Common minimum standards of civil procedure

European Added Value Assessment
Annex I
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Research paper

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**List of abbreviations**

ADR  Alternative Dispute Resolution
ALI  American Law Institute
CJEU Court of Justice of the EU
CoNE Cost of Non-Europe
CFREU Charter of Fundamental Rights of the European Union
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
ELI European Law Institute
EU European Union
IPR Intellectual Property Rights
MS Member State
OECD Organisation for Economic Cooperation and Development
PIL Private International Law
TEU Treaty of European Union
TFEU Treaty of Functioning of the European Union
UNIDROIT International Institute for the Unification of Private Law
Executive summary

Introduction

On 25 November 2015, the European Parliament’s Directorate for Impact Assessment and European Added Value commissioned Blomeyer & Sanz to prepare a research paper on ‘Common Minimum Standards of Civil Procedure’ in the EU. The research was conducted by Magdalena Tulibacka, Margarita Sanz and Roland Blomeyer. This executive summary presents the research paper’s main features.

Structure of the Report

The Report is structured in line with the terms of reference as set out by the European Parliament’s Directorate for Impact Assessment and European Added Value. Further to the introduction discussing the scope of research, the main findings are presented in three sections:

Section 1 assesses whether and why action at EU level may be necessary. It reviews the current academic and policy debates on the future of European civil procedure, proposals for reform, and on-going projects. It draws comparisons with the developments in the area of EU criminal procedure. It proceeds to examine in some detail the civil procedure standards currently in force in the EU. The analysis is structured along four categories of principles including:

- Principles on access to courts and to justice,
- Principles on ensuring fairness of the proceedings,
- Principles on ensuring efficiency in the proceedings,
- Principles on ensuring a just and effective outcome.

Having reviewed the current situation, Section 1 presents some preliminary arguments for further EU action in the area, specifically action focused on the introduction of common minimum standards (CMS). It proceeds to examine the potential obstacles to further developments in the area of EU civil procedure.

Section 2 considers the legislative power of the EU in the area of civil procedure, its scope and limitations, and puts forward three different options for action on CMS. Importantly, it suggests a shift in the interpretation of the notion ‘matters with cross-border implications’ that define the EU legislative competence in this area.

Section 3 proceeds to examine the potential added value (costs and benefits) of the introduction of CMS at the EU level, taking into account the different scope of involvement in each of the three options proposed. We look at costs and benefits in the political and economic dimension, the latter with the use of quantification methods. The main issues are: the potential added value resulting from the EU intervention compared to what could be achieved at national or international level, the added value in terms of effectiveness (realisation of border free EU), efficiency (pooling resources) and synergy (reducing fragmentation and disparities), supplementing other national and international policies (complementarity), and the added value from the perspective of stakeholders (utility and simplification).

The key notions and scope of the Study

For the purposes of this Report we see procedural standards as an expression of general principles of civil procedure (thus our focus on the principles mentioned above, examined in detail in Section 1). They translate and elaborate these general principles in a specific procedural context. Among the general procedural principles, some scholars see a multi-tier system consisting of fundamental procedural guarantees (for instance judicial independence and impartiality) at the top level, the more detailed but still leading principles (such as jurisdiction rules or judicial management of proceedings), as well as more incidental principles (such as

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1Each category is divided into a number of sub-categories. These categories have been adapted from Professor N. Andrews’ paper: ‘Fundamental Principles of Civil Procedure’ – see attached Bibliography for reference.
security for costs) at lower levels. A further feature of civil procedure are rules dealing with practical mechanisms, steps and powers. Following the legislative path taken by the EU in regulating civil procedure, the Report covers all these levels in seeking the currently applicable standards and making recommendations.

Discrepancies in definitions and scope of ‘civil procedure’, and its links and overlaps with the rules of substantive law, private international law and other areas of procedural law entailed the need for this Report to adopt a somewhat arbitrary definition and scope. Primarily, the Report focuses on procedure before courts, including, in contrast to the ELI/UNIDROIT Project, the principles and rules on costs and funding of litigation. Within EU law, we examine horizontal legislation on civil procedure (acts adopted in the area of judicial cooperation in civil matters), as well as some examples of ‘sectoral’ legislation (acts concerning civil procedure adopted in specific areas of substantive EU law, for instance consumer or competition law).

The Report does not cover ADR, as well as certain matters that in some systems belong to substantive law and in others to procedural law (for instance burden of proof, evidence, or limitation periods). Further, while the scope of the Report includes civil matters in general, it does not include family law issues and insolvency. It also does not include areas covered by distinct procedural rules or different court systems, for instance employment law.

Methodology

The research involved a comprehensive academic review of the relevant issues. The review was essentially literature based, but involved some interviews with scholars. It was supported by a qualitative exercise, namely a survey of sentiments of stakeholders, as well as a quantification of the costs and benefits of the suggested actions.

EU, national and international developments – the context of the Report

The Report should be seen in the wider context of academic and policy debates on harmonisation, Europeanisation and globalisation of civil procedures. These debates are quite robust at present on the EU and international level, and less so on the national level. The national debates are focused on the domestic-level procedural reforms. These reforms are proceeding quite dynamically, and the Report argues that there is potential for the EU-led discussion on CMS in civil procedure to inspire and coordinate the national developments.

The European Union’s institutions, and in particular the Commission and the Parliament, are engaged in work towards developing CMS in criminal procedure (this work is more advanced) as well as, recently, in civil procedure. The Report draws on some of the experiences of the process of building the CMS in criminal procedure (especially in our recommendations regarding the limitation of the legal basis for legislation to matters ‘with cross-border implications’ – see below). The Report examines the scholarly writings, reports and on-going research on these matters. It specifically emphasises the ELI/UNIDROIT Project, and the earlier ALI/UNIDROIT Rules on Transnational Civil Procedure. It uses the findings and recommendations of these two projects, as well as the work of the Council of Europe’s Commission for the Efficiency of Justice (CEPEJ).

See Report for references.
Findings and recommendations

Section 1

The European Union’s civil procedure law is a complex grouping of Treaty provisions, principles deriving from the CFREU and the ECHR, as well as secondary legislation of a horizontal nature and of a sectoral nature. Further, the jurisprudence of the CJEU and of the ECtHR plays an important role in interpreting the existing legal provisions and applying them in specific cases.

All these legislative and judicial instruments contain or deal with procedural standards. Their analysis in Section 1 is presented in two formats.

1. The descriptive analysis follows the four groups of procedural principles listed above. The analysis is an attempt to systematically review the standards for civil procedures that are operational at the EU level, also accounting for the fact that the existing standards range from fundamental guarantees, other leading principles, incidental principles, through more detailed rules implementing these principles. In addition to reviewing them, we also seek to establish where there is potential for codification (if the principles and accompanying rules are comprehensive), for filling the gaps (where these exist), and for deploying additional principles or tools (if there is scope for such and there have been developments on the national or international level to indicate new approaches). These suggestions are preliminary and are meant to stimulate debate. They need to be looked into in further detail and should by no means be treated as recommendations on concrete steps. Where there are conclusions from the ELI/UNIDROIT Project, we include them in the review.

2. The table that follows the descriptive analysis depicts the presence of standards reflected in these principles in the secondary EU instruments covered by the Report (horizontal legislation and some sectoral legislation).

This part of Section 1 demonstrates that there is no coherent system of general procedural standards in the European Union civil procedure. Those introduced by EU legislation have limited application. They cover specific procedures, motions, and situations. Many only apply to cross-border litigation and exist alongside procedures and mechanisms introduced under national procedural laws. Further, they do not cover all the aspects and stages of civil procedure. To follow the structure of the ALI/UNIDROIT Rules of Transnational Civil Procedure, one can point to the following matters that are currently not covered at all: the right of the parties to engage a lawyer, confidential legal advice, structure of civil proceedings (stages, appeals, etc.), intervention, and Amicus Curiae submission.

It can be concluded that a citizen or a resident of an EU Member State wishing to commence litigation in another EU Member State should not expect to approach courts and authorities in any Member State as easily as in their own. When involved in litigation, he or she still cannot rely on the same or similar procedural guarantees. When enforcing a judgement or settlement in another Member State, EU citizens and residents may also encounter difficulties. Various aspects of access to justice, jurisdiction, standing, judicial independence and impartiality, costs and funding of litigation, legal representation, the stages of proceedings, the roles of the parties and the court, evidential rules, requirements concerning language and translation of documents, specific procedural steps, timelines and time limits, sanctions, interim relief, decisions, appeals, recognition and enforcement retain significant differences. The courts applying EU procedural standards are national courts, and their different approaches as well as the results they produce do not always encourage mutual trust.
Other Reports on the application of the existing EU legislation in civil procedure, as well as the qualitative and quantitative research leading to the writing up of our Report, unveil a number of crucial features of the EU civil justice:

- We know very little about how the EU civil procedure legislation works in practice because there is no reliable data on how many times and how it is used, or why it is not used.
- What transpires from the available data is very low usage of EU civil procedure mechanisms (for instance of the Small Claims Procedure, or the Brussels I Regulation).
- The minimum standards operating currently, based on the EU legislation in force, leave significant issues to national civil procedures, and even the aspects expressly regulated by EU measures do not receive the same interpretation and application on the national level. There are fears about the implications of these divergences for the aims of mutual trust and mutual recognition. They were expressed for instance with reference to the European Order for Payment Procedure and the European Small Claims Procedure.
- The level of knowledge and awareness of common standards in civil procedure, and the procedures and other mechanisms carrying them, is very low not only among businesses and consumers but also among the judiciary and other members of the legal profession.
- While the CFREU and the ECHR (and the jurisprudence of the CJEU and ECtHR) establish a set of general principles, their practical application through detailed procedural rules remains within the scope of each national civil procedure.

It is submitted that the problems identified here cannot be solved exclusively by actions on the Member State level. They require an exercise in coordination and systematisation that goes beyond the borders and interests of one state. In the light of the key aims of the EU legal system, and the aims of the policy of judicial cooperation in civil matters, action at the EU level seems necessary. This conclusion is supported by the respondents to our Survey. Only 12% of stakeholders were satisfied that the current EU approach to harmonisation of civil procedures was sufficient to remove obstacles to trade and to bringing cross-border cases. An overwhelming majority (81%) held favourable views on the possible greater harmonisation of the civil procedure rules in the EU (for 25% these were very favourable views). These arguments should, however, be weighed against the potential obstacles to further procedural harmonisation. The Report highlights the very nature of civil procedure and the difficulties in reconciling the different approaches to it on the national level, and the limited legislative powers of the EU to regulate civil procedures.

With regard to difficulties in systematisation of the existing EU standards and the related lack of data on national implementation and use of these standards, another important element and potential contribution of the contemplated CMS is noted. It is facilitating, fostering and perhaps even directly establishing, as part of the future CMS system, a framework for empirical metrics on performance of specific procedures, mechanisms and standards, and thus also on the performance of the entire CMS system.

**Section 2**

The Report recommends a systemic approach to minimum standards in civil procedure at the EU level, specifically one entailing drafting an ‘umbrella instrument’ containing CMS. The Survey we presented to stakeholders offered a whole array of options, and the respondents were divided. Improvement and filling the gaps in existing legislation was an option preferred by 27%. 17% of respondents preferred new legislation, and the same number opted for a multiple-step project involving consolidation of the existing legislation and drafting of minimum procedural standards as an optional instrument as a first step, further harmonisation
and gradual convergence of procedural rules as the next step, and introduction of an EU code of
civil procedure to replace national civil procedure codes as the final step. 13% preferred
introduction of CMS as a binding piece of EU law, and the same number – CMS accompanied
by more detailed rules in civil procedure as an optional mechanism for cross-border cases. 10%
opted for the CMS accompanied by more detailed rules in civil procedure as an optional
mechanism for all cases, domestic and cross-border. Only 3% preferred an immediate
introduction of a European code of civil procedure replacing national civil procedure rules, and
no one opted for introduction of CMS as a piece of non-binding EU law.

We singled out three options for establishing such an umbrella instrument. The options reflect
the preferences of the stakeholders. However, for reasons of greater coherence, the options
consolidate the choices presented to them. Each one of the options involves, to a lesser or
greater extent, introduction of a set of clear procedural standards applicable to civil
proceedings. In fact, seen together they present a pathway towards what is effectively
codification (in the understanding of establishment of a set of generally binding principles) of
civil procedure standards across the EU. This codification would involve binding principles for
domestic as well as cross-border cases. This is where we see the greatest advantages for the EU.

The options we propose are as follows:

1. **Compilation and consolidation** (maintaining of the status quo, accompanied by writing up
   of existing minimum standards in one instrument, possibly also of guidelines on application);

2. **Comprehensive review, a ‘Roadmap’ and subsequent further legislation** (where the
   Roadmap would contain the key principles, and further pieces of binding legislation would
   cover specific aspects or stages of civil procedure);

3. **Binding instrument containing minimum standards** (adoption of a binding instrument
   containing CMS, or a binding instrument containing CMS accompanied by a non-binding
   instrument concerning further, more detailed standards and some detailed rules as a suggested
   method of application of these standards in practice. Ultimately – the aim here is adoption of an
   EU Code of Civil Procedure).

In addition to reviewing the main features and introducing potential advantages and
disadvantages of each option, Section Two also addresses the following issues that are
significant with respect to all the proposed options:

1. **The legal basis of the contemplated legislative measures**: the choice of a legal basis for a
   binding measure containing common minimum standards in civil procedure appears to fall on
   Article 81 TFEU. We considered the possibility of using Article 114 TFEU as the sole legal basis
   and rejected it. Whereas the specific legal basis exists for civil procedure measures, Article 114, a
   lex generali concerning measures for building the internal market, should not be used as a legal
   basis for a horizontal piece of legislation concerning civil procedure. Even if one accepts the
   possibility of the CMS measure having two legal bases, Article 81 would be the dominant legal
   basis because of the nature, contents and aims of the measure. The latter option does not
   challenge the main limitation of the measure adopted (matters with cross-border implications –
   see below). We also considered the possibility of the measure being based on Article 352 TFEU
   and rejected it.

2. **The limited legislative competence of the EU to regulate civil procedure - matters with
   cross-border implications**: the fundamental limiting feature of Article 81 TFEU is that the EU
   has the power to only regulate ‘matters with cross-border implications’. The currently accepted
   interpretation of this phrase is rather narrow. For the existing EU legislation on civil procedure
   adopted on the basis of Article 81 ‘cross-border implications’ entail a cross-border case: one
   with a cross-border element. A more liberal interpretation we suggest may take into account, in
addition to the scope of the case itself, the nature of the matters regulated (in our case – common minimum standards in civil procedure), and seek to establish whether these matters have cross-border implications. We recommend seeing the limitation in the context of the aims and desired results of the legislation. These aims include improving judicial cooperation, enhancing mutual trust, fairness of civil justice, and protection of fundamental rights. Here we follow the Commission’s assertions (in some legislative proposals) on the need for a wider outlook on the notion of ‘cross-border implications’, and the current developments in the ‘sister policy’ to civil procedure: judicial cooperation in criminal matters. It is important for the general level of mutual trust between judicial authorities, and effective enforcement of decisions, for domestic procedures and cross-border procedures to be following equally robust procedural principles and standards.

In summary, we are recommending that the CMS are applicable also to cases of a domestic nature.

