Abstract
Since 1999, the European Union has gained considerable experience in harmonizing procedural law. The regulatory approaches range from the coordination of national procedures to the enactment of self standing procedures. However, the practical impact of the European instruments is still disappointing. In this respect, the European lawmaker should not only focus on rules, minimum standards and self standing procedures, but also regard the judicial systems of the EU member states. Implementing legislation of Member States is an important tool to improve the practical impact of the EU instruments. In addition, legislative approaches should be based on clear concept and aim to pursue clear objectives. In this respect, the concept of “procedural minimum standards” still deserves further clarification.
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LIST OF ABBREVIATIONS

**ADR**  Alternative Dispute Resolution

**CJEU**  Court of Justice of the EU

**ESCP**  European Small Claims Procedure

**MPI**  Max-Planck Institute
1. HORIZONTAL AND VERTICAL DIMENSIONS OF EUROPEAN PROCEDURAL LAW

The laws of civil procedure of the 28 EU Member States are undergoing a constant change, in light of the increasing influence of European law. The reasons for these growing impacts are obvious. On the one hand, substantive European law is expanding steadily; recent developments relate to consumer and data protection. Here, European substantive law is implemented by national courts in the framework of, and by means of, their national (civil) procedures. Most of these procedures are applied to purely domestic disputes. While related to the Internal Market, they often do not transgress the borders of the respective Member State. Procedural interventions of the EU law-maker in these areas of law are often annexed to substantive law-making. Prominent examples include Article 7 of the Directive on Unfair Terms in Consumer Contracts and the new Regulation on Data Protection. One might describe the influence of Union law in this area as vertical: as national courts implement substantive EU law by virtue of their national procedures, the European law-maker may intervene in order to guarantee or to improve the uniform application of EU law by the courts of the Member States.

The second dimension of European procedural law relates to cross-border proceedings. In this area of law, the Union disposes of specific competences in Articles 67 and 81 TFEU; it is empowered to set up a procedural framework for the settlement of cross-border disputes in the Area of Freedom, Security and Justice. The core activities of the EU in this respect relate to the instruments on jurisdiction, pendency and the cross-border enforcement of judgments. As far as the free movement of judgments is concerned, the legislative activity of the European Union operates in a horizontal way: it aims at overcoming impediments in national procedural laws to the free circulation of judgments (and other enforceable titles) in the Justice Area. These impediments may result from the differences of the national procedures. Additional impediments relate to language barriers, cultural divergences, and the lack of information about litigation risks and costs.

Under Article 81 TFEU, the Union is empowered to enact legislation in order to improve and guarantee effective access to justice and to eliminate obstacles to the proper functioning of civil proceedings. If necessary, the Union may also promote the compatibility of the rules on civil procedure applicable in the Member States. The competence under Article 67 TFEU is limited to “cross-border” disputes. So far, the law-making activity of the Union in this field has been hindered by an extremely restricted interpretation of the criterion “cross-border”. Only those situations in which both parties are domiciled in different EU Member States qualify as “cross-border”. This restricted approach was one of the main reasons for the limited impact of the EU Small Claims Regulation; in the recent reform of this instrument, the proposal of the Commission to enlarge the definition of cross-border cases

1 Typical examples are labour and anti-discrimination disputes.
4 Hess, Europäisches Zivilprozessrecht (2010), § 11, para 1 ss.
6 See infra at footnote 32 ss.
was not ultimately taken up by the EU law-maker. All in all, the political impacts of the legislative competences of Article 67 and 81 TFEU will be limited for so long as the restrictive interpretation of this head of competence prevails.

Against this background it is expected that the legislative activities of the Union in procedural law will shift from the horizontal approach in cross-border settings back to the vertical approach under its general competences. If one looks at recent instances of Union law-making regarding dispute resolution, one finds several major initiatives related to consumer and data protection, to collective redress and damage claims in cartel law as well as to the alternative resolution to the settlement of consumer disputes. Another area relates to insolvency and restructuring in the context of the “justice for growth” program. Although it might be premature to predict a shift in its law-making activities, it is expected that the importance of horizontal law-making based on Article 114 TFEU will increase in the near future.

2. REGULATORY OPTIONS

In both areas of procedural law described above, the European Union disposes of different regulatory options and may apply different legislative techniques. Experience since 1999\(^1\) shows that while diverse approaches have been engaged, not all of them have proven to be successful.

