. Opt-out systems are seen as curtailing both these aspects of the right to access to justice. However, this is not accurate; opt-out systems come with the guarantee that proper and effective notice is given to all members of the represented class, enabling them to opt-out of the collective action if they do not wish to participate to the proceedings.¹⁷² More importantly, opt-out systems can to a certain extent cater for the right of the defendant to fair proceedings by offering increased possibility for what is often called ‘global peace’. Due to the higher participation rates in opt-out actions, the defendant can rest assured that he will avoid future litigation. In contrast, in opt-in regimes, where participation rates are low, another collective action representing the remaining aggrieved members of the class, may crop up in the future.¹⁷³

An interesting solution could be to combine both systems and come up with a future EU mechanism of collective redress providing for opt-in and opt-out actions.¹⁷⁴ This could provide the mechanism with adequate efficiency and flexibility. For instance, where the number of plaintiffs is very large and the value of the claims is very low, opt-out systems can facilitate collective redress, cutting down expenses for *ex ante* identification of the members of the class, while also securing swift dispute resolution. Similarly, in cases where there are high value claims and the members of the

¹⁷¹ ‘Defining the collective actions system and its role in the context of Community consumer law’ (Own-initiative opinion) (n 167) 14; Micklitz and Stadler (n 141) 1499.

¹⁷² Civil Justice Council, ‘Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: A Final Report’ (A series of recommendations to the Lord Chancellor, November 2008) 133-134

<http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Access+to+Justice+through+Collective+Actions.pdf> accessed 20 November 2012; M Cappelletti and B G Garth, *Introduction – Policies, Trends, and Ideas in Civil Procedure* (International Encyclopedia of Comparative Law, J C B Mohr and M Nijhoff Publishers 1987) 76:

[...] the principles underlying the expansion of standing and participation [in class actions] are reconcilable with a slightly modified traditional view of litigation. Instead of the very limited principle of individual party disposition, we have the principle of disposition by responsible representatives of individuals.

¹⁷³ S Issacharoff and G P Miller, ‘Will Aggregate Litigation Come to Europe?’ (2008) 62 (1) *Vand.L.Rev.* 179, 206 <http://ssrn.com/abstract=1296843> accessed 20 November 2012; Buccrossi et al (n 29) 65-66.

¹⁷⁴ ‘Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress’ (n 168) 9.

prospective class of claimants can easily be identified due to their limited number, opt-in systems become the more rational and proportional approach in terms of balancing the interests of the claimants, the defence and the good administration of justice.¹⁷⁵

5.4.2.2 Legal Standing in collective disputes: Filtering mechanisms?

At the outset, it should be underscored that there are various schemes of collective redress in the Member States establishing different standing rules for the claimants. As a result, any classification of existing schemes is essentially artificial and to a certain extent arbitrary; differentiating points between the various types of collective redress and legal standing are often vague, and particular features of collective redress may co-exist. Having said that, I will look mainly at three basic types of collective redress: collective actions, representative actions, and test cases.¹⁷⁶

Collective actions are instituted by one member of the group of victims, on his/her name, and on behalf of the entire class, which does not otherwise participate in the proceedings. Depending on the opt-in/opt-out character of the collective action, the decision reached binds either only the claimants that have actively opted in the action or everybody in the class who has not opted out from the proceedings. Representative actions are initiated by specially designated organisations, state authorities, or representative bodies on behalf of a group of claimants. These often provide the possibility for injunctive relief rather than compensation, and bind either the members of the group who have clearly opted in the proceedings, or everyone who has not validly opted out of the action. Finally, test cases follow on from the idea that, in principle, it is

¹⁷⁵ This is the case with employment disputes in the US, where an opt-in regime has been established. See also, 'Defining the collective actions system and its role in the context of Community consumer law' (Own-initiative opinion) (n 167) 15, arguing that the problem with such a dual system is the lack of legal certainty. The distinction between cases where an opt-in system should prevail, as opposed to those where an opt-out system is preferable, is not a straightforward one. This could lead to further complexity and delay.

¹⁷⁶ Ibid, 12. See also: 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 261; R O Faulk, 'Armageddon through aggregation? The use and abuse of class actions in international dispute resolution' (2001) 10 Michigan State University -- Detroit College of Law Journal of International Law 205-238 http://works.bepress.com/richard_faulk/3 accessed 03 March 2013; C Hodges, 'Multi-party Actions: A European Approach' (2001) 11 Duke J.Comp.& Int'l L. 343-344.

sufficient to deal with a single case, taking it through all levels of the judicial system, using the findings of this case for the settlement of all other mass claims based on similar facts and legal bases. This presupposes that the defendant recognises that the specific case constitutes a test case for claims brought by other claimants.¹⁷⁷ Along these lines, the decision binds all claimants, who can always be present and influence the test case.¹⁷⁸

Legal standing schemes of collective redress are also fundamental from an access to justice point of view as they impinge on the right to access courts, instituting legal proceedings. Accordingly, solely allowing state authorities and consumer associations to initiate actions for collective redress could contribute to enhanced access to courts, to the extent that these organisations constitute repeat-players, who will come with guarantees of expertise in the loyal representation of the group interests. They also come with their own budgets for the funding of the group litigation. This last element vests the represented group of claimants with liquidity to cover the litigation expenses regardless of the cost allocation scheme existing. From the perspective of the defence rights in the initiation of collective redress proceedings, representative organisations can guarantee that the defendant will not be dragged to the courts for unmeritorious, frivolous cases,¹⁷⁹ whereas they can also reimburse his legal expenses in the event that the association is defeated and the loser-pays rule applies for the allocation of costs.¹⁸⁰

However, associations in representative actions have only indirect gains from litigation, mainly through increased popularity and increased revenue from membership

¹⁷⁷ ‘An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report’ (n 67) 261-262.

¹⁷⁸ ‘Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios’ (n 169) 268-272.

¹⁷⁹ See, however, the German Verbandsklage, giving standing to associations to institute proceedings in cases of unfair competition on behalf of the group of competitors. Unless the defendant signs a declaration of injunction, the association becomes entitled for a fixed compensation to be paid by the defendant for the notification expenses. This rule resulted in an abusive situation where many commercial associations looked for obvious and trifling infringements, filing identical complaints against several branches of the same holding, hence making a profit due to the warning fee. Such a solution evidently contradicts the defendant’s right to procedural justice.

¹⁸⁰ Commission, ‘Accompanying document to the White paper on damages actions for breach of the EC antitrust rules - Impact assessment’ (staff working document) SEC (2008) 405, 18-20; Buccirosi et al (n 29) 68.

fees. As a result, they often lack sufficient incentive to institute collective legal proceedings, which does not promote aggrieved claimants' access to courts. In contrast, in collective actions the aggrieved individual instituting the proceedings shares the same direct interests with all the members of the class, having a straightforward incentive to sue the violator. Allegedly, collective actions are faced with more limitations in terms of funding opportunities for the proceedings compared to representative actions, as well as limited guarantees as to the merit of the claims pursued. These two parameters can jeopardise the right of access to justice of the defendant by rendering difficult the application of the loser-pays rule, and by the risk of the so-called 'blackmail suits', aimed purely at extracting a settlement from the defendant.¹⁸¹

On the other hand, test cases can hardly cater for information asymmetries between the parties to the dispute, whereas they raise funding issues, especially where low value claims are under discussion and instituting individual claims does not appear economically rational. Finally, their value depends on the defendant recognising subsequent cases as similar to those of already tested cases, rendering it a rather unrealistic scenario in case of big classes of aggrieved individuals. However, regardless of the particular type or types of legal standing chosen, the adoption of pre-trial filtering mechanisms for an assessment of the preliminary merits of collective redress cases could contribute to a fair balance of the interests of the claimants and the defendants. Parameters such as the commonality of legal and factual issues, the numerosity of the class, the superiority of collective actions, the adequacy of the representative, and the financial capacity of the representative to reimburse the defendants' recoverable costs could be some of the most important filtering criteria.¹⁸²

5.4.2.3 Financing the EU collective redress mechanism

If the costs for pursuing private claims were unreasonable, litigants' prospects to enforce their rights, either individually or collectively, would be at a minimum,

¹⁸¹ R Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'' (1979) 92 Harv.L.Rev. 664. Whether this is really the case with collective actions will be looked at below, '5.4.2.3 Financing the EU collective redress mechanism' 176.

¹⁸² 'Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: A Final Report' (n 172) 138.

rendering adjudication a viable possibility for only well-off litigants. Access to justice implies that access to courts should not be unreasonably costly; however, collective redress will essentially be a costly process with costs including court fees, and where applicable, lawyers' fees, notification costs for opt-in systems, and experts costs. Some of these costs will even have to be paid upfront for the institution of court proceedings, whereas large amounts of funds are also required for the continuation of the action.

Even if a fair mechanism for the appropriation of costs could be envisaged, costs might still be disproportionately high in cases of low value claims. For instance, one option could be to hold the representative organisation or authority liable for all costs involved in collective redress actions.¹⁸³ However, associations' funds are limited too, and in such a scenario, associations would be even more selective regarding the cases worth pursuing judicially.¹⁸⁴ Even slight variations, such as the maintenance of members of the class' liability for their share of the costs and for any additional costs they personally have incurred to the class, could hardly be reliable and effective enough at the end of the day, realistically contributing to the enhanced enforcement of aggrieved persons' rights.¹⁸⁵ More importantly, the costs appropriation in cases of opt-out actions between the members of large classes of claimants, who simply have not opted-out of the action, is both unrealistic and undesirable, as it would nullify the value of opt-out regimes, namely the procedural simplification and ensuing efficiencies.

Third party funding of collective redress actions could be envisaged as a solution, which allocates the risk of litigation to entities that can bear it more efficiently. The rationale is that the third parties under discussion come with guarantees of liquidity both for the institution and continuation of collective redress actions, as well as for the reimbursement of the defendants' expenses in case of defeat, in cost-shifting regimes. Two broad categories of third party funding can be discerned; contingency/conditional fee mechanisms, and various insurance products.

¹⁸³ This is the case in Austria, France, and the Netherlands.

¹⁸⁴ *Buccirossi et al* (n 29) 68.

¹⁸⁵ This is the Swedish system under sections 34 and 35 of the Group Proceedings Act; see also the GLO costs apportioning system in England and Wales.

Contingency fees constitute a means to cover lawyers' fees, offering a percentage of the class compensation to the class advocate in case of victory. The most common percentage amount in the US is that between 20-30% of the class recovery, depending on various parameters such as the time and work needed, the complexities of the case, the possibility for parallel employment by the attorney, the attorney's experience, and reputation, and the chances for success of the case. Conditional fees also aim to limit lawyers' expenses through agreements for reduced upfront fees accompanied with the possibility for a success fee in case of victory.¹⁸⁶

Although contingency/conditional fees do not provide a source of funding for all legal expenses in collective redress actions, they nonetheless alleviate a considerable part of the financial burden claimants need to cover upfront. This possible route can facilitate access to courts for the additional reason that it transfers the collective redress action's risk to law firms, along with guarantees of legal expertise for the successful pursuance of the case and with fewer risk-aversion considerations due to the possibility to spread any potential financial loss onto a portfolio of other cases.¹⁸⁷ Additionally, contingency fee schemes can be seen as enhancing the defendants' right to a just and fair trial through the limitation of frivolous, unmeritorious claims. Since lawyers indirectly co-finance the proceedings, they have little incentive to take up weak cases that are unlikely to succeed in a court of law, as this would lead to no or limited reimbursement for their services.¹⁸⁸

The main drawback of contingency fees put forward in the literature is the possible clash of interests between claimants and attorneys (principal-agent problem). Attorneys are seen as having an incentive to settle collective actions of increased complexity or of limited success prospects in order to receive their fees as a percentage

¹⁸⁶ 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report' (n 67) 315-316.

¹⁸⁷ J Backhaus, 'The law firm as an investment bank in class actions' (2011) 32(2) *Eur J Law Econ* 225, 226.

¹⁸⁸ E Helland and A Tabarrok, 'Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19(2) *J.L.Econ. & Org.* 517. For an opposing view see, *inter alia*: W Olson, 'Sue City: The Case against the Contingency Fee' (1991) 55 *Policy Review* 46.

of the compensation settlement.¹⁸⁹ In the former case, early settlement does not promote claimants' right to a fair trial and effective remedy, since the continuation of court proceedings might result in higher compensation and a generally more appropriate resolution of the dispute.¹⁹⁰ The latter case presupposes the association between the promotion of frivolous cases and the introduction of contingency fee schemes. Only if lawyers were incentivised to take up weak cases, could they also tend to settle at an early stage for fear they might lose in the end (blackmail suits). However, empirical evidence demonstrates that there is hardly any link between contingency fees and unmeritorious cases; lawyers actually take up strong cases and proceed with the trial of the case when their gains will increase proportionately with the amount of compensation awarded.¹⁹¹

Contingency/conditional fees can only provide the essential liquidity for the institution and continuation of proceedings. However, in case of loss, they provide no solution for the loser-pays rule. In other words, although prospective claimants can rest assured that when a case is lost, they will not incur lawyer's fees, they would still have to cover the defendant's legal expenses, which is often off-putting for the initiation of even well-grounded cases. As a result, an additional means to secure third party funding for the coverage of legal expenses, including those of the defendant in case of defeat, is via agreements for before the event (BTE) and after the event (ATE) insurance schemes.

The main concern is that insurance companies have the right to deny insuring certain prospective litigants, hence limiting their right to access courts. This problem becomes even more pertinent in ATE insurance covers, where insurance companies may only offer coverage for high value claims.¹⁹² Even if legal expenses insurance is indeed

¹⁸⁹ See *inter alia*, H Gravelle and M Waterson, 'No Win, No Fee: Some Economics of Contingent Legal Fees' (1993) 103 *The Economic Journal* 1205.

¹⁹⁰ See *inter alia*: C Hodges, 'Europeanisation of civil justice: trends and issues' (2007) 26 *C.J.Q.* 102-104; Hodges, 'Multi-party Actions: A European Approach' (n 176) 308.

¹⁹¹ See *inter alia*: D Cumming, 'Settlement Disputes: Evidence from a Legal Practice Perspective' (2001) 11(3) *Eur J Law Econ* 249.

¹⁹² In England and Wales, the threshold of viability for a claim value is currently not less than £100,000, and for many funders £1 million. This threshold is lower in Germany were legal expenses' predictability is more straightforward: C Hodges, J Peysner, and A Nurse, 'Litigation Funding: Status and Issues'

offered, there are serious concerns about the actual level of the insurance premium, which may be prohibitive for many prospective litigants.¹⁹³ The larger the pool of insured persons, the lower premiums will be. This in turn suggests that in legal orders with legal expenses transparency, through fixed lawyers' fees and capped recoverable costs, BTE insurance could be a realistic and popular alternative.¹⁹⁴ ATE insurance schemes are different because there is a considerably smaller pool of insured persons compared to BTE, and consequently more expensive insurance premiums.¹⁹⁵ However, at least in opt-in collective actions, there will be a greater number of class members among which to divide the ATE premium.

5.4.2.4 Allocation of Legal Costs

Related to the funding of collective redress actions is the issue of which scheme should apply for the recovery of legal costs. This issue has serious access to courts repercussions for both the claimants and the defendants. On the one hand, claimants should not be discouraged to lodge meritorious cases due to high legal expenses involved in the adjudication of disputes. On the other hand, the defendant should be equally protected from a judicial regime that makes it disproportionately easy for claimants to bring a claim, even if it lacks solid grounds, being frivolous. The scheme largely applied in the EU to balance the interests of both the claimants and the defence, is that of the 'loser pays' principle. This rule comes with guarantees that only meritorious cases will reach the courts for fear of having to pay the winning parties' legal expenses, a likely prospect in case of weak, frivolous lawsuits. Equally, the high level of legal expenses does not completely put off claimants with strong cases, because if they win the case, they will recover these costs by the losing party.

[Footnotes continued on next page]

(Research Report 2012) 104 <http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf>
accessed 20 November 2012.

¹⁹³ Ibid, 18.

¹⁹⁴ For instance, this is the case in Denmark, England and Wales, and Germany: C Hodges, S Vogenauer, and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing 2010) 21; V Prais, 'Legal Expenses Insurance' in A A S Zuckerman and R Cranston (eds), *Reform of Civil Procedure Essay on 'Access to Justice'* (Clarendon Press 1995) 431.

¹⁹⁵ Hodges refers that 'in 2008, after-the-event litigation funding was only used in approximately 0.4 per cent of cases'. Hodges et al, 'Litigation Funding: Status and Issues' (n 192) 41.

However, as has already been explained in the previous sub-section, the loser-pays rule can often prevent claimants with meritorious cases pursuing them judicially due to the expenses involved in the event of defeat. After all, the prospect of being reimbursed for the expense incurred by the losing defendant, offers practically no assistance to litigants struggling to cover the upfront legal expenses for the institution of proceedings. These considerations, combined with the possibilities for abuse of the loser pays rule by the defendants, render the fairness of this provision all the more questionable. Large multi-national companies have the resources and incentive to incur unreasonably high legal costs, mainly by employing many lawyers, to deter mass claimants from pursuing their case before the courts, or at best to settle at a very early point, preventing the mass claimants from achieving the amount of compensation that they could have otherwise secured.