There are potential concerns, this proposal to extend the application of the legislative mandate of the EU in the area of civil procedure leads to: for instance those related to subsidiarity, or to the very nature of civil procedure. Further, by advocating an extension of the legislative mandate of the EU in the area of civil procedure the Report goes against what seems to remain the consensus among Member States. However, in the matter of common minimum standards, it is submitted that adoption of a set of standards only for cross-border cases creates further problems, as indicated by some respondents to our Survey. By introducing a parallel system of principles, it creates two systems, two sets of procedures, and ultimately two categories of litigants.

3. The legal form of the contemplated legally binding measures: the Report contains some suggestions for a legal form of legislation proposed in each of the three options. It also examines the main features of each legal form (Recommendation, Directive, Regulation).

Section 3

Following the methodology used in ‘Costs of Non-Europe’ Reports, the Report attempts to offer a first approximation of ‘European added value’ inherent in CMS. Each of the three proposed options involves, to a lesser or greater extent, introduction of a set of clear procedural standards applicable to civil proceedings. In fact, seen together they present a pathway towards what is effectively codification of civil procedure standards across the EU. This codification would involve binding principles for domestic as well as cross-border cases. This is where we see the greatest advantages for the EU. Thus, while the examination of potential added value of introduction of CMS below applies, albeit to a somewhat different extent, to all three options, we see a gradation of benefits we identify with the greatest benefits produced by the codification in OPTION THREE. On the other hand, the costs would also grow with each following option, and the costs of OPTION THREE would be very significant indeed. The greatest burden would fall on the Parliament and the Commission; on the national level OPTION THREE would involve the most significant adjustment, reform and reorganisation.

Economic perspectives

In line with the current approach to ‘European added value’, we singled out economic and political perspectives of this added value. The principles of subsidiarity and proportionality, examined in Section 2 of the Report, also come into play, as they delimit the scope and size of the EU activities in the areas where the EU has the power to act.

In the context of this report, economic perspectives throw light upon the costs and efficiency benefits of establishing the common procedural standards across the EU, the economic benefits of increased cross-border trade which may result from the greater level of mutual trust, and the
economic benefits of a more uniform application of substantive laws of the EU. Thus, we consider the following forms of impact of the non action on consumers and businesses, on society, on the operation of the internal market of the European Union, and on the general functioning of the European Union’s legal system:

- Costs to the operation and conduct of business (costly insurance coverage, the need for advice concerning civil litigation systems of other Member States)
- Administrative and legal costs of negotiating different procedural systems, different procedural standards and rules
- Social costs (including emotional costs of dealing with different procedural systems, uncertainty and insecurity)
- Wider costs for the European society: hindrance to free movement of persons and goods, hindrance to cross-border business and cross-border consuming
- Wider costs for the EU legal system: lack of uniformity in application of EU law, effet utile, lack of legal certainty and predictability of outcomes. This type of costs is also related to lack of what the EU civil justice policy is aiming to achieve: the general impression of a just system.

The approach to quantification of the cost reduction inherent in CMR involved three steps, identifying the volume of cross-border civil law litigation, identifying the actual cost of going through litigation in a different Member State, and the question of the possible cost reduction inherent in harmonisation initiatives, i.e. by how much would the different harmonisation options reduce the cost identified under the first two steps? It is recommended to consider the figures in this report as a very first attempt to quantify the cost reduction. Indeed the report notes a series of important caveats in relation to quantification: Systematic statistical data on the number of cross-border cases in the European Union does not exist; the exact cost of cross-border civil procedure litigation is not known; and there are uncertainties surrounding the possible cost reduction deriving from CMS, since the scale of the reduction depends on the coverage and content of the CMS and their nature (recommendations / binding). Notwithstanding these caveats, this section comprises a series of calculations, aiming to give the reader a first tentative approximation of the costs of cross-border civil law litigation and possible savings deriving from CMS.

Looking at the number of cross-border cases, the calculations take the form of an extrapolation based on the data available for the only Member State with systematic data, namely Germany. Germany reports a total of 18,573 claimants residing in different EU Member States (excluding Germany) seeking justice in German civil law courts in 2014 (excluding family law). Assuming a relation between the number of cross-border cases handled in a country (in this case Germany) and the country’s intra-EU trade performance (share of intra-EU28 exports in 2014), the calculation establishes the figure of 83,222 cross-border civil law cases for the EU. Note, that when conducting the extrapolation using population data (EUROSTAT, 2015) instead of exports, the total number of cross-border cases is 116,277.

Turning to the second element of the calculation, existing research has established the cost of civil law litigation per Member State for two different scenarios, a first scenario of a civil law case worth EUR 20,000, and a second scenario with a case valued at EUR 200,000. Multiplying the number of cases with the cost per case, for the EUR 20,000 scenario, the total cost for the EU amounts to some EUR 370 million; for the EUR 200,000 scenario, the total cost amounts to nearly EUR 2.1 billion. Again, using population data instead of export data as the basis for extrapolation, the total cost for the EU for the EUR 20,000 scenario amounts to some EUR 511 million; for the EUR 200,000 scenario, the total cost amounts to nearly EUR 3.1 billion. However, these figures fail to consider the additional cost of civil procedure related to the cross-
border ‘quality’ of the case. On the basis of stakeholder feedback, the study multiplies the cost of litigation with a ‘cross-border’ factor of 2.5, allowing to establish total costs for the EU for the EUR 20,000 scenario, of some EUR 924 million; and for the EUR 200,000 scenario, the total cost amounts to nearly EUR 5.2 billion. Using population data instead of export data as the basis for extrapolation, the total cost for the EU for the EUR 20,000 scenario amounts to some EUR 1.3 billion; for the EUR 200,000 scenario, the total cost amounts to around EUR 7.7 billion.

Finally, coming to the possible reduction inherent in the introduction of CMS, the calculations apply, on the basis of the three options outlined in this report, a related reduction of 5% (option 1), 10% (option 2) and 15% (option 3) to the two scenarios (EUR 20,000 / EUR 200,000). For the EUR 20,000 scenario, the potential cost reduction inherent in CMS for the EU ranges from EUR 46 million (5%) to EUR 139 million (15%); for the EUR 200,000 scenario, the total cost reduction for the EU ranges from EUR 258 million (5%) to EUR 773 million (15%). Using population data instead of export data as the basis for extrapolation, for the EUR 20,000 scenario, the total cost reduction for the EU ranges from EUR 64 million (5%) to EUR 192 million (15%); for the EUR 200,000 scenario, the total cost reduction for the EU ranges from EUR 387 million (5%) to EUR 1.2 billion (15%). As mentioned before, these calculations aim to add to the discussion on CMS, with further in-depth research in all Member States required to address the data gaps with regard to the actual number of cross-border cases and the scope of a cost reduction inherent in CMS.

**Political perspectives**

Political perspectives indicate the wider policy objectives of greater harmonisation between the Member States’ legal orders, greater coherence of legal orders, legal clarity and predictability of outcomes, including:

- Greater awareness of EU procedural rules and the procedural mechanisms already existing – the new common principles would give greater exposure to those existing mechanisms.
- Encouraging cross-border trade (both by consumers and by businesses): greater trust for the procedural systems of other states, greater confidence that if things go wrong the procedures for enforcing rights will be based on common (known) principles.
- Greater trust between judiciaries based on the respect for common procedural standards.
- Greater general feeling of justice across the EU.
- Better monitoring and assessment of operating standards through introduction of metrics that this Report recommends.

**Other benefits**

The existing EU legislation, the jurisprudence of the CJEU, the Charter of Fundamental Rights and the ECHR already offer a set of procedural standards binding upon the Member States. However, in order to fully achieve the political and economic benefits examined in this section of the Report, what is contemplated should be more than simply a codification of what already has been achieved. By proposing to start discussions on these standards, the EU has the chance to take the leading role in the process of re-thinking and reforming civil procedure at the EU as well as at the national level. Many EU Member States have been conducting reforms of their civil procedures, sometimes very significant reforms involving redrafting of civil procedure codes or reshaping of civil justice systems. These reforms have resulted from reflections on the need for transformations in the roles of civil procedure and litigation, their main features, and the principles governing civil justice systems in general.
The minimum procedural standards for the EU entail minimum level of protection for the parties, but they leave detailed rules of proceedings to national procedures and to the growing number of EU procedural measures. Despite their general nature, however, the general minimum standards require scrutiny of national procedural rules, stimulate change if those rules do not fulfil the minimum requirements, generate greater attention and focus on civil procedure in general, enhance cooperation among various actors in the area of civil procedure, and, what this Report highlights, by increasing legal certainty and predictability, they enhance the smooth functioning of the Internal Market. In the longer term, they may also lead to a deeper level of coordination, approximation and even harmonisation – the type of harmonisation covering procedural rules, ultimately leading to the adoption of a single code of civil procedure rules.

0. Introduction

On 25 November 2015, the European Parliament’s Directorate for Impact Assessment and European Added Value commissioned Blomeyer & Sanz to prepare a research paper on ‘Common Minimum Standards of Civil Procedure’.

This introductory section presents the research overview (Section 0.1), the structure of the report (Section 0.2) and the methodology (Section 0.3).

Further to this introduction, the research paper is organised in three sections. Section 1 discusses whether and why action at the EU level is necessary in the area of private procedural law. Section 2 presents the EU competencies for action in the area of civil procedure law, and options for action. Section 3 shows the added value of harmonisation at the EU level for European citizens and businesses, focusing on the quantification of possible benefits of common minimum standards (CMS) of civil procedure or other harmonisation initiatives.

0.1. Research overview

In the European Union, enforcement of law in general, and the civil procedure before courts in particular, still largely remains the matter of national procedural rules and practice. National courts are also EU law courts. It is essential for the proceedings before them to ensure fairness, justice and efficiency – fundamental aims of every civil justice system - on the one hand, and effet utile and uniform application of EU law - the aim of the EU legal system - on the other hand. The path taken by the EU in building a civil justice system capable of meeting these objectives has been delineated by its limited legislative powers, by the very nature of civil procedure, and by significant differences between the Member States’ civil procedure and civil justice systems.

The European Union’s regulatory coverage of civil procedure finds its legal basis in the Founding Treaties, where the policy of ‘judicial cooperation in civil matters’, aiming at creating the ‘European area of justice’, is regulated. Legislative measures adopted in this area, whether dealing with private international law issues, or introducing new procedures and procedural mechanisms, are only applicable to matters with cross-border implications. Thus, often they are an additional layer of procedural rules existing alongside national procedures and mechanisms. A further line of legislative measures regulating civil procedures has recently emerged from

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3 For exploration of the role of national courts and national civil procedures see for instance Hartnell, ‘Civil Justice as Governance’, at p. 3, and Tulibacka, ‘Europeanisation of civil procedures’, at p. 1533, and literature referred to there.

4 These are currently the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). See below for the elaboration of legal basis of EU action in the area of civil procedure – the legal basis for measures in the area of judicial cooperation in civil matters is Article 81 TFEU.

various substantive areas of EU law (this Report deals with consumer protection, competition law and IP law, but there are other examples: such as public procurement, equality and discrimination law, and environmental protection law). These ‘sectoral’ measures, while limited to procedures dealing with enforcement of a specific area of substantive EU law, are wider in scope than the horizontal measures adopted within ‘judicial cooperation in civil matters’. Determined by a different Treaty provision they are based on (Article 114 TFEU) they are not limited to matters with cross-border implications. The policy papers and legal instruments introduced by the EU are based on the principle of mutual recognition. Mutual recognition depends on mutual trust and confidence between the Member States’ procedural systems. The acceptance of certain minimum standards concerning guarantees of procedural fairness, justice and efficiency constitutes the foundation of mutual trust. The legislation introduced so far already contains many common standards aimed at enhancing mutual trust. The jurisprudence of the Court of Justice of the EU (CJEU) has developed further standards. Last but not least, the Charter of Fundamental Rights (‘the Charter’), as well as the European Convention of Human Rights (ECHR), and the jurisprudence of the CJEU and the European Court of Human Rights (ECHR) interpreting these instruments, set the standards in civil procedure applicable throughout the EU. The terms of reference for this assignment note that the EU’s current regulatory framework for civil proceedings is fragmented, and often lacks coherence. Some aspects of civil proceedings are regulated, while others are left for national civil procedure rules and practice. There are problems with the implementation and practical application of the existing standards. Further, a significant problem with the current EU civil procedure rules, especially in the context of the ‘European area of justice’ aim and the postulate of mutual recognition, is the poor use of these rules and poor knowledge of them.

National civil procedure rules of the now 28 EU Member States are very different. Differences in the national civil procedure rules do not necessarily constrain the functioning of the internal market, nor are they automatically a problem from the point of view of the EU law, of the Charter and of the ECHR. Indeed, the EU civil procedure policy respects the legal traditions, laws and practices of the Member States. However, if these differences concern some of the most fundamental procedural principles and guarantees, they run the risk of hindering mutual trust and confidence that are at the basis of mutual recognition.

This Report reviews the possible ways in which the process of building an EU civil justice system could proceed, focusing on building common minimum standards of civil procedure.

0.2. Structure of the Report

The Report is structured following the key elements of the terms of reference as set out by the European Parliament’s Directorate for Impact Assessment and Added Value Unit. After the introductory part explaining the scope of the researched issues (definitions of civil procedure and of minimum standards in civil procedure), the main findings are structured into three main sections:

- Section 1 concerns the questions whether and why action at the EU level may be necessary. It reviews the current academic and policy debates on the future of the European civil procedure, proposals for reform, and ongoing projects. It draws comparisons with the developments in the area of criminal procedure. It proceeds to examine in some detail the standards currently in force. Their analysis is structured along the four categories of principles specified below (Methodology), each category divided into a number of sub-categories. Gaps, weaknesses and problems are highlighted. Having evaluated the current position, section 1 presents some preliminary arguments for further EU action in the area, specifically, action focused on

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4 This phenomenon of ‘Proceduralisation through the back door’ or ‘incidental proceduralisation’ was recently examined at a Conference organised at the University of Maastricht (October 2014). Contributions have been published in the Review of European Administrative Law, Vol. 8, No. 1, 2015.

7 Article 67.1 TFEU.
the introduction of CMS. It proceeds to examine the potential obstacles to further developments in the area of civil procedure.

- Section 2 considers the legislative power of the EU in the area of civil procedure, its scope and limitations, and puts forward three different options for action. It also suggests a shift in the interpretation of the notion ‘matters with cross-border implications’ that define the EU legislative competence in the area of civil procedure.

- Section 3 proceeds to examine the potential added value (costs and benefits) of the introduction of CMS at the EU level, taking into account the different scope of involvement in each of the three options proposed. We look at costs and benefits in the political and economic dimension, the latter with the use of quantification methods. The main issues are: the potential added value resulting from the EU intervention compared to what could be achieved by MS at national or international level, the added value in terms of effectiveness (realisation of border free EU); efficiency (pooling resources); and synergy (reducing fragmentation and disparities), supplementing other national and international policies (complementarity) and the added value from the perspective of stakeholders (utility and simplification).

0.3. **Methodology**

The Study involved a comprehensive academic review of the relevant issues. It was essentially literature based, but involved some interviews with scholars. It was supported by a qualitative exercise: a survey of sentiments of stakeholders, as well as a quantification of the costs and benefits of the suggested actions.