2.1. Coordinating the National Procedural Systems

From the perspective of the Member States, the less invasive regulatory choice of European law-making is to simply coordinate national procedures without harmonizing them. This approach was initially adopted in the Brussels I Convention in 1968; it still prevails in the area of international civil litigation in civil matters and with regard to divorce proceedings and family and succession matters. In this regard, the current main regulatory objective of the European law-maker is to simplify cross-border enforcement by abolishing exequatur proceedings.

However, the recast of the Brussels I Regulation (Regulation EU 1215/2012)\(^12\) demonstrates that a simple coordination of the national systems may prove to be insufficient in order to overcome the impediments to cross-border proceedings. Under the former regime (Articles 38 et ss. of the Brussels I Regulation), foreign judgments were formally recognized in the Member State of enforcement by judges of first instance. On the basis of a form, foreign judgments were declared enforceable in accelerated proceedings without any review of grounds for non-recognition (Articles 38 – 42 Reg. 44/2001).

However, on application of the debtor, grounds for non-recognition were reviewed by the courts of appeal in the Member States in a procedure which is mainly prescribed by the Regulation itself (Articles 43 – 46 Reg. 44/2001). Thus, the “old” regulation provided for a self-standing European procedure which was applied in a uniform way in all EU Member States. This self-standing procedure, based on uniform rules, provided for legal certainty and the uniform application of EU law in all Member States.

The recast aims at further simplifying the free circulation of civil judgments. Here, the focus is on abolishing “interim procedures” (like that of exequatur) in order to save time and to reduce costs. According to its Articles 39 and 42, judgments no longer require any declaration of enforceability; rather, they are enforced on the basis of a form filled out by the court of origin.\(^14\) However, Article 45 of the recast maintains the possibility for the debtor to attack the judgment on grounds of non-recognition in the Member State of enforcement.\(^15\) Consequently, the Member States must provide for review proceedings (Articles 45 – 47 and 75 of the Recast Brussels I).\(^16\) Unfortunately, these proceedings are no longer addressed by the Regulation itself, since Article 47 of the recast simply refers to the enforcement laws of the Member States. Yet, the redress procedures in the national

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\(^{11}\) In 1999, the Treaty of Amsterdam entered into force and conferred to the European Union far reaching legislative competences in private international and procedural law (cf. Article 65 EU-Treaty 1998).

\(^{12}\) OJ 2012 L 351/1. The new regulation has been applicable since January 10, 2015, but only applies to proceedings initiated after this date.

\(^{13}\) Hess/Pfeiffer/Schloesser, The Heidelberg Report on the Application of the Regulation Brussels I (2008), paras 568 ss.


enforcement systems diverge considerably and often lack sufficient transparency. As a result, it may turn out that the free movement of judgments under the Brussels Ibis Regulation will be less efficient than under the current regime. This example demonstrates that a (simple) coordination of the national procedures may not sufficiently overcome the practical impediments of cross-border litigation. Therefore, European instruments should at least address the interfaces to the national procedures. On the other hand, there also exists an obligation of the national law-makers to provide for implementing legislation (even in the case of a regulation).

2.2. Establishing Minimum Procedural Standards

At present, European law does not provide for a set of minimum standards of domestic civil procedures. In the legal literature, some authors proposed to enact a European instrument providing for procedural minimum standards. At first sight, this concept appears to be compelling: by setting minimum standards, the EU legislator provides for a level playing field and respects the different procedural cultures of the national procedures. However, here the devil lies in the detail: up until now, the legislative concept of “minimum standards” has not been sufficiently elaborated. Standards refer to “principles”, at least to more general rules which have to be specified at the level of national procedural law. On the other hand, the term does not necessarily refer to general principles: “minimum standards” may equally encompass specific regimes for the service of documents (and the documentation thereof).

Consequently, it is submitted here that the inherent charm of “minimum standards” is derived from the absence of an underlying concept which refers to both constitutional principles and to concrete rules. For the legislator, an open concept potentially generates far reaching political options without implying (a priori) an intrusive approach into the procedural cultures of the EU Member States. However, the missing clarity of the concept must equally be considered as its inherent weakness: until now, minimum standards cannot be regarded as offering a coherent approach to procedural law-making, but as a reference to various, heterogeneous concepts of national and European procedural laws. In this respect, the description of more general instruments (like the Recommendation on Collective Redress) as a mere “toolbox” is telling.