Possible alternatives could be more relaxed versions of the loser pays rule, mainly through the possibility of recovery of some legal expenses only, or the recovery of all costs at a fixed rate. Such an option could potentially maintain the positive aspects of the traditional loser pays rule, namely the encouragement of meritorious cases, rendering litigation a less daunting prospect. At the same time, it could render the litigation funding options discussed above, and mainly that of legal expenses insurance, all the more feasible and effective, due to limited risks¹⁹⁶ and increased transparency.¹⁹⁷

5.5 Summary

On the one hand, IPRED has introduced core civil procedure rules on important matters of law enforcement, such as disclosure of evidence, provisional measures, and

¹⁹⁶ For instance, the impact of error costs is limited under qualified cost-shifting rules, also limiting litigants' risk-averse behaviour in initiating legal proceedings. See *inter alia*, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (n 169) 176-180.

¹⁹⁷ Hodges, 'Europeanisation of civil justice: trends and issues' (n 190) 100-101: Hodges identifies the possibility for a limitation of the defeated weaker party's liability to a percentage of the court costs, excluding any liability for lawyer's fees. However, such costs allocation scheme seems to contradict the right of access to justice, which should respect the defendants' rights too, shifting disproportionately the burden for the funding of collective redress actions to the defendant.

legal costs. In doing so, its impact has been felt more widely in domestic procedural systems; even sectoral rules on these core procedural themes are interwoven with and refer back to the general national provisions on the same matters. In addition, the strict law enforcement perspective of IPRED has led to the creation of fragmented rules of only limited effectiveness for the adjudication of EU law IP rights, lacking a definitive balance of competing interests.

On the other hand, ESCP has introduced an autonomous EU procedural mechanism, existing in parallel with analogous domestic small claims mechanisms, offering the possibility for EU litigants to choose either the domestic or EU mechanism in order to resolve their disputes.¹⁹⁸ Despite positive steps in the direction of facilitating effective access to justice in the EU, ESCP has raised serious concerns too. Specifically, ESCP applies solely to cross-border disputes, which combined with its considerable dependence on Member States' domestic procedural regimes, results in the creation of parallel, alternative systems, which are, however, divergent from one Member State to another, depending on the domestic procedural rules that fill the EU procedure's gaps. More importantly, this approach leads to a multiplicity of procedures, since in reality the procedural scene consists of 28 different national procedural regimes that may, or may not, include special provisions for the procedural subject regulated its time, along with equal number of EU originated procedures applicable solely to cross-disputes.

In view of this truncated environment of civil procedure harmonisation, discussions on the adoption of a future EU collective redress mechanism might offer a preliminary indication as to the better solution forward under the current Treaty scheme. Such a mechanism poses many challenges for the promotion of the right of access to justice, requiring a careful consideration and assessment of alternative regulatory options in a handful of issues, striking a balance between law enforcement and procedural fairness. Procedural rules are not mere technicalities in the service of

¹⁹⁸ See *inter alia*: Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1; ESCP (n 5).

substantive law. Such a consideration is one-sided and limited, and does not conform to entrenched EU-wide beliefs regarding the close relationship between procedure and national legal cultures. Accordingly, fundamental values should underpin the technical side of civil procedural rules in a ‘checks-and-balances relationship’.¹⁹⁹

In the next chapter of this thesis, I will focus on the meaning and breadth of the appropriate legal basis for a general and coherent intervention in national civil justice systems, namely Article 81 TFEU. I will argue that a joint reading of Articles 47 CFREU and 81 TFEU constitutes the right way forward. Such joint reading will remedy the deficiencies of the horizontal EU approach as evinced through the ESCP, maintaining only the positive elements of the *ad hoc* judicial and legislative approaches, namely the scope of Union law and the intervention into core procedural themes.

¹⁹⁹ A B Spencer, ‘The Restrictive Ethos in Civil Procedure’ (2010) 78(2) *Geo.Wash.L.Rev.* 116 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1343129## accessed 10 March 2013.

6 The Horizontal Approach to EU Civil Procedure Law Reconceptualised: Achieving Greater Coherence

6.1 Introduction

In the previous chapters, I argued that a certain degree of EU intervention into national procedural regimes has already been achieved via the CJEU case law (Chapter 4) and sectoral or horizontal instruments of secondary EU law (Chapter 5), aiming at the effective enforcement of EU substantive law. Although access to justice has played an instrumental role in all these methods of harmonisation of national procedural regimes, the essentially *ad hoc* nature of both CJEU and sectoral secondary EU rules, have inhibited EU institutions from systematically promoting the right of access to justice via the adopted EU civil procedure rules. The reason is the incapacity to fully consider the depth of the right of access to justice under Article 47 CFREU, due to limited constitutional legitimacy. In addition, the current application of the horizontal approach comes with several limitations for the systematic promotion of access to justice in the EU, exacerbated by its territorial scope of application to cross-border disputes.

In this chapter, I will further explore the potential of the horizontal approach to lead to coherent EU civil procedure rules promoting access to justice in the EU pursuant to the enactment of the 2009 Lisbon Treaty. The Lisbon Treaty has introduced Article 81 TFEU (ex Article 65 EC) as a separate Chapter 3 of Title V on an Area of Freedom, Security, and Justice. Civil justice cooperation has gained an autonomous character in that it now constitutes a distinct sub-area of the EU policy on Freedom, Security, and Justice.¹ More importantly, the approximation of Member States' civil procedural rules, provided for in Article 81 TFEU, has gained a central role in the establishment and proper functioning of this Area and the EU in general.²

¹ See: B Hess, *Europäisches Zivilprozessrecht* (CF Müller 2010) 74.

² In addition, based on Article 3(2) TEU, the creation of an Area of Freedom, Security, and Justice constitutes for the first time a primary goal of the EU.

Against this backdrop, I will compare and contrast Article 81 TFEU to its predecessor, Article 65 EC Treaty. The aim is to identify any substantial differences between the two versions of the provision at hand, and discover whether the new formulation offers wider prospects for systematic EU regulatory intervention. I will submit that the horizontal approach of Article 81 TFEU can more easily pass the access to justice test, offering adequate guarantees for a consistent and systematic approach to EU civil procedure law, which nonetheless presupposes a genuine reconsideration of the scope of application of Article 81 TFEU and the overall policy of civil justice cooperation.³ I will then test this submission against the principles of subsidiarity and proportionality in the last part of the analysis.

6.2 Civil justice cooperation after the Lisbon Treaty: a new era?

Even at the early stages of the visualisation of the European Economic Community and the creation of the Founding Treaties, participating Member States envisaged procedural cooperation in civil matters as a key parameter of EU integration. Therefore, the original Treaty of Rome encouraged Member States to enter into negotiations with each other in order to achieve for their citizens among others, the simplification of recognition and enforcement of judgments of courts or tribunals and of arbitration awards.⁴ Moving on, the Maastricht Treaty set the foundations for a distinct European policy on civil justice cooperation in Article K.1(6) EU.⁵ Finally, the

³ See: B Hess, 'Procedural Harmonisation in a European Context' in X E Kramer and C H van Rhee (ed), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 171; M Tulibacka, 'Europeanization of Civil Procedures: In search of a Coherent Approach' (2009) 46 CML Rev. 1527, 1561-1564.

⁴ Article 220 EEC (now repealed). The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ L299/32) was based on this Treaty provision. Remien, writing on the significance of this initial instrument pithily suggests that 'the expert drafters of the [Brussels] Convention were forerunning the diplomatic drafters of article 65 EC [now 81 TFEU] by almost 30 years'. O Remien, 'European Private International Law, The European Community and its Emerging Area of Freedom, Security and Justice' (2001) 38 CML Rev. 55. On the inefficiencies and complexities involved in the intergovernmental approach of Article 220 EC to judicial cooperation see, *inter alia*: J Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam' (2000) 37 CML Rev. 688.

⁵ This Article has served as a legal basis for the drafting of the 1995 Convention on insolvency proceedings, the 1997 Convention on Service of Judicial and Extrajudicial Documents, and the 1998

Amsterdam Treaty brought a sea of change in civil justice cooperation by transferring the policy area from the Third Pillar, of intergovernmental responsibility, to the First Pillar, of EU action.⁶ Article 65 EC (the article existing before the 2009 Lisbon Treaty, now Article 81 TFEU) formed the legal basis for civil justice cooperation in civil matters having cross-border implications, and which were necessary for the proper functioning of the Internal Market.⁷ My purpose in this section is to explore in detail the new provision of Article 81 TFEU on civil justice cooperation after the 2009 Lisbon Treaty. Does the new version come with greater guarantees for an access-to-justice based intervention in national procedural regimes? Are there nonetheless any limitations in the wording of the legal basis and the overall policy area of civil justice cooperation confining potentials for a coherent approach to EU civil procedure law?

6.2.1 Key changes in the post-Lisbon era

Only the first and part of the second paragraph of Article 81 TFEU are relevant for this analysis. They read as follows:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

[Footnotes continued on next page]

Convention on Jurisdiction and Recognition and Enforcement of judgments in matrimonial matters. None of the three Conventions ever entered into force. On the limitations of Article K.1 EU see: G Barrett, *Justice Cooperation in the EU, The Creation of a European Legal Space* (Institute of European Affairs 1997) 24-38: lack of deadlines, lack of sanctions, unanimity, vague objective, complex adoption and re-ratification processes.

⁶ This was achieved via the insertion of a new Title IV in the EC Treaty focusing on Visas, Asylum, Immigration, and other policies related to the free movement of persons. On the significance of the Area of Justice, see: European Parliament, 'Resolution on the draft action plan of the Council and Commission on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice' A4-0133/99, para 2.

⁷ A Staudinger and S Leible, 'Article 65 of the EC Treaty in the EC System of Competencies' (2000/01) 4 *The European Legal Forum* 226; Justice and Home Affairs Council, 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of Freedom, Security and Justice' [1999] OJ C19/ 4, para 16. See also, B Hess, 'Nouvelles techniques de la coopération judiciaire transfrontière en Europe' (2003) 92(2) *Rev. Crit. DIP* 223-224.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

[...]

(e) effective access to justice;

Many interpretative issues arise from the above wording and structure of Article 81 TFEU. Firstly, Article 81 TFEU has added ‘effective access to justice’ as a distinct aim of EU approximation measures to be promoted in the area of civil justice cooperation.⁸ Access to justice constitutes a fundamental human right, protected under Articles 6 and 13 ECHR, and more recently, under Article 47 CFREU. Taking into account that the Lisbon Treaty has accorded the Charter of Fundamental Rights a binding legal status, equal to that of primary EU Treaty law, the explicit reference to effective access to justice in Article 81 TFEU constitutes a further commitment to the promotion of this fundamental right. To this end, the actual meaning and scope of the fundamental right of Article 47 CFREU should guide the reach of future EU approximation measures.⁹ Nevertheless, with this proposition I do not advocate the introduction of new EU powers in civil justice cooperation, or the modification of existing tasks. I only put forward an appeal for a systematic interpretation of primary EU law, whereby the right to effective access to justice should have a consistent meaning and scope throughout all EU Treaty provisions.¹⁰

⁸ Briefly, Article 81 TFEU enumerates promptly and in an exhaustive fashion, the specific aims of EU approximation measures. Repeating in elements (a)-(d) and (f) what used to be Article 65(1) EC, it has added as further bases of EU activity elements (g) on alternative methods of dispute settlement, and (h) on training of the judiciary and judicial staff, offering transparency along with increased scope of EU competence. For more detailed analysis, see, S Bariatti, *Cases and Materials on EU Private International Law* (Hart Publishing 2011) 6.

⁹ See above, ‘2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection’ 50. See also: G Sanna, ‘Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters’ in G di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 173-174; E Storskrubb, *Civil Procedure and EU Law, A Policy Area Uncovered* (OUP 2008) 91.

¹⁰ For the additional implications of the hereby-predicated joint reading of Articles 47 CFREU and 81 TFEU, see below, ‘6.3.2 Reconsidering the general premises of EU civil justice cooperation’ 199. See also: M Storme, ‘A Single Civil Procedure for Europe: A Cathedral Builders’ Dream’ (2005) 22 RLR 91;

Secondly, it has downgraded the importance of the Internal Market provision. Article 65 EC presupposed that any EU measure should be necessary for the proper functioning of the Internal Market. In other words, EU civil procedure rules based on Article 65 EC needed to be adequately connected with the proper functioning of the Internal Market.¹¹ Article 81 TFEU has relaxed this condition, providing that the EU can adopt approximating measures ‘particularly when necessary for the proper functioning of the internal market’. The use of the adverb ‘*particularly*’ (emphasis added) suggests that the proper functioning of the Internal Market constitutes only an indication of these cases when EU approximation measures to ensure effective access to justice might be necessary. In other words, EU civil procedure measures based on Article 81(2)(e) TFEU could promote access to justice in the EU for the enforcement and dispute resolution of non-Internal Market related rights and obligations, covering the whole spectrum of rights and freedoms guaranteed under Union law, in accordance with Article 47(1) CFREU.

What is more, under the Amsterdam regime, Article 65 EC fell under Title IV, which also related to the free movement of persons. The drafters of the EC Treaty needed to legitimise judicial cooperation in civil matters as a Union policy, associating it with an already existent EU policy, that of the establishment of the Internal Market.¹² However, after the enactment of the Lisbon Treaty, a distinct EU policy for an Area of Freedom, Security, and Justice (Title V) has been created in accordance with Articles 3

[Footnotes continued on next page]

H E Hartnell, ‘EUstitia: Institutionalizing Justice in the European Union’ (2002-2003) 23 *Nw.J.Int'l L. & Bus.* 92. See however, House of Lords, *The Treaty of Lisbon: an Impact Assessment* (10th report, 2007-2008) 137-138 <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/62/62.pdf> accessed 9 March 2013: suggesting that the explicit introduction of the access to justice provision in the wording of Article 81 TFEU offers an additional impetus to EU legislative activity in the area of civil procedure approximation, albeit already covered in the pre-Lisbon regime.

¹¹ See: H Duintjer Tebbens, ‘Ein Ziviljustizraum in der Europäischen Union – auf Kosten einer Aushöhlung der internationalen Zusammenarbeit?’ in Baur/Mansel (eds), *Systemwechsel im europäischen Kollisionsrecht* (2002) 177. However, according to Staudinger and Leible this provision can be read to have a more pervasive effect. Specifically, the Internal Market formulation of Article 65 EC provided the EU with extra power to legislate in the area of judicial cooperation to achieve something more than a functioning Internal Market, namely a properly functioning Internal Market. See, Staudinger and Leible (n 7) 233.

¹² According to Article 26 TFEU (ex Article 14 EC), the Internal Market is conceived as incorporating the promotion of all four freedoms, including the free movement of persons.

TEU and 4(j) TFEU. As a result, this policy area has been dissociated from the free movement of persons, now placed in a separate Title IV, further downgrading the necessity for approximation measures ensuring access to justice to be linked, even remotely, with the Internal Market.¹³

Thirdly, under the pre-Lisbon regime, Article 67 EC provided for a specific legislative procedure that, unlike the ordinary legislative co-decision process of Article 251 EC, did not offer to the Commission the sole right of initiative. That same provision also empowered Member States to set a legislative agenda themselves, keeping a consultation only role for the European Parliament, and obliging the Council to adopt legislation by unanimity. The sharing of the legislative initiative between the Commission and the Member States considerably curtailed the Commission's capacity to make swift and autonomous legislative proposals in judicial cooperation matters. Furthermore, the European Parliament's diminished role in the decision-making process for civil justice cooperation measures impacted on the democratic legitimacy and possibilities for control of the Council's activities. Finally, the requirement for a unanimous adoption of legislative proposals on civil justice cooperation could result in the paralysis of the entire policy area, leading to the adoption of watered-down proposals at the level of the lowest common denominator, or of non-binding nature.¹⁴

On the contrary, Article 81 TFEU explicitly provides that legislative proposals in the area of civil justice cooperation should be adopted following the ordinary legislative procedure of Article 294 TFEU (ex Article 251 EC), namely via co-decision between the European Parliament and the Council. New Article 81 TFEU facilitates swift legislative proposals for future EU civil procedure rules, which, if jointly adopted by the Parliament and the Council, will come with considerable democratic legitimacy, and potentials to ensure effective access to justice in the EU through concrete rules, striking a balance between competing interests in adjudication of EU law rights and obligations.

¹³ Praesidium, 'Area of freedom, security and justice: draft Article 31, Part One and draft articles from Part Two' (Cover Note) CONV 614/03, 20.

¹⁴ Barrett (n 5) 24-38.