The focus on CMS in civil procedure entails two strands of enquiry:

- The added value of CMS, the legislative power of the EU to enact them, the legislative form, the scope, and the practical feasibility of the CMS; and

- The substance of the CMS.

This Report primarily addresses the first strand, contributing to the wider discussion in the Parliament, in the Commission, and on national levels: among Member State governments and key stakeholders (consumers, businesses, the law profession, and scholars). The substance of CMS, whereas not examined here in detail, is also addressed through the examination of the standards currently in place, the assessment of gaps and the potential for filling them. With regard to the assessment of the existing standards, there are a number of possible ways to proceed. We considered two particularly useful approaches: one following the structure of civil proceedings, and one following the general procedural principles and aims. The first approach revealed very significant gaps in coverage of civil proceedings by the EU-derived principles and rules. It was abandoned in favour of the approach following general procedural principles and aims of fairness, efficiency and justice (we proceed along a more comprehensive catalogue of these principles and aims – see below).

Any detailed proposals concerning the CMS must be left to thorough scholarly examination. The latter is currently taking place within the ELI/UNIDROIT Project on ‘Fundamental Principles of Civil Procedure’, to some extent using the earlier ALI/UNIDROIT Principles of Transnational Civil Procedure, the Storme Commission’s Report, and other scholarly work in this area.

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*See Sections 1.2.1 and 1.2.4 for further elaboration on the ELI/UNIDROIT and other projects mentioned below. ELI/UNIDROIT Project on Fundamental Principles of Civil Procedure, details accessible at: http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure,*
The following pages present relevant definitions and discuss the scope of research.

0.3.1 The concept of civil procedure (civil procedural law) and the scope of the report

Civil procedure rules relate to judicial organisation, jurisdiction, and rules of procedure before courts.\textsuperscript{11}

The EU civil justice policy (judicial cooperation in civil matters) deals with two categories: jurisdiction and the rules of procedure before courts. The rules of judicial organisation are not harmonised at the EU level. They are often regulated outside the scope of ordinary rules of civil procedure and they will not be covered in this Report.\textsuperscript{12}

Discrepancies in definitions and scope of the notion of civil procedure as set out in various EU policy papers and scholarly writings on the matter, and the links and overlaps of civil procedure with the rules of substantive law, private international law and other areas of procedural law, entail the need for this Report to adopt a somewhat arbitrary definition and scope of inquiry. The main point of focus for our Study - common minimum procedural standards - also affects the direction of enquiry. Primarily, this Report focuses on the rules of procedure before courts (including, in contrast to the ELI/UNIDROIT Project, the rules on costs and funding of litigation). Here we follow the definition of civil procedure provided by van Rhee: as a ‘coherent totality of (…) formalities that regulate legal proceedings from beginning to end’,\textsuperscript{13} with two caveats. First of all, the procedure we focus on has an EU dimension (this may entail a cross-border dimension). Second, instead of the entirety of formalities, we emphasise procedural standards.

In line with the EU dimension of our Study, the Report also touches upon the issues of jurisdiction, recognition and enforcement of judgements (which are commonly considered to be part of private international law) as long as they include or affect common minimum standards of civil procedure. Private international law traditionally covers three issues: ‘jurisdiction’, ‘choice of law’, as well as ‘recognition and enforcement’.\textsuperscript{14} The three areas of procedural international law are very closely linked with civil procedure rules, and often there are overlaps.\textsuperscript{15} These issues have been examined for the European Parliament, in the context of potential further harmonisation and even codification, by the team of academics headed by Professor Xandra Kramer.\textsuperscript{16} Nick Bozeat followed this paper in his ‘Costs of non-Europe Report’ concerning the potential benefits and costs of codification.\textsuperscript{17} These Reports are relevant here,
because of the very significant links between private international law and the rules of civil procedure.\textsuperscript{18}

Alternative dispute resolution (ADR)\textsuperscript{19}, as it is not within the scope of the definition of civil procedure specified above, will not be covered. ADR\textsuperscript{20} is widely acknowledged to be part of every civil justice system (confirmed by scholars – for instance Professor Hodges or Professor Stuyck,\textsuperscript{21} as well as by EU policy papers – especially in the context of consumer protection policy). The authors of this Report view ADR as distinct from civil litigation in many respects, and in the context of minimum procedural standards requiring a different approach. Perhaps some of the minimum standards and key principles that are important in civil litigation are also applicable in the context of ADR, but the nature and the role of the latter entail an approach specifically tailored to ADR.

There is no common understanding of the exact scope of ‘civil procedure rules’ among the EU Member States. There are matters that in some systems belong to substantive law, and in others to procedural law (this problem is clear with regard to burden of proof, evidence, or limitation periods – these are ‘substantive law issues’ in France, and procedural issues in England and Wales).\textsuperscript{22} These somewhat contentious matters have not been included in the scope of this Report.

Further, the scope of this Report includes civil matters in general, but does not include family law issues\textsuperscript{23} and insolvency.\textsuperscript{24} It also does not include areas covered by distinct procedural rules or different court systems: for instance employment law.

Table 1 below sets out the framework of the concept of ‘civil procedure’ for the purposes of this Report. It contains three categories: the concept of ‘civil procedure’ as covered by the Report and its contents, other aspects normally included in the concept of civil procedure that are nonetheless excluded, and areas only associated with civil procedure – also excluded.

<table>
<thead>
<tr>
<th>The contents of the concept of ‘civil procedure’ covered by the Report:</th>
<th>Other aspects of ‘civil procedure’ not included in the Report</th>
<th>Areas associated with civil procedure, not included in the Report</th>
</tr>
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<tbody>
<tr>
<td>• Jurisdiction (only to the extent that it contains common standards)</td>
<td>Private international law</td>
<td>ADR</td>
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<tr>
<td>• Costs and funding of litigation</td>
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<tr>
<td>• Initiation of proceedings</td>
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\textsuperscript{18}According to X. Kramer ‘the harmonisation of private international law rules and civil procedure are dependent upon each other and go hand in hand (X. Kramer, ‘Harmonisation of civil procedure and the interaction with private international law’, at p. 121).

\textsuperscript{19}Here we refer to ADR as mechanisms and bodies resolving disputes outside of the realm of courts; Court-conducted and court-mandated mediation, as part of the litigation process, is included in the narrower definition of civil procedure specified above.

\textsuperscript{20}C. Hodges, I. Benoir, N. Creutzsfeldt, ‘Consumer ADR in the EU’.

\textsuperscript{21}The Stuyck ADR Study: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Final Report.’ A Study for the European Commission prepared by the Study Centre for Consumer Law (Prof. J. Stuyck), 2007. This approach was already advocated by Mauro Cappelletti in 1975 (M. Cappelletti, ‘La protection d’intérêts collectifs et le groupe dans le process), and currently its greatest proponent is Christopher Hodges (‘The Reform of Class and Representative Actions in European Legal Systems’). Hodges refers to it as the ‘integrated approach’.

\textsuperscript{22}O. Dubos, ‘The origins of the Proceduralisation of EU Law’, at p. 8.

\textsuperscript{23}Divorce, children, maintenance and succession - Article 81.3 TFEU contains a separate provision on the procedure to be followed by the EU legislators when adopting ‘measures concerning family law with cross-border implications.

\textsuperscript{24}Cross-border insolvency is regulated by Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, (OJ L 160, 30.6.2000). The Regulation contains provisions on the applicable law, jurisdiction, and recognition of decisions in insolvency proceedings. This Report considers both the insolvency proceedings and the proceedings in family law matters as very specific and requiring a specific approach with regard to common procedural standards. For this reason, both these areas are excluded from the scope of the Report.
- Formulation of claims (pleading)
- Notification of parties
- Evidence gathering (including factual evidence and expert evidence)
- Judicial decision or judicial settlement
- Decisions on costs (‘loser pays’ principle)
- Finality of judicial decisions and judicial settlements
- Recognition and enforcement of judgements (only to the extent that they contain common standards).

<table>
<thead>
<tr>
<th>Family law proceedings</th>
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<tr>
<td>Insolvency proceedings</td>
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</table>

### 0.3.2 The concept of minimum procedural standards

The idea of minimum standards of civil procedure is linked to a number of other general concepts: fundamental principles of civil procedure, other procedural principles, fundamental procedural rights, and the goals of civil procedure. These concepts are interlinked, and have been defined and described by scholars throughout Europe and beyond, although minimum standards or procedural standards are rather referred to as a matter of course and not defined in literature. For the purposes of this Report we adopt the following line of thought. We accept that procedural standards are an expression of general principles of civil procedure. They translate and elaborate these general principles in the specific procedural context. The general principles of civil procedure express the general aims we as society wish civil procedure to fulfil, with specific levels of emphasis placed on different general principles through more detailed principles and even more detailed rules of civil procedure. Indeed, among the general procedural principles some scholars see a multi-tier system consisting of fundamental procedural guarantees (for instance judicial independence and impartiality, and procedural equality) at the top level, the more detailed but still leading principles ‘concerning the style and course of procedure’ (jurisdiction rules or judicial management of proceedings), as well as more incidental principles (such as security for costs) at lower levels. These ‘tiers’ reflect the level of abstraction/specificity of the principles rather than their overall importance. A further feature of civil procedure are rules, which translate the principles into practical mechanisms, steps and powers.

Considering this complex structure of the regulatory framework of civil procedure, an important methodological decision the authors of this Report needed to take was the scope of the common procedural standards: the level of generality or specificity of the contemplated CMS. In other words: should the concept of CMS covered here include only general procedural guarantees, should it include more detailed leading and incidental principles, and should it, or to what extent should it include any detailed rules? We decided to follow the legislative path taken by the EU so far. The regulatory framework for civil proceedings at the EU level includes very abstract concepts and principles, more detailed principles, and, a more recent phenomenon, concrete procedures, procedural mechanisms and procedural steps. The EU civil

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25See below for review of literature on the subject.
26N. Andrews, Fundamental principles’, at p. 23, also referring to the author’s earlier writings: especially ‘Embracing the noble quest for transnational procedural principles’. This Report is based on a list of principles (below) including all three tiers.
procedure system includes fundamental procedural guarantees (these are included in the Charter of Fundamental Rights (the ‘Charter’ or ‘CFREU’), the ECHR, the Treaties, and echoed in procedural legislation), as well as some leading and incidental principles (mostly included in procedural legislation of the EU). Procedural rules have to some extent now also been subject to harmonising efforts by the EU, but generally they remain within the Member States’ discretion.②7 Our review of the current procedural standards therefore includes all the three tiers of principles as well as, where they exist, the rules.

In reviewing the existing standards, our aim is to point out gaps or potential for further development, and recommend options for such further development. It is important to emphasise, however, that the ultimate decision on the scope of CMS the EU adopts rests with the EU lawmaking bodies, and ought to be taken following comprehensive consultations, research, and taking into account the conclusions of the ELI/UNIDROIT Project on ‘Fundamental Principles of Civil Procedure’. ②8

It is crucial to adopt a working body of principles that can serve as basis for our review of the EU’s common minimum standards in civil procedure: including the general procedural guarantees, leading principles and more incidental principles. The Report adapted it from the principles suggested by Professor Neil Andrews, based on the ELI/UNIDROIT Project. ②9 We added costs and funding of litigation that the ELI/UNIDROIT Project does not cover. As rightly pointed out by Reimann, as well as Hodges and Vogenauer, costs and funding of civil litigation are often the single most important issue upon which rests the decision to commence civil litigation, and thus are a crucial part of a wider set of conditions for effective access to justice. ②0

Our working list of general principles includes the following:

**Principles relating to access to courts and to justice:**

i. Access to legal advice and information,
ii. Confidential legal consultation,
iii. Choosing a lawyer (including confidential legal consultation),
iv. Choice between litigation and alternative modes of dispute resolution,
v. Funding: access to mechanisms enabling litigation to be funded,
vi. Proportionate costs of litigation,

**Principles relating to ensuring fairness in the proceedings:**

viii. Judicial independence,
ix. Judicial impartiality,
x. Transparency of the proceedings (openness),
xi. Equality between the parties,
xii. Fair play between the parties (including the right to be heard/contribute/comment),
xiii. The obligation to duly notify the parties,
xiv. Equal access to information (including disclosure between the parties).

**Principles relating to ensuring efficiency of the proceedings:**

xv. Judicial control over the process,
xvi. Avoidance of undue delay.

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②8 See Section 1.2.1 for further information on this Project.
Principles relating to ensuring just and effective outcome:

xvii. Duty of the court to provide reasons,
xviii. Accurate decisions,
xix. Protective relief,
xx. Effective enforcement of decisions,
xxi. Finality.
1. **Why EU action on civil procedure law?**

The following issues are examined here:

- What is the fundamental function of civil procedure law in the context of the EU legal order? (Section 1.1)
- What is the current status of debate on harmonisation of civil procedures in the EU: in academia and policy, as well as on the national and international level, and the normative outlook on future options (Section 1.2)
- What are the currently applicable EU law instruments in the area of procedural private law? What are the current gaps and shortcomings in the existing EU legal framework applicable to civil procedure? (Section 1.3)
- Assessment of the current standards in civil procedure at the EU level. (Section 1.4)
- Why EU action towards the harmonisation of civil procedure rules among MSs may be necessary to complement the available national rules and existing EU legal framework? (Section 1.5)
- What are currently the biggest obstacles to the development of the common minimum standards of civil procedure on the EU level? (Section 1.6)

### 1.1. Civil procedure law – functions and importance in the EU legal order

If one takes as a starting point the structure of legal systems as explained by Van Gerven: comprising rights, remedies and procedures, the procedures are an essential part of a well-functioning legal system. Procedural law contains the rules for exercise of remedies, which in turn are classes of action intended to rectify infringements of rights.\(^{31}\) Jolovicz highlighted a dichotomy of aims of civil procedure: on the one hand it is ‘fair, economical and expeditious adjudication, in accordance with the law, of those disputes which the parties choose to submit to the courts’, and on the other hand it provides ‘the opportunity for the judges to perform their function in interpreting, clarifying, developing and, of course, applying the law’.\(^{32}\) Uzelac emphasised this dichotomy as essentially present in all procedural systems, albeit expressed in different words. ‘Resolution of individual disputes by the system of state courts’, and ‘implementation of social goals, functions and policies’, always coincide, the differences between various systems only being the different levels of importance and emphasis on each goal.\(^{33}\)

The goals of civil procedure are currently undergoing a process of reshaping in many countries where reform of civil procedure is being contemplated and carried out (see for instance the Netherlands, the United Kingdom, Switzerland, the post-socialist states of Central and Eastern Europe).\(^{34}\) The European Union, in contemplating the introduction of common standards in civil procedure, must proceed with caution when establishing the balance between these goals, taking into account the national developments.

Civil procedure is an integral part of the EU legal system.\(^{35}\) One of the tasks of the European Union is to ‘develop the European area of justice based on mutual recognition of judicial

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\(^{32}\)Jolovicz, ‘On Civil Procedure’, at pp. 70, 71.

\(^{33}\)A. Uzelac, Goals of Civil Justice and Civil Procedure’, at p. 6.

\(^{34}\)Ibid. Uzelac, and the contributions to the volume.