In civil procedural law, the pertinent standards are not found in EU instruments, but have mainly been developed by the case law of the CJEU. Here, several principles can be

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17 This is especially the case in Germany; see Hess, Rechtspolitische Perspektiven der Zwangsvollstreckung, JZ 2010, 662 ss.
19 This obligation is derived from Article 4 (3) TEU.
23 cf. Hess
25 Minimum procedural rules are found in articles 13-19 of Regulation (EC) No 805/2004: With regard to the European Enforcement Order, the regulation provides for minimum norms on service and review proceedings.
detected: first, Union law provides for procedural guarantees such as the principle of access to justice, to a fair trial and also that of mutual trust. These principles are derived from human rights law which entails a growing constitutionalization of the procedural laws at the EU level (reinforced by the EU Charter of Fundamental Rights and the European Convention of Human Rights). 27 Other principles are regarded as core values of EU primary law (forming part of the “constitution of the Union”). 28 Second, the principles of effectiveness and equivalence influence the national systems of adjudication. 29 In practice, however, these principles are applied according to the circumstances of the specific case. 30 Consequently, it has proved to be difficult to elaborate a comprehensive line of the case law. Nevertheless, it might be advisable to elaborate a set of common principles of European and of constitutional law to be applied in domestic proceedings with cross-border implications. However, the term: “procedural minimum standards” should be avoided.

2.3. Providing for Rules: Implementing Self Standing Procedures

At present, two self-standing procedures are found at the EU level: on the one hand, the Regulation on the European Small Claims Procedure (ESCP) which was established in 2007, 31 and on the other, the work of a group of experts (mainly judges) which has recently culminated in the elaboration of the procedure of the new Unified Patent Court.

The first self-standing European civil procedure can be found in Regulation (EC) No 867/2007 on Small Claims. However, four years after its entry into force, the Regulation cannot be considered as a successful instrument: 32 The procedure is not frequently used in legal practice and remains almost unknown in the EU Member States. 33 The failure of this ambitious legislative project can be explained with reference to two factors: firstly, its application only to cross-border cases entailed that its practical importance remained limited; in the practice of the civil courts (with the exception of the English High Court), cross-border cases are still rare exceptions. 34 Secondly, the Regulation does not address its application within the Member States – the designation of the competent court remains a matter of national legislation. Yet, many Member States did not provide for any implementing legislation (since the regulation does not need to be implemented). As a
result, the competent local courts are not familiar with the European instrument.\textsuperscript{35} The ESCP demonstrates that the adoption of self-standing procedures must be accompanied by implementing measures of the Member States, while the exercise of a strong supervisory process on the part of the Commission itself is also necessary.\textsuperscript{36} Unfortunately, the Regulation as it has been recast does not sufficiently address these deficiencies.\textsuperscript{37}

Nevertheless, there is an additional sector in which a genuine European procedure is evolving. After many years of discussion, the European patent litigation was finally adopted in 2015.\textsuperscript{38} The new legislative framework provides for a self-standing litigation system of specialized European courts which shall apply their own autonomous procedures. The basic provisions on the structure of the court and the applicable procedure are found in the Agreement of the Unified Patent Court.\textsuperscript{39} The Court shall have its seat in Paris, and additional sections will operate in London\textsuperscript{40} and Munich. The detailed future procedure of the European patent courts is currently being elaborated by a group of stakeholders (mainly judges and practitioners). In September 2013, a “preliminary set of provisions for the Rules of Procedure of the Unified Patent Court” was published – it consists of more than 300 provisions (addressing proceedings in the first instance,\textsuperscript{41} evidence,\textsuperscript{42} appellate proceedings\textsuperscript{43} and general provisions\textsuperscript{44}). Although the first draft still needs considerable improvement, the elaboration of a comprehensive procedure for patent litigation among private parties seems to be an important endeavor. Compared to the ESCP, the new patent litigation system must be expected to work successfully as its legal framework addresses all pertinent issues, not only concerning its procedure, but also the institutional framework.


\textsuperscript{36} Note that supervision by the Commission in the context of an EU regulation is much more difficult than in the context of a directive.

\textsuperscript{37} Regulation (EU) 2015/2421, OJ 2015 L 341/1 ss.

\textsuperscript{38} This system is not entirely integrated in the framework of European law; see Regulation (EU) No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection OJ 2012 L 361/1. and the Agreement on a Unified Patent Court of 19 February 2013 entered into force on January 1\textsuperscript{st}, 2014.

\textsuperscript{39} Articles 6 – 19 (institutional provisions); Articles 52 ss. (proceedings before the court)

\textsuperscript{40} Depending on the outcome of the British referendum of 23 June 2016 a different location of the section might have to have determined.

\textsuperscript{41} Part 1, rules 10 – 157.

\textsuperscript{42} Part 2, rules 170 – 213.

\textsuperscript{43} Part 4, rules 220 – 254

\textsuperscript{44} Part 4, rules 260 – 382.
3. BASIC ASSUMPTIONS AND MISSING EMPIRICAL EVIDENCE

According to a prevailing assumption, differences among the national procedures impact on the uniform application of Union law in the Member States in domestic as well as in cross-border constellations. At first sight, this assessment seems to be a truism. However, when it comes to differences in procedural law, a more cautious approach might be advisable. It is dangerous to regard procedures in isolation, without looking at the institutional framework in which procedural norms are implemented. What counts are procedural cultures and the institutions applying and implementing those procedures. A striking example in this respect is the electronic accessibility of courts: in complex cases, i.e. in cartel damage claims, the means of evidence may comprise thousands of documents. If lawyers are required to present their briefs in printed copies, the relevant court will need much more time to review the evidence than another court which has available to it the appropriate IT tools. Furthermore, the willingness of a court to agree with the parties on a flexible time schedule might improve the general willingness of parties to come to quicker resolution of the dispute and to negotiate a settlement.

At present, it is very difficult to prove basic assumptions on the performance of national procedures and the European instruments with statistical information. Although the general situation has improved considerably, a comprehensive collection of data on the number of disputes, their subject matter, the parties involved and the average time is still lacking. Of course, anecdotal evidence about “torpedos” is often quoted. However, what is still missing are valuable data – they are not found in the Judicial Scoreboard of the Commission as they are not raised by the Member States. At present, the MPI Luxembourg is conducting an empirical study for the European Commission. The aim of the study is to investigate whether, and to what extent, differences of national procedures impact on the free movement of judgments and on the coherent application of EU law on consumer protection. Encouraged by the Commission, we have elaborated

45 In CDC (CJEU, case C-352/13, EU:C:2015:335), the plaintiffs asked the Higher Regional Court of Dortmund whether they could submit their (complex) files as data. As the court had no technical facilities, plaintiffs had to print out and to copy thousands’ of pages of documents.
46 In this respect, the state courts can profit considerably from the dispute resolution techniques of arbitral tribunals.
47 A basic collection of statistical data (not for all EU-Member States) is found in the Judicial Scoreboard.
questionnaires in which we ask about data on the application of different EU instruments in the Member States.\textsuperscript{49}

However, the results obtained so far are rather limited: **most Member States do not collect data systematically** (i.e. on the number of cases concerning the Small Claims Regulation or the Payment Order Regulation).\textsuperscript{50} Nevertheless, the figures obtained so far demonstrate that the instruments are applied differently. The number of cases is higher in Member States where information about the procedure is available and where the European procedure corresponds to the existing national one. This may explain why the European Order for Payment (EPO) is applied more in Austria and in Germany than in England or in the Netherlands.\textsuperscript{51} The example demonstrates that the implementation of uniform rules does not guarantee a uniform application in all EU Member States. However, information campaigns and implementing legislation may raise awareness of the instruments also in those jurisdictions where the EU instruments are considered as (foreign) legal transplants.

Although the first results of the study need further improvement,\textsuperscript{52} empirical research remains an urgent need in procedural law-making. We still do not know to what extent differences in the national procedural systems impact the coherent application of EU law in the Member States. The Luxembourg study will also build on empirical research based on interviews with stakeholders and on an online questionnaire. A high number of structured interviews may also help to obtain more information on the practical functioning of the instruments. At present, we have only limited information about the different performances of national systems and about the **growing competition of judicial markets in Europe**.\textsuperscript{53}

\textsuperscript{49} An evaluation study of the impact of national procedural laws and practices on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU law, JUST/2014/RCON/PR/CIVI/0082.

\textsuperscript{50} At present, the following data were obtained from EU Member States:


\textsuperscript{52} In the next step, national reporters will interview stakeholders in order to obtain additional empirical evidence.

4. THE WAY FORWARD

The examples demonstrate that the enactment of binding rules alone is not the most efficient way to change and improve the diverging national practices. Without addressing the infrastructure of the (different) adjudicative systems and the diverging procedural cultures, procedural reforms will remain “law in the books” without having a practical impact. On the other hand, only providing for a “toolbox” of heterogeneous “standards”, being partly principles and partly best or worst practices does not appear to be a feasible alternative. Legislative initiatives, whether binding or not, must be based on a clear regulatory concept.

Against this background, two possible options might be considered: on the one hand, one might consider establishing self-standing EU courts for specific areas of law (as in cartel damages, IP-rights, maybe even cross-border commercial disputes) which mainly apply EU law on the basis of self-standing procedures. The international composition of these courts may overcome language barriers and inequalities (in this respect) among the parties. Statistical data obtained from the High Court in London demonstrate that parties carefully select the place of litigation by jurisdiction clauses.54 It seems to be advisable to set up European commercial courts where parties can bring cross-border claims and where they can expect a bench of experienced judges giving a balanced judgment in a reasonable period of time. Therefore, establishing European Commercial Courts for cross-border disputes might be an option in a long-term perspective.

On the other hand, it seems to me that the Commission has carefully reframed its political strategy in procedural law, as the example of collective redress demonstrates: that is, a non-binding recommendation on collective redress, which did not need to be adopted by the EP and Council.55

However, the preference of the Commission for a non-binding instrument does not preclude the implementation of binding instruments at a later stage. This approach corresponds to a long-term legislative strategy which was recently successfully implemented in the field of consumer ADR. In this area of law, the EU Commission initiated two recommendations on minimum procedural and fairness standards for consumer dispute resolution in the 1990s, which were finally accepted by the stakeholders in the EU Member States.56 In 2011, the Commission made the second and decisive step by proposing a directive for a comprehensive framework on consumer ADR. This directive endorses the principles of the former recommendations and implements a binding framework for consumer ADR to be set up by the EU Member States. The same strategy has been adopted in the area of insolvency law: here, a comprehensive reform of the Insolvency Regulation57 on the coordination of insolvency proceedings in cross-border settings was adopted in the tripartite negotiations in the spring of 2015.58 In March 2014, the Commission published a

54 In 2012-13, the Commercial Court of London decided 1188 cases. In 961 out of these cases (80,89 %) one of the parties was a foreigner. In 582 out of these cases, both parties were foreigners, amounting to 49 % of all cases.
56 Hess, Europäisches Zivilprozessrecht (2010), § 10 VI.
58 Document 16636/5/14, of March 17, 2015.
recommendation on business failure and restructuring providing for legislative action in substantive insolvency and corporation law.\textsuperscript{59}

If one looks at the final part of the Recommendation on Collective Redress, there appear to be some parallels to the Consumer ADR Directive: in the final part of the Recommendation, EU Member States are urged to adopt corresponding domestic remedies and to report their legislative activities to the Commission within two years. According to paragraph 41 of the draft Recommendation, the Commission will assess the implementation of the instrument and propose further legislative action, if necessary. This context demonstrates that the Commission still envisages additional legislative action.\textsuperscript{60} Its objective is to lower the costs of assessing the risks of investing in another EU Member State, to increase recovery rates for creditors and to remove difficulties in cross-border restructuring.\textsuperscript{61} In 2015, the Commission appointed an expert group for the elaboration of a legislative initiative.

Furthermore, it must be noted that the Recommendation on Collective Redress has already triggered legislative activities in the Member States. In 2015, the United Kingdom adopted a far reaching reform of the Financial Ombudsman Schemes providing for opt-out collective redress (in domestic situations\textsuperscript{62}). Germany is equally considering the implementation of a general collective redress remedy after earlier unsuccessful drafts were advanced from academia;\textsuperscript{63} a legislative proposal was announced the end of 2015 and is still expected at.\textsuperscript{64} In the current political debate on collective redress, references are often made to the principles of the Recommendation.

These examples demonstrate that the use of non-binding instruments in European law-making has become a suitable regulatory approach. The \textit{ELI/Unidroit rules of civil procedure} might be a first step of a broader legislative process where Member States consider necessary reforms of their respective procedures against the backdrop of a comprehensive and modern model code of civil procedure. At a later stage, the EU lawmaker might step in and consider additional activities in order to improve the judicial protection of citizen within the Area of Justice.

\textsuperscript{59} Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency \cite{OJ L74/65}.

\textsuperscript{60} \textit{M Clough}, ‘Where to Next? The European Law Institute’s Statement on Collective Redress and Competition Damage Claims’ in \textit{Lein et al (n 53) 357} et seq.

\textsuperscript{61} Recommendation on a new approach to business failure and insolvency (n 62) 5.

\textsuperscript{62} Consumer Rights Act 2015, s.81 and Schedule 8, broadening the jurisdiction of the Competition Appeals Tribunal.

\textsuperscript{63} \textit{H-W Micklitz} and \textit{A Stadler}, ‘Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika’ in \textit{T Gabriel and B Pirker-Hörmann (eds), Massenverfahren: Reformbedarf für die ZPO?} (Wien, Verlag Österreich, 2005) 111-309.

\textsuperscript{64} Entwurf der Fraktion der Bündnis 90/Grüne eines Gesetzes über die Einführung von Gruppenverfahren, Bundestagsdrucksache 18/1464 as of 21 May 2014.
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