EU CIVIL JUSTICE AT THE HARMONISATION CROSSROADS?

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1. INTRODUCTION

At a conference in 2016, Professor Marcel Storme looked back at the plea he had made over 30 years ago, in 1986, in favour of the unification of civil procedural rules within the EU. He noted that the project that he later headed and that resulted in the so-called Storme Report of 1993 had removed a taboo and opened the doors to civil procedural harmonisation at the EU level. However, despite the time that has passed since Professor Storme's plea and the Storme Report, we have yet to see a comprehensive civil procedural harmonisation project in the EU. At the same conference, Professor Storme eloquently referred to Erasmus of Rotterdam in stating that, 'Indeed, only fools can dream of such a simple approach.' I will in this chapter argue that there are several current developments

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2 Storme, 'Approximation of Procedural Law in Europe' (n 1) 483.
that indicate we may be closer than ever before to the harmonisation crossroads of EU civil justice.

First, it is pertinent to set out some of the background and context to these current developments in EU civil justice, taking the institutional perspective into account. In depicting the state of play, the various strands of civil justice will first be briefly presented (section 2.1). Next, the results of the institutional positions and regulatory choices made so far will be analysed (section 2.2). These practices and choices have led to the fragmented landscape of EU civil justice that we have today. This fragmentation in itself may be a trigger factor that occasionally calls for further harmonisation. However, there are additional ostensible pressure and trigger factors for harmonisation that will be presented (section 3), namely: (i) mutual trust, (ii) the rule of law, and (iii) soft law. Against this backdrop it will be possible to analyse whether any institutional and regulatory changes are likely to emerge at the potential harmonisation crossroads (section 4).

2. STATE OF PLAY

2.1. STRANDS OF PROCEDURAL DEVELOPMENT

Traditionally, the EU was not considered to have competence in the field of procedural law, and the Member States were considered to have autonomy over national civil procedure. The awareness that the Member States’ procedural autonomy is *de facto* limited has emerged gradually, and various developments mean that today the traditional perception is no longer correct. There is, however, at present no specific legal basis that grants the EU the right to generally harmonise procedural rules, even though there has been an ongoing debate as to the feasibility of procedural harmonisation in the EU since the beginning of the 1990s. The debate has resurfaced more recently, and I will return to it below. That being said, there has been considerable interaction between EU law and domestic procedural law over the decades and the impact of EU law, both on domestic procedural law in general and in domestic courts, can be considered significant. However, the impact so far has been fragmented and disparate. I have previously compared this development to tentacles that find their way

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4 There are some who have argued otherwise, e.g. Storme (ed), *Approximation of Judiciary Law* (n 1). For a review of the historical discussion on the legal basis and of the debate on procedural harmonisation following the Storme Report, see E. Storskrubb, *Civil Procedure and EU Law – A Policy Area Uncovered* (OUP 2008) 19–27. See also below sections 2.2 and 4.1.
into domestic law, at times in perhaps unexpected ways. There is no common method of legal systematisation of the fragmented procedural landscape of the EU today. I have chosen to categorise the development into five separate strands of enacted procedural rules or other types of measures. The five strands are not presented chronologically, but rather divided from a normative perspective into broad groups of legislative and regulatory development. We start with general primary rules and case law principles, before moving to secondary rules of varied scope, and finally to soft forms of regulation.

The first strand constitutes the primary norms. In particular, Article 47 of the EU Charter of Fundamental Rights (the Charter) states that everyone whose rights and freedoms guaranteed by the law of the EU are violated has the right to an effective remedy before a tribunal and is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. In addition, Article 19(1) of the Treaty on European Union (TEU) provides that Member States shall provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. These general articles embody the fundamental principle of and right to access to justice in the EU context.

The second strand has been created by the European Court of Justice (CJEU) by imposing from 1976 onwards the requirements and principles of equivalence and efficiency on national procedural rules. This means, in the words of the Court, that in the absence of any relevant harmonised procedural rules, it is for the domestic legal system to set out detailed procedural rules (principle of the procedural autonomy of the Member States). However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence), nor may they be framed in such a way as to make it

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8 The seminal cases are Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Lanswirtschaftskammer für das Saarland ECLI:EU:C:1976:188; and Case C-45/76 Comet BV v Produktionschap voor Siergewassen ECLI:EU:C:1976:191. The case law has dealt with a myriad of domestic procedural and remedial issues, including standing, evidence, legal aid, division of costs, time limits, ex officio raising of issues and res judicata, and continues to grow and evolve. For a review of the complexities of this case law, see inter alia M. Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures to Enforcing Union Law before National Courts' in P. Craig and G. de Búrca (eds), The Evolution of European Law (OUP, 2nd edn 2011). Note that most of the CJEU case law has been in the context of administrative or public law, but its importance for the private law field has been perceived as increasing; see Storskrubb, Civil Procedure and EU Law (n 4) 16–17.
virtually impossible or excessively difficult to exercise the rights conferred by Community law (principle of efficiency). Article 19(1) TEU, mentioned as part for the first strand above, is intended to embody these principles. This case law has highlighted the fact that enforcement of substantive rights under EU law is decentralised, meaning that enforcement relies on proceedings in national courts and hence on the national procedural and remedial rules.

The third strand of regulation is the main body of legislation and procedural rules that exists today in the EU. It has been enacted under the policy area of judicial co-operation in civil matters, with Article 81 of the Treaty of the Functioning of the European Union (TFEU) as its legal basis. The policy area was introduced in the Treaty of Amsterdam under the general political project of the Area of Freedom, Security and Justice (AFSJ). Initially, measures enacted in this policy area dealt with traditional aspects of private international law and international procedural co-operation: jurisdiction of courts, applicable law, service of documents, taking of evidence, and enforcement of judgments in cross-border civil disputes. Subsequent measures have gone further in breadth and depth, and have been innovative, either dealing with specific matters, such as insolvency, or creating discrete new European procedures, such as the European Small Claims Procedure or the recent European Account Preservation Order. Commentators have identified different generations of measures.

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9 See inter alia Case C-430/03 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten ECLI:EU:C:1995:441, para 17.
10 For the earlier historical and nascent development of civil justice in the EU see STORSKRUBB, Civil Procedure and EU Law (n 4) 33–38.
What currently nevertheless limits the remit of these measures is that they only relate to cross-border disputes.

The fourth strand of regulation is special procedural rules enacted by the EU for specific types of disputes under certain limited substantive policy areas. It is not a new phenomenon that substantive legislative instruments limited to a particular field of EU law may include private international law or even procedural rules, e.g. the insurance directives. Originally, such rules were fairly limited in terms of both their scope and their impact from a procedural point of view. Such rules were often only an ancillary part of a directive that focused on harmonisation of substantive rules or had a narrow procedural scope. However, recent developments have seen a surge of sector-specific initiatives with procedural rules as their only focus. Such developments have taken place in the areas of intellectual property rights, competition law and consumer rights. The specific measures that have been enacted on the legal basis of the internal market are not necessarily limited to cross-border matters. The impact of much of this development has yet to be seen, since many of the new specific procedural rules have only relatively recently entered into force or are not yet applicable.

The fifth and final strand of procedural regulation involves the overarching and supporting measures of a soft law nature, such as networks, judicial
training programmes\textsuperscript{18} and e-justice portals.\textsuperscript{19} The impact of such regulation is becoming more important as the other strands of civil justice in the EU grow and mature.\textsuperscript{20} Further, under this heading we can include the measures that the Commission itself groups together as ‘effective justice’ measures.\textsuperscript{21} These include, first and foremost, the so-called Justice Scoreboards, published annually by the Commission since 2013.\textsuperscript{22} The other main steering mechanisms that the Commission includes in promoting ‘effective justice’ are its measures to protect the rule of law.\textsuperscript{23} These will be returned to below in the context of the triggers and ostensible pressures for harmonisation.

2.2. REGULATORY CHOICES AND INSTITUTIONAL POSITIONS

The brief presentation of the five strands above shows that their development has not been linear or chronological and that there are inconsistencies. For example, there is incoherence between the specific development of procedural harmonisation in certain policy areas of the internal market, such as consumer law, and the strict approach of the Member States in limiting general civil justice measures to cross-border disputes. I have previously identified the so-called cross-border limitation, on the legal basis of Article 81 TFEU, as the focal point of the struggle between the EU institutions regarding the potential incursion of the EU into national procedural autonomy. The struggle has concerned whether the scope of EU civil justice should be defined in a restrictive or expansive way, specifically how ‘matters having cross-border implications’ should be interpreted. The Commission has argued for a broad interpretation, but so far the Council (i.e. the Member States), supported for nearly two decades by the


European Parliament, has steadfastly refused to enact any general procedural measures that would apply to purely domestic matters.24

The first legislative proposal that caused this disagreement was the Legal Aid Directive. In the latest regulation to be enacted in the civil justice field, the European Account Preservation Order Regulation, we can see that the same institutional dynamic is repeated. In addition, in the review of relevant measures both the Council and the Parliament, in relation to the amendment of the Small Claims Regulation, rejected a broadening of the Regulation’s cross-border scope.25 The example of collective redress is a different but also instructive example since the most recent consultation process was not subsequently followed by a legislative process. The Member State responses in the consultation process publicly evidenced the concerns some of them had about expanding the legal basis and the importance they placed on respecting national procedural systems.26

It is clear that the Member States in the Council have wanted to keep the development of civil justice limited to cross-border procedures. The limitation has even been called the ‘vigorously defended’ ‘wall of exceptionalism’ around the policy area and against its expansion.27 In contrast, the sector-specific procedural rules are a significant development in the manner in which the EU can impact directly on procedural law in the Member States. These rules can at times even have an impact on disputes that are not cross-border in nature, although each measure is limited to specific types of disputes. This dynamic but disparate development has been called a ‘new approach’ to procedural harmonisation,28 ‘vertical harmonisation’29 or the ‘invisible pillar of Europeanisation of procedural law’.30 The measures do not simply provide for new sets of rules but


26 STORSKRUBB, ‘Civil justice: Constitutional and regulatory issues revisited’ (n 15) 310–312. See also follow-up report COM(2018) 40 final. The most recent development is that the Commission has proposed a sector specific directive that grants representative actions for the protection of the collective interests of consumers COM(2018) 184 final.

27 C. CRIFO, ‘“Trusted with a Muzzle and Enfranchised with a Clog”: The British Approach to European Civil Procedure’ in B. HESS, M. BERGSTROM and E. STORSKRUBB (eds), EU Civil Justice – Current Issues and Future Outlook (Hart 2016) 94.


30 KRANS (n 6) 571.
also introduce considerable structural changes and mechanisms such as online platforms for litigants in the consumer field or the future court system in the intellectual property rights field.

The result of this difference between generic civil procedural regulation and sector-specific procedural regulation is a constitutional incoherence. Linked to the strict constitutional question of competence is an underlying broader tension between a restrictive and an expansive political vision of EU civil justice. The opposing visions relate to how far procedural harmonisation in Europe is considered practically feasible and politically desirable. A debate on such harmonisation took place within the academic community in Europe close to two decades ago, subsequent to the Storme Report. The perspectives put forward in that debate are still highly relevant. However, we already have a wealth of generic civil justice measures enacted. Thus, to some extent, the goalposts have been moved. The current measures are much broader than private international law or even international procedural law in its traditional sense. Although they may be limited to the cross-border realm, many of the reforms of the enacted regulations demonstrate incremental pressures towards deeper integration. In addition, some of the second-generation measures – such as the Small Claims Procedure, Payment Order and Account Preservation Order Regulations – create discrete, alternative and independent supranational procedures. Thus, we are already inevitably dealing with some form of harmonisation, albeit so far limited. In addition, we have the parallel and more recent development of sector-specific rules, which shows that the Member States are willing to proceed with procedural harmonisation in some instances under the guise of effective enforcement of substantive EU civil law.

The persistent resistance of the Member States in the Council to a broad interpretation of the cross-border limitation must, nonetheless, be acknowledged. It demonstrates that civil justice matters are sovereignty-sensitive. Procedural systems are deeply ingrained in society and its fundamental legal structures. Member States’ procedural reforms, both completed and ongoing, demonstrate

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that quests for efficiency and proportionality are finely tuned and that the effect of any reform needs to be carefully considered in terms of how it impacts the justice system as a whole.\textsuperscript{34} If the underlying structural features of the Member State procedural systems differ, for example in relation to the organisation of the relevant actors (\textit{inter alia} courts, bailiffs and the bar), is it at all possible to harmonise? Will any supranational harmonisation attempts harm the carefully balanced equilibrium of national justice systems behind which are broader societal goals and visions, for example in relation to costs or litigiousness?\textsuperscript{35} Are we able to say that we have a mutual vision in Europe or should the political will concerning that understanding and vision first be clearly uniform before any harmonisation is attempted? Logically, a mutual vision on justice may be necessary if any such project is to succeed.

In parallel to these issues related to potential further harmonisation, there is existing criticism of the fragmented nature of procedural regulation thus far. There may be valid political arguments for this fragmentary approach, which can also be called a piecemeal or incremental approach. However, several commentators have pointed out that it has its disadvantages. There is a risk of overarching procedural principles being neglected when procedural rules are enacted in discrete policy areas and for specific types of disputes.\textsuperscript{36} In addition, an overly narrow specific substantive policy focus and a multitude of different procedural rules and solutions may create complexity that negatively affects user-friendliness and legal certainty, as well as creating a risk of conflicts between different procedural rules. So far, there has been no overall road map or systematic approach in relation to the five strands outlined above.\textsuperscript{37} Coordination and coherence have been advocated by many commentators.\textsuperscript{38} I have also called for debate on the best regulatory choices and methods, including a discussion on subsidiarity, i.e. the governance level at which it is appropriate to legislate on civil justice matters.

\textsuperscript{34} See \textit{inter alia} A. Uzelac, ‘Goals of Civil Justice and Civil Procedure in the Contemporary World’ in A. Uzelac (ed), \textit{Goals of Civil Justice and Civil Procedure in Contemporary Justice Systems} (Springer 2014), and the further national contributions in the same volume.

\textsuperscript{35} C. Hodges, ‘Competition Enforcement, Regulation and Civil Justice: What is the Case?’, (2006) 43 CMLR 1398, 1404 and 1406.


\textsuperscript{37} Hess, ‘The State of the Civil Justice Union’ (n 13) 10.

3. OSTENSIBLE HARMONISATION PRESSURES AND TRIGGERS

As noted above, there are within the realm of the current fragmented civil justice regulation several regulatory pressures towards further and deeper integration, even harmonisation. These pressures are a result of the regulatory and constitutional history of the emergence of civil justice as a policy area in the EU. They are also a result of the governance choices so far made by the EU legislator in the evolution of civil justice. Furthermore, commentators have identified an increased constitutionalisation of civil justice with increased focus on the Charter and thus fundamental procedural rights and principles.\(^\text{39}\)

In addition to these pressures, I have identified three further, more recent and separate developments that may each be potential harmonisation ‘pressures’ or ‘triggers’ for civil justice in the EU.

One of the developments has arisen within the civil justice policy area and in the context of the development of its legislative acts and their interpretation by the CJEU, namely the issue of mutual trust in the recognition and enforcement of civil and commercial judgments. The other two developments have emerged adjacent to the civil justice policy area but clearly linked to it. The first has arisen within the EU and encompasses the renewed focus on and efforts linked to the rule of law by the EU institutions. The second is a soft law project called ‘Model Rules of European Civil Procedure’. The project is external and developed under the auspices of two independent bodies in co-operation, the European Law Institute (ELI) and UNIDROIT. I will briefly illustrate the main thrust of these three developments below. However, the purpose here is not to describe all the details of these developments, as they have been charted elsewhere. It is rather to explain their potential role as so-called harmonisation pressures or triggers for EU civil justice. It will then be possible to consider tentatively whether any institutional and regulatory changes are likely to emerge at the potential harmonisation crossroads (section 4).

3.1. MUTUAL TRUST

Aside from the above-mentioned criticism that there is a lack of overarching vision for and systematic development of EU civil justice, the issue of mutual trust has in recent years become one of the central and most critical issues

for the evolution of EU’s AFSJ. In civil justice, the question of mutual trust has been strongly linked to the goal of implementing mutual recognition and direct enforcement of judgments across borders without any intermediate *exequatur* procedure. The principle of mutual recognition underpins most of the legislative measures in the third strand, i.e. measures enacted under the legal basis for judicial co-operation in civil matters. However, there are in many of the measures still so-called grounds for refusal of enforcement and also other safeguards in the form of minimum procedural standards. Mutual trust has thus become an important complement to justify mutual recognition, direct enforcement and the potential further removal of existing safeguards.

In practice, problems may arise in applying direct enforcement. The question may arise in the Member State where enforcement is sought whether judicial proceedings in the original Member State upheld the fundamental rights and principles of a fair trial. In relations to the AFSJ, these issues reached a constitutional level in the tensions arising from the potential accession of the EU to the European Convention on Human Rights. The CJEU went as far as to say that the principle of direct enforcement requires Member States to consider all other Member States to be compliant with the fundamental rights recognised by EU law, save in exceptional circumstances. This presumption has come under criticism, and commentators including the present author have noted

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42 Storskrubb, ‘Mutual Trust and the Dark Horse’ (n 40) 3–9.

43 For civil justice see *inter alia* M. Requejo Isidro, ‘On the Abolition of the Exequatur’ in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook* (Hart 2016); and Weller, ‘Mutual Trust: In Search of the Future’ (n 40).

that it is problematic from the perspective of breaches of fundamental rights in individual cases. More recent case law has shown a more nuanced approach and commentators now point to the acceptance of limitations to mutual trust, one of them referring to ‘temperate mutual trust’ with a new dialectic relationship to the need to protect human rights. The present author has noted that many cases in the civil justice context also demonstrate a balanced approach to mutual trust.

Notwithstanding the above, what is perhaps more relevant at the macro level is that criticism has also been levelled at the choice of mutual recognition and the ancillary and necessary principle of mutual trust as method of governance for justice issues. Mutual recognition as a governance method transposed from the internal market means that the Member States de facto relinquish sovereignty to a degree that they were perhaps not originally prepared to do. In addition, since mutual recognition in the internal market has never been unconditional, commentators have noted that there is a difference between blind and binding trust. Proportionate restrictions to protect important national rights and values have always been present in the treaties and also established through case law. In addition, mutual recognition has not been the sole regulatory method; it has been used in parallel with inter alia minimum harmonisation and other governance techniques such as administrative co-operation and communication structures. Mutual trust is also not seen as an unconditional principle in the internal market, and it has also affected the regulatory strategy by occasioning a need for harmonised rules, deeper administrative co-operation and increased transparency.
Thus, the need for an ever-developing, multi-layered regulatory strategy and the limits of mutual trust have been understood in the internal market. Moreover, the lessons learnt from the internal market also seem to be slowly having an impact on mutual recognition as a regulatory strategy in civil justice, for example in the emphasis on ancillary measures to support mutual recognition. However, the debate on mutual trust and its limits also clearly indicates a further potential regulatory development that has already been prominent in the criminal justice field, namely the potential of legislative harmonisation in civil justice. As noted, harmonisation has been used in other fields to mediate the effects of mutual recognition and support mutual trust.