\(^{35}\)See for instance: E. Storskrub, Civil Procedure and EU Law, at p. 19, M. Dougan, ‘National remedies before the Court of Justice’, at pp. 20-23. For policy and the CJEU jurisprudence on the issue – see below.
decisions and mutual trust between justice authorities in different EU countries. In a genuine European judicial area citizens should be able to assert their rights anywhere in the Union.” Mutual recognition, mutual trust, and the idea of the European judicial area lie at the basis of the idea of CMS for the EU. They are examined in some detail in Section 3 of this Report, where the potential added value of such common minimum standards is explored. The instrumental role of civil procedure rules in the EU is reflected in the Treaties. The policy of judicial cooperation in civil matters was placed within the part of the TFEU dealing with market freedoms. Further (this will be examined in detail in a later section of this Report), the law-making powers of the EU pertaining to civil procedure are related to (albeit no longer contingent upon) the measures being necessary for the proper functioning of the internal market (Article 81 TFEU). National judges are ‘first judges of European law’, and domestic civil procedures continue to a large extent to govern the practical application of EU law. They can potentially support or disrupt the fundamental elements of the internal market (for instance the free movement of persons or freedom of establishment). Substantive EU law must have practical effect (effet utile), and the latter requires effective enforcement mechanisms, including those before civil courts.

On the macroeconomic level, procedural differences among EU Member States may constitute disturbances to trade, and on the microeconomic level they can deter businesses or consumers from utilising their internal market rights.

1.2. The current status of debate on harmonisation of civil procedures in the EU

1.2.1 Academic views, projects and proposals

Scholars are increasingly focusing on the topic of harmonisation of civil procedure rules within the EU and the future of this process. The piecemeal nature of the procedural harmonisation at the EU level received very critical reviews. Further criticism was added with regard to the recent trend of ‘sectoral harmonisation’ (also referred to as ‘incidental proceduralisation’), that entails EU-level harmonisation of procedural rules within specific areas of substantive EU law (consumer and competition law are good examples). Scholars comment on the lack of
coherence of the current regulatory efforts in the area of civil procedure. They postulate coordination, consistency, expertise and the renewed focus on constitutional mandate, as well as consolidation, coherence, scrutiny and debate. Some also note that the legislation of the EU in the area of civil procedure is of little practical importance, the conclusion that finds its basis in some of the reports on the functioning of the EU legislation in the area of civil procedure.

Civil procedure rules are difficult to harmonise. Civil procedure is ‘deeply enshrined in each nation’s political organisation, social and economic structure, its constitutional and social identity, as well as arrangements for wealth distribution’. It was referred to as ‘a complex area of policy-driven rules the application of which is irrevocably linked to legal cultures and judicial practices’. While, as Professor Weatherill points out, the differences in national systems are not insurmountable and ought not be overstated, they are significant and need to be taken into account when contemplating further harmonisation.

Some critical remarks concerning lack of significant economic benefits of procedural harmonisation (to some extent questioning the feasibility and the need for harmonisation) were put forward by the law-and-economics scholars. They examine the question of diversity versus uniformity in civil procedural law, and demonstrate weaknesses in the arguments in favour of procedural harmonisation. In the words of Parker, ‘(g)iven that disputes subjected to litigation are unlikely to be homogeneous, the case for a uniform procedural law appears weak’.

While transaction cost savings have been identified as the only economic benefits of harmonisation of civil procedures, what fits the economic line of reasoning seems to be a set of harmonised procedural rules as an optional mechanism. A further critical contribution can be transposed from the debate on harmonisation of European private law, especially those advocating regulatory competition.

Despite these critical comments, it appears that there is a wide consensus as to the general trajectory of development: further harmonisation is desirable and it is forthcoming. Professor Marcel Storme, the ‘father’ of European procedural harmonisation, recently expressed his views on the matter in the following words: ‘the process of harmonisation and unification of procedural law on a European level appears to be an irreversible trend’.

Professor Hess called for the elaboration of an ‘umbrella instrument’ providing for a coherent and systematic set of rules of European procedural law. In 2011 Professor Kramer pointed out that with the elimination of exequatur by the recast of Brussels I Regulation, the issue of mutual trust comes to the fore and requires common approach to the principle of fair trial (indicating the need for examples. For a review of current tendencies in these and other areas see: Review of European Administrative Law, Volume 8, No.1, 2015.

44 Tulibacka, ‘Europeisation’.
45 Storskrub, at 305-310.
51 Ibid. Parker, Introduction.
53 For instance S. Weatherill ‘Why object to the harmonisation of private law’, Van Gerven ‘Harmonisation of Private Law: Do we need it?’, and Wilhelmsson, ‘Private law in the EU’.
54 Storme, ‘Closing Comments’, at 379.
harmonisation of certain fundamental procedural principles and standards).\(^{56}\) Professor van Rhee urged for the existing differences in national civil procedure rules not to be exaggerated, and emphasised: ‘(t)he argument that the harmonisation of procedural law is not necessary for the smooth operation of the internal market fails even in light of the experience with procedural law in the United States of America, which varies from state to state. After all, procedural law has already been largely harmonised in the United States by the introduction of the Federal Rules of Civil Procedure, which have also extensively influenced procedural law at the level of the separate States’.\(^{57}\) Indeed, the Federal Rules of Civil Procedure established a single set of procedural rules to become a ‘highly influential model impacting the development of procedural law in almost all 50 states’ with their own, often very different, procedural laws, legal cultures, and bar.\(^{58}\) The Federal Rules affected both civil law (Louisiana) and common law systems (for instance Virginia).\(^{59}\)

There is no consensus as to the exact scope, level, and the detailed features of the further harmonisation. This Report contributes to the debate on these issues, and should be seen in the wider context of other reports and research produced for the European Parliament and the Commission, and other scholarly works. Of particular importance is the recent project conducted for the European Parliament on the perspective of having a European Code of Private International Law, and the ‘Cost of Non-Europe Report’ following it.\(^{60}\) When contemplating further harmonisation of Private International Law rules, scholars headed by Prof. Kramer postulated an incremental process, or in other words a ‘creeping codification’ consisting of a number of phases/pillars: completing the _acquis_, consolidating the _acquis_, and improving the institutional framework. They indicated that these three phases could in the long-term lead to adoption of the EU code of private international law. In 2014 the Commission initiated an important Study evaluating national procedural laws and practices in the context of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, the results of which are forthcoming.\(^{61}\) The Tender specifications document contains numerous references to minimum procedural standards in EU civil procedure, indeed suggesting the adoption of the common minimum standards as one of the options for rectifying the problems in EU civil procedure identified there.

The more comprehensive scholarly works concerning harmonisation of civil procedure in Europe and aimed at drafting of a set of common principles and rules of civil procedure, while challenging, are also being undertaken. The Storme Group produced the first comprehensive set of procedural principles and rules in the EU in 1994.\(^{62}\) While the intended ‘European Judicial Code’ was not achieved, the recommendations of the Storme Group remain relevant. They are now an inspiration for the Project conducted by the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT).\(^{63}\) The Project aims to draft a comprehensive set of general principles, and even more detailed rules, of civil procedure. So far, only a small number of ‘chapters’ commenced work, and no final

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\(^{57}\) Ibid. Reimann, ‘Civil Procedure: A European Ius Commune?’, at p. 597.


\(^{59}\) Ibid. Gidi et al., p. 772.


\(^{62}\) An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, JUST/2014/RCON/PR/CIVI/0082.

\(^{63}\) The results were published in Storme, ‘Rapprochement’, in 1994.
recommendations were produced (these are expected some time in 2018). The preliminary recommendations offered by the working groups are incorporated into this Report, when relevant.

The multi-step, incremental process seems to some scholars best tailored to the nature of civil procedure, its links with Member States’ political, economic, social and legal arrangements, and the needs of the EU internal market.64 On the one hand, in the face of the plethora of the legislation on civil procedure the EU already produced the emphasis is on better implementation, application, consolidation and improvement. Scholars talk of a ‘move beyond common rules and towards best practices that give body to mutual trust and judicial cooperation, which can in turn feed the further development of the European civil procedure framework from the bottom up.’65 On the other hand, procedural principles and standards are also the point of focus, especially in the context of the ELI/UNIDROIT Project. Introduction of common minimum standards could have the effect of combining the two strands of approach: introduction of clear and comprehensive principles as well as the renewed focus on developing best practices.

1.2.2 EU policy developments: towards common standards in criminal and civil procedure

The current efforts of the EU in the area of civil procedure also involve the two approaches highlighted above.66 On the one hand, the focus is on evaluating what is currently there and improving how it works, and on the other the potential for introducing common minimum standards in civil procedure is explored.67

In the context of the academic debates and proposals presented above, the EU is shaping its policy gradually focusing on common minimum standards as a horizontal measure. Those common minimum standards, as an expression of general principles of civil procedure, to some extent counteract the contemporary tendencies in many systems, including the EU, of proliferation of detailed rules.68 By bringing the focus back onto what is fundamentally important in the roles of the parties and the court, the general principles of civil procedure also entail focus on ‘best practices’ and may help legal systems converge closer together.69

The EU has been working for a number of years on the common minimum procedural standards in criminal procedure. In the Green Paper – ‘Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union’, the Commission opened a consultation on what these standards would be70 The 2009 Council Resolution established the ‘Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings’.71 It set out the programme for action in this area, listed the five key principles, and recommended further action. Its recommendations are being implemented through detailed procedural legislation translating these principles into procedural rules.72

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64M. Tulibacka, ‘Europeanisation’.
65X. Kramer in describing the context for the conference ‘From common rules to best practices in European civil procedure’ (Erasmus University, Rotterdam, 25-26 February 2016).
67In the area of private international law of the EU, where harmonisation has been more comprehensive than in the civil procedure area, an idea of an EU code has been considered, although no proposals were made so far: see X. Kramer et al. ‘A European Framework for Private International Law: current gaps and future perspectives’, Report for the European Parliament’s Legal Affairs Committee, 2012, referred to above.
72One of the latest measures is the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the
measures adopted are not limited to matters with cross-border dimension, but rather apply horizontally to all criminal proceedings. What is emerging is not yet a comprehensive set of standards governing all the aspects of criminal procedure. Priority areas were highlighted and the standards are enacted in those areas.

The criminal and civil justice systems of the EU are pursuing the idea of common standards somewhat in parallel, both motivated by their main purposes: mutual recognition of judgements and decisions, and mutual trust between judiciaries. However, there are differences between the EU criminal justice system and the civil justice system that appear to entail a different approach to the latter. First of all, harmonisation of principles, standards and rules of criminal procedure is less advanced than the harmonisation in the area of civil procedure. Indeed, the 2009 Roadmap and the following legislation are building the foundations of the criminal justice policy of the EU, similarly as the Tampere, The Hague, and the Stockholm Programmes and the legislation examined in this Report have done. Perhaps taught by the experience of harmonisation of civil procedure, the focus in the process of building the criminal justice system is on a more coherent approach to minimum standards, and this is where the civil justice area may be looking for an inspiration. Another difference between civil and criminal justice seems to be, under current interpretation, the scope of the legislative power of the EU. This Report argues that the similarities here are more significant than it was assumed (see Section 2).

In the area of civil procedure, in the Action Plan implementing the Stockholm Programme, the Commission announced a green paper on minimum standards for 2013 (no green paper was produced so far). Further, the European Parliament also started considering the possibility of introduction of minimum standards in civil procedure. In September 2015 the JURI Committee for the first time discussed the potential for further convergence of civil procedure in Europe through the creation of minimum standards in EU law. Emil Radev became the rapporteur for an own-initiative report on common standards of civil procedure, in accordance with Article 225 TFEU. The European Parliament’s research service produced a detailed report entitled ‘Europeanisation of civil procedure. Towards common minimum standards?’ in June 2015. Rafael Manko – the author of the report – examined in some depth the potential for the introduction of common minimum standards. He looked at the existing acquis in the area of civil procedure, other developments affecting civil procedures, the legal basis for potential further harmonisation, and its potential forms. The Legal Affairs Committee produced a ‘Working document on establishing common minimum standards for civil procedure in the European Union – the legal basis’ in December 2015. Both documents indicate that the idea for establishing EU-wide common minimum standards in civil procedure is gaining ground in the European Parliament. Emil Radev – the author of the latter document - concludes by stating: ‘The creation of a well-functioning mechanism of minimum standards in civil proceedings does not happen through one action but through a process.’

An important element in the discussions on the potential for introduction of CMS at the EU level should always be the fact that a small number of Member States are not fully part of the general policy of judicial cooperation in civil matters, and thus may not be bound by those CMS in future. Denmark does not participate in the policy at all, and unless it concludes a bilateral agreement with the EU it is not bound by legislation in this area. The United Kingdom and Ireland are bound by the legislation if they opt in.

right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013.


1.2.3 Developments and lack of a harmonisation debate on the national level

This Report refers briefly to developments on the national level below, in Section 3.2.\textsuperscript{76} It emphasises the reforms currently contemplated and already being put in place by a large number of the EU Member States, and the potential for the EU to take on a leading role in guiding the path of these reforms. The initiative of the EU in this area would be beneficial also in stirring the debate on the national level towards EU-focused developments (see Section 3.2). The national debate concerning civil justice so far has been focused almost entirely on the internal, domestic issues. While understandable, it also reinforces a climate where EU-derived rules are unknown, rarely used, and their usage is not effectively monitored.

1.2.4 International developments

Globalisation is a phenomenon that affects many areas of law and legal systems, including civil procedures. Harmonisation of civil procedures in the EU is taking place in a wider context of international discussions, academic projects and policy initiatives. Globalisation and harmonisation of civil procedures were discussed in a book edited by Professors Kramer and van Rhee in 2012, and in a book edited by Professor Uzelac in 2014.\textsuperscript{77} The international developments are presently focused on knowledge exchange, on developing points of understanding and similarities, mostly on the academic arena. They are being monitored and fostered by the work of the International Association of Procedural Law, the Procedural Law Branch of the Comparative Law Society, the International Bar Association (especially its ‘Access to Justice and Legal Aid’, ‘Consumer Litigation’ and ‘Litigation’ Committees), and the American Law Institute (ALI). The latter’s project, conducted together with the UNIDROIT Institute, was mentioned above. It led to drafting of a set of common procedural principles and rules that are now an inspiration for the ELI/UNIDROIT European project. The project on Transnational Principles of Civil Procedure is a unique effort. The ALI/UNIDROIT Principles are also used by this Report, for comparison and illustration purposes.

An important contribution to the assessment, analysis and development of cross-border and international approaches to civil justice is the work of the Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ). The Commission ‘prepares benchmarks, collects and analyses data, defines instruments of measure and means of evaluation, adopts documents (reports, advices, guidelines, action plans, etc), develops contacts with qualified personalities, non-governmental organisations, research institutes and information centres, organises hearings, promotes networks of legal professionals.’\textsuperscript{78} Its work is extremely valuable, and is referred to in this Report on a number of issues.

1.3. Review of the common procedural standards currently in force in the EU

1.3.1 Introduction: the ‘civil procedure system’ of the European Union

The procedural private law of the European Union (its ‘civil procedure system’) is a complex grouping of Treaty provisions, principles deriving from the Charter of Fundamental Rights and the ECHR, as well as secondary legislation of a horizontal nature (enacted in the context of the

\textsuperscript{76}Various comparative projects observed these developments in some detail (although some reach further than the EU Member States): for example, M. Storme, ‘Rapprochement’, Jolovicz, ‘On civil procedure’, van Rhee, ‘European Traditions in Civil Procedure’, the Stanford/Oxford Global Class Actions Programme (now on the Stanford Global Class Actions Exchange website), the work of the Oxford’s CSLS Civil Justice Programme, or the Nagoya/Freiburg project on ‘A New Framework for Transnational Business Litigation’.