Fourthly, in the pre-Lisbon regime, Article 68 EC (now repealed) provided that only national courts of last instance could make use of the 234 EC preliminary reference procedure for the interpretation of Article 65 EC and of measures adopted on that legal basis.¹⁵ Alternatively, the Council, the Commission, or the Member States could request the CJEU to interpret measures on civil justice cooperation. However, after the enactment of the Lisbon Treaty, measures adopted based on Article 81 TFEU can be reviewed by the CJEU via the lodging of a preliminary reference by the courts and tribunals of all levels in a national court system (Article 267 TFEU).¹⁶ This constitutes yet another potential for a coherent approach to EU civil procedure law for the promotion of effective access to justice. Prospective EU instruments will be judicially interpreted and explicated by the CJEU in a systematic fashion, diluting doubts and ambiguity regarding the application of procedural rules by national courts for the adjudication of EU rights and obligations.

On the whole, both Articles 67 EC and 68 EC generated significant limitations and inefficiencies in the policy area of civil justice cooperation. Nevertheless, they should not be interpreted as an intentional way to limit the reach of Article 65 EC. Quite on the opposite, both these Articles enshrined an attempt by the makers of the Amsterdam Treaty to reconcile the pre-Amsterdam intergovernmental era with a steadily increasing EU role in civil justice. Therefore, Articles 67 EC and 68 EC could be seen as a phasing-in procedure for the gradual transition from a strictly intergovernmental policy area to a completely Europeanised one. Their application was expressly limited to a 5-year period, after which the ordinary legislative procedure of Article 251 EC would have to be introduced in the policy area of civil justice cooperation and the preliminary reference procedure should be opened up to more

¹⁵ On the problematic aspects of this provision for the broader ‘Area of Freedom, Security and Justice’ see, *inter alia*: P Eeckhout, ‘The European Court of Justice and the ‘Area of Freedom, Security and Justice’: Challenges and Problems’ in D O’Keeffe and A Bavasso (eds), *Liber Amicorum in Honour of Lord Slynn of Hadley. Judicial Review in European Union Law* (Vol1, Kluwer Law International 2000) 153ff.

¹⁶ Case C-283/09 *Artur Weryński v Mediatel 4B spółka z o.o.* [2011] ECR I-00601, paras 28-31; case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] OJ C 362/3, paras 19-20.

national courts. Indeed, Member States amended Article 67 EC in the 2001 Treaty of Nice, extending the co-decision process of Article 251 EC in the civil justice area too.¹⁷

Overall, the new formulation of the competence in Article 81 TFEU is of tremendous importance in the quest for greater coherence in EU civil procedure law via recourse to the right of access to justice. On the one hand, it explicitly authorises EU institutions to intervene in national laws and regulations, allowing for access to justice to be used as the guiding tool in this process. On the other hand, approximating measures need not be necessary for the proper functioning of the Internal Market.¹⁸ As a result, EU civil procedure measures can be envisaged in the broader remit of EU law, covering not only economic, but also social policies.

6.2.2 New rules, old problems?

The scope of the EU competence on civil justice cooperation has been considerably expanded in the post-Lisbon era. However, the new provision has carried over some of the inefficiencies and problematic aspects of its predecessors. To begin with, Article 81 TFEU, like its predecessor Article 65 EC, provides that ‘the Union shall develop judicial cooperation in civil matters having ‘cross-border implications’. EU approximation measures can apparently be adopted for civil justice matters, either litigation or comparable proceedings such as mediation, affecting parties not habitually resident in the same Member State. *E contrario*, purely domestic civil justice matters should be left to the Member States’ regulatory discretion and authority.

Judging from the current discussions on a European Attachment Order, Article 81 TFEU will most likely continue being interpreted in such a restrictive fashion. The legal basis for the European Attachment Order is expressly Article 81 (2)(a), (e), and (f) TFEU. Accordingly, its regulatory scope is still limited to cross-border disputes, introducing yet another alternative European procedure that will exist in parallel with

¹⁷ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80/01, Article 2(4).

¹⁸ See: UK Government, ‘Commentary on the Constitutional Treaty, Part 3 the policies and functioning of the EU’ (2005) 168

http://webarchive.nationalarchives.gov.uk/20050606200944/http://www.fco.gov.uk/Files/kfile/commentary_Part2_Part3.pdf accessed 18 March 2013; House of Lords. *The Treaty of Lisbon: an Impact Assessment* (n 10) 137-138.

Member States domestic attachment provisions. The proposed European procedure will bear some of the positive characteristics of the Small Claims Procedure, such as the lack of mandatory legal representation, the wide use of standard forms, and the abolition of the *exequatur*. It will also respect the interests of the defence via considerable possibilities to contest the attachment, generally being inspired by access to justice considerations regarding the effective execution of judgements. However, it will also carry over all limitations and compromises of the pre-Lisbon era in the area of civil justice cooperation.¹⁹

As with the Small Claims Procedure,²⁰ the limitation to cross-border claims will most likely compromise the effectiveness and value of the entire attachment procedure. The European attachment order does indeed emanate from private international law considerations regarding the existence of actual enforcement measures for judgments rendered abroad. This is particularly so due to the limitations and inefficiencies of the Brussels I Regulation epitomised in its prohibition for an *ex parte* attachment order, as well as complicated, timely and costly opportunities for protective measures.²¹ Although this problem is tackled in the recently adopted recast of the Brussels I Regulation,²² the European attachment order provides common standards for the procedure of granting attachment orders. This is exactly where the initiative transcends the strict PIL boundaries, rendering the cross-border limitation hard to justify. Taking into account the rules on provisional and precautionary measures already introduced in

¹⁹ See: Commission, ‘Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts’ COM (2006) 618 final; Commission, ‘Annex to the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts’ (Commission Staff Working Document) SEC (2006) 1341; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters’ COM (2011) 445 final.

²⁰ See above, ‘5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure’ 150.

²¹ See: Articles 31 and 43 (5) Brussels I Regulation; case 125/79 *Denilauler v. Couchet Frères* [1980] ECR 1553.

²² Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) [2012] OJ L351/1, Article 35.

IPRED, insisting on the dichotomy between cross-border and domestic disputes makes little sense.²³

Overall, there is a paradox in the access to justice rationale of the proposal for the execution of decisions. Article 47 CFREU explicitly guarantees the right of access to justice for all rights and freedoms provided under Union law. These rights can be breached and freedoms unjustifiably limited in purely domestic, rather than cross-border cases too. After the Lisbon Treaty and the European Charter, measures in civil procedure law, essentially encroaching upon the fundamental right of access to justice, should no longer maintain a narrowly perceived cross-border distinction,²⁴ unless associated with PIL. This derives from the systematic interpretation of primary EU law, indispensable part of which is as of 2009 the EU Charter and its Article 47 CFREU.²⁵

Other Limitations

In the pre-Lisbon regime, two protocols were attached to Title IV and Articles 61 and 65 EC dealing with the position of the United Kingdom, Ireland, and Denmark with regard to the Area of Visas, Asylum, Immigration and policies related to the free movement of persons. The UK and Ireland opted out of measures related to Title IV of the Treaty. Nevertheless, they retained the possibility to decide within three months of the submission of a proposal on Title IV that they wished to participate in the adoption and application of specific measures (opt in).²⁶ Denmark also opted out, as a matter of general principle, of measures adopted based on Title IV EC Treaty. However, Denmark did not even retain the possibility to opt in at a later stage to future EU measures in that policy area.²⁷

²³ See above, '5.2.1 An instrument for harmonising core aspects of civil procedure?' 138. See also a direct reference to IPRED in the green paper for the review of the Brussels I Regulation: Commission, 'Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 0175 final, 8: this constitutes a further confirmation of the similarity of requirements and access to justice considerations of civil procedure law regardless of its application to cross-border and/or domestic disputes.

²⁴ See below, '6.3.2.2 'Cross-border implications'' 202.

²⁵ See, Article 6 TEU.

²⁶ Treaty of Amsterdam, 'Protocol No 4 (now No 21) on the position of the United Kingdom and Ireland', Articles 1-4.

²⁷ Treaty of Amsterdam, 'Protocol No 5 (now No 22) on the position of Denmark', Articles 1-3, 5, 7.

The initial reasons for those three countries' opt-outs were concerns of losing control over asylum and immigration policies, rather than civil justice cooperation matters.²⁸ Therefore, both the UK and Ireland soon expressed their intention to participate fully in EU activities related to civil justice cooperation at the Justice and Home Affairs Council meeting that took place on 12 March 1999.²⁹ Denmark could also waive part of the Protocol and easily participate to procedural cooperation measures taken at the EU level. Alternatively, Denmark could conclude international law treaties with the EU, which however could jeopardise uniformity and legal certainty in the EU, ending up with a mixture of EU law measures and international law ones.

Overall, the new version of Article 81 TFEU has expanded the EU competence in civil justice cooperation, confirming it constitutes the official legal basis for the introduction of EU civil procedure rules. The explicit reference to the approximation of national laws for the promotion of effective access to justice, in element (e), testifies in favour of the broader suitability of horizontal procedural measures based on Article 81 TFEU for a coherent approach to EU civil procedure law. This suggestion, however, presupposes a fundamental reconsideration of the inherent limitations of Article 81 TFEU, presumably emanating from its initial PIL status. The next sections will further investigate this proposal, also providing some preliminary thoughts on the conformity of future EU civil procedure measures with the principles of subsidiarity and proportionality.

6.3 The way forward

²⁸ See also, Basedow (n 4) 695-696.

²⁹ Commission, 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (1999) 348 final, 5, under point 2.2. ²⁹ For instance, both the UK and Ireland are bound by the European Small Claims Regulation 861/2007, the Regulation for a European order for payment procedure 1896/2006, the Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters 1206/2001, and the Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters 1348/2000.

Initial procedural measures adopted under the then Article 65 EC (now 81 TFEU) had a primarily international private procedural law scope. These included measures on international jurisdiction, recognition, and enforcement of foreign judgments, cross-border service of documents, and cross-border taking of evidence. They aimed to coordinate national legal systems, and enable them to communicate effectively, allowing national legal acts and official documents to take place or have an effect across the Member States.³⁰ However, international civil procedural law should be distinguished from EU civil procedural law, which is aimed at the approximation of Member States' laws and regulations.³¹ Unfortunately, the Lisbon Treaty has not managed to draw this distinction as clearly as is necessary; despite explicitly referring for the first time to EU measures approximating Member States' laws and regulations, it has maintained some of the restrictive language of the previous versions.

In this section, I will revisit the relationship between Article 81 TFEU and Article 114 TFEU to identify the most appropriate legal basis for future EU initiatives in the area of civil procedure law. Based on these findings, I will reconceptualise the existing limitations for a coherent approach to EU civil procedure law, resulting from the general Area of Freedom, Security, and Justice and the territorial scope of the new legal basis of Article 81 TFEU. I will focus on two important limitations to the existing EU competence in civil justice cooperation, namely the mutual recognition principle established in Article 67(4) TFEU and the 'cross-border implications' requirement in Article 81 TFEU. My aim is to reconceptualise these limitations in light of the scope of application of the fundamental right of access to justice in Article 47 CFREU. In the next section, I will test this proposal against the principles of subsidiarity and proportionality.

³⁰ X E Kramer 'Procedural Harmonisation in a European Context' in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 123.

³¹ X E Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure, Accomplishments, New Features and Some Fundamental Questions of European Harmonization' in AW Jongbloed (ed), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports* (Intersentia 2008) 280.

6.3.1 Recasting the relationship between Articles 81 and 114 TFEU: harmonisation through the backdoor?

In the previous chapter, I discussed how the EU has already used Article 114 TFEU to introduce EU civil procedure rules in the area of IP rights protection.³² The same provision is also one of the potential legal bases for a future collective redress mechanism.³³ Article 114 TFEU (ex Article 95 EC) explicitly provides that it is applicable to the extent there is no other specific Treaty provision on a certain issue of the Internal Market. Under the pre-Lisbon regime, Article 65 EC (now 81 TFEU) required that EU civil justice cooperation measures be necessary for the proper functioning of the Internal Market. As a result, it constituted a *lex specialis*³⁴ to the general internal market provision of Article 114 TFEU, meaning that the EU should assume competence to legislate in civil justice matters solely under the provisions and limitations of the particular legal basis of Article 65 EC.³⁵

In the post-Lisbon era, the Internal Market plays a considerably diminished role in the formulation of Article 81 TFEU and civil justice measures can be envisaged even when they are not necessary for the proper functioning of the Internal Market.³⁶ However, to the extent civil procedure rules are adopted due to Internal Market considerations, Article 81 TFEU remains the appropriate, special legal basis, embodying the level playing field, and competition objectives of the legal basis of Article 114 TFEU, which is existent in the policy and legislative documents related to IP rights, damages in antitrust cases, and collective redress for consumer claims. This is even more apparent as Article 81 TFEU also expressly provides for the approximation of Member States laws and regulations in the area of civil justice cooperation.

³² See above, '5.2 Sectoral EU civil procedure rules: the example of IPRED' 135.

³³ See, P Buccirosi et al., *Collective Redress in Antitrust: Study* (European Union 2012) 57-58 <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=7435> accessed 22 October 2012.

³⁴ See, S Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 613.

³⁵ Ibid, 614; G R de Groot and J J Kuipers, 'The new provisions on Private International Law in the Treaty of Lisbon' (2008) 1 MJ 109, 112. With regard to Article 65 EC (now 81 TFEU), see: Remien (n 4) 72-73; A Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?' (2005) 1 Jour.P.I.L. 219; Basedow (n 4); Staudinger and Leible (n 7).

³⁶ See above, '6.2.1 Key changes in the post-Lisbon era' 186.

More importantly, the approximation of laws based on Article 114 TFEU has a primarily substantive law scope, providing rules for the free movement of goods, services, and capitals. As a result, it should serve as the appropriate legal basis for the adoption of measures that have the smooth functioning of the Internal Market as their primary object, only promoting civil justice cooperation at an incidental or subsidiary level.³⁷ This becomes even more apparent in the 2008 *Caffaro* case, where Advocate General Trstenjak investigated the EU competence to provide rules affecting Member States' enforcement procedures.³⁸ Specifically, the Advocate General compared the scope of Article 65 EC (now 81 TFEU) based EU civil procedure measures, with that of procedural rules pursuant to a directive adopted based on Article 95 EC (now 114 TFEU). Accordingly, she argued that the EU could 'not harmonise all the rules relating to late payments in commercial transactions' based on Article 95 EC, but 'only certain specific rules intended to combat such delays, namely, rules on interest for late payments (Article 3), retention of title (Article 4) and procedures for recovery of unchallenged claims (Article 5)'.³⁹ Even in these specific areas, EU competence could not impose on Member States the obligation to introduce a new procedure for the recovery of unchallenged claims, as was initially provided in the original proposal for Directive 2000/35.⁴⁰ On the contrary, she submitted that the EU would have 'general powers to regulate the procedures for forced execution' in cases of late payment in commercial transactions involving cross-border elements under Article 65 EC on civil justice cooperation.⁴¹

This explains why the drafters of the various civil justice instruments have traditionally searched for legal bases outside Articles 100 and 100a EC, which largely correspond to what is now Article 114 TFEU. These provisions existed even prior to the Amsterdam Treaty and the communitarisation of the Area of Justice, permitting direct

³⁷ Article 26 TFEU. See also: Peers (n 34) 612.

³⁸ Case C-265/07 *Caffaro Srl v Azienda Unità Sanitaria Locale RM/C* [2008] ECR I-07085, Opinion of AG Trstenjak, paras 28ff.

³⁹ *Ibid*, paras 28-29.

⁴⁰ Commission, 'Proposal for a European Parliament and Council Directive combating late payment in commercial transactions' COM (1998) 126 final.

⁴¹ *Caffaro Srl v Azienda Unità Sanitaria Locale RM/C* (n 39) paras 32 and 44.

EU action, as opposed to the intergovernmental proceedings under Articles 220 and K.1 EC, which were actually used for the adoption of the initial instruments of civil justice cooperation.⁴² In other words, civil justice legislation cuts across the entire spectrum of substantive private law, be it consumer protection, competition law, intellectual property, etc. In addition, civil procedure rules do not actually affect peoples' access to the Internal Market, but rather their relationships during disputes.⁴³ Of course, civil procedure law fulfils an enforcement of substantive law function, and, as such, is important for the practical applicability of existing EU law substantiating the premises and requirements of the Internal Market.⁴⁴ However, even from this perspective, the link with the Internal Market is indirect and insufficient for the adoption of future EU civil justice measures based on Article 114 TFEU.⁴⁵

Using Article 114 TFEU as a legal basis for the approximation of civil justice laws could be seen as a means to circumvent the scope and reach of Article 81 TFEU.⁴⁶ This is why the EU legislature has struggled to justify the choice of Article 114 TFEU as the correct legal basis for the adoption of the IPRED. It did that based on the following considerations. On the one hand, IP rights protection is important for the realisation of the Internal Market through the promotion of innovation and economic growth; on the other hand, the directive does not refer to civil justice cooperation matters, of the kind that would be regulated under Article 81 TFEU.⁴⁷ As I have already argued, IPRED touched on core procedural matters with implications on the entire civil

⁴² See above, '6.2 Civil justice cooperation after the Lisbon Treaty: a new era?' 185.

⁴³ See, J Israël, 'Conflicts of Law and the EC after Amsterdam- A Change for the Worse?' (2000) 7 MJ 91.

⁴⁴ See above, '1.2.2 The fundamental goals and functions of civil justice' 19.

⁴⁵ The legal basis must be identified pursuant to the principal aim of the proposed EU measure: case C-211/01 *Commission v Council* [2003] ECR I-8913, paras 38-40; case C-300/89 *Titanium Dioxide* [1991] ECR I-2867, para 21. In addition, Hess draws a distinction between the reactive legal harmonisation based on Article 95 EC (now 114 TFEU), which 'reacts primarily to distortions of competition and similar restraints to market freedoms'; and the active legal harmonisation based on Article 65 EC (now 81 TFEU), which provides the EU with 'subject-matter oriented competence [...] similar to the policies of consumer protection and the environment for the creation of positive standards'. B Hess, 'The Integrating Effect of European Civil Procedure' (2002) 4(1) Eur. J. L. Reform 3, 13.

⁴⁶ See *inter alia*, Peers (n 34) 614.

⁴⁷ See, IPRED preamble, points 9-11.

justice system, rather than solely on IP rights protection.⁴⁸ Therefore, the reason why the drafters of the IPRED tried to establish Article 114 TFEU as the appropriate legal basis has arguably been the avoidance of the territorial scope of Article 81 TFEU, which is limited to matters having cross-border implications. The same holds true for damages actions and collective redress arrangements in antitrust and consumer cases, where any prospective sectoral EU legal instruments would most likely be applicable to both domestic and cross-border disputes.⁴⁹

6.3.2 Reconsidering the general premises of EU civil justice cooperation

Despite the limitations of using Article 81 TFEU as a legal basis as identified above,⁵⁰ namely its application to cross-border disputes and the English, Irish, and Danish opt-outs, I argued that it nonetheless constitutes the appropriate legal basis for civil procedure harmonisation in the EU for the promotion of access to justice. On the one hand, Article 81 TFEU still constitutes *lex specialis* of the legal basis of Article 114 TFEU for the adoption of civil procedure rules necessary for the proper functioning of the Internal Market. On the other hand, civil procedure law in general can only indirectly facilitate access to the Internal Market, essentially regulating the relationships of the parties to a dispute, enforcing their substantive EU law rights and obligations.

Bearing this in mind, Article 81 TFEU could offer adequate constitutional legitimation for a coherent approach to EU civil procedure law.⁵¹ By linking the reference to ‘effective access to justice’ in Article 81(2)(e) TFEU with Article 47 CFREU, I attempt to apply the same meaning of access to justice to both provisions, transplanting the regulatory scope of Article 47 CFREU to the relevant provision of Article 81 TFEU. This proposition will not result in an extension of EU competence in

⁴⁸ See above, ‘5.2.1 An instrument for harmonising core aspects of civil procedure?’ 138.

⁴⁹ See especially the ‘Summary Table’ No 10 in Buccirosi et al., (n 33) 55-62. However, in case of adoption of a general, horizontal EU collective redress mechanism, the European Parliament seems to opt for a limited territorial scope, namely for cross-border disputes, as these are currently narrowly construed under Article 81 TFEU. European Parliament, ‘Resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ 2011/2089(INI), 13 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0012+0+DOC+PDF+V0//EN> accessed 18 February 2013.

⁵⁰ See above, ‘6.2.2 New rules, old problems?’ 191.

⁵¹ See, Tulibacka (n 3) 1561.

the area of civil justice cooperation, nor an amendment of its specifications in the Treaty text. It merely puts forward a harmonious and systematic interpretation of EU primary law, an indispensable part of which is, as of December 2009, the Charter of Fundamental Rights of the European Union. Under this interpretative stance, the fundamental procedural right of Article 47 CFREU will influence the exercise of the EU civil justice competence to the direction of facilitating dispute resolution and enforcement of EU law based rights before national courts.⁵²

6.3.2.1 Mutual Recognition

Both Articles 67(4) TFEU and 81 TFEU refer to the mutual recognition of judicial and extrajudicial decisions as the guiding principle in civil justice cooperation. The principle of mutual recognition focuses on the facilitation of the recognition and enforcement of judgments from one Member State to another. It is not a principle aimed at guiding the approximation of Member States' national procedural laws and regulations. In other words, the mutual recognition principle and the approximation of Member States' laws and regulations are two distinct aims, both grouped under the broad policy area of civil justice cooperation. The former is primarily concerned with the enforcement of decisions where a border has to be crossed, whereas the latter relates to securing access to justice for the acquisition of a decision regardless of whether or not it will have to be enforced abroad in the end.⁵³

As a result, mutual recognition is not driven by the promotion of access to justice considerations, nor does it have an approximation of Member States' laws overall objective. Procedural approximation in the form of minimum procedural standards, demonstrated by the scope of the mutual recognition programme, constitutes only an ancillary accompanying measure not an end in itself,⁵⁴ leaving internal legal orders largely intact. Accordingly, mutual recognition and accompanying minimum

⁵² C Engel, 'The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Dogmatic Consequences' (2001/2) MPI Collective Goods Preprint 15-16 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269312 accessed 06 March 2013.

⁵³ 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, 14.

⁵⁴ *Ibid.*

procedural standards are solely aimed at enabling the communication and mutual trust between the various national legal orders in the EU.⁵⁵ That being said, this tactic could facilitate effective access to cross-border justice in attempting to gradually dispense with any exequatur procedure. For instance, the abolition of the exequatur in the recast of the Brussels I Regulation could lead to the timely execution of judgments across the borders, hence facilitating claimants' access to courts;⁵⁶ enforcement could nonetheless be denied where the judgment under discussion has not been delivered under fair proceedings.⁵⁷ Even so, EU instruments following the principle of mutual recognition do not introduce concrete procedural standards of access to justice, striking a clear balance between the interests of the claimants in enforcing their EU rights and those of the defendants in constraining such enforcement.

Article 67(4) TFEU provides: '[t]he Union shall facilitate access to justice, *in particular* (emphasis added) through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'. The phrase 'in particular' indicates that the principle of mutual recognition is only one – certainly not the only one – option for the facilitation of access to justice in the EU. This interpretation is consistent with the French version of the Treaty: '*nottament*'; the German version: '*insbesondere*'; and the Greek version: '*ιδίως*'. This is confirmed by the formulation of Article 81 TFEU explicitly providing that EU institutions can approximate Member States' national rules and regulations in order to promote among others, effective access to justice. Recent instruments in the area of civil justice cooperation, such as the European Small Claims Procedure,⁵⁸ constitute a primary indication that Article 81 TFEU is not confined to the coordination of judicial authorities, such as, for instance, the Service of Documents

⁵⁵ Commission, 'Action Plan Implementing the Stockholm Programme' COM (2010) 171 final, 4. See also, T Andersson, 'Harmonization and Mutual Recognition: How to handle Mutual Distrust' in M Andenas, B Hess, and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (BIICL 2005) 247.

⁵⁶ See, X Kramer, 'Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area' (2011) 4 NIPR 633, 639.

⁵⁷ This has been judicially inferred from the public order provision in Article 46 of the Brussels I Regulation. See for instance, case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935, para 43.

⁵⁸ See above, '5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure' 150.

Directive, but is also driven by a self-standing aim of promoting access to justice in the EU.⁵⁹ A genuine harmonisation of national procedure rules for the promotion of effective access to justice in the EU could thus be envisaged in future EU instruments based on Article 81(2)(e) TFEU. This approach could remedy national institutional inefficiencies for the enforcement of EU law rights and obligations, while guaranteeing procedural fairness and efficiency of proceedings.⁶⁰

6.3.2.2 ‘Cross-border implications’

The Commission has systematically favoured an expansive interpretation of the cross-border provision, suggesting that EU legislation could approximate procedural rules applicable to purely domestic disputes too.⁶¹ Procedural law by its nature may have ‘cross-border implications’ since discrepancies in judicial systems in Member States can distort competition in the Internal Market.⁶² Approximation of civil procedure rules could ensure access to justice under equal conditions. Unless we accept such a broad interpretation of the “cross-border” requirement, no unified definition to this term can be realised and every legislative act would have to be investigated on a

⁵⁹ See also to that effect: B Hess, ‘The Brussels I Regulation: recent case law of the Court of Justice and the Commission’s proposed recast’ (2012) 49 CML Rev. 1075; Kramer, ‘Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area’ (n 56) 635.

⁶⁰ On the necessity for something more than existing mutual recognition minimum standards in order to promote the right of defence, see: Andersson (n 55) 250: ‘In order to [...] promote the rights of defence, minimum standards should not allow for too many variations and should not rely too heavily on domestic law’.

⁶¹ Commission, ‘Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations’ COM (2004) 401 final, 11: ‘[...] it will be necessary to avoid a situation where in each Member State there are two separate legal regimes, one relating to the disputes with a cross-border implication and the other to purely internal disputes’. See also, Economic and Social Committee, ‘Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure’ COM(2004) 173 final, point 1.5:

The Commission has decided to extend the scope of the single order for payment procedure to national disputes, in order to ensure equal treatment for all and to prevent distortion of competition between economic operators, in line with the EESC’s opinion on the Green Paper, whilst ensuring that the procedure is compatible with the principles of proportionality and subsidiarity.

⁶² Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure’ COM (2005) 87 final, 6.

separate basis, complicating the enforcement of these instruments and increasing the uncertainty and fragmentation in the EU judicial context.⁶³

Such a broad interpretation of the ‘cross-border implications’ provision is not embraced by all scholars in the literature. On the contrary, it is seen as far-reaching,⁶⁴ and as rendering null and void the explicit limitation imposed by the ‘cross-border’ provision.⁶⁵ The main risk of adopting such a broad understanding is that EU institutions may end up attributing a cross-border character to all civil procedure law matters, without further investigation. If the drafters of Article 81 TFEU wished to provide the EU with such an extensive competence in the area of civil justice cooperation, there would have been no need to qualify ‘civil matters’ with the phrase ‘having cross-border implications’. There must have been a good reason for this phrase to be included in the wording of the provision under discussion.⁶⁶

Nevertheless, it should be underscored that, according to earlier literature on ex Article 65 EC (now 81 TFEU) the ‘cross-border implications’, reference was only added to the text of the then Amsterdam Treaty at the very last minute. The addition was proposed by the then UK Prime Minister, Tony Blair, who apparently exercised strong political pressure in order to emphasise the strictly economical character of the Union.⁶⁷ That the Union is no longer confined to economic objectives, pursuing social and political goals too, is no longer disputed.⁶⁸

The Lisbon Treaty has not only included the provision on effective access to justice in the legal basis of Article 81 TFEU, but has also given binding force, equal to

⁶³ Ibid, point 2.2.

⁶⁴ Peers (n 34) 611.

⁶⁵ Van der Grinten (n 4).

⁶⁶ See, Hess, *Europäisches Zivilprozessrecht* (n 1) 35. See also: House of Lords, ‘23rd Report of Session 2005-06: European Small Claims Procedure – Report with Evidence’ (HL Paper 118) 19 (n.58), <http://www.publications.parliament.uk/pa/ld200506/ldselect/lducom/118/118.pdf> accessed 17 March 2013; Peers (n 34) 612.

⁶⁷ See *inter alia*: M Traest, ‘Development of a European Private International Law and the Hague Conference’ (2003) 5 *Yrbk Priv Intl L* 228; G Betlem and E Hondius, ‘European Private Law after the Treaty of Amsterdam’ (2001) 1 *E.R.P.L.* 10.

⁶⁸ One needs to look at *inter alia*, the general provisions of the TEU (mainly Articles 3 and 4 TEU), the CFREU and the categories of fundamental rights introduced (social, political, economic), as well as the Citizenship provisions of Articles 21-24 TFEU.

that of primary EU law, to the CFREU. Consequently, the fundamental procedural EU right to an effective remedy (Article 47 CFREU) has been created, for disputes arising out of substantive EU rights and freedoms. Article 47 CFREU, which binds EU institutions, provides for a right to effective remedy for all rights guaranteed under Union law. It does not distinguish between cross-border and domestic disputes. More importantly, there is extensive CJEU case law confirming that the fundamental rights protection in the EU refers to matters falling within the scope of Union law.⁶⁹ Therefore, the reference to access to justice in Article 81 TFEU should be read in conjunction with the primary EU provision on access to justice, namely Article 47 CFREU.

Taking into account the direct effect and supremacy of EU law, EU substantive law rights apply to domestic relationships in the Member States, and, therefore, so should the procedural measures the EU enacts to facilitate the enjoyment and private enforcement of these rights. As a result, Article 81 TFEU should be reconceptualised, as a minimum prerequisite, to apply in the field of EU law. Future measures that aim to facilitate effective access to justice in judicial cooperation in civil matters should no longer maintain the dichotomy between cross-border and domestic disputes.

This further suggests that the reference to matters with ‘cross-border implications’ in Article 81(1) TFEU should be interpreted broadly, encapsulating all matters with an EU, rather than a cross-border, dimension.⁷⁰ In other words, I argue that a matter can have cross-border implications, in the sense of Article 81 TFEU, if it merely falls within the scope of EU law. This is the case where, for instance, two

⁶⁹ See *inter alia*: case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* [1991] ECR I-2925; case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, para 31; case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, paras 24-33.

⁷⁰ See also: M Storme, ‘Improving Access to Justice in the Europe’ (2010) *Teka Kom. Praw.* – OL PAN 207, 214; B Hess, ‘Procedural Harmonisation in a European Context’ in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 171:

The better solution would be a reconsideration of Art. 81 TFEU and a careful redefinition of the compromise of 2003 relating to the interpretation of the ‘cross-border’ threshold: the wording of Art. 81 TFEU permits a broader reading which would empower the Union to enact legislation in procedural matters for the swift and efficient enforcement of Union law, especially with regard to the Internal Market and the free movement of persons in the European Judicial Area.

litigants, habitually residing in the same Member State, adjudicate before the competent national court on a right they derive from EU law. There is an indispensable international dimension to this matter, which does not constitute a purely internal case, but one with cross-border implications in the sense that it directly relates to the functioning of the EU supranational legal order. Such large scale EU law-limited intervention in national civil procedural regimes has already been envisaged in one of the earlier drafts of the IPRED. The initial Commission proposal provided in Article 2(1) that the directive should apply to ‘any infringements of the rights deriving from Community and European provisions on the protection of intellectual property rights, as set out in the Annex to the Directive, and the provisions adopted by the Member States in order to comply with those provisions’.⁷¹

A broad understanding of the cross-border provision of Article 81 TFEU would lead to both a wider scope of application of the various EU civil procedure measures, and to increased effectiveness. By linking EU civil procedure with the enforcement of substantive EU law before national courts, both domestic and transnational disputes come into the discussion. This is particularly important considering that the great bulk of Union law adjudication occurs in domestic disputes between individuals and the State, or other individuals.⁷² It will also remedy a fundamental paradox in the current interpretation of the ‘cross-border’ requirement. Specifically, parties not residing in the Member State whose court is seized of the dispute may avail themselves of EU civil procedure rules; on the contrary, litigants residing in the Member State whose court is

⁷¹ See, Commission, ‘Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights’ COM (2003) 46 final, 19. However, the final version of the directive explicitly provides in Article 2(1) IPRED that its rules ‘[...] shall apply [...] to any infringement of intellectual property rights as provided for by Union law *and/or* [emphasis added] by the national law of the Member State concerned’.

⁷² For instance, according to the Heidelberg Report and statistical data from 2003 to 2005, the jurisdiction rules of Brussels I Regulation have been applied in a relatively small number of cases, ranging from less than 1% of all civil cases to 16% in border regions. See: B Hess, T Pfeiffer, and P Schlosser, ‘Report on the Application of the Regulation Brussels I in the Member States’ (Study JLS/C4/2005/03) 16 http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf accessed 11/03/13. Additionally, based on the EEC-Net Report on the application of the ESCP, 47% of the respondents said that only 0-5% of consumer complaints have been handled with the ESCP, whereas 53% of respondents had no statistical data.

seized of the dispute do not have this possibility, even if in both cases the dispute relates to the same EU law matter.⁷³

This proposal is not without problems. For one thing, switching between different procedural mechanisms, EU based ones and national ones, could lead to unnecessary complication and burden for the deciding judges.⁷⁴ Such a situation would presumably have a considerable toll on the quality of the overall judicial system, be it for the adjudication and enforcement of EU law provisions, or national ones.⁷⁵ It is no coincidence that, unlike substantive law, courts have traditionally denied to apply foreign procedural rules, stretching as far as possible the scope of procedural law and applying the rules of the forum as extensively as possible.⁷⁶

However, two important considerations could considerably mitigate the limitations and inefficiencies of a dual system. Firstly, the interpretation of cross-border implications as synonymous to matters in the field of Union law and the subsequent mandatory application of EU civil procedure rules to Union law matters adjudicated before national courts would only require the familiarisation of judges with these additional EU procedural rules, as opposed to 28 different civil justice regimes in the context of PIL. Provided these rules are of a mandatory nature for the enforcement of substantive EU law, national judges and EU citizens will have the possibility to

⁷³ See: C M G Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22(4) ELR 291, 309; Storme, 'Improving Access to Justice in the Europe' (n 70) 214.

⁷⁴ In the context of PIL and the application of foreign procedural rules by national judges: J J Fawcett, J M Carruthers, and Sir P North, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 79.

⁷⁵ See to that effect: The Law Society of England and Wales, 'Towards a Coherent European Approach to Collective Redress: Response of the Law Society of England and Wales' (2011) 3 http://ec.europa.eu/competition/consultations/2011_collective_redress/law_society_of_england_and_wales_en.pdf accessed 22 November 2012. In the context of optional procedural harmonisation in the EU: 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) 100-101; M Eliantonio, 'The Future of National Procedural Law in Europe: Harmonisation vs Judge-Made Standards in the Field of Administrative Justice' (2009) 13(3) EJCL 8 <http://www.ejcl.org/133/art133-4.pdf> accessed 24 March 2013.

⁷⁶ Fawcett, Carruthers, and North (n 74) 79.

familiarise themselves with these rules, recognising and treating them as an indispensable aspect of the national civil justice system, rather than a ‘*Fremdkörper*’.⁷⁷

Secondly, by providing for procedural rules that are applicable in an obligatory and exclusive fashion in national legal orders in cases of cross-border or domestic dispute resolution and enforcement in the field of EU law, a wider spectrum of prospective litigants is covered, essentially promoting access to justice considerations in the EU in accordance with Articles 47 and 51 CFREU. Mandatory measures for EU law disputes could also contribute to the creation of a level-playing field in the Internal Market, setting the foundations for a Single Area of Justice for all, where litigants can approach courts as easily as in their own country, without being discouraged by the complexity of Member States’ procedural systems.⁷⁸ Finally, they could reduce the fragmented character of EU civil procedure law, and offer a coherent, realistic, competitive alternative to the diverse domestic procedures embedded in national procedural regimes.⁷⁹

Ultimately, EU civil procedure rules could constitute a source of inspiration for the subsequent adaptation of purely national, non-EU law related procedural rules. This has effectively started occurring in the area of civil justice cooperation and the creation of EU alternative dispute resolution mechanisms, namely the Mediation Directive.⁸⁰ Although this directive has introduced rules on voluntary mediation for cross-border disputes, many Member States, such as Italy,⁸¹ Greece,⁸² and Germany⁸³ have expanded

⁷⁷ Term borrowed from: W van Gerven, ‘A Common Law for Europe: The Future Meeting the Past?’ (2001) 4 E.R.P.L. 485. For more detailed analysis of a mandatory EU civil procedure scheme see below, ‘6.4.2 The principle of proportionality’ 212.

⁷⁸ ‘Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations’ (n 61) 11.

⁷⁹ See also below, ‘6.4.2 The principle of proportionality’ 212.

⁸⁰ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3. For a comprehensive examination of the individual provisions of the Mediation Directive see, *inter alia*: J Nolan-Haley, ‘Evolving Paths to Justice: Assessing the EU Directive on Mediation’ in *Proceedings of the Sixth Annual Conference on International Arbitration and Mediation* (forthcoming M Nijoff Publishers 2012) <http://ssrn.com/abstract=1942391> accessed 13 February 2013.

⁸¹ Decreto Legislativo n.28, ‘Attuazione dell’articolo 60 della legge 18 giugno 2009, n.69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali’ (2010).

⁸² N. 3898/2010 (ΦΕΚ Α’ /211) «Διαμεσολάβηση σε αστικές και εμπορικές υποθέσεις».

its scope of application for domestic disputes. A similar development could be envisaged in civil justice measures for the promotion of effective access to justice in the field of EU law, with Member States potentially applying them for non-EU law related disputes too. This could gradually contribute to the development of a common EU legal cultural identity, following from the right to effective access to justice and its fundamental procedural guarantees.

Practically, this broader understanding of the cross-border implications provision of Article 81 TFEU will eventually allow a combination of the most effective aspects of existing approaches to civil procedure harmonisation from an access to justice proactive point of view. This interpretation brings civil justice cooperation in the context of EU law enforcement, as has been the case with both the CJEU and the sectoral procedural rules. Accordingly, prospective EU civil procedure rules based on Article 81(2)(e) TFEU will be applicable to both cross-border and domestic disputes concerning the violation of directly effective Treaty rights and Regulation provisions, damages claims for state liability in case of unimplemented or wrongly implemented Directives, the violation of EU rights stemming from the indirect or incidental horizontal direct effect of unimplemented Directives, and the violation of national rules implementing EU secondary legislation. In addition, coming with the constitutional guarantees for comprehensive and concrete rule-setting, EU civil procedure rules under Article 81 TFEU will touch core procedural matters, such as evidentiary rules, provisional relief, and the funding of litigation in a general fashion, actively promoting all aspects of the right of access to justice, balancing competing interests, namely the interests of the claimants, the defendants, and good administration of justice.

6.4 What is needed? The principles of subsidiarity and proportionality

[Footnotes continued on next page]

⁸³ Entwurf eines Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, BT-Drs 17/5335, <http://dipbt.bundestag.de/dip21/btd/17/053/1705335.pdf> accessed 19 February 2013.

The challenge for EU institutions is not to intervene into Member States' national procedural regimes at all costs. The overarching aim is to guarantee the enforcement and dispute resolution of claims based on 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. EU institutions need to support, via concrete empirical evidence and cost-benefit analysis, the desirability and feasibility of further action in the area of civil procedure law for the promotion of the fundamental right of access to justice in the EU (Article 47 CFREU).⁸⁴ Once such action is deemed necessary, it is for the EU legislature to come up with horizontal, mandatory measures, applicable to EU civil law matters, in both domestic and transnational disputes, based on Article 81(2)(e) TFEU. In doing so, it should take into account interconnections and commonalities between different areas of procedural law as well as sectors of substantive law. The substantive scope of this intervention will follow from the fundamental procedural guarantees for an effective remedy and fair trial, namely accurate, timely justice at a reasonable cost.⁸⁵ This will ensure a coherent intervention into national procedural rules, safeguarding only the fundamental parameters of effective enforcement and judicial protection of legal rights, as exemplified first in the European Convention,⁸⁶ then in the CJEU case law on effective judicial protection,⁸⁷ and most recently in the binding EU Charter of Fundamental Rights and Freedoms.⁸⁸

Therefore, this final part of the analysis will involve a subsidiarity and proportionality investigation of the proposed solution for coherent EU civil procedure law. As seen from the *Tobacco Advertising*⁸⁹ case, once EU competence is established,

⁸⁴ G Cumming and M Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (Vol 42, Kluwer Law International Wolters Kluwer Law & Business 2009) 33.

⁸⁵ 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) 3-52.

⁸⁶ Articles 6 and 13 ECHR.

⁸⁷ See above, '2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection' 50.

⁸⁸ Article 47 CFREU. See also above, '2 The Right of Access to Justice in the EU: In Search of a New Role' 39.

⁸⁹ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

an additional second step needs to be undertaken; that is, to investigate whether Member States could effectively regulate a certain issue without EU intervention (subsidiarity).⁹⁰ Even if the EU should regulate an area, the measures adopted should be proportional to the problem that it is aiming to address (proportionality).⁹¹ The principles of subsidiarity and proportionality become handy whenever the EU institutions need to establish this balance *in casu*, with regard to the various proposed regulatory measures.⁹² As a result, this section is of essentially limited value, offering only an overall first consideration of the subsidiarity and proportionality principles *in abstracto*. The final answer as to the actual conformity of horizontal EU civil procedure law measures with these principles will largely depend on the particularities and specificities of these measures *in concreto*.

6.4.1 The principle of subsidiarity

Traditionally, the principle of subsidiarity does not play a fundamental role in controlling the ambit and reach of EU action in the areas of shared competence. The few CJEU cases focusing on the conditions of applicability of the subsidiarity principle⁹³ have introduced a ‘proceduralised’ principle, exhausted in the EU legislature’s obligation to provide reasoned statements why action at EU level is both essential and more appropriate.⁹⁴ It will be interesting to see whether the new Protocol No 2 will boost the dynamic of the subsidiarity principle.⁹⁵ Briefly, the Protocol provides that within eight weeks from the date of transmission of a proposed EU measure, national parliaments can send opinions stating the reasons why the proposed measure violates

⁹⁰ Article 5(3) TEU. See: G A Bermann, ‘Competences of the Union’ in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century* (Hart Publishing 2004) 65. Bermann points out that the issue of competence is interrelated with that of subsidiarity, yet it needs to be tackled independently. The competence issue refers to the prior question of the subject of powers and the actual content of these powers. In contrast, subsidiarity refers to the way Union competences are actually exercised once granted.

⁹¹ Article 5(4) TEU.

⁹² See, S Weatherill, *Cases and Material on EU Law* (OUP 2010) 614.

⁹³ Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paras 26-28; case 84/94 *United Kingdom v Council* [1996] ECR I-5755, para 47; case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras 31-33.

⁹⁴ G A Bermann, ‘Proportionality and Subsidiarity’ in C Barnard and J Scott (eds), *The Law of the Single European Market, Unpacking the Premises* (Hart Publishing 2002) 86.

⁹⁵ Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality (2010) OJ C 83/206. See, J Peters, ‘National Parliaments and Subsidiarity: Think Twice’ (2005) 1 *EuConst* 68.

the subsidiarity principle.⁹⁶ If 1/3 of national parliamentary votes decide that the proposed measure does not comply with the principle of subsidiarity, then the EU measure must be reviewed.⁹⁷

Generally, the principle of subsidiarity promotes an ‘effectiveness-comparison’ between EU and State legislative measures. Clearly, where the EU adopts measures for civil matters in the field of Union law, it makes little sense to argue that individual Member States are best placed to develop such measures via un-coordinated, spontaneous action.⁹⁸ Furthermore, the EU needs to provide sufficient qualitative and quantitative indicators on why the pursuance of a Treaty objective is better achievable via measures taken at EU rather than State level. EU institutions should take into account potential EU or State financial or administrative burdens before they can come to a final judgment on the necessity for any EU action for the realisation of a Treaty goal.⁹⁹ This balancing activity could result in a situation where a Treaty objective may indeed be more adequately regulated at an EU level, but when considering all surrounding consequences of such an action, it may be preferable to opt for a less effective, but also less damaging, action at State level.¹⁰⁰ This stage of the subsidiarity inquiry presupposes an adequately substantiated EU civil procedure law proposal.

⁹⁶ Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality (n 95) Article 6.

⁹⁷ Ibid, Article 7(2). See also, T Tridimas, ‘The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?’ in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century* (Hart Publishing 2004) 133-134. Tridimas suggests that such a scenario could be more easily realised in Member States with weak governmental majorities or coalition governments, where members of the parliament could exercise political force in a rather independent way.

⁹⁸ Article 5(3) TEU.

⁹⁹ Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality (n 95) Article 5.

¹⁰⁰ P Biavati, ‘Is Flexibility a Way to the Harmonisation of Civil Procedural Law in Europe?’ in F Carpi and M Lupoi (eds), *Essays on Transnational and Comparative Civil Procedure* (G Giappichelli Editore 2001) 90; Storskrubb (n 9) 43. See also: case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999, Opinion of AG Maduro, para 30; joined cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451, paras 101-108; case C-110/03 *Kingdom of Belgium v Commission of the European Communities* [2005] ECR I-2801, paras 56-58; K Lenaerts and P Van Ypersele, ‘Le principe de subsidiarité et son contexte: Étude de l’article 3B du traité CE’ (1994) 30 CDE 100.

6.4.2 The principle of proportionality

Additionally, the actual content and form of EU measures should be proportional to the particular Treaty objectives pursued.¹⁰¹ EU measures should be scrutinised with regard to their appropriateness for the attainment of the Treaty objective, their necessity for the realisation of that objective, and their proportionality *stricto sensu*.¹⁰² Generally, the CJEU's review standard is a manifestly inappropriate, manifestly unnecessary, and manifestly disproportionate EU measure.¹⁰³ This is due to separation of powers questions, mainly between the legislature and the judiciary, involved in the proportionality investigation. There is a high level of respect for EU institutions' policy decisions and range of discretion.¹⁰⁴ An even more limited scrutinising action is seen in cases involving extensive scientific and complex cost-benefit analyses that the CJEU realistically might not be able to crosscheck.¹⁰⁵

Firstly, opting for a horizontal approach to EU civil procedure law offers the possibility for a more systematic consideration of the right of access to justice. This possibility covers both the broader procedural themes of the adopted measure, as well as the particular provisions in conformity with the guarantees of procedural fairness and good administration of justice (rationality test).¹⁰⁶ Secondly, the costs for the

¹⁰¹ Article 5(4) TEU.

¹⁰² See: G De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 YEL 113; Hess, *Europäisches Zivilprozessrecht* (n 1) 73.

¹⁰³ Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-5755; case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405; case 426/93 *Federal Republic of Germany v Council of the European Union* [1995] ECR I-3723; case C-280/93 *Federal Republic of Germany v Council of the European Union (The Bananas)* [1994] ECR I-4973.

¹⁰⁴ Tridimas speaks of a 'soft proportionality test' applicable by the ECJ when reviewing EU policy measures in: T Tridimas, *The General Principles of EU Law* (OUP 2006) 138.

¹⁰⁵ See: De Búrca, 'The Principle of Proportionality and its Application in EC Law' (n 102) 105-125; F G Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999). According to settled case law, the EU legislature enjoys wide discretion in matters with complex economic implications. The Court's review activity is limited to the establishment of manifest error, or misuse of powers, or clear disregard of the limits of discretion. See: case T-180/00 *Astipesca, SL v Commission of the European Communities* [2002] ECR II-3985, para 79; joined cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, para 64; joined cases C-248-9/95 *SAM Schiffahrt and Stapf v Germany* [1997] ECR I-4475, para 23.

¹⁰⁶ See, Bermann, 'Proportionality and Subsidiarity' (n 94) 80.

implementation of these measures will be proportionate to the objective pursued,¹⁰⁷ if mandatory EU civil procedure measures apply to both domestic and cross-border disputes in the field of EU law. This is due to the considerably higher volume of EU law-related domestic disputes, leading to increased possibilities for the actual success of the measures in national legal orders.¹⁰⁸ Thirdly, proposed EU measures should be proportionate to the objective pursued. In other words, in case of multiple appropriate and necessary measures, the EU institutions should opt for the less restrictive one, which inflicts less costs and burdens on all subjects involved.¹⁰⁹ This could practically mean that instead of a Regulation, a Directive or even a Recommendation might be more proportionate for the achievement of the Treaty goal.

To begin with, 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 requirements of effective dispute resolution and enforcement of EU rights and obligations. The main reason is that it completely lacks binding force, having only a guiding, advisory role. 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

¹⁰⁷ Ibid; joined cases C-96/03 and C-97/03 *Tempelman and van Schaijk v Directeur van de Rijksdienst voor de keuring van Vee en Vlees* [2005] ECR I-1895, para 48; case C-86/03 *Greece v Commission* [2005] ECR I-10979, para 96; case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, para 37.

¹⁰⁸ Commission, 'Extended Impact Assessment: Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' SEC (2005) 351, 12: there is limited empirical evidence regarding small claims disputes resolution in cross-border claims and problems identified therewith. On the contrary, there is considerably more data available regarding the pursuit of domestic small claims, such as their volume, their cost, duration, and complexity of litigation.

¹⁰⁹ See, *inter alia*: 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' (n 62) 6-7; Commission, 'Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure' COM (2002) 173 final, 8-9. In the initial Commission proposals for EU legislative acts in the area of civil justice cooperation, there was hardly any reference to the proportionality principle, other than that the measures adopted were the minimum needed and did not exceed what was necessary for the attainment of certain objectives. See, *inter alia*: Commission, 'Proposal for a Council Regulation creating a European enforcement order for uncontested claims' COM (2002) 159 final, 87, point 16; Commission, 'Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings' COM (2002) 13 final; Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters' COM (2006) 751 final, 6.

other, as each Member State would interpret and incorporate suggestions in a different way.¹¹⁰ What is more, the promotion of the application of a fundamental right such as that contained in Article 47 CFREU cannot be entrusted to mere soft law. EU intervention in 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. Bearing this in mind, a soft law approach is both inappropriate and illegitimate to address the interests at stake.

The next less intrusive option for EU civil procedure law would be minimum harmonisation. Minimum standards do not abolish national procedural systems in their entirety, allowing for more protective and effective national procedural rules. As a result, they respect Member States' cultural identity, also permitting some competition between different jurisdictions.¹¹¹ However, incorporation of these minimum standards in the national legal order might as well compromise the overall quality of these systems, especially where minimum standards are isolated, *ad hoc* provisions that disregard interconnections and interdependencies between the various areas of application of civil procedural law.¹¹² Such a scenario could be detrimental for the

¹¹⁰ 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* (A. Longo Editore 2006) 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 from contract law: 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' 7-12 http://ec.europa.eu/justice/news/consulting_public/0052/contributions/247_en.pdf accessed 16 March 2013. See however at a worldwide level: ALI/UNIDROIT, *Principles of transnational civil procedure* (CUP 2006).

¹¹¹ On national legal traditions and regulatory competition as inhibiting parameters in the process of civil procedure harmonisation in the EU see above, '3.3 The Feasibility of EU Intervention into National Civil Procedural Law' 83.

¹¹² 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) 33; M Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 132-136.

effective enforcement of EU rights and obligations, rendering recourse to national courts even more problematic and complicated.¹¹³

Finally, a 29th regime approach could be envisaged. This was the case with the ESCP, an optional, alternative mechanism, existing in parallel with national provisions for cross-border disputes.¹¹⁴ Such an approach guarantees that Member States' legal cultural identity remains intact, constituting a conservative solution on a trial and error basis.¹¹⁵ Regardless of the existence of the additional procedural mechanism, national civil procedural mechanisms and rules on the same subject would offer a simultaneous, alternative option¹¹⁶ 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 for a variety of procedural options in accordance with litigants' expressed preferences.¹¹⁷ Finally, it also considerably reduces 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.¹¹⁸

However, optional instruments raise some insurmountable problems, which are aggravated when limited to cross-border disputes only. Although horizontal EU civil procedural measures applicable to both cross-border and domestic disputes at an

¹¹³ Take for example the case of the IPRED provision on reimbursement of actual legal costs, which led to an overall drop of IP cases in the Netherlands, where under the previously existing system, parties' legal costs were compensated at a fixed rate.

¹¹⁴ See above, '5.3.2.3 An optional instrument as a transitional system?' 163.

¹¹⁵ In the area of contract law: 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 March 2013; 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) 86. For an extensive analysis of the optional instrument approach in the area of substantive contract law harmonisation see: W Kerber and S Grundmann, 'An Optional European Contract Law Code: Advantages and Disadvantages' (2006) 21 Eur J Law Econ 215-236.

¹¹⁶ 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' (n 31) 281; Van der Grinten (n 4)15.

¹¹⁷ By analogy from contract 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' (n 110) 31; Visscher (n 115) 86.

¹¹⁸ On the impact of lobbyism on civil procedure law harmonisation see above, '3.3 The Feasibility of EU Intervention into National Civil Procedural Law' 83.

optional basis could be more easily accepted as a transitional solution,¹¹⁹ being less restrictive, they could not be maintained on a long-term basis. This is due to additional costs associated with the need for judges to waste valuable judicial resources in order to switch between the various procedural regimes.¹²⁰ More importantly, as analysed above,¹²¹ procedural law fulfils a fundamental function in parallel with conflict resolution, that is policy implementation via the enforcement of law. Wasting limited judicial resources solely for the sake of procedural diversity and the respect of legal judicial tradition, whatever that tradition may be, does not comport with the overarching objective of procedural law, which is the effective enforcement of law, here, of EU law.¹²² 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.¹²³

As a result, under the current Treaty scheme, a parallel, mandatory regime for cross-border and domestic disputes in the field of EU law could pass both the subsidiarity and the proportionality test. Such mandatory measures applicable for the dispute resolution and enforcement of EU law have the double advantage of securing adequate familiarisation with their provisions for both national judges and EU citizens. More importantly, they do not impose the burden of choice and information acquisition on litigants, but rather on the paragons of justice systems, namely the judges. Under an optional regime, it is primarily litigants, who should be aware of potentially more effective procedural rules in case of cross-border disputes. By providing for procedural rules applicable in an obligatory and exclusive fashion in national legal orders in cases of cross-border or domestic dispute resolution and enforcement in the field of EU law, a

¹¹⁹ Storskrubb, *Civil Procedure and EU Law, A Policy Area Uncovered* (n 9) 229-30.

¹²⁰ Fawcett, Carruthers, and North (n 74) 79. It could be presumed that the reason why *lex fori* has traditionally been the governing rule in the area of procedural law is the inherent complexity of that type of law that would render it too difficult for national judges to familiarise themselves with foreign procedures whenever the parties to the dispute have chosen so.

¹²¹ See above, '1.2.2 The fundamental goals and functions of civil justice' 19.

¹²² See: Wagner (n 75) 100-101; Eliantonio (n 75) 8.

¹²³ See, Engström (n 112) 34-35. On the derivative value of civil procedural law see also, Dougan (n 112) 103.

wider spectrum of prospective litigants is covered, thus promoting access to justice considerations in the EU in accordance with Articles 47 and 51 CFREU.

More importantly, these EU civil procedure rules become an indispensable part of Member States national procedural regimes for matters in the field of EU law. Under the 29th regime approach, EU procedural rules should also become an integral part of national procedural systems. However, the optional character in combination with the considerably limited scope of application to only cross-border disputes saps the real possibilities for genuine integration. For instance, in the case of the ESCP, empirical evidence suggests that it is hardly used and many judges are completely unaware of the existence of such an optional European procedure.¹²⁴ Along these lines, the promotion of judicial training in EU matters is of fundamental importance, facilitating the accurate and consistent applicability of EU-originated procedural mechanisms.¹²⁵ Accordingly, Member States can genuinely integrate EU procedural mechanisms in their domestic legal orders, offering a realistic ‘alternative’ to national choices.

6.5 A review of main findings

Civil procedure cooperation has played a central role in the European integration process since the creation of the European Economic Community and has gained increased significance with the various amending Treaties. The legislative history of Article 81 TFEU shows that Member States traditionally regarded this policy area as intergovernmental. Therefore, initial measures in this field, had a rather limited scope, focusing on cross-border litigation, setting common rules of private international law on certain subjects of the judicial process.¹²⁶ However, the Treaty of Lisbon further

¹²⁴ See above, ‘5.3.2.3 An optional instrument as a transitional system?’ 163.

¹²⁵ See: Article 81(2)(h) TFEU and EJTN website: <http://www.ejtn.net>.

¹²⁶ See *inter alia*: Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L 160/37; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (Brussels I Regulation).

promoted the objectives, framework, and modes of civil justice cooperation.¹²⁷ Article 81 TFEU has diminished the importance of the Internal Market provision¹²⁸ introducing a further basis for civil procedure approximation measures in element (e) referring to ‘*effective access to justice*’ (emphasis added).¹²⁹

Against this background, I argued that Article 81(2)(e) TFEU should be read in conjunction with Article 47 CFREU, achieving a harmonious interpretation of effective access to justice in the EU supranational legal order. It is in light of this proposition that I have reconceptualised the general provisions of the legal basis of Article 81 TFEU, namely the mutual recognition principle and the cross-border limitations, arguing in favour of an extensive interpretation of the said provisions. Such extensive understanding would also conform to the principles of subsidiarity and proportionality, demanding a careful reconsideration of interests involved and potential risks of EU legislative activity. This is so because the EU could coordinate Member States’ efforts to this end, guaranteeing a coherent and systematic approach and EU-wide effectiveness in equal terms.

¹²⁷ See: W Kennett, *Enforcement of Judgments in Europe* (OUP 2000) 6; A M Rouchaud, ‘Le renforcement de la coopération judiciaire’ in Université Jean Moulin, Faculté de Droit (eds), *Les effets des jugements nationaux dans les autres Etats membres de l’Union européenne* (Bruylant 2001) 23.

¹²⁸ See UK Government, ‘Commentary on the Constitutional Treaty, Part 3 the policies and functioning of the EU’ (2005) 168

http://webarchive.nationalarchives.gov.uk/20050606200944/http://www.fco.gov.uk/Files/kfile/commentary_Part2_Part3.pdf accessed 18 February 2013.

¹²⁹ See also: Storme (n 10) 91; Storskrubb (n 9) 45; M Freudenthal, ‘The Future of European Civil Procedure’ (2003) 7(5) EJCL 10 <http://www.ejcl.org/75/art75-6.html> accessed 24 March 2013.

7 Concluding Remarks

In this thesis, I focused on the possibilities for a coherent approach to EU civil procedure law. I identified the potential for greater coherence in the use of the fundamental right to effective access to justice as a tool for EU intervention in national procedural regimes. This proposal can be realised via recourse to the legal basis of Article 81(2)(e) TFEU explicitly providing for the approximation of national laws and regulations for the promotion of effective access to justice. Therefore, I put forward a link between Article 81(2)(e) TFEU and Article 47 CFREU, promoting a harmonious interpretation of effective access to justice in the EU supranational legal order, through a genuine reconceptualisation of the general provisions of Article 81 TFEU and of the overall policy area of civil justice cooperation. From this point of view, civil procedural law constitutes the means for the introduction and incorporation of fundamental notions of justice in the supranational legal order.¹

In order to examine my main thesis, I broke down the analysis in six chapters as follows:

7.1 Background and overall argument

In the introductory chapter, I broadly examined the fundamental functions of civil procedure rules. I suggested civil justice systems fulfil a dual role. On the one hand, they facilitate the resolution of civil law disputes, focusing on the fairness and efficiency of the proceedings as distinct from the outcome of the adjudication.² On the other hand, they facilitate the enforcement of subjective rights and through that of the relevant national policy, laying emphasis on the rule of law, giving litigants what is

¹ H E Hartnell, 'EUstitia: Institutionalizing Justice in the European Union' (2002) 23 *Nw.J.Int'l L. & Bus.* 92.

² H Genn, *Judging Civil Justice* (The Hamlyn Lectures 2008, CUP 2010). On the function of dispute resolution as distinct from the litigation outcome, see also: L B Solum, 'Procedural Justice' (2004-2005) 78 *S.Cal.L.Rev.* 181, 183; S L Blader and T R Tyler, 'A four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" process' (2003) 29 *Pers Soc Psychol Bull* 747 <http://psp.sagepub.com/content/29/6/747> accessed 08 March 2013.

rightfully theirs.³ *Van Gend en Loos* established the decentralised system of private enforcement and dispute resolution of claims based on EU law rights and obligations before national courts.⁴ The latter, acting as European courts of general competence, set the procedures and remedies for the adjudication of EU law related claims.⁵ Nevertheless, EU intervention into national procedural regimes may be deemed necessary to ensure that national procedures come with sufficient guarantees for the promotion of both fundamental goals of civil justice, namely dispute resolution and law enforcement, in order to protect litigants' interests on both sides of the EU law based dispute.⁶ This essentially calls for adequate and effective remedial rules, as well as for efficient and fair proceedings before national courts.

Having said that, the EU has intervened so far in national procedural systems in a rather fragmented and incoherent way, lacking systematic planning and clearly set objectives.⁷ This is exhibited in the multiplicity of modes of intervention, namely either via CJEU *ad hoc* rules of procedure,⁸ sector specific, secondary legislative instruments on core procedural themes,⁹ or via horizontal autonomous EU mechanisms of civil procedure.¹⁰ I thus argued that Article 47 CFREU, on the right to an effective remedy and a fair trial, should constitute the guiding principle for the interpretation of the potential legal basis for civil justice harmonisation and the subsequent development of

³ Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1988] ECR 1339, para 23.

⁴ Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, para 12.

⁵ See *inter alia*: C N Kakouris, 'Do the Member States possess Judicial Procedural Autonomy?' (1997) 34 CML Rev. 1389; J S Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9(5) ELJ 599-613; W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 CML Rev. 501.

⁶ On the desirability and feasibility of such EU intervention at the political level see above, '1 Civil procedure law in the EU: unravelling the policy considerations' 73.

⁷ See to that effect: M Tulibacka, 'Europeanisation of Civil Procedures: In Search of a Coherent Approach' (2009) 46 CML Rev. 1553-1565; E Storskrubb, *Civil Procedure and EU law. A Policy Area Uncovered* (OUP 2008) 301-311.

⁸ For a detailed assessment of this mode of civil procedure harmonisation in the EU see above, '4 Civil procedure law in the EU: the role of the CJEU case law' 98.

⁹ See for instance, Directive 2004/48/EC on the enforcement of Intellectual Property Rights [2004] OJ L 195/16. See also above, '5.2 Sectoral EU civil procedure rules: the example of IPRED' 135.

¹⁰ See for instance: 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. See also above, '5.3 Horizontal EU civil procedure rules: the example of the European Small Claims Procedure' 150.

relevant EU legislation on the private enforcement and dispute resolution of claims based on EU law rights and obligations.

Article 47 CFREU, which constitutes primary EU law since the entry into force of the Lisbon Treaty, has codified the EU right of access to justice, incorporating CJEU case law on the principle of effective judicial protection, which draws inspiration from ECHR Articles 6 and 13 and the relevant Strasbourg case law.¹¹ Unlike initial, limited conceptualisations of access to justice either as a right of access to courts, to due process, or to judicial redress,¹² Article 47 CFREU encapsulates guarantees of reasonable length of proceedings, fair hearing, and judicial impartiality and independence for the enforcement and dispute resolution of claims stemming from ‘rights and freedoms guaranteed by the law of the Union’.¹³ What is more, the Lisbon Treaty has created two explicit legal bases for the promotion of the right of access to justice in the EU, namely Articles 67 and 81(2)(e) TFEU on civil justice cooperation.¹⁴ This development offers ample possibilities to use Article 47 CFREU as a legitimising tool or a higher standard, inducing greater coherence to civil procedure harmonisation efforts in the EU.¹⁵

7.2 Of fundamental rights and obligations

In Chapter 2, I examined the scope of application and meaning of Article 47 CFREU on the right to an effective remedy and a fair trial, investigating whether and how, if at all, it could be used as a guiding principle for the future development of civil procedure law in the EU. According to the traditional defensive view, human rights are

¹¹ See above, ‘2 The Right of Access to Justice in the EU: In Search of a New Role’ 39.

¹² On the evolution of the right of access to justice see: M Cappelletti and B Garth (eds), *Access to Justice and the Welfare State* (EUI 1981).

¹³ Article 47(1) CFREU; Article 6 TEU.

¹⁴ See also, M E Méndez-Pinedo, ‘Access to Justice as Hope in the Dark: in Search for a New Concept in European Law’ (2011) 1(19) *IJHSS* 9.

¹⁵ See above, ‘6 The Horizontal Approach to EU Civil Procedure Law Reconceptualised: Achieving Greater Coherence’ 184.

limits to State intervention into individuals' sphere of freedom.¹⁶ Therefore, human rights vest individuals with justiciable claims that can be invoked before national courts in case of breach by the State.¹⁷ In the EU context, this view prevailed during the initial years of the evolution of an EU fundamental rights policy. As a result, Member States insisted on the introduction of EU law fundamental rights, as these would essentially limit integration efforts, restricting, rather than expanding, EU competences in the various sectors of activity.¹⁸

However, after the enactment of the Lisbon Treaty, and the subsequent binding force of the European Charter,¹⁹ Article 51 CFREU has imposed on EU institutions the obligation not only to respect the Charter of Fundamental Rights, limiting their regulatory activity appropriately, but also and most importantly, to promote the application of these rights too. The latter obligation has arguably introduced an alternative, proactive view on the role of EU fundamental rights, aimed at remedying institutional deficiencies, which inhibit the full exercise of these rights.²⁰ In this light, I suggested that the right of access to justice under Article 47 CFREU calls for concrete EU legislative measures guaranteeing effective, fair, and efficient access to in-court adjudication for rights and freedoms under EU law. Such a proactive stance is both

¹⁶ On the traditional defensive view on the role of human rights see *inter alia*: S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); O De Schutter, 'The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination' (Jean Monnet Working Paper 07/04)

<http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040701.pdf> accessed 31 January 2013.

¹⁷ See: S Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' (2006) 12(1) ELJ 41, 48.

¹⁸ See *inter alia*, G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011).

¹⁹ Article 6 TEU.

²⁰ See to that effect: P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CML Rev. 945-994; De Schutter (n 16) 19-20; G De Búrca, 'Fundamental Rights and Citizenship' in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (EUI Robert Schumann Centre 2003) 21; P Alston and J H H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in P Alston (ed), *The EU and Human Rights* (OUP 1999) 3; M P Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in T K Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart Publishing 2003) 289; P Carozza, 'The Member States' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) 49. See however, A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 CML Rev. 1333.

desirable and feasible, due to the existence of express EU legal competence to ensure effective access to justice through the approximation of Member States' civil justice laws and regulations in Article 81(2)(e) TFEU.²¹

In other words, Article 47 CFREU should influence the interpretation and nature of developments in EU civil procedure law, albeit in a more subtle way than establishing or modifying powers. EU institutions could invoke the fundamental right of access to justice as a legitimising argument or as a higher standard, guiding efforts to intervene into Member States' civil procedural regimes.²² To this end, the wording and standard of protection of Article 47 CFREU, pursuant to judicial interpretation in the context of the traditional view of individual and retrospective judicial enforcement against State violations, can play an instructive role in two contexts. Firstly, it offers specific procedural guarantees for the effective EU law enforcement and dispute resolution that EU institutions will have to consider when harmonising national civil procedural regimes. Secondly, it provides EU institutions with general guiding criteria for the limitation of these procedural guarantees by legislative instruments, where this is justifiable, legitimate, and proportionate, thus striking a balance between access to courts, procedural fairness, and efficiency of proceedings. This argument has been instrumental for my investigation as to the appropriate legal basis for civil procedure harmonisation in the EU. Therefore, it has informed the analysis in the subsequent chapters four, five, and six, on the role of CJEU case law, sectoral intervention in national procedural regimes, and judicial cooperation in civil matters respectively, in the harmonisation effort.

Specifically, Article 47 CFREU imposes a duty on EU institutions to ensure that individuals have the ability to apply to a court for a remedy, in instances of violations of EU law rights and obligations. With this in mind, national authorities should reason

²¹ See above, '2.2 The constitutionalisation of the right of access to justice and repercussions for EU civil procedure law' 41.

²² See: Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (n 7) 90-91; G Sanna, 'Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters' in G di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 173-174.

their decisions to allow individuals to turn to national courts under the best possible circumstances.²³ In addition, the relief provided must be realistic and adequate for the harm caused, often calling for the possibility to apply for a combination of remedies. This duty is so pervasive that it can also affect the institutional organisation of courts and tribunals, and their jurisdiction, in instances where they can lead to unnecessary, costly, and time-consuming complications.²⁴

In this light, EU institutions should also guarantee real and practical access to courts for the adjudication of EU law rights and obligations, in accordance with certain procedural rules on standing and legal interest,²⁵ whilst also ensuring that final and binding judgments are enforced within a reasonable time.²⁶ This obligation does not affect the possibility for mandatory out-of-court settlement prior to in-court adjudication, provided there is a realistic possibility to pursue the matter further via the judicial avenue, in terms of overall duration and costs of dispute resolution.²⁷ To this end, the provision of financial assistance may be necessary in certain cases, and though legitimate and proportional restrictions are permissible, these cannot result in a blanket denial of the right to legal aid for legal commercial persons.²⁸ Additionally, all parties to the dispute should be able to take knowledge of and comment on all evidence and observations, having a reasonable opportunity to present their case and lines of argumentation under equal procedural conditions, without one party being systematically disadvantaged over the other party. This is often synonymous to oral proceedings, in the presence of all parties and of the media or public following the

²³ Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097.

²⁴ Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483.

²⁵ Joined cases C-87/90, C-88/90 and C-89/90 A. *Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757.

²⁶ In the context of the ECHR case law, see: *Burdov v. Russia* App no 59498/00 (ECtHR, 7 May 2002).

²⁷ Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08)*, *Filomena Califano v Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECR I-02213.

²⁸ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849.

case.²⁹ Fair proceedings should also last for a reasonable amount of time only; reasonableness will be based on the complexity of the case, the applicants' and judicial authorities' conduct, and the importance of the case for the applicant. Finally, such fair and timely proceedings should take place before independent and impartial tribunals established by law, being permanent, having binding jurisdiction, and in principle *inter partes* procedures, and applying rules of law in an unprejudiced and unbiased way, subjectively and objectively construed.³⁰

7.3 Desirability and Feasibility

In Chapter 3 of the thesis, I focused on the desirability and feasibility of civil procedure harmonisation for the promotion of the right to effective access to justice in the EU. Using traditional justifications for substantive private law harmonisation as a starting point, I found that these justifications could yield some convincing results in the area of civil procedure law too.³¹ Specifically, intervention in national procedural regimes could promote a level playing field for dispute resolution and law enforcement in the EU, offering economic operators equivalent access to justice, putting them on equal footing for the adjudication of Internal Market related rights and obligations.³² The more effective, efficient, and fair these common procedural rules are, the more commercial operators will be incentivised to engage in economic activity in the Internal Market, safe in the knowledge that the enforcement of their commercial entitlements

²⁹ In the context of the ECHR case law, see: *Fredin v. Sweden* (no 2) App no 18928/91 (ECtHR, 23 February 1994).

³⁰ In the context of the ECHR case law, see: *Piersack v. Belgium* App no 8692/79 (ECtHR, 1 October 1982).

³¹ On similar investigations by other scholars see, *inter alia*: 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); M Dougan, *National Remedies before the Court of Justice. Issues of Harmonisation and Differentiation* (Hart Publishing 2004); 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).

³² See, Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' COM (2005) 87 final.

will not be a ‘mission impossible’.³³ Such increased economic activity can also be envisaged due to the ensuing limitation of information costs for the assessment of the adjudication risks when considering expanding commercial activity to another State in the Internal Market.³⁴ Finally, approximation of national procedural rules could curtail incentives for the abuse of forum shopping and a potential race to the bottom. These tactics could eventually compromise the effective enforcement of EU law rights and obligations via recourse to, for instance, prohibitively expensive judicial systems, which lack an impartial and independent judiciary, thereby unreasonably prolonging adjudication.³⁵

These efficiencies, however, should not be overemphasised. The promotion of a level playing field in the Internal Market can only indirectly be achieved through the harmonisation of civil proceedings facilitating effective access to justice. It is mainly through the substantive EU legislation that the proper functioning and the elimination of distortions of competition in the Internal Market can realistically be promoted. In addition, economic efficiencies from civil procedure harmonisation due to increased legal certainty and limited information costs for the expansion of commercial activity should be weighed against implementation and adaptation costs as well as costs from the limitation of procedural options and learning effects. Finally, although abusive forum shopping constitutes a real risk in civil procedure law, deteriorating litigants’ access to justice for the dispute resolution and enforcement of EU law based claims, the same cannot be said with regard to the likelihood of a race to the bottom. Such a

³³ For preliminary empirical evidence on the correlation between effective civil procedure rules and economic efficiencies, see *inter alia*: The International Bank for Reconstruction and Development/The World Bank, *Doing Business 2011: Making A Difference for Entrepreneurs* (The World Bank and the International Finance Corporation 2010)

<http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf> accessed 03 March 2013; K H Bae and V Goyal, ‘Creditor Rights, Enforcement, and Bank Loans’ (2009) 64(2) *The Journal of Finance* 823.

³⁴ See: L E Ribstein and B H Kobayashi, ‘An Economic Analysis of Uniform States Laws’ (1996) 25(1) *J. Legal Stud.* 138-140.

³⁵ See, *inter alia*: A S Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 25; P H Lindblom, ‘Harmony of the legal spheres: A Swedish view on the construction of a unified European procedural law’ (1997) *E.R.P.L.* 23-24.

scenario would result in the degradation of the entire national procedural system, eventually inflicting additional costs, rather than efficiencies.³⁶

Therefore, I argued that the EU needs to weigh the policy efficiencies associated with the harmonisation of civil procedure law against the various challenges to the further promotion of the harmonisation project in a systematic fashion. These challenges stem from the very nature of civil procedure law and its close relationship with Member States' divergent legal identities and traditions, which resist the adoption of harmonisation measures that do not conform to their long established ideas on court adjudication.³⁷ Besides, harmonisation efforts could diminish procedural diversity across the Member States, reducing the various jurisdictions' incentive to innovate and experiment for the provision of better and more competitive procedural regimes.³⁸ Finally, harmonised procedural rules may tilt the balance in favour of certain pressure groups' interests due to increased lobbying possibilities at a centralised level.³⁹

Without nullifying the importance of these parameters for the future development of harmonised civil procedure rules, I tried to show their limitations and realistic dimensions. Specifically, national procedural rules on trial administration and general court infrastructure can easily be harmonised without national procedural regimes losing efficiency or effectiveness. Additionally, harmonisation efforts contrary to Member States' fundamental procedural choices could still be envisaged in light of

³⁶ For a detailed assessment of the efficiencies linked to civil procedure harmonisation see above, '3.2.4 Assessment' 81.

³⁷ M Taruffo, 'Harmonisation in a Global Context: The ALI/UNIDROIT Principles' in X E Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T. M. C. Asser Press 2012) 209.

³⁷ See *inter alia*: D Kerameus, 'Procedural Harmonisation in Europe' (1995) 43(3) *Am.J.Comp.L.* 404-405. In the context of contract law harmonisation: 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) 26; P Legrand, 'On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations' (2002) 1 *E.R.P.L.* 63.

³⁸ 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* (Hart Publishing 2002); S Goldstein, 'On comparing and unifying civil procedural systems' in R Cotterrell (ed), *Process and Substance* (Butterworths 1995) 43.

³⁹ See, A Geiger, 'Lobbyists — the Devil's Advocates?' (2003) 24(11) *ECLR* 559.

the right of access to justice and the subsidence of the civil/common law dichotomy. Furthermore, individual consumers' and SMEs' realistic potentials to take advantage of regulatory competition should not be overestimated, considering their limited information and choice capacities. Otherwise, equality of arms for the resolution of disputes and the enforcement of EU law rights and obligations could be seriously undermined. Finally, increased lobbying possibilities at the centralised level could prove beneficial for the promotion of the 'losing' pressure groups' interests for effective access to justice.⁴⁰

7.4 On institutional restrictions

In the 4th Chapter, I focused on the CJEU case law on national procedural autonomy and the principles of equivalence and effectiveness, investigating whether this initial attempt to create EU civil procedure rules has succeeded in promoting effective access to justice in the EU.⁴¹ Looking at landmark case law on the principle of equivalence, I found that the Court has only scarcely used this principle as a review tool of national procedural regimes. This principle requires that national procedural rules for the enforcement of EU law rights and obligations are not less favourable than the procedural rules applicable to similar actions of domestic nature. However, the Court has only rarely been able to identify domestic actions that are similar to the EU law based ones, in terms of the purpose, cause of action, and basic procedural elements.⁴² As a result, the principle of equivalence, where applied, has not actually led to the creation of procedural rules at a centralised EU level. It has only promoted the cohesion of the

⁴⁰ For a detailed reconsideration of the feasibility parameters for the harmonisation of civil procedure law see above, '3.3.4 Countervailing Considerations' 88.

⁴¹ Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989. On the existence of national procedural autonomy or competence see, *inter alia*: J S Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9(5) *ELJ* 599-613; N Kakouris, 'Do the Member States possess Judicial Procedural "Autonomy"?' (1997) 34 *CML Rev.* 1389-1412.

⁴² Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835, para 44; case C-78/98 *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* [2000] ECR I-3201, para 61.

national procedural systems, asking equivalent remedies and procedures regardless of whether a claim is EU law or domestic law originated. More importantly, the importance of the principle of equivalence is all the more diminishing in a highly integrated supranational legal order, rendering the distinction between EU and domestic law based actions hardly feasible.⁴³

Unlike the principle of equivalence, there is extensive CJEU case law on the principle of effectiveness, requiring that national procedural rules do not render EU law enforcement practically impossible or excessively difficult. As such, this principle is more pervasive, calling for modifications in national judicial systems for the effective enforcement of EU law rights and obligations, nonetheless leaving procedural rules for internal cases intact. Based on this principle, CJEU has reviewed national procedural rules on limitation periods for the institution of EU law based claims before national courts, including retrospective EU law related claims.⁴⁴ In doing so, it has either asked national courts to set those procedural rules aside, to amend them, or to apply new ones.

The Court has been even more daring in the case of compensatory relief for state liability for non-, or wrong, implementation of EU Directives, or as an essential corollary to direct effect, securing adequate relief for breach of EU rights by state (executive, legislature, judiciary),⁴⁵ or non-state organs. Despite introducing a remedy that would not otherwise be available in national procedural systems, CJEU has only broadly sketched the constitutive elements for the availability of compensatory relief, leaving executive conditions on the personal and substantive scope, the form, and the extent of the said relief to Member States' judicial systems. Along the same lines, it introduced interim remedial relief in national procedural systems for the suspension of

⁴³ See *inter alia*: C M G Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22(4) ELR 291; M Bobek, 'Why There is no principle of "procedural autonomy" of the member states' in H W Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 305.

⁴⁴ For example, see: case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-4269; case C-338/91 *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475.

⁴⁵ See: joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357; case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

enforcement of secondary invalid EU provisions, as well as of national law in breach of Union law.⁴⁶ In doing so, it only established the basic constitutive elements for the availability of interim relief in cases of invalid secondary EU provisions, leaving both constituent and executive elements of interim relief for national law breaching EU law entirely to Member States' internal procedural choices.⁴⁷

Finally, the CJEU has reviewed national evidentiary rules and presumptions, asking national courts to put them aside where it would be realistically impossible for a litigant to produce or rebut such evidence, availing national remedies for the enforcement of his/her EU law rights and obligations.⁴⁸ However, the necessity for effective enforcement of EU law has not led the CJEU to impose on national judges a general duty to raise points of EU law *ex officio*. Such a duty can only be envisaged where there has not been an adequate opportunity for a litigant to bring forward an EU law related claim before a court of law, taking into account the rights of defence and the procedural efficiency of judicial systems.⁴⁹

The CJEU has placed the effectiveness of the EU legal order at the top of its hierarchy when it comes to Member States' domestic procedural provisions in EU law related cases before national courts. That being said, the criterion against which the CJEU has assessed the necessity for intervention into Member States' national procedural regimes, asking them to either set aside certain rules, modify them, or, less often, come up with new remedies, is the fundamental right of access to justice. In other words, CJEU has intervened to guarantee the application of the right of access to justice during the private enforcement of EU law rights. The CJEU case law has shown in parallel the inherent limitations of the access to justice yardstick when employed by the

⁴⁶ See for instance: case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433; joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-00415.

⁴⁷ On the distinction between constitutive and executive remedial elements, see: Van Gerven, 'Of Rights, Remedies and Procedures' (n 5) 505.

⁴⁸ See for example: case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595; case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁴⁹ See: case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599; joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

Court.⁵⁰ The essentially factual approach of the Court, as well as the incapacity to consider relevant remedial and procedural rules in 28 Member States inhibit the Court from establishing detailed rules of EU civil procedure. In other words, the principle of equivalence and the recourse to national procedural regimes were used to fill in the CJEU case law gaps. These gaps derive from the inherently limited position of the CJEU to consider domestic legal regimes and fundamental choices in order to guarantee the right of access to justice in the EU, an integral element of which is the effective enforcement of EU law.

Realistically seen, the CJEU case law has contributed to the cooperation between the Court and Member States' national courts: this has removed an enforcement burden from the EU Institutions, while also increasing EU citizens' and national courts' understanding of the EU legal order.⁵¹ Nevertheless, CJEU has developed its case law in an *ad hoc* fashion, being less normatively (procedurally) coherent and comprehensive compared to a systematic legislative scheme of intervention into Member States' national remedial and procedural regimes.⁵² As a result, CJEU has systematically asked the EU legislature to take up its role in harmonising national procedural systems,⁵³ embracing and further developing its intervention yardstick, namely effective access to justice. I have thus argued for the use of Article 81(2)(e) TFEU as the genuine competence basis for the harmonisation of civil procedure law in accordance with the procedural guarantees for effective remedies and fair trial in Article 47 CFREU.

⁵⁰ See also, M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 391-395.

⁵¹ See, J Bridge, 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States' (1984) 1 ELR 28, 31.

⁵² For an investigation of the reasons behind CJEU's reluctance to promote a stronger 'Communitarian approach to the problems of judicial procedure' see: M Cappelletti and D Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration' in M Cappelletti, M Seccombe, and J Weiler (eds), *Integration Through Law. Europe and the American Federal Experience*. (Vol 1: Methods, Tools and Institutions, Book 2: Political Organs, Integration Techniques, and Judicial Process, Walter de Gruyter 1986) 337-338.

⁵³ See for instance, case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] ECR 1887.

7.5 In search of constitutional legitimacy

In Chapter 5, I looked at some examples of legislative harmonisation of civil procedure law in the EU. These examples came from both sectoral EU legislative harmonisation of national measures, namely IPRED, as well as horizontal EU mechanisms, i.e. ESCP. As with Chapter 4, my aim has been twofold; firstly, to examine the actual type and extent of harmonisation of national procedural systems, and, secondly, to identify whether these modes of harmonisation can, and indeed have promoted effective access to justice whilst striking a balance between competing interests.

To begin with, IPRED introduced EU rules on core procedural themes, such as disclosure and preservation of evidence (Articles 6-7), provisional and precautionary measures (Article 9), and legal costs reimbursement provisions (Article 14). Based on Article 114 TFEU on the approximation of laws in the Internal Market, IPRED provisions apply to both domestic and cross-border disputes for the enforcement of EU or national IP rights. The initial impetus for such a limited scope of application of these procedural provisions might have been political considerations of minimum intervention in national procedural systems, as well as of gradual development of more general rules on a trial and error basis.⁵⁴ However, despite their sectoral scope, IPRED rules were modelled on Member States' general provisions on the same procedural themes, and as a result, their impact has been felt much wider in national procedural systems.⁵⁵ On the one hand, regulating core procedural themes such as disclosure of evidence and provisional measures anew for every area of EU activity may lead to convoluted national regimes, inherently inconsistent and largely divergent depending on the substantive matter. On the other hand, the balance between competing interests in those

⁵⁴ See, 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) 112.

⁵⁵ See, Tulibacka 'Europeanization of Civil Procedures: In search of a Coherent Approach' (n 7) 1547.

core procedural matters, namely the defendant's, the claimant's, and those of the good administration of justice, does not change with the sector of EU activity.⁵⁶

Bearing this in mind, both the Storme Report on the approximation of judiciary law in the EU⁵⁷ and the ALI/UNIDROIT principles of transnational civil procedure law⁵⁸ have tackled these issues in a generic, non-substantive law specific fashion. IPRED provisions on evidentiary rules, provisional measures, and legal costs are instrumental from an access to justice promotion perspective and as such need not be harmonised at sectoral level. Such a sectoral approach overemphasises the law-enforcement perspective, and is inherently limited for the promotion and balancing of all competing interests in civil adjudication.⁵⁹ This was mainly demonstrated in Article 2 IPRED and the introduction of minimum standards Member States could adapt in their national legislation tilting unjustifiably the balance in favour of right holders only. These minimum standards stem from the constitutional limitations of the sectoral approach; trying to avoid the cross-border limitation of Article 81 TFEU on civil justice cooperation, IPRED drafters used Article 114 TFEU as the legal basis for intervention in national procedural regimes. However, procedural rules could only indirectly promote the functioning of the Internal Market, eliminating distortions of competition. As such, Article 114 TFEU offers EU legislature only a limited constitutional mandate for civil procedure harmonisation, discernible in the absolute lack of provisions on the possibilities to fund IP rights litigation.⁶⁰

Bearing this in mind, I examined another mode of legislative intervention in national procedural regimes, namely via horizontal autonomous EU procedural mechanisms, such as the ESCP. This mechanism has introduced procedural rules aimed at the facilitation of both the enforcement of EU law rights and obligations, as well as of

⁵⁶ See above, '5.2.1 An instrument for harmonising core aspects of civil procedure?' 138.

⁵⁷ M Storme, *Approximation of Judiciary Law in the European Union* (Kluwer Academic Publishers 1994).

⁵⁸ ALI/UNIDROIT 'Principles of Transnational Civil Procedure Law' (2004) 4 Unif. L. Rev. 758.

⁵⁹ See *inter alia*, Wagner, 'Harmonisation of Civil Procedure: Policy (n 54) 112.

⁶⁰ See above, '5.2.2 Limitations of the IPRED' 145.

effective dispute resolution, actively promoting access to justice in the EU.⁶¹ Specifically, it introduced standard forms for a swift and simplified institution and running of court proceedings, also establishing a written procedure for the adjudication of simple, low-value claims, combined with optional legal representation and limited evidence-taking requirements. Along these lines, it has incorporated, *inter alia*, provisions for oral hearing or expert evidence through extensive use of ICT possibilities, where the complexity of the case so requires, catering for the interests of the defence and the fairness of the proceedings, as well as of the good administration of justice in procedural efficiency.⁶²

However, ESCP applies only to cross-border small claims disputes constituting an alternative mechanism litigants could opt for. This leads to a multiplicity of procedures and convoluted civil justice systems, impairing prospective litigants' and national judges' awareness of the mechanism,⁶³ for the additional reason that the mechanism is limited to cross-border disputes, which are of particularly low volume in national legal orders in the first place.⁶⁴ In addition, ESCP's effectiveness for cross-border disputes is restricted due to language barriers and subsequent translation costs, albeit not applicable in case of low value domestic disputes for EU law matters. Such a limited territorial scope does not conform to the wording of Article 47 CFREU providing the right to an effective remedy for all rights and freedoms guaranteed under Union law, regulating not only cross-border, but also domestic relations.⁶⁵ Similarly, ESCP has also introduced minimum procedural standards based on the principle of mutual recognition enshrined in the legal basis of Article 81 TFEU and the broader area of civil justice cooperation. However, these minimum standards are particularly

⁶¹ See *inter alia*, X E Kramer, 'The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation' (2008) 2 ZeuP 370-373.

⁶² See above, '5.3.1 Key features of the Small Claims Procedure in the Context of the Right of Access to Justice' 153.

⁶³ See to that effect: ECC-Net, 'European Small Claims Procedure Report' (2012) http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf accessed 13 December 2012.

⁶⁴ See, B Hess, T Pfeiffer, and P Schlosser, 'Report on the Application of the Regulation Brussels I in the Member States' (Study JLS/C4/2005/03) 16 http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf accessed 11 March 2013.

⁶⁵ See above, '5.3.2.1 Cross-border-disputes limitation' 157.

problematic from a promotion of access to justice perspective, as they need to be complemented by national procedural regimes; this will lead to considerable divergences from one Member States to the other, rendering the comparison between the EU mechanism and the domestic one a difficult and complicated task. This is shown in ESCP provisions on the expansion of time limits for the various actions in the litigation process in ‘exceptional circumstances’, the hardly elaborated bases for judicial review, as well as in the unqualified delegation of the availability, form, and extent of appeal proceedings to national procedural law.⁶⁶ Despite evident efforts to strike a balance between competing interests in small claims litigation, promoting both law enforcement and dispute resolution considerations, the drafters of the ESCP have arguably undermined its effectiveness due to the incongruously limited interpretation of the legal basis of Article 81 TFEU.

Against this fragmented legislative background of civil procedure harmonisation in the EU, the recent discussions on a coherent approach to collective redress might be indicative of the better way forward. Although the initial approach to collective redress was sector-specific, with separate proposals for competition and consumer law, the latest Commission Public Consultation and the Parliament report on collective actions for damages urge greater coherence and horizontality. This stems from the commonality of stakes for the promotion of effective access to justice in the EU in competition, consumer, environmental and yet more areas of EU activity, where the same business practices can inflict small losses on a great amount of individuals or other businesses. Where justifiable, such a horizontal approach could also accommodate sector-specific instruments, for instance, for the quantification of damages in competition law violations, or the broader relationship between public and private enforcement of competition law.⁶⁷

⁶⁶ See above, ‘5.3.2.2 Minimum procedural standards’ 160.

⁶⁷ See for instance: Commission, ‘Public Consultation: Towards a Coherent European Approach to Collective Redress’ (Staff Working Document) SEC (2011) 173, 4-5; European Parliament Committee on Legal Affairs, ‘Draft Report on Towards a Coherent Approach to Collective Redress’ 2011/2089(INI), 5.

Current discussions on collective redress constitute a valuable guiding tool for future civil procedure rules in the EU for yet another reason; they demonstrate the need to strike a clear balance between the competing interests in the core procedural provisions for the promotion of effective access to justice in the EU. For instance, a future EU instrument on collective redress should entail rules on the identification of prospective collective claimants. This is important from an access to justice perspective for a multitude of reasons; for the claimants' fundamental freedom to decide whether they wish to involve themselves in litigation, but also for the existence of a realistic possibility to access courts in a manner that is not too complicated, or expensive, or time-consuming. Equally, this issue is fundamental for the defendants' access to justice through increased possibilities for global peace. Accordingly, opt-in, opt-out solutions, or a combination of both should be considered.⁶⁸

Legal standing rules are also important from an access to justice perspective, affecting matters such as the possibility to inform and represent effectively the members of the class, to encourage meritorious claims, and to guarantee adequate financial liquidity in case of defeat and of the ensuing necessity to reimburse the winning party's legal costs.⁶⁹ Potential solutions include group actions, class actions, or test cases. Finally, possibilities to finance the institution and continuation of proceedings, also covering the defendants' legal costs in case of defeat, are equally important from an access to justice perspective, facilitating claimants' access to courts and allowing for meritorious claims that will not drag defendants to the courts. Against these basic balancing premises, contingency fees, BTE and ATE insurance schemes and public legal aid models can be envisaged.⁷⁰

7.6 'A paradigm shift'

⁶⁸ See above, '5.4.2.1 Identifying the claimants: to opt in or to opt out, or both?' 171.

⁶⁹ See above, '5.4.2.2 Legal Standing in collective disputes: Filtering mechanisms?' 174.

⁷⁰ See above, '5.4.2.3 Financing the EU collective redress mechanism' 176.

In Chapter 6, I looked at the legal basis for horizontal EU civil procedure rules after the 2009 Lisbon Treaty, namely Article 81 TFEU. The predecessors of this provision, namely Articles 220 EEC, K.1(6) EU, and 65 EC, have diachronically served as the legal bases for procedural cooperation in civil matters, a key parameter of EU integration. The Lisbon Treaty attributed an autonomous place to civil justice cooperation in the broader Area of Freedom, Security, and Justice, which is aimed at ensuring, *inter alia*, ‘effective access to justice’ even when this is not necessary for the proper functioning of the Internal Market.⁷¹ However, Article 81 TFEU has also maintained some of the inefficiencies of its predecessors, and mainly Article 65 EC. It only covers cross-border disputes between parties not habitually residing in the same Member State, whereas the UK, Irish, and Danish opt-outs from the Area of Visas, Asylum, Immigration, and policies related to the free movement of persons were maintained in the Lisbon Treaty too.⁷²

Despite Article 81 TFEU related limitations, the EU legislature should not use Article 114 TFEU on the approximation of laws in the Internal Market as the legal basis for future EU civil procedure rules. On the one hand, Article 81 TFEU continues constituting a *lex specialis*, where civil justice approximation measures are necessary for the proper functioning of the Internal Market.⁷³ On the other hand, Article 114 TFEU requires a direct link between the approximation measures and the functioning of the Internal Market, which is missing in the area of civil procedure law harmonisation. Civil procedure rules do not affect parties’ access to the Internal Market, but their relationships in case of dispute. In addition, although they fulfil an enforcement of substantive law function, they are not limited to Internal Market related substantive EU legislation.⁷⁴

⁷¹ See *inter alia*, G R de Groot and J J Kuipers, ‘The new provisions on Private International Law in the Treaty of Lisbon’ (2008) 1 MJ 109, 112.

⁷² See above, ‘6.2 Civil justice cooperation after the Lisbon Treaty: a new era?’ 185.

⁷³ See *inter alia*, S Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 613.

⁷⁴ See above, ‘6.3.1 Recasting the relationship between Articles 81 and 114 TFEU: harmonisation through the backdoor?’ 196.

I have argued that only Article 81 TFEU comes with the necessary constitutional legitimacy for a coherent EU approach to civil justice harmonisation, capable of actively promoting effective access to justice in the EU. This presupposes a reconceptualisation of its general premises through a harmonious interpretation between Articles 47 CFREU and 81(2)(e) TFEU. Accordingly, EU civil procedure rules for the facilitation of effective access to justice should be discerned from the minimum standard setting function of the principle of mutual recognition of judicial and extra-judicial decisions in civil matters, presumably allowing for genuine and systematic civil justice harmonisation measures.⁷⁵ Along the same lines, the ‘cross-border implications’ condition should be interpreted more broadly, covering domestic and cross-border disputes *stricto sensu* for rights and freedoms guaranteed under Union law. As a result, future EU civil procedure rules will maintain their international character, being directly linked to the functioning of the supranational legal order.⁷⁶ At the end of the day, these EU civil procedure rules could be used as a source of inspiration for the adaptation of national procedural systems in non-EU law related disputes, as has been the case with the Mediation Directive.⁷⁷

Finally, this proposition conforms to the principles of subsidiarity and proportionality. On the one hand, the responsibility to adopt civil procedure rules for disputes in the field of EU law falls reasonably on the shoulders of EU institutions (subsidiarity). On the other hand, horizontal, mandatory EU civil procedure rules in the field of Union law are appropriate, necessary, and proportionate *stricto sensu* for the promotion of effective access to justice in the EU due to their prospective substantive and personal scope of application. Accordingly, soft law approaches for the harmonisation of civil procedure law lack the necessary binding force that would allow

⁷⁵ See to that effect: T Andersson, ‘Harmonisation and Mutual Recognition: How to handle Mutual Distrust?’ in M Ardenas, B Hess, and B Oberhammer (eds), *Enforcement Agency Practice in Europe* (BIICL 2005) 250.

⁷⁶ See above, ‘6.3.2 Reconsidering ’ 199. See also: 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, 14; B Hess, ‘Procedural Harmonisation in a European Context’ in X E Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 171.

⁷⁷ On the possibility for gradual harmonisation of civil procedure rules for non-EU related disputes, see: M Storme, ‘Improving Access to Justice in the Europe’ (2010) *Teka Kom. Praw.* – OL PAN 207, 215.

the establishment of enforcement systems of equitable performance levels. What is more, a minimum harmonisation 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 timely, at reasonable costs, and accurate application of EU law to individual cases.⁷⁸

Finally...

The European Union comes with unique constitutional legitimacy and political structures that enable it to intervene in national civil justice systems with unprecedented vigour and consistency. Nevertheless, the EU keeps sending out mixed signals regarding its intentions and actual regulatory approach for the development of EU civil procedure law.⁷⁹ Therefore, in this thesis, I have analysed the specific EU approach to civil procedure harmonisation that, in my opinion, can set civil justice cooperation free from its schematic premises, offering potentials for effective and coherent solutions at a centralised EU level. This is facilitated via the joint reading of Articles 81(2)(e) TFEU and 47 CFREU, leading to an expansive understanding of the general conditions of the policy area of judicial cooperation in civil matters.⁸⁰ To conclude using the words of Van der Grinten, '[h]owever difficult (in part) the issues may be, this does not mean that we [...] are excused from the task of finding the answers. Let us in this respect strive for answers that contribute to more coherence, *better law making* and a better European civil procedural law'.⁸¹

⁷⁸ See above, '6.4 What is needed? The principles of subsidiarity and proportionality' 208. See also: 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) 2 http://ukael.org/past_events_24_3656132649.pdf accessed 16 March 2013; Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' (n 59) 101.

⁷⁹ Tulibacka 'Europeanization of Civil Procedures: In search of a Coherent Approach' (n 7) 1565.

⁸⁰ See above, '6 The Horizontal Approach to EU Civil Procedure Law Reconceptualised: Achieving Greater Coherence' 184.

⁸¹ P M M van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure' (2007) 3 TCR 65-70 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392006 accessed 18 October 2012.

7.7 Outlook to the future

Comparative research constitutes the essential prerequisite for the coherent approach promoted in this work. Originally, national procedural law reformers undertook comparative research of mainly neighbouring civil procedure systems in order to draft new or amend domestic civil procedure legislation and rules. Comparative study is particularly promising in case of competing national procedural regimes seeking to attract more litigation business. It reveals their strengths and weaknesses in the supranational arena.⁸² As a result, comparative research of the various national procedural systems in the supranational EU legal order is a *sine qua non* in a highly globalised competitive judicial environment. It facilitates the identification and objective appreciation of the challenges of creating EU civil procedure measures promoting effective access to justice in the EU. To put it differently, it is of strategic importance for the establishment of the need for regulation, only after EU reformers have genuinely considered the sources and reasons for divergences in national procedural systems, thus lending credibility to future EU rules and mechanisms.⁸³

Such comparative activity needs to be complemented by empirical data focusing on the various positive and negative duties deriving from the wording and judicial interpretation of Article 47 CFREU and its ECHR counterparts, Articles 6 and 13.⁸⁴ This will allow an even more insightful and complete understanding of the various national procedural solutions, appreciating their impact on prospective EU citizens' access to justice for the enforcement of EU law rights and obligations.

CEPEJ has paved the way, launching in 2002 a systematic study of the functioning of European judicial systems, albeit not only in EU Member States,

⁸² 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) 60.

⁸³ W van Gerven, 'A Common Law for Europe: The Future Meeting the Past?' (2001) 4 E.R.P.L. 485, 494; J S Parker, 'Comparative Civil Procedure and Transnational "Harmonisation": A Law-and-Economics Perspective' (George Mason Law & Economics Research Paper No.09-03 2009) 1-3 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325013 accessed 25 March 2013.

⁸⁴ See above, '2.3 The fundamental procedural guarantees of the right of access to justice: the standard of protection' 50.

collecting comparative data about key indicators of the rule of law and effectiveness of access to justice in the Council of Europe Member States. These comprise statistical data and information on, *inter alia*, court fees, taxes, and reimbursement in the various Member States; legal aid and funding schemes; the duration of proceedings; the execution of judgments; lawyers' fees; court organisation and e-justice possibilities; and, rules on the appointment of the judiciary.⁸⁵ Along the same lines, but having a much more limited scope, the European Commission has released an extensive comparative empirical study on the transparency of costs in civil litigation in the 27 Member States.⁸⁶ The cost of accessing justice is instrumental for the fundamental right of effective access to justice as enshrined in Article 47 CFREU. Therefore, the study focused on procedural themes such as reimbursement rules for legal costs, lawyers' fees, court fees, and legal aid schemes. These are themes relating to two complementary aspects of civil proceedings costs: the costs inflicted by litigants in order to access civil proceedings (sources of legal costs); and, States' actions with regard to civil proceedings funding in order to facilitate such access to the judicial system (legal aid, legal expenses insurance, funding by lawyers and third party litigation funders).

⁸⁵ CEPEJ, *European Judicial Systems: Efficiency and Quality of Justice* (Council of Europe Publishing 2012).

⁸⁶ J Albert et al, 'Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union: Final Report' (2007)

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf accessed 12 March 2013.

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