3.2. THE RULE OF LAW

As is well known, the EU is founded on common values shared by its Member States and set out in Article 2 TEU. These values include the rule of law. Since the Amsterdam Treaty there have also been provisions in the EU treaties regarding sanctions for the breach of the common values, now in Article 7 TEU. The mechanism in Article 7 TEU can be characterised as a political tool. Its first ‘preventative’ limb constitutes a formal determination or ‘warning’ issued by the Council, which can include recommendations. The second limb consists of a determination that there has been a persistent breach, which can ultimately lead to sanctions that are political in nature since they relate to the Member States’ right to participate in EU decision-making. All decisions under Article 7

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require a super-majority of Member States in the Council and the European Parliament has to consent. In addition, the decision to activate the second limb with the threat of potential sanctions has to be unanimous in the European Council (excluding the relevant Member State).\textsuperscript{58}

In 2010–2012, situations arose in a few Member States that caused general concern within the EU as to the protection of its values in Article 2, including the rule of law. One of the situations related to the make-up of Hungarian courts, occasioned by a new system of early retirement of judges. Despite these concerns, the political sanction mechanism in Article 7 was not activated.\textsuperscript{59} Since then, many actors, including Member States, have called for the development of more effective tools to protect the EU’s common values.\textsuperscript{60} These events also encouraged the EU institutions to take measures to allow more active work on protecting the rule of law. In addition, the events fostered an intense doctrinal debate.\textsuperscript{61} The Council now organises an annual rule-of-law dialogue meeting.\textsuperscript{62} In addition,
the European Parliament issued a report on its own initiative, emphasising the importance of the rule of law in various ways, and also calling upon the other EU institutions to strengthen the mechanism, amongst other things. Furthermore, in 2014 the Commission drew up a rule-of-law framework that creates a pre-Article 7 procedure, through which the Commission can assess risks of breaches of fundamental values, formalise these in an opinion and monitor the response to the opinion, all with the purpose of creating a dialogue with the Member State in question and instituting a softer initial tool.

The purpose of both the Commission’s framework and the Council’s dialogue is thus to fill a gap and to have means to take action before Article 7 is activated. In January 2016, the Commission used the framework for the first time and initiated a process against Poland. The process has continued in 2018 and relates *inter alia* to changes in the local law to limit the independence of the Polish Constitutional Court. In December 2017, the Commission proposed to the Council that Article 7(1) be activated against Poland; in March 2018 the European Parliament also voted in favour of doing so. However, the Council has not acted upon the proposal. The political rule-of-law mechanism in the TEU has been perceived as a measure of last resort, and also as insufficient to address such issues and to prevent them from arising. Moreover, the additional

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63 EPRS (n 59) 8–9; and Report with recommendation to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL), A8-0283/2016, 25 October 2016.

64 COM(2014) 158. For an analysis of the framework see KOCHENOV and PECH (n 59).


68 CLOSA, KOCHENOV and WEILER (n 61) 2.
tools developed, the Council’s annual dialogue and the Commission’s framework have been heavily criticised as being inadequate or inadequately used, indicating the inherent limits of a political mechanism.\footnote{See \textit{inter alia} Pech and Scheppele (n 61) 26–34; and Besselink (n 58) 134–143, for critique and analysis of the limits to the actions and the different perspectives of the institutions.}

The connection between the tools to support the rule of law and civil justice are demonstrated in some of the situations that have raised concern in the EU so far. A fair trial and effective judicial remedies can only be guaranteed if the judiciary is independent and impartial. The independence of the judiciary is considered to be an important component in the rule of law.\footnote{COM(2014) 158, appendix 1, 1–3.} In the cases of Hungary and Poland, the actions of their respective governments have resulted in the concern that the local courts and court systems, including civil justice, may no longer be independent. This is of direct impact and importance in the EU because the trust that domestic authorities and citizens have in the legal systems of other Member States is central to the functioning on the EU’s AFSJ. As mentioned in the preceding sections, due to legislative regulatory choices in the EU, Member State courts often have to directly recognise and enforce civil judgments from other Member States. Can such a system be legitimate if there is a risk that certain Member States are actively undermining or dismantling features of the rule of law?\footnote{COM(2014) 158, 5. See also Case C-216/18 Minister for Justice and Equality v LM (Défaillances du système judiciaire), pending before the CJEU, where questions on the rule of law in Poland have been raised by the Irish High Court in the similar, albeit criminal justice, context of an extradition requested under the European arrest warrant.}

3.3. SOFT LAW

The 2004 Principles of Transnational Civil Procedure, which consist of 31 principles covering the key topics of civil procedure, were the result of a transnational project led by the American Law Institute (ALI) and UNIDROIT.\footnote{See <https://www.unidroit.org/civil-procedure#PrinciplesofTransnationalCivilProcedure>. The Principles are accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by UNIDROIT or the ALI, but constitute the reporters’ model implementation of the Principles. See further \textit{Principles of Transnational Civil Procedure} (CUP 2006).} The project was primarily concerned with cross-border commercial disputes and has been widely hailed as a successful attempt to overcome the differences between the major legal families. However, the uptake or subsequent use of the model Principles seems to have been limited.\footnote{X.E. Kramer, ‘Strengthening Civil Justice Cooperation: The Quest for Model Rules and Common Minimum Standards in Europe’ in M.A. Rodrigues and H. Zaneti Jr (eds), \textit{Repercussões do CPC – Processo Internacional} (Juspođivm, 2018) (forthcoming).} UNIDROIT has sought...
to promote the Principles and other regional models. The ongoing research project by the ELI and UNIDROIT on European Rules of Civil Procedure is an example of just such a regional project that takes the ALI-UNIDROIT Principles as its starting point. The project started in 2014 after an exploratory conference in 2013. Since its start, when three Working Groups were set up as pilots, the project has grown to include nine Working Groups led by a Steering Committee and supported by an Advisory Board, as well as a Consultative Committee. The various bodies consist of a mix of participants from different professional backgrounds and jurisdictions throughout Europe. The aim is to have a first consolidated set of works published in 2019.

It is a soft law project that will hopefully provide a platform for debate among experts, practitioners and users across Europe to identify best practices in civil procedure. At present, the platform for a broader debate has been limited, as the work has been in progress and mostly not made public. However, there have been a few public events at which the ongoing project work has been presented to a wider audience. At such events there has already been interest in the project. In addition, the project has a number of observer bodies that have had access to drafts and annual meetings. The observers include three EU institutions: the CJEU, the Commission and the European Parliament. Both the Commission and the Parliament have been active participants. In particular, the Parliament has shown an overt interest in the project by publishing its own report on it.

As will be discussed further below, the European Parliament has also, in the wake of that report, passed a Resolution on Common Minimum Standards of Civil Procedure. Annexed to the Resolution is a recommendation for a directive on common minimum standards of civil procedure in the EU. In other words, the Parliament has proposed a legislative initiative that would form the basis for

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75 See contributions in the (2014) Uniform Law Review (issues 2 and 3) regarding the conference.
76 The author was one of the co-reporters for one of the first three Working Groups, the Working Group on Service and Due Notice of Proceedings, and is currently a co-reporter for the Working Group on Costs. See <https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/> for lists of all the members of each body.
77 See Kramer, ‘Strengthening Civil Justice Cooperation’ (n 73) for a more detailed description of the project work and analysis; see also the contribution of John Sorabji in this volume on the ELI/UNIDROIT project.
78 See ELI website (n 74); and the UNIDROIT website <https://www.unidroit.org/work-in-progress/transnational-civil-procedure> for public reports on the progress of the project.
some level of further harmonisation of civil procedure in the EU. Although there is no definite causal link between these developments, it seems clear that the soft law project has served as a trigger or tool for the European Parliament to further its agenda in civil justice matters. However, more than this, the soft law project can indicate best practices and provide a set of modern civil procedural rules that may highlight lacunae or deficiencies in current practice and legislation at both the domestic and supranational level. Thus, the soft law model rules may also potentially come to provide inspiration for future legislative reform at the domestic or supranational level.

4. RESHUFFLING THE CARDS

4.1. INSTITUTIONAL ROLES REVISITED

When it comes to the institutional actors in the EU, the pressures and triggers mentioned above have contributed to a slight reshuffling of their roles. Formally, the ordinary legislative procedure remains the relevant legislative procedure. There has been no formal change: the Commission remains the initiator of legislation and the European Parliament, together with the Member States in the Council, remain the legislators. However, the Parliament has always had the opportunity to make reports and legislative proposals on its own initiative. Since it does not have the formal power of initiative, it can under Article 225 TFEU propose that the Commission submits the same proposal. The Parliament did so in the case of its proposed directive on common minimum standards of civil procedure. However, the Commission is not obliged to support or act upon the Parliament’s proposals – it has full discretion whether or not to initiate legislation – but it must respond to the Parliament. The Commission responded in October 2017 and declined to take the proposed directive on common minimum standards forward.\(^{81}\)

In its response, the Commission stressed that a gradual harmonisation of procedural standards is already taking place in the context of the measures enacted so far, mainly regarding judicial co-operation in civil matters, i.e. the third strand mentioned above. Thus, the Commission argued that the way to promote further minimum standards is in the context of the implementation of the existing *acquis*.\(^ {82}\) The Commission further explained that it has ordered comprehensive studies on national procedural law and implementation of

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\(^{82}\) SP(2017)539 of 16 October 2017 (n 81) 1 and 5.
certain existing measures. Reforms of specific existing measures, potentially initially including the Service and Evidence Regulations, are expected. The Commission, however, noted that it would take the Parliament's proposals into account in the context of further specific reforms. The Commission also noted that it is following the ELI/UNIDROIT project closely.

Thus, in the short term, there appears to be no major regulatory shift. However, the Parliament's own initiative report and proposal demonstrates that it has a current political interest in taking an active role and putting pressure on the Commission to act. In addition, it is notable that the Parliament’s research assessment raises the issue of the relevant legal basis. There is an awareness of the cross-border limitation in Article 81 TFEU, but there seems to be an opening for a broader reading of the limitation than the Parliament has in practice taken before. If the Parliament were in the future to support the Commission's broad interpretation of the legal basis, this could lead to a shift in the negotiations between the Parliament and the Council in the context of the ordinary legislative procedure. How the Member States would react to such a development remains to be seen. As long as a qualified majority of Member States still want to protect national procedural autonomy, or consider that, for reasons of subsidiarity, civil procedure should mainly be left to be legislated at the national level, the limited and fragmented harmonisation, or rather approximation, approach will continue.

Notwithstanding this, the other pressures and triggers mentioned above have led to the advent of other types of measures that may also come to have a significant impact on civil justice. Both the problems encountered with mutual trust between the legal systems of the Member States and the risk of challenges to rule of law in the EU have demonstrated in a new way how dependent the EU is on the Member States to provide, at the domestic level, a functioning justice system to enforce EU law. These developments, which have been called


87 See above section 2.2.; and (n 24).
‘constitutional capture’ and ‘rule of law backsliding’ demonstrate a frailty that exists because of the procedural autonomy of the Member States. Even though there are several strands of development in the EU that have already created a limited harmonisation of procedural rules, as presented above, a justice system is not solely built on procedural rules themselves. It is also built on the actors and institutions, such as courts and judges that apply the procedural rules and oversee judicial proceedings, as well as on Member State governments and legislators.

Although it is uncertain whether the EU has legislative competence to harmonise the broader design of the Member States’ legal systems, it may arguably have a political mandate to protect its values (rule of law) and support its policies (mutual recognition/mutual trust). It is this grey area that the Commission has in recent years stepped into. As noted above, the Commission did not follow the Parliament’s call to back a more comprehensive procedural harmonisation act. However, it has launched other types of measures in recent years that may have a ‘soft’ impact on civil justice development. In this context, the Justice Scoreboards are one interesting development. Published since 2013 by the European Commission, the Scoreboards are a means for the Commission to annually collect information on the justice systems of the Member States and to evaluate certain indicators on key components (quality, independence and efficiency) that are considered important in achieving an efficient judicial system. The Scoreboards provide information on, inter alia, the length of proceedings and the number of pending cases. They also focus, among other things, on the training of judges, as well as on the efficiency, quality and independence of the justice systems. The information is collected in the context of the EU’s economic term (i.e. the EU budgetary process), and enables the Commission and ultimately the Council to make country-specific recommendations and have a dialogue with EU Member States on procedural reforms when allocating funds in the annual budget process via the EU Structural and Investment Funds.

Considerable criticism can be levelled at how information is collected for the Scoreboards, at the opaque manner in which the data is presented, at the parameters chosen to indicate ‘efficiency’ of justice, and at the apparent lack of comparative procedural awareness. In addition, it is regrettable that the

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88 Pech and Scheppele (n 61) 21.
89 Pech and Scheppele (n 61) 8–9.
90 For the most recent Scoreboard see COM(2018) 364 final.
92 Storskrubb, ‘Några tankar’ (n 5) 374–378.
Scoreboards have not yet resulted in a transparent dialogue with all Member States on how to address challenges in civil justice at the domestic level, and have thus not contributed to strategic learning cross-borders. Nevertheless, they form a starting point that has the potential to support ‘soft’ impact and dialogue. There is also all the work that the Commission has stepped forward to do in the context of the political rule-of-law process mentioned above, as well as all the measures, including judicial networks, judicial training and e-justice, that the Commission co-ordinates and directs EU funds to – that is, all the measures included in the fifth strand of civil justice development mentioned above. There is thus considerable investment into structural matters that are central to the functioning of the domestic justice systems, and which is geared toward their development and modernisation. We should not ignore these actions in considering the role of the institutions and the context of the work being done that may have an impact on the domestic civil justice systems, and ultimately potentially contribute to the goal of a ‘European judicial culture’.94

In contrast to the surge of activism on the part of the European Parliament or the development of potentially helpful new tools by the Commission, the role of the Member States in the Council appears to have remained mostly unchanged in relation to civil justice development. This is unsurprising, but also perhaps does not represent the full picture. Although the Council has played the role of the gatekeeper the most, it has nevertheless also allowed and enabled the constitutionally incoherent, gradual and fragmented approximation of procedural rules that we have today. In the future, the Council will be the key to unlocking potential legislative measures. In addition, the Member States in the Council arguably cannot remain unaffected by the pressures and triggers identified above. The Council is in the unique position to be able to conduct with authority a dialogue on the challenges and future of civil justice. It is the Council that can ultimately affect the choice of a regulatory strategy and heed the call for a more developed and coherent strategy. It is to be hoped that the pressures and triggers will inspire it to do so.

Finally, the institution that has historically been central to developing procedural principles in the context of the second strand presented above, namely the CJEU, remains important as regards impact on civil justice. The CJEU’s case law on mutual recognition and mutual trust in the AFSJ context has been one of the central factors in creating the ‘mutual trust trigger’, as explained above. The Court’s position has, as mentioned above, also been criticised. However, regardless, the Court has very clearly demonstrated through its case

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93 Storskrubb, ‘Några tankar’ (n 5) 374–378.
law, perhaps inadvertently, the challenges and limitations of mutual trust. In addition, in its more recent cases the CJEU has had – and in its upcoming cases will continue to have – the opportunity to further nuance and clarify the limits of mutual trust and mutual recognition. In this respect, the CJEU is engaged in a dialogue concerning the justice systems of the Member States. Furthermore, the CJEU has also recently had the occasion to address the importance of effective judicial protection in the domestic courts and the independence of the judiciary in the Member States, with a further case pending that raises issues related to the rule of law.⁹⁵

4.2. TYPES OF FUTURE ACTION

Aside from the institutional perspective, the pressures and triggers identified may come to affect regulatory decisions. Even though the pressures and triggers ostensibly lead to further harmonisation, the present author has argued that to simply latch onto the promise of harmonisation may not lead to a functional regulatory strategy.⁹⁶ In addition, the European Parliament’s proposal for a directive on common minimum standards of civil procedure brings to the fore the question of what kind of measures should be pursued. Some observations about the proposal will first be made from a regulatory perspective, after which other possible regulatory avenues and types of action will be discussed.

The European Parliament’s proposal, though not covering close to all matters dealt with in any domestic set of procedural rules, nevertheless encompasses a wide range of procedural issues both general and specific.⁹⁷ What is concerning from a regulatory perspective is that the proposal suggests an added layer of rules between the current levels of civil justice measures. The report behind the Resolution acknowledges that there is a ‘regulatory puzzle’ of civil justice regulation in the EU, of which the Brussels I regime and other measures dealt with in this contribution are a part.⁹⁸ However, the proposal is not intended to supplant or improve them. Notably, the proposal includes rules on some procedural issues that are already covered by prior civil justice measures on the same issue. However, the proposed directive would add an extra layer of rules solely for cross-border cases. The scope of this layer is regrettably very unclear and is different from all other civil justice measures. Therefore, programmatically suggesting that the proposal will, if enacted, add ‘systemisation’ to EU civil justice appears to be optimistic. As such, the proposal has also been considered

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⁹⁵ See Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas ECLI:EU:C:2018:117, paras 30–44; and pending Case C-216/18 (n 71).
⁹⁶ Storskrubb, ‘Mutual Trust and the Dark Horse’ (n 40) 23.
⁹⁷ Resolution (n 80) paras 14–20; Report (n 80) 34.
⁹⁸ Report (n 80) 33.
by commentators as being ‘unclear’ as to regulatory method and in need of refinement.99

Furthermore, looking at the proposal from the perspective of the problems or challenges arising from the pressures and triggers identified above, it arguably cannot address all issues. What is required, rather, is improved co-ordination that would ensure mutual terminology and a common and overarching approach to procedural issues in the existing measures.100 Further, it would be important to focus on specific procedural safeguards and work on specific remedies for human rights violations and other problems that might arise in cross-border litigation, including mutual recognition of judgments. Such an approach could arguably contribute more concretely to mutual trust and upholding the legitimacy of the EU civil justice measures. This could be compared to the field of criminal justice, where the very specific harmonising directives have all dealt with a particular issue of criminal procedure.101 Thus, to continue a gradual legislative approximation process appears most concrete and useful, provided that it incorporates an overall understanding and co-ordination.

Furthermore, if the purpose of the European Parliament’s proposal is to start a debate on civil procedural standards in Europe, it is concerning that its starting point is common minimum practices, rather than best practices.102 It is true that assessing practices and identifying the best ones might be a sensitive issue. It is also true that practices often strike a balance between competing policy considerations and should not be taken out of that context. In addition, it is true that it may take a long time to promote, encourage and incentivise domestic actors to adopt best practices from other jurisdictions.103 As a result, a level of comparative knowledge and openness will be needed to realise the goal of debating and identifying common best practices. However, such work is taking place under the auspices of the ELI/UNIDROIT project, and when the results of that project are more widely disseminated, discussed and debated among legal practitioners, there is a possibility that the best practices identified may be organically transferred to and implemented in the Member States’ domestic justice systems. In addition, the European Judicial Network in Civil and Commercial Matters, which now has 505 members comprising public officials and professional associations of legal practitioners, hosts annual meetings to

100 Hess and Kramer (n 99), 26.
101 See inter alia Mitsilegas, ‘Conceptualising Mutual Trust’ (n 56).
102 Storskrubb, ‘Mutual Trust and the Dark Horse’ (n 40) 22; and Hess and Kramer (n 99) 29.
discuss best practices in relation to EU civil justice regulations. In addition, in the context of the work of the Council’s Working Party on e-justice for example, recommendations have been issued on the use and sharing of best practices on cross-border videoconferencing at the EU level. It is therefore apparent that cross-learning and discussion of best practices is already taking place in many relevant fora. While these influences may be slower to evolve and bear fruit than legislative harmonisation, they arguably contribute more to mutual trust and true approximation.

There are many difficult issues facing civil justice systems in Europe, including the opportunities provided by digitalisation and the challenges of public austerity. The soft regulatory techniques elaborated upon and proposed above that provide room for cross-learning and debate are thus ever more important. If they can complement gradual and targeted legislative initiatives, as well as case law that supports fundamental procedural rights, we may have the beginnings of a functioning and mixed regulatory strategy for civil justice in the EU. Finally, it is hoped that in the context of such a mix there will be room for a debate on civil justice values including the rule of law, and on how a modern civil justice system can meet its obligations and provide access to justice. It is only through such dialogue that a truly European area of justice can emerge.