\textsuperscript{78}CEPEJ website: http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp.
policy of judicial cooperation in civil matters) and of a sectoral nature (procedural measures adopted in specific areas of substantive EU law). Further, the jurisprudence of the Court of Justice (CJEU) and of the European Court of Human Rights (ECtHR) plays an important role in interpreting the existing legal provisions and applying them in specific cases.

All these legislative and judicial instruments contain procedural standards. Their analysis below is presented in two formats. The first, longer format involves a descriptive analysis following the four groups of procedural principles listed above. The second format is a table depicting the presence of standards reflected in these principles in the secondary EU instruments covered by this Report (horizontal legislation and some sectoral legislation). This part of the Report demonstrates lack of a comprehensive, exhaustive, horizontal system of standards. In other words, the European rules of civil procedure do not constitute a ‘rational system’: ‘a construction with fundamental principles and logically derived consequential rules’.79

The descriptive analysis below is an attempt to systematically review the standards for civil procedures that are operational at the EU level, also accounting for the fact that the existing standards range from fundamental guarantees, other leading principles, incidental principles, through more detailed rules implementing these principles. In addition to reviewing them, we also seek to establish where there is potential for codification (if the principles and accompanying rules are comprehensive), for filling the gaps (where these exist), and for deploying additional principles or tools (if there is scope for such additional principles and there have been developments on the national or international level to indicate new approaches). These suggestions, in bold, are preliminary and are meant to stimulate debate. They need to be looked into in further detail and should by no means be treated as recommendations on concrete steps. Where there are conclusions from the ELI/UNIDROIT Project, we include them in the review.

An introduction to the role of the CJEU, and the more general instruments: the Treaties, the CFREU, the ECHR and the jurisprudence of the ECtHR, precede the analysis. They are the sources of the fundamental procedural guarantees in the EU.

1.3.2 The role of the Court of Justice: developing the fundamental principle of effective judicial protection

The Court played a pivotal role in establishing the foundations of the EU involvement in civil procedure. Till today, its jurisprudence continues to shape the understanding of what civil procedure means for the EU legal system. CJEU also interprets the existing procedural acquis, the Charter, other fundamental principles of EU law, striving for their uniform application consistent with the EU objectives.

While some procedural standards now accepted as part of the EU procedural system were ascertained in the CJEU jurisprudence,80 the contribution of the Court should ultimately be seen as standard-interpreting rather than standard-building. The manner in which the Court deals with the procedural principles and standards should be narrowed down to the context of the specific case, and drawing more general conclusions from its jurisprudence may be problematic. On the other hand, the rich experience of the Court with reviewing national remedial and procedural rules is very instructive in the context of this Report. The compromises and the competing values the Court pursues must also be taken into account when contemplating introduction of a horizontal umbrella instrument of a legislative nature containing common standards of civil procedure. This is examined further in the concluding fragments of Section 1 dealing with potential problems in further harmonisation.

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79This definition of a ‘rational system’ was offered by C. Crifo in reference to the English civil procedure system after the Woolf reforms (Crifo, ‘Civil Procedure in the European Order’, at p. 360).
80Including the right to effective judicial protection now incorporated into Article 19.1 TEU.
The Court’s focus on procedures commenced with building of the system of EU-derived remedies for breaches of substantive law of the European Union. CJEU established a number of mechanisms by virtue of which individuals could uphold, against other individuals and against Member State entities, rights granted to them by EU law.85 These remedies entailed the need for providing conditions under which they would be available: a review of some rules of national civil procedure. Thus started the process of challenging the national procedural autonomy under which where EU law does not provide relevant mechanisms and procedures, enforcement of substantive EU law is subject to the national rules of procedure.82 In Reve and Comet, the Court established two key limitations to national procedural autonomy: the requirements of equivalence and effectiveness.83 Thus, such national rules must not be less favourable than those governing similar domestic actions, nor render virtually impossible or excessively difficult the exercise of rights conferred by EU law. In line with the requirements of equivalence and effectiveness, the Court reviewed the individual right to access to justice, the principles of party autonomy and freedom of disposition, the power of national courts to invoke EU law issues of their own motion, and other procedural principles and rules.84 The Court expressly recognised the general principle of Community law resulting from constitutional traditions of the Member States and supported by Articles 6 and 13 ECHR that everyone is entitled to effective judicial protection.85 This principle was later incorporated into Article 19.1 TEU. In Schindler v Commission, the CJEU ruled on the principle of effective judicial protection as ‘a general principle of European Union law to which expression is now given by Article 47 of the Charter and which corresponds, in European Union law, to Article 6(1) of the ECHR’.86

The growing jurisprudence of the CJEU interpreting the existing legislation in civil procedure shows two tendencies. The first is giving procedural concepts and principles introduced by this legislation a uniform interpretation, grounded in their context, that is independent of what they mean in national law.87 The second are the attempts by the Court to fill in gaps left by the legislation.88 Both these tendencies are motivated by the need for uniform application of the legislation and the overall uniform application of EU law, as well as protection of fundamental rights of litigants. They demonstrate the need for developing uniformly understood procedural principles, standards and rules.

85Tulibacka, ‘Europeanisation of civil procedures’, at p. 1536, and literature referred to in ft. 40.
86For arguments for maintaining the autonomy see: C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores; Case C-168/05 Mostaza Claro; Case C-40/08 AsturcomTelecomunicaciones; C-618/10 Banco Español de Crédito, Case C-137/08 VB PenzingLizising; and C-453/10 Perenicičová and Perenič. See Storskrubb, ‘Civil Procedure and EU Law’, at p. 19. Challenging the conception that Member States ever possessed procedural autonomy within the European Community – Kakouris, ‘Do Member States possess judicial procedural autonomy?’ 34 CMLR, 1997, 1389-1412.
90Case C-301/11 P, 18 July 2013.
91These tendencies were highlighted in the Technical Specifications to the ‘evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law’, JUST/2014/RCON/PR/CIVI/0082, at p. 6. Examples of decisions: in the context of the Brussels I Regulation, Case C-103/05 Reisch Montage, Case C-167/08 Draka NK Cables and Others, Case C-189/08 Zuid-Chemie; and Case C-456/11 Gothaer Allgemeine Versicherung and Others.
92Case C-325/11 Alder.
1.3.3 From the fundamental principle of effective judicial protection to the fundamental right: the Treaty, the Charter of Fundamental Rights, and the ECHR

The principle of effective judicial protection recognised by the CJEU has now been incorporated into the Treaty on European Union. Article 19.1 TEU provides that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. This provision refers to the structure of the judicial system of the European Union, with its two fundamental pillars: the EU courts, and the national judicial systems. The latter are expected to provide for effective remedies in order to ensure application of EU law. This requirement is reiterated in Article 47 of the Charter, where the fundamental right to an effective remedy before a tribunal is set out. The Charter, adapted at Strasbourg on 12 December 2007, has the same legal force as the Treaties. The right to effective remedy guarantees access to justice in the context of actions by Member States and EU institutions implementing EU law. Thus, individuals can rely on this fundamental right when they are enforcing rights granted them by EU law.

The Charter became binding when the Treaty of Lisbon came into force in 2009. In regulating the right to effective judicial protection it follows the European Convention of Human Rights (Articles 6 and 13). Indeed, the Charter itself specifies that the meaning and scope of the rights provided by it are the same as those laid down by the ECHR. Article 47 provides: ‘(e)veryone 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’ (corresponding to Article 13 ECHR, although wider than this provision as the Charter provides for effective remedy ‘before a tribunal’). In the further part of the provision there is a specific reference to a fair and public hearing, within reasonable time, by an independent and impartial tribunal previously established by law (corresponding to Article 6 ECHR, but again wider in scope because it goes beyond the ECHR’s ‘determination of civil rights and obligations’). Article 47 also covers the right to be advised, defended and represented, and the right to legal aid if it is necessary to enable effective access to justice.

Article 6 of the ECHR, referred to as ‘the right to fair trial’, provides in its first paragraph: ‘(i)n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. Article 13 of the Convention, referred to as the ‘right to effective remedy’, reads: ‘(e)veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

The application of these provisions, and the substantive content of the rights to fair trial and effective remedy, has many facets: including judicial independence and impartiality, costs and funding, reasonable time for proceedings, fairness, and publicity. They are explored below.

The ECHR applies whether a case is covered by EU law or not. Its provisions are very similar in scope and meaning to Article 47 of the Charter. Of course, neither the Charter’s fundamental rights nor the Convention’s human rights are absolute. They may be limited, as long as those...
limitations correspond to the ‘objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.’ The CJEU frequently invoked provisions of the ECHR, including Articles 6 and 13, to establish fundamental principles of the Community, and later the EU, law. It saw in them the principles that are common to the constitutional traditions of the Member States. Currently Articles 6 and 13 are invoked together with Article 47 of the CFREU. Thus, the ECHR remains significant for the future development of the common standards in the EU civil procedure.

1.3.4 Review of procedural standards in the civil procedure system of the EU

The following tables contain a list of legislation, presenting horizontal measures and sectoral measures:

Table 1 List of legislation (Horizontal measures – legislation adopted within the policy of judicial cooperation in civil matters)

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Source</th>
</tr>
</thead>
</table>

*Joined cases C-317/08 and C-320/08 Alassini and Others [2010] ECR I-2213, para 63.
### 1.3.4.1 PRINCIPLES RELATING TO ACCESS TO COURTS AND TO JUSTICE

**Introduction: access to justice in EU legal system**

Access to justice is expressed in EU law as the right to effective judicial protection, the right to an effective remedy, and the right to a fair trial. As mentioned above (Section 1.3.2), the right to effective judicial protection was brought into the sphere of EU interests by the CJEU. It invoked Articles 6 and 13 of the ECHR and referred to effective judicial protection as a fundamental principle of Community law, common to all Member States. According to the ECtHR, the right to fair trial in its civil procedure limb concerns the right to an effective remedy: a practical and effective access to a court or tribunal, although of course this right is not unlimited. Currently the right to an effective remedy exists in the TEU (Article 19.1), and in the Charter (Article 47).

Whereas it is unnecessary to duplicate the general principle of effective judicial protection in other EU legislation, the proposed measure on common minimum standards may include a provision transposing it into the context of civil litigation, and thus introducing the general principle of effective judicial protection in civil matters.

As a fundamental right, access to justice is supported by many procedural secondary legislative measures of the EU. In fact, a number of these measures refer directly to access to justice: including the Small Claims Regulation, the Legal Aid Directive, the Collective Redress Recommendation, the Consumer Injunctions Directive, and the Competition Damages Directive. These measures contain more specific principles adapting the general principle of access to justice to their particular context. Many are examined further in this part of the Report: for instance in sections concerning openness of proceedings (translations), or litigation funding (legal aid). Below are a number of issues that do not fit into any other sub-categories below and yet are considered essential in the context of access to justice.

The use of standard forms available online is aimed at simplifying and streamlining access to courts. The Small Claims Regulation for instance includes four standard forms, including the claim form. The latter can be filled in by the claimant without the help of a lawyer. Further

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96See above for introduction to the right to effective judicial protection and fair trial in Articles 6 and 13 ECHR and Article 47 of the Charter.

97See above.

98Case of Beles and Others v. the Czech Republic, Judgement of 12 November 2002, Case of Bellet v. France, Judgement of 4 December 1005.


100There is a large number of decisions of ECtHR concerning effective judicial protection and access to justice, starting from: ECHR decision of 21 February 1975, No 6289/73, Series A, No. 18 (Golder v the UK).

101The presence of a lawyer in the procedure is not necessary - Article 10. The new Article 4.5 of the Small Claims Regulation (amended by Regulation 1215/2421). Further, Article 11 of the Small Claims Regulation requires Member
orders and procedures established by EU law also include the possibility of using standard forms: such as the European Enforcement Order certificate, an application for its withdrawal, a document declaring limitation or suspension of its enforceability, or a replacement document, an application for a European Order for Payment, and the court’s requests to complete, rectify or modify the application for the Order, rejection of the application for the Order, the application for Legal Aid, and others. These forms are available on the e-justice portal in a dynamic format, enabling the parties to fill them in online, in any official language of the EU.

A crucial practical matter that must be considered with regard to access to justice are the developments in E-justice. The EU set up cooperation networks and databases enhancing judicial cooperation and exchange of information. The European Judicial Network in civil and commercial matters involves contact points in all Member States (judicial or administrative authorities designated by each Member State), other administrative and judicial authorities responsible for judicial cooperation, and professional associations of lawyers. Further, the new European E-Justice Portal (since 2010) is envisaged as a future one-stop-shop in the area of justice, containing databases of resources for national civil justice systems, electronic forms to be used in various procedures, and other information. Beyond these networks, the use of IT: videoconferencing, teleconferencing, electronic communications and payment systems, is gaining popularity in the EU civil justice system. The latest example of the way in which civil proceedings can capitalise on these developments are the changes to the Small Claims Procedure (the new Article 8 concerning hearings to be conducted with the use of distance communications, Article 13 concerning service by electronic means, and Article 14 regarding payment of court fees by distance payment methods). These developments can be taken further, and should be emphasised and possibly extended in the context of drafting the CMS. There is scope for further work on the use of standard forms available electronically. The electronic versions of the standard forms could also include a translating function going beyond the different versions of the dynamic format of the forms available currently at the e-justice portal.

The issues of jurisdiction of a particular court over the parties are an important aspect of access to justice. Some commentators also add further aims of jurisdiction rules: the good administration of justice, proximity of the court to the conflict, efficiency and cost awareness. For civil proceedings across the EU, jurisdiction matters are regulated by the Brussels I Regulation Recast. The rules on jurisdiction are based on the general principle that the defendant’s domicile determines jurisdiction (subject to exceptions in consumer cases, employment disputes, insurance disputes, exclusive jurisdiction rules, and the parties’ prerogative to determine jurisdiction as a contractual measure – prorogation of jurisdiction).

States to ensure that parties in small claims procedure receive practical help in filling in forms. Member States should enable the claimant to receive assistance with filling in the form. Member States should ensure that the claim form is available in all competent courts or tribunals, as well as on the relevant websites.

European Enforcement Order Regulation, Articles 6.2, 6.3, 9 and 10 – the forms must be filled in the language of the court. They are included in the Annexes to the Regulation.

European Order for Payment Procedure Regulation, Articles 7, 9, 10 and 11. The forms are included in the Annexes to the Regulation.

Under the Legal Aid Directive (Article 16).


On the potential design of the IT framework for civil justice in the EU: see F. Contini, G.F. Lanza (Eds.), ‘Building Interoperability for European Civil Proceedings Online’, Bologna, CLUEB, 2013.


Herein lies the mechanism for protecting the defendant’s interest in being proceeded against in an unfamiliar system.\textsuperscript{111}

The Collective Redress Recommendation, the Consumer Injunctions Directive and the Competition Damages Directive are all aimed at enabling access to courts in otherwise difficult or impossible circumstances. The causes of difficulties are: the small value of individual claims as well as disproportionate cost and complexity of individual litigation, the need to represent the interests of consumers on a cross-border basis, and the various difficulties in seeking damages for breaching antitrust law.\textsuperscript{112} It would be difficult to generalise these very specific conditions to establish a common standard applicable more widely.

\begin{itemize}
  \item \textbf{i. Access to legal advice and information}
\end{itemize}

Access to legal advice and information has not been regulated in many of the legislative measures within the area of judicial cooperation in civil matters. Indeed, until recently it was only mentioned in the Legal Aid Directive, where Recital 5 refers to access to justice, especially in light of Article 47 of the Charter. Article 3.2(a) of the Directive specifies that legal aid is appropriate if it covers ‘pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings.’ Thus, this is not an unqualified right to legal advice and information: it is only to be secured in the context of provision of legal aid, and only aimed at reaching a settlement and therefore avoiding the legal proceedings altogether.

After the 2015 amendment, the Small Claims Regulation requires Member States to provide parties with free general assistance and information concerning the procedure, the competent courts, and the forms to fill in (this does not include an obligation to provide free legal aid for legal assistance with preparation of a specific case).\textsuperscript{113}

Consumer protection policy of the EU emphasises the importance of access to advice and information,\textsuperscript{114} and the developments in this area ought to be taken into account when establishing common minimum standards in civil procedure.

On the other hand, it should be pointed out that access to advice and information should not be seen as a uniform and unconditional principle. The very presence of advice and information and its features depend on the context and the type of proceedings in question. In some cases provision of advice and information may be impractical or impossible (for instance in some small claims proceedings where lawyers do not need to be present), in others the only type of advice and information possible may be the type available online.

With the development of e-justice, greater use of standard forms, as well as the increased emphasis on advice and information (for instance in the context of consumer protection), this element of pre-litigation activities may well be one to focus on. This is especially justified by the greater importance of ADR within the EU, and the resulting need to introduce potential litigants to the full choice of dispute resolution mechanisms available to them (see below – section iv.). It is possible to envisage the common standards including free general assistance

\textsuperscript{111}See the Report on the Application of Regulation Brussels I in the Member States (by Hess, Pfeiffer, Schlosser), (\textit{The Heidelberg Study}) JLS C4/2005/03, 2007.

\textsuperscript{112}The Directive on Competition Damages expressly stipulates requirements for national rules of procedure governing enforcement of competition claims, thus incorporating the requirements of equivalence and effectiveness introduced by the CJEU. Article 4 provides ‘In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law’.

\textsuperscript{113}Recital 20, article 11, Small Claims Regulation as amended by Regulation 2015/2421.

\textsuperscript{114}Through initiatives aimed at consumer empowerment, particularly the work of the ECC-Network: \url{http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm}. 
and information concerning these choices, perhaps in coordination with the activities in the area of consumer protection concerning advice and information. With regard to civil litigation, advice and information may include the courts and forms to fill in on a more general basis, possibly in conjunction with the rules concerning availability of legal aid.

ii. Confidential legal consultation

This issue is not yet regulated at the EU level with regard to civil procedure. However, it received a considerable amount of attention in the area of competition law enforcement. In a series of decisions starting from AM & S v. Commission, Hilti v. Commission, and Akzo Nobel v. Commission, the CJEU established the principle of professional legal privilege in EU law. It is important in the context of the Competition Damages Directive, where the issues of confidentiality and access to evidence were regulated in some detail. The Directive contains a provision referring to professional privilege. Article 5.6 reads: ‘Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.’

iii. Choosing a lawyer

Not yet regulated by the EU legislation in the area of civil procedure. However, the fundamental right to an effective remedy as established by the Charter provides that everyone should have the possibility of being advised, defended and represented (Article 47).

The Small Claims Regulation contains a provision enabling the small claims procedure to be conducted without the assistance of a lawyer.

iv. Choice between litigation and alternative modes of dispute resolution – ADR (for instance mediation, arbitration, ombudsmen)

ADR is not included in the scope of this Report. However, access to ADR mechanisms is now seen as an essential part of a wider notion of access to justice: this is both within the area of judicial cooperation in civil matters (where the Mediation Directive was adopted), and within various sectors of EU substantive law: especially consumer law (with the adoption of the ADR Directive and the ODR Regulation).

Several procedural measures support ADR as a valuable dispute resolution and redress mechanism. The Legal Aid Directive covers legal aid for ‘extrajudicial procedures (…) if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.’ This does not, however, include ADR in the traditional sense of an optional mechanism. The Recommendation on collective redress emphasizes the importance of ADR: in fact, it contains an entire chapter dealing with alternative dispute resolution in mass harm situations. The Recommendation contains the general principle of availability of ADR procedures to parties in mass harm situations, accompanied by a number of more detailed

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116For instance, in contrast to Belgian, Greek, Norwegian, Dutch, Portuguese and English systems, it does not cover in-house lawyers.
117Article 10.
120There are problems with application of this provision, as a definition of an extra-judicial procedure is not uniform across the EU, and some Member States have not implement this requirement at all – see the Report on the application of the Legal Aid Directive COM (2012) 71 final, para. 4.2.2.
The choice between litigation and ADR mechanisms is a complex issue. The decision by potential claimants to commence litigation, to engage in some formalised ADR mechanism or procedure, to complain informally, or perhaps to take no steps in a dispute, is a result of an array of considerations examined elsewhere. These considerations range from the practical questions of ‘what is available’ and ‘what is accessible’, through costs and available funding, through public perceptions of effectiveness and fairness, to even more subjective decisions often grounded in the legal culture of a particular society. Thus, one cannot simply refer to the ‘right to choose between litigation and ADR’ without taking the context of civil justice and legal culture into account. The European Union, as well as the Member States, are working on creating an environment where the choice between equally attractive avenues of redress and dispute resolution (including but not limited to litigation and ADR) is a realistic one. The obligation for Member States to establish ADR bodies for all consumer disputes (ADR Directive), and the Recommendation on collective redress mentioned above, entail a growing importance of ADR in the civil justice systems of the European Union, and of each Member State.

The EU contribution in this field and the developments on the national level are significant. There is scope to consider introduction of a general standard concerning the value of ADR and the freedom to choose between litigation and the alternative methods of dispute resolution.

v. Funding: access to mechanisms enabling litigation to be funded

In spite of the considerable attention the issue of funding received on the national level of many Member States, the European Union has not as yet dealt with the issue in any great detail. Further, the ELI/UNIDROIT Project also does not cover funding of litigation. In the context of the ECHR right to fair trial, discussions of funding are rather limited to legal aid. Applying Article 6 of the Convention, the ECtHR referred to the obligation to make legal aid available as not an absolute and unconditional duty. According to the ECtHR, when making decisions on granting legal aid to litigants, courts should consider the following issues: the importance of what is at stake for the applicant, the complexity of the relevant law and procedure, the applicant’s ability to self-represent, and the existence of the statutory requirement to have legal representation.

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121 Recommendation 26. According to Recommendation 25, ‘Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial. Collective alternative mechanisms for resolving disputes ought to be made available to the parties (on a voluntary basis), alongside collective judicial procedures, before and during litigation.’

122 Recommendation 27.

123 Recital 48, Articles 18, 19.

124 See Hodges et al., ‘Consumer ADR in Europe’; Hodges, ‘Reform of Class and Representative Actions’; Caffaggi and Micklitz, ‘Administrative and Judicial Collective Enforcement’ (for a wider perspective of law enforcement and choice of remedy).

125 In particular: in England and Wales (Jackson LJ, ‘Review of Civil Litigation Costs. Final Report, London, HMSO, 2010), but also France, Poland, Portugal or Germany. For a review of costs and funding reforms across the EU see: Hodges, Vogenauer and Tulibacka, ‘The Costs and Funding of Civil Litigation’ (especially pp. 3-32), and on costs and fees see: Reimann ‘Cost and Fee Allocation in Civil Procedure’.


127 See the ECHR Guide to Article 6. Right to fair trial (civil limb), at p. 17 for references to the relevant cases). Another issue considered recently by the ECtHR was lawyer funding in the UK: specifically, conditional fee agreements. In MGN Limited v UK, the ECtHR found that the recovery of ‘success fees’ from the loser exceeding the winner’s actual legal costs in certain privacy and defamation suits amounted to a violation of article 10 (freedom of expression) of ECHR (Case MGN Limited v UK, Judgement of 18 January 2010 (application 39401/04)).
Clearly, neither the legislation of the EU nor the jurisprudence of the ECtHR reflect the depth of the topic of litigation funding. The mechanisms for funding civil litigation cover two main categories: public funding (legal aid) and private funding (through insurance, lawyer-funding, third-party funding, other means).

The tendency across the EU Member States is to limit the availability of legal aid as far as it is possible in civil litigation, due to budget constraints. On the other hand, private sources of litigation funding such as insurance, third-party funding, lawyer funding (conditional fees, contingency fees, other arrangements) are encouraged and actively developing. There is no general right to litigation funding on the national level, although there is a right to legal aid for claimants and defendants falling within the criteria for availability (this right exists in national procedural laws, but also derives from the ECHR as explained above).

No right to obtain funding for civil litigation exists also at the EU level. However, the availability of legal aid for cross-border cases is now governed by the set of minimum standards set out by the Legal Aid Directive. The Directive establishes the right of a cross-border litigant (a citizen of a Member State or a citizen of a third country legally resident in a Member State) to obtain appropriate legal aid (as defined by it), subject to the merits and financial tests that are mostly governed by national laws and rules of procedure."128 The Directive indeed leaves some crucial aspects of decisions on granting legal aid to these national rules. For instance, it is unclear what criteria should be considered by courts when applying the merits test. Article 6.3 requires the courts to take into account the ‘importance of the individual case to the applicant’ but does not define this notion further. Differences in approach have been identified.129 Some elements of the Directive were not transposed by all Member States: for instance, the requirement that legal aid should be available for extra-judicial proceedings if they are required by law or by court.130

Further, the Recommendation on Collective Redress contains some rules on third-party funders (aiming in particular at ensuring that they do not affect procedural decisions of parties, that they have adequate funds, and that they are properly regulated),131 and on contingency fee arrangements. The latter are not to be permitted in principle, although subject to adequate regulation and taking into account the need for full compensation they may be allowed in collective actions.132 Funding mechanisms that are available for collective actions are to be ‘arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest.’133

The availability of funding is often the key determinant in the decision whether to bring or get involved in litigation. This issue needs to be considered by the EU not only in the context of group litigation, but also in the wider perspective of civil litigation in general. The standards contained in the Legal Aid Directive should be tightened to eliminate some of the problems identified in the application of this instrument. Further, legal aid budgets are limited, and private funding is often the only viable alternative. Introduction of a number of common standards concerning the key funding mechanisms (insurance, third-party funders, lawyer-funding such as contingency fees) could contribute to the stability of these mechanisms, and assist in their development in jurisdictions where they are immature or do not yet exist. It is also worth noting, in the context of development of general standards, that the need for legal aid is somewhat diminished if there are no court fees, and other costs are proportionate and predictable (especially with a clearly regulated loser pays rule).

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128Articles 3-11.
129Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2003/8/EC to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes, COM/2012/071 final, para. 3.2.2.
131Articles 14-16, and 32.
132Article 30.
133Recital 19.
vi. Proportionate costs of litigation

Similar to funding mechanisms, the costs of litigation have not been comprehensively regulated or defined at the EU level, and are not covered by the ELI/UNIDROIT Project. They largely remain within the discretion of the Member States, where they are presently undergoing some significant reforms. The lack of comprehensive EU regulation is not surprising, as with the exception of Portugal no EU state comprehensively defined or codified the principles governing their litigation costs systems.

The costs of litigation include the following:

- Charges for the use of judicial facilities and processes (‘court fees’), including associated officers and bailiffs,
- Evidential costs: witnesses and experts, translators (although the latter may also be part of the ‘court fees’ category),
- Lawyers’ fees (in the common law jurisdictions these include the costs of obtaining documentary evidence by lawyers).

Various pieces of procedural EU law refer to one or more of these categories. Further, the issue of proportionate costs has been mentioned in a number of instruments, where it is part of the general aim of improving access to justice. In this context the costs of litigation also received attention of the ECtHR. In a series of decisions, the ECtHR dealt with proportionality of court fees. The main consideration in charging and setting court fees should be ‘proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts’.

Interestingly, costs were not, until the recent amendment, mentioned in the substantive part of the Small Claims Regulation. The Regulation left this issue to national procedures. After the 2015 amendment the new Article 15a requires court fees not to be disproportionate, and not to be higher than court fees for simplified procedures under national procedures. The court fees should also be payable through electronic means.

The European Order for Payment Procedure Regulation provides that the ‘combined court fees of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of opposition to a European order for payment in a Member State shall not exceed the court fees of ordinary civil proceedings without a preceding European order for payment procedure in that Member State’. The latter requirement is referred to as a ‘cost neutrality’ requirement. The European Account Preservation Order Regulation specifies that court fees shall not be higher than the fees for obtaining an equivalent national Order or a remedy against it. The collective redress recommendation provides, as one of its guiding
principles, that collective procedures ought not be ‘prohibitively expensive’.\textsuperscript{144} The Competition Damages Directive does not include a provision on costs. However, it includes an express provision on two principles previously established by the CJEU when assessing enforcement of substantive EU law: effectiveness and equivalence.\textsuperscript{145} The issue of costs is undoubtedly covered by these principles, particularly effectiveness that requires costs requirements not to render litigation impossible or excessively difficult. Article 3 of the IP Rights Protection Directive sets out the general principles of IP rights protection. It provides 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...’ \textsuperscript{146}

In spite of lack of comprehensive regulation of litigation costs, both on the national and the EU level, a general standard relating to the proportionality of costs of civil litigation may be considered appropriate. It may result in the general incorporation of the principles effectiveness and equivalence established by the CJEU, as it was done in Article 4 of the Competition Damages Directive. Perhaps this general standard could be accompanied by more detailed rules concerning the criteria to be deployed when setting, modifying and/or waiving court fees and other fees.

Cost shifting

This issue is largely left to national procedural rules.\textsuperscript{147} However, the legislation introducing specific EU procedures: for instance, the Small Claims Regulation, the Recommendation on collective actions, and the IP Rights Protection Directive,\textsuperscript{148} express their preference for the loser pays rule. This rule is often qualified by the requirement that the costs to be shifted onto the unsuccessful party be ‘necessary’ (the Small Claims Regulation, the Recommendation on collective actions), reasonable (IP Rights), and proportionate (the Small Claims Regulation), and its application be governed by national law. The Legal Aid Directive leaves the matter to national law: Recital 12 provides that “it shall be left to the law of the Member State in which the court is sitting or where enforcement is sought whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid”.

For reasons of greater coherence and comprehensive nature of the CMS, the ‘loser pays’ rule may be considered for inclusion, perhaps also modified by the requirement of necessity or even proportionality of costs.

Security for costs

Security for costs is a mechanism aimed at fair administration of justice and balancing the interests of the litigants. However, according to the ECtHR it should not be an effective barrier to access to court.\textsuperscript{149} The sentiments expressed in decisions of the ECtHR are crucial for determination of appropriateness of the specific demands for security for costs.\textsuperscript{150} The EU does not approach this issue comprehensively.

The European Account Preservation Order Regulation introduces rules on security for costs. Recital 18 explains the essence of the requirements for the creditor to ‘provide security so as to ensure that the debtor can be compensated at a later stage for any damage caused to him by the Preservation Order. (...) The court should have discretion in determining the amount of

\textsuperscript{144}Recommendation I.2.
\textsuperscript{145}See above - Footnote 112.
\textsuperscript{146}Article 3.
\textsuperscript{147}The Oxford Study found in 2009 and 2010 that in a majority of Member States cost shifting is the general rule (see Hodges, Vogener and Tulibacka, ‘The Costs and Funding of Civil Litigation’, \textit{passim}).
\textsuperscript{148}Article 14.
\textsuperscript{149}Case \textit{García Manibardo v Spain}, Judgement of 15 February 2000.
security sufficient to prevent abuse of the Order and to ensure compensation to the debtor and it should be open to the court, in the absence of specific evidence as to the amount of the potential damage, to consider the amount in which the Order is to be issued as a guideline for determining the amount of the security (…).”

vii. Mechanisms for filtering unmeritorious claims

A number of procedural mechanisms, both horizontal and sectoral, contain references to filtering unmeritorious claims: because of the need to protect the interests of defendants (the European Order for Payment Procedure)\(^{152}\), and as filters ensuring that procedures or mechanisms provided are not abused (Collective redress Recommendation,\(^{153}\) the Legal Aid Directive\(^{154}\) and the Small Claims Regulation\(^{155}\)). The current approach is as follows: the exact criteria for filtering claims are unspecified in EU legislation, leaving this issue to national procedural rules.

This is a sensitive issue, requiring balancing the interests of the parties and the justice system with its finite resources. Exactly how this filtering is performed by courts differs significantly between Member States, and even between specific courts within a single state, and depends on a number of issues. Particularly relevant are the following: the availability of evidence enabling an informed decision (thus, the presence of the requirement of discovery, the involvement of the parties at this stage in the proceedings), and other more general matters of judicial discretion related to legal culture in a particular jurisdiction. While these matters remain unharmonised, it is not advisable for any general standard to be considered rather than one concerning dismissal of claims if they are clearly unfounded, leaving the ultimate criteria and the ultimate determination to national courts (following the Small Claims Regulation).

1.3.4.2 PRINCIPLES RELATING TO ENSURING FAIRNESS IN THE PROCEEDINGS

viii. Judicial independence

ix. Judicial impartiality

Independence and impartiality are related issues. Independence is a more objective notion relating to expertise and qualifications of judges as well as constitutional, financial and organisational independence of courts from improper internal and external influences.\(^{156}\) Impartiality is related to the specific case, the specific judge, and the specific parties to a dispute.

The current EU procedural measures do not refer to judicial independence or impartiality directly.\(^{157}\) However, Article 47 of the CFREU provides for the right to an effective remedy before an independent and impartial tribunal previously established by law. Procedural legislation often refers to proceedings or other activities before or by courts or tribunals, but does not define the courts and tribunals. It applies ‘whatever the nature of the court or tribunal’,\(^{158}\) leaving the issues of judicial qualifications, expertise, the constitution of the court, the qualifications of judicial officers and other court employees, any conflicts of interests and

\(^{151}\)See also Art. 12.

\(^{152}\)Article 8, the European Order for Payment Directive.

\(^{153}\)Recommendations III.8 and III.9.

\(^{154}\)Recital 17, Article 6.

\(^{155}\)Recital 13, Article 4.4 second indent.

\(^{156}\)The ALI Transnational Rules of Civil Procedure explain that external influences can be exerted by the legislative or executive authority, or by persons with economic interests, and internal influences can derive from other officials within the judicial system (Rule 1.1, Comment P-1B).

\(^{157}\)It is important to note here that the Consumer ADR Directive (2013/11/EU, outside the scope of this Report – see Section 0.3.1) contains detailed requirements concerning expertise, independence and impartiality of ADR bodies, and of ‘natural persons in charge of ADR’ (Article 6).

\(^{158}\)Article 1.2 of the Legal Aid Directive, Article 2.1 of the European Enforcement Order Directive.
potential exclusions of judges or courts, to national rules. These are regularly reviewed by CEPEJ in the wider context of the Council of Europe, and in 2014 a report was produced by CEPEJ for the EU Commission’s DG Justice on the functioning of judicial systems of the EU Member States. Clearly these matters, while not within the regulatory framework of the EU procedural system, are within the sphere of interest of the EU. They are an important element of the rights of access to an effective remedy and fair trial as set out in the ECHR. An extensive line of jurisprudence of the ECtHR concerns the definition of a tribunal, and the notions of independence and impartiality. In determination of independence, the ECtHR uses the following criteria: the manner of appointment of members of the judiciary and their term in office, the existence of guarantees against outside pressures, and the appearance of independence to an objective observer. As regards impartiality, ECtHR developed a two-stage test: an objective test (whether the tribunal guarantees impartiality) and subjective test (regarding a particular judge). When producing standards concerning independence and impartiality at the EU level regard should be paid to the methodology for evaluating the work of judicial institutions adopted by CEPEJ, as well as to the jurisprudence of the ECtHR.

Judicial expertise

One important aspect of judicial independence is expertise and knowledge. In the context of cross-border proceedings in the EU such expertise is crucial, for the judges are required to be familiar not only with their own domestic procedures and practices, but also with the requirements relating to the cross-border nature of litigation. Their guidance is often an essential element of the parties’ procedural decisions. Their awareness of the various EU instruments in the area of civil procedure is a key element of the successful operation of these instruments. It is already clear that this awareness, knowledge and expertise are not adequate (the Commission’s Report on the application of the European Small Claims Procedure indicates that only 50% of courts are aware of the existence of this procedure). There is scope and need for consideration of an expertise requirement with regard to EU civil procedure in the context of shaping CMS. For the exact framework of this requirement it is instructive to refer to the ALI/UNIDROIT Transnational Rules of Civil Procedure (Rule 1.5: ‘The court should have substantial legal knowledge and experience’). However, the knowledge that such potential common standard for the European Union would seek to ensure covers, in addition to substantive law, procedural rules of the EU.

x. Transparency of the proceedings (openness)

Transparency of the proceedings is a principle encompassing openness with regard to access to civil litigation, the openess of the proceedings (including publicity), and the openness of decision-making. Access to litigation was explored above, and the matters related to decision-making are dealt with in a further part of this analysis concerning judicial reasoning.

Article 47 of the Charter provides everyone with the right to a ‘fair and public hearing’. An important element in the considerations of openness of the proceedings is their public nature.

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159 The Small Claims Regulation provides that ‘the court or tribunal must include a person qualified to serve as a judge in accordance with national law’ (Recital 27), but this requirement results from the nature of small claims procedures.


161 See the ECHR Guide to Article 6. Right of fair trial (civil limb), at pp. 20-25.


163 Case Micallef v. Malta, Judgement of 15 October 2009.

164 See the 2014 Report – above, as well as the CEPEJ Report ‘Monitoring and Evaluation of Court System: Comparative Study’ (available at: https://www.coe.int/t/dghl/cooperation/cepej/series/EtudesSuivi_en.pdf). Further work and publications of CEPEJ can be found at: https://www.coe.int/t/dghl/cooperation/cepej/quality/default_en.asp.

Specifically, whether the right to effective remedy before a court entails the right to a public hearing in one’s case. This issue was considered by the ECtHR, where the general requirement remains public hearing before at least one instance. Only in exceptional circumstances can the court dispense with public hearing. Procedural laws of the EU often do not regulate this aspect of openness, in many cases leaving it to national law. Further, often public hearing is unnecessary due to the specific types of proceedings. In many instances the procedures regulated have a sense of urgency, the need for efficiency, or for secrecy. Thus, hearings can be dispensed with. For instance, for reasons of efficiency the Small Claims Procedure is a written procedure, where a hearing can only be held if the court considers it necessary to give judgement, or if the court, upon request of a party, deems that it is necessary for the fair conduct of the proceedings. The European Order for Payment procedure, the European Enforcement Order for Uncontested Claims, and the European Account Preservation Order procedure appear to be document-based and not requiring a hearing. Other aspects of publicity and openness of proceedings: such as openness of hearings, court records, and judgements, to the public, are also mostly left to national law. However, the Recommendation on collective actions contains requirements concerning dissemination of information on the ongoing and contemplated injunctive and compensatory actions, and establishment of national registry of collective redress actions. The IP Rights Enforcement Directive contains a provision on publicity (subject to the court’s decision).

Language plays a particularly important role in EU civil procedure, especially in cross-border cases. Procedural legislation of the EU regulates language issues, for instance by requiring that the claim form, counterclaim, responses, and description of evidence be submitted in the language, or in one of the languages, of the court. This requirement is balanced in the context of the European Small Claims Procedure by a specification that courts can only demand translation of documents other than those specified above when they are necessary to give judgement (this is assessed on the national level and leads to inconsistencies in application – in some states all documents must be officially translated). In line with the Regulation on Service of Documents, the person being served can refuse service if it is not done in the appropriate language. It would be advisable for the CMS to codify the language requirements regarding civil proceedings in general, outside of the context of the specific procedures or applications. The key principle would be that proceedings are brought and conducted in the language of the court. The ALI/UNIDROIT Transnational Rules of Civil Procedure (Rule 6) could assist in establishing the EU standard.

It would also be advisable to consider systematising the requirement of openness of the proceedings, especially as regards public hearings and the possibilities of dispensation with them, in line with the jurisprudence of the ECtHR as well as the current EU legislation.

x. Equality between the parties (equal respect for the parties)

xi. Fair play between the parties (including the right to be heard/contribute/comment)

These two principles concern the relationship between the parties and the court: the judicial

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166 Case Fischer v. Austria, Judgement of 26 April 1995. For further, detailed analysis of the ECtHR jurisprudence see the ECHR ‘Guide to Article 6. Right to fair trial (civil limb)’, at pp. 46-49.
167 Article 5 of the European Small Claims Procedure Regulation.
169 Recommendations 10-12.
170 Article 15.
171 For instance – Article 6, European Small Claims Procedure Regulation.
173 Below – see ‘fair play between the parties’.
174 The ALI/UNIDROIT Rules specify as follows: ‘6.1 The proceedings, including documents and oral communication, ordinarily should be conducted in a language of the court. 6.2 The court may allow use of other languages in all or part of the proceeding if no prejudice to a party will result. 6.3 Translation should be provided when a party or witness is not competent in the language in which the proceeding is conducted. Translation of lengthy or voluminous documents may be limited to portions, as agreed by the parties or ordered by the court.’
duty to treat both parties equally, fairly, with equal respect (equality), and between the parties themselves (duty of the parties to conduct themselves fairly towards each other). The main features of the two principles may be considered together. They include the right of both parties to be heard, to contribute to the proceedings, and to comment.

In the jurisprudence of the ECtHR the principle of ‘equality of arms’ is deployed in this context, entailing the need to maintain a fair balance between the parties, affording each party an opportunity to present his or her case. The fundamental right to an effective remedy under the Charter entails the right to a fair hearing (Article 47).

These issues have probably received the most comprehensive regulation at the EU level, as with the elimination of exequatur it is essential that courts enforcing judgements, settlements and authentic instruments are doing so with full trust that the parties’ rights have been secured throughout the proceedings leading to the adoption of the instrument the recognition or enforcement of which is sought. Also the sectoral legislation contains fairness requirements: for instance, the IP Rights Enforcement Regulation requires that the procedure be ‘fair’.

A further, specific aspect of the principle of equal respect for the parties derives from judicial control over the proceedings – this issue is considered below.

**Non-discrimination**

With regard to equality between the parties, many procedural measures contain the principle of non-discrimination. Indeed, one of the cornerstones of the European area of justice is equal treatment of litigants and other persons involved in litigation irrespective of nationality. It would be advisable for the common standards to reinforce the principle of non-discrimination of litigants.

**Guarantees of defendant’s rights**

a. **General guarantees of fairness:**

Further guarantees of procedural equality and fair play concern specifically the rights of defendants to be properly serviced, and to be able to prepare and present their defence, to be able to find out about a decision or order against them, the reasons for it, and challenge it, appeal or ask for a review. The exact scope of the guarantees depends on the type of procedure regulated: if for instance, as is the case in the European Account Preservation Order Procedure, the defendant is unaware the Procedure was commenced, the guarantees are very extensive. According to the Regulation, ‘the creditor should be required in all situations, including when he has already obtained a judgment, to demonstrate to the satisfaction of the court that his claim is in urgent need of judicial protection and that, without the Order, the enforcement of the existing or a future judgment may be impeded or made substantially more difficult because there is a real risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets or have disposed of them under value, to an unusual extent or through unusual action’. The Regulation contains quite detailed guidelines as to the criteria to be used by courts when establishing the existence of such risk. The Regulation also introduces the availability of security for costs. In the Small Claims Procedure, the guarantees are less extensive, largely left to the national rules.

Legislation regulates provision of information to defendants, in order to ensure awareness of their rights and procedural position. The European Enforcement Order for Uncontested Claims

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175 Case of DomobBeheer B.V. v. the Netherlands, Judgement of 27 October 1993.
176 Article 3.1.
177 See also: Rule 3.2 of the ALI/UNIROIT Transnational Rules of Civil Procedure.
178 Recital 14. See also Article 7.
179 Article 12.
Regulation contains detailed requirements on information to be provided to the debtor, including the claim as well as conditions for contesting the claim.  

b. Service

Proper service received very comprehensive regulation, as national rules in this regard differ very significantly. In fact, currently we can talk of a harmonised system of rules concerning service in EU legislation, with some important caveats. The Brussels I Recast provides that service should be effected in such a way as to allow the defendant to defend himself. The European Enforcement Order Regulation and the European Order for Payment Procedure Regulation set up minimum standards in order for the debtor to be informed about the actions against him to enable him to arrange for defence. Both contain very detailed requirements concerning service on the defendant to make sure the latter has the opportunity to learn about the order and possibly oppose it. The European Account Preservation Order Regulation also contains requirements concerning service. The defendant also has a chance to have the orders reviewed if there was no proper service. Further, under the Regulation on the Service of Documents, the person served with the document may refuse service in certain, very limited, circumstances: that is when the document ‘is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands’. The Commission as well as some commentators expressed concerns with regard to the balance of the rights of the parties when the EU rules on service are applied in practice by different national courts. The requirements described above, while quite clear, are not always detailed and no guidelines have been issued so far. Further, there are some aspects of service that remain unharmonised. The Regulation on service of documents, similarly with the other legislation, does not harmonise the date of service. The date is to be governed by the law of the Member State addressed, with some exceptions. Again, this causes uncertainty. The commentators rather agree, however, that the defendant’s rights are respected because, as in the context of the European Enforcement Order, he ultimately has the power to oppose an order or ask for a review. The ELI working group on service has recently commenced its work on service and translation of documents. The first report was produced in November 2014, and includes an analysis of the current acquis as well as references to the ALI/UNIDROIT Transnational Rules of Civil Procedure.

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180 Articles 16 and 17.
181 See for instance: Recital 12 to Regulation on the European Enforcement Order. For the latest on the ECtHR approach to service – see Aivotis v Latvia (Application No. 17502/07), now before the Grand Chamber.
183 Article 45.1(b) provides that recognition of a judgment may be refused: ‘where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so’.
184 Recital 12 to Regulation on the European Enforcement Order.
185 Articles 13 and 14 – service with proof of receipt or, unless the defendant’s address is not known with certainty, without proof of receipt.
186 Article 28.
187 Article 20, Regulation on the European Order for Payment Procedure – see below.
188 Article 8 of the Regulation on service of documents.
The common standards could contain the codification of the existing rules concerning service, or alternatively they could contain a general requirement of proper service and a reference to other sources for further, more detailed rules. While the Commission’s Green Paper on the Payment Order highlighted the need for guidelines on the thoroughness of the judicial review of application and on the safety valve application, such guidelines may need to be adopted also on a more general basis. The matter of date of service may need to be looked at for potential further harmonisation. The ELI/UNIDROIT conclusions, when finalised, will be of fundamental importance.

c. Challenges and reviews:

While appeals are left to national procedural laws, the EU legislation introducing specific orders or procedures enables the parties to challenge or review judicial orders, decisions, judgements, settlements and instruments, or to challenge their enforcement or recognition. The conditions for such reviews are related to breaches of fundamental rights of the parties (especially the defendant’s rights), for instance concerning proper service (see above).192

xiii. The obligation to duly notify the parties (judicial duty to avoid surprise)

Proper service is crucial from the point of view of, specifically, defendants in cross-border litigation. Service of documents has been regulated in quite some detail by the procedural measures of the EU. This was explored above (see fairness and equality between the parties).

xiv. Equal access to information (including disclosure between the parties)

This principle concerns access to information relevant to civil proceedings between the parties, including disclosure of the relevant evidence. The questions on the types of evidence and the ways of obtaining evidence are not comprehensively regulated by EU procedural measures, with some notable exceptions explained below. It is, however, clear that as to the question of disclosure, the EU is rather in favour of the continental approach reducing the availability of common law-style disclosure requests, which are seen as costly and complex. One of the latest procedural measures adopted by the EU - the Recommendation on collective redress - discourages the use of ‘elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States.’193 The ELI/UNIDROIT working group on access to information and evidence produced its First Report in November 2014, where the scope of the relevant issues was set out, including: a. scope of dispute and relevance, b. claimant’s and defendant’s responsibilities concerning evidence and information, c. powers and responsibilities of the court for the gathering and assessment of evidence, d. equal access to information and evidence, and e. types and subject-matter of evidence.194 The group is currently working on the conclusions and recommendations in these areas.

The European Small Claims Procedure is said to ‘promote fundamental rights and take into account, in particular, the principles recognised by the CFREU. The court or tribunal should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken.’195

192See Article 18.1 of the European Small Claims Procedure; Article 17,18 (opposition), Article 20 (review), Article 22,23 (refusal, stay and limitation of enforcement) of the European Order for Payment Regulation; Article 19 (review), Article 21 and 23 (refusal, stay and limitation of enforcement) of the European Enforcement Order for Uncontested Claims Regulation; Articles 34-36 of the European Account Preservation Order Regulation (remedies of debtors and creditors against orders).

193Recital 15.


Under the European Account Preservation Order Procedure, the creditor may request that the 'information needed to identify the debtor’s account be obtained by the court, before a Preservation Order is issued, from the designated information authority of the Member State in which the creditor believes that the debtor holds an account'.

The Competition Damages Directive contains very detailed provisions on evidence applicable in proceedings where damages are sought for breaches of antitrust rules. Recital 15 stipulates: ‘(evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities.’ Chapter II of the Directive (Articles 5-8) regulates the conditions under which disclosure can be requested, and limits on disclosure of evidence. Section II of the IP Rights Protection Directive regulates taking of evidence.

The Regulation on Taking of Evidence regulates taking and requesting evidence on a cross-border basis, including refusals to execute, the direct taking of evidence by the requesting court, and costs.

While the issues of access to information and evidence are still being developed both by the EU and Member States, it would be advisable to await the recommendations of the ELI/UNIDROIT Project’s working group.

1.3.4.3 PRINCIPLES RELATING TO ENSURING EFFICIENCY OF THE PROCEEDINGS

xv. Judicial control over the process (with the need to balance the need for efficiency with the need to protect the interests of the parties)

This is a controversial area in European civil procedure, as in spite of the now common view that the strict division between inquisitorial and adversarial models of civil procedure does not find practical justification, there are fundamental differences in the approach to the role of judges in litigation.

The general trend in the reforms of civil procedure rules across the EU appears to be towards greater efficiency and speed of proceedings, thus entailing some level of judicial control. This would appear to have been easier to achieve in the so-called inquisitorial procedural systems (continental Europe) than in the adversarial systems of common law (England and Wales, Ireland). However, the challenges that European civil justice systems are struggling with are significant in both types of systems. The most remarkable developments took place in England and Wales, where judicial case management towards achieving the ‘overarching objective’ of dealing with cases justly has been one of the most significant achievements of the Woolf Reforms. Post-socialist states of Central and Eastern Europe have been dealing with the challenge of lack of social trust in judges. The EU is yet to take a firm view on this issue.

The level of judicial control over proceedings in the current EU legislation depends upon the regulated issue, the type of procedure, and the aims of the measure. Small Claims Procedure, aimed at simplification, shortening and decreasing the costs of proceedings concerning small claims, gives judges a relatively wide scope of control over the procedure: including the power to determine whether or not to hold an oral hearing, and the power of determination of the

196 Recital 20, Article 9.
197 See contributions to Dwyer, ‘The Civil Procedure Rules Ten Years On’, and with regard to Central and Eastern Europe see the contribution by Tulibacka, ‘The Ethos of the Woolf Reforms’.
198 Article 5.1.
means of taking evidence and the extent of the necessary evidence.199 On the other hand, the European Small Claims Regulation also contains strict time limits on various steps, thus limiting judicial discretion.200 By contrast: a European order for payment is issued solely on the basis of the information provided by the claimant, not verified by the court, normally within 30 days from lodging the application (unless rectification or amendment was necessary). The application can be rejected only if the requirements are not fulfilled or the claim is clearly unfounded or inadmissible. The decision rejecting the application cannot be appealed against, but it can be reviewed at the same level of jurisdiction, for instance through a new application, subject to national law rules.201

Significant emphasis on judicial management is required in mass proceedings, and indeed it is interesting that the Recommendation on collective redress does not focus on this issue, leaving it to national procedural arrangements.

As a matter of reference, the ALI Transnational Rules of Civil Procedure contain Rule 14 regarding the judicial responsibility for the proceedings. It recommends that the courts ought to actively manage the proceedings (to the extent it is practically possible in consultation with the parties), exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. It also provides that courts should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines.

While the issue has not yet been considered by the ELI/UNIDROIT Project, the ALI suggestions may be useful for determination of the relevant standard concerning judicial management of civil proceedings. However, judicial activism and case management are sensitive issues, and the national rules, practices, cultures and sentiments towards them ought to be carefully considered before any proposals are made. It would perhaps be advisable to wait for the ELI/UNIDROIT recommendations (once the work in this area commences) before making final proposals.

xvi. Avoidance of undue delay

This is a pertinent issue in the context of the right to fair trial and adequate judicial protection, which according to the extensive jurisprudence of the ECtHR include the right to have a case concluded in reasonable time. At the Strasbourg level the most litigated requirement in Art.6 is the obligation on States to ensure that proceedings do not exceed ‘reasonable time’.202 The circumstances of the case may determine the importance of expedition. As noted by Kramer, many countries violate this requirement in civil proceedings.203 Article 47 of the Charter also includes the right to a hearing ‘within a reasonable time’.

Many pieces of EU legislation introduce time limits for various procedural steps, especially those aimed at introducing swift and efficient procedures: such as the European Small Claims Regulation.204 The European Account Preservation Order Procedure Regulation introduces very detailed, and short, time limits for the decision whether to issue an Order.205

While it is important for specific pieces of legislation to include time limits adjusted to the nature of the proceedings they regulate, a potential CMS could be limited to a general obligation to proceed within reasonable time.

1.3.4.4 PRINCIPLES RELATING TO ENSURING JUST AND EFFECTIVE
OUTCOME

xvii. Duty of the court to provide reasons

According to the jurisprudence of the ECtHR, the right to fair trial in Article 6.1 ECHR contains within it the judicial duty to give sufficient reasons for their decisions.\(^\text{206}\) The reasons need to be sufficiently detailed in order to enable the parties to make effective use of their right to bring in an appeal or challenge.\(^\text{207}\) This matter is not regulated in the procedural legislation of the EU, leaving it to national procedural arrangements.

xviii. Accurate decisions

Procedural arrangements designed to ensure accurate decisions concern the impartiality and independence of courts, as well as evidential rules. These were explored above.

xix. Protective relief

Availability of protective relief is a crucial remedy in EU law, as established by the CJEU\(^\text{208}\) Its exact features, however, are mostly left to national rules. EU procedural laws do not often regulate this matter, with some notable exceptions. The Recast of Brussels I includes provisional, also protective, measures in its definition of a ‘judgement’ (as long as they were adopted in the presence of the defendant or if the judgement containing the measure was served on the defendant before enforcement is sought) for the purposes of recognition and enforcement of judgements.\(^\text{209}\) Further, the Regulation on the European Account Preservation Order Procedure is in itself devoted to harmonisation of standards concerning one such protective measure: an account preservation order. Of course, this Regulation operates alongside national protective measures, only in cross-border cases, and does not replace any such national measures. The IP Rights Enforcement Directive’s Section IV contains rules on provisional and precautionary measures.

The ELI/UNIDROIT working group on provisional and protective measures produced its first report in November 2014,\(^\text{210}\) announcing the methodology for further work in this area, and it is recommended that the forthcoming conclusions are taken into account in the context of CMS.

xx. Effective enforcement of decisions

Effective enforcement of judgements, settlements and authentic instruments is one of the main objectives of the European area of justice. Mutual recognition is its cornerstone. Thus, this principle can be seen as part of a wider catalogue of principles examined in this Report, or as the ground rule at the basis of all EU legislation in the area of civil procedure. Here it is considered in its former manifestation.

Recognition and enforcement of decisions in civil matters is governed by the Brussels I Regulation (Recast). The main change brought about by the Recast was elimination of exequatur. Exequatur was also eliminated in other procedural measures: the Small Claims Procedure Regulation, the European Enforcement Order Regulation, the European Order for Payment Procedure Regulation, and the European Account Preservation Regulation. The elimination of exequatur is founded upon the principles of mutual recognition, and mutual trust in fairness of the procedural rules of other Member States. Common minimum standards are the basis upon which the mutual recognition and enforcement of judgements is

\(^{206}\) Case H v. Belgium, Judgement of 30 April 1987.
\(^{208}\) Case C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, Judgement of 19 June 1990.
\(^{209}\) Chapter III of Brussels I (Recast), and Article 2(a).
contemplated. They concern the procedural rights of the parties, particularly the defendant being able to arrange for defence and to oppose enforcement of a judgement if it resulted from proceedings where his or her rights were not sufficiently protected.\textsuperscript{211} According to Article 36 of Brussels I (Recast), a judgement given in a Member State ought to be recognised in another Member State without any special procedure being required. Further, Article 39 specifies that a judgement given in a Member State that is enforceable in that Member State ought to be enforced in other Member States without any declaration of enforceability being required.

In contrast to the other procedural measures mentioned above, where the elimination of exequatur is complete and subject to only minor exceptions concerning defendant’s rights, the Brussels I (Recast) retains the public policy exemption. Thus, any interested party may apply for refusal of recognition of a judgement in cases where such recognition is manifestly contrary to public policy (\textit{ordre public}) in the Member State addressed.\textsuperscript{212}

The criterion of public policy extends potentially to many aspects of civil proceedings, but particularly to protection of the parties’ interests. Under some established jurisprudence, especially according to French courts, the rights of defence are part of the \textit{ordre public} considerations and they were indeed held valid grounds for refusal of recognition.\textsuperscript{213} The concept of \textit{ordre public} is by its very nature within the discretion of national authorities, but the CJEU quite early on emphasised the limits of this discretion. In Krombach\textsuperscript{214} it held, in the context of the predecessor of the Brussels I Regulation – the Brussels Convention: ‘while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.’\textsuperscript{215} It also held that ‘(r)ecourse to the public-policy clause (…) can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.’\textsuperscript{216} Such fundamental principles, confirmed also by the CJEU decisions and by the ECtHR decisions, are the right to be defended, and the right to a fair hearing.\textsuperscript{217}

While Brussels I is heralded as one of the most effective pieces of EU legislation,\textsuperscript{218} there are gaps in it, where some crucial concepts are left untouched. In line with the tendency identified above, the CJEU commenced the process of filling them by interpreting the relevant rules in their context and giving them an autonomous meaning, independent of the meaning they are attributed to in national law. For instance, the concept of ‘document which instituted the proceedings or ... equivalent document’\textsuperscript{219} was interpreted in Case C-474/93 Hengst Import, while in another case the Court explored when it was ‘possible’ for a defendant to bring a

\textsuperscript{211}For analysis of the manner in which elimination of exequatur potentially threatens the rights of the defendant, and the need for ‘prior reconciliation of procedural law’ see Storskrubb, ‘Civil Procedure and EU Law’, at p. 147, and Hess, ‘The Integrating Effect of European Civil Procedural Law’, at p. 9f.

\textsuperscript{212}Article 46. There are other reasons for possible refusal to recognise a judgement. These follow the sentiments of the other procedural measures mentioned above: the application for refusal may be made where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; or where the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; or where the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed. The same grounds can be invoked by a person against whom enforcement of a judgement is sought.

\textsuperscript{213}See sources quoted by Storskrubb, ‘Civil Procedure in the EU’, at p. 147, ft. 96.

\textsuperscript{214}Case C-7/98 Krombach v. Bamberski, Judgement of 28 March 2000.

\textsuperscript{215}Para. 22

\textsuperscript{216}Para. 37

\textsuperscript{217}The application of ‘public policy’ before national courts was examined in the 2007 study commissioned by the European Commission in preparation of the Brussels I Regulation Recast (the ‘Heidelberg Study’) and the 2011 study commissioned by the European Parliament on the ‘Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law’.

\textsuperscript{218}See the Heidelberg Study, JLS/C4/2005/03.

\textsuperscript{219}Article 27(2) of the Brussels Convention (Article 34(2) Brussels I Regulation).
challenge to a default judgment against him.\textsuperscript{220}

Effective enforcement of decisions, and the measures regulating it in the EU, affect many fundamental principles of civil procedure: the defendant’s right to appear and to defend himself, procedural equity and fairness, finality of judgments, and the general principle of legal certainty.

It is hoped that the currently undertaken ‘evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law’ (mentioned above, commissioned by the Commission)\textsuperscript{221} will provide insights into the application of the principles concerning enforcement of judgments across the EU.

The exact meaning of the ‘public policy’ clause may need to be explained, using the jurisprudence of Member States’ courts and the results of the currently undertaken ‘Evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law’.

xxi. Finality

Finality of judicial and extra-judicial decisions is a notion related to the need to maintain legal certainty and to the principle of \textit{res judicata}. The latter principle means that once a decision has become final, it should be binding and there should normally be no risk of it being overturned.\textsuperscript{222} Finality is seen as part of the right to a fair trial under the ECHR.\textsuperscript{223} EU civil procedure law rather leaves it to national procedural rules, although provisions of Brussels I (Recast) and some other pieces of legislation where exequatur was eliminated allow for a challenge to recognition and enforcement where the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties.\textsuperscript{224}

1.4. Assessment of the current standards in civil procedure at the EU level

There is no coherent system of general procedural standards in the European Union. Those introduced by EU legislation adopted in the context of judicial cooperation in civil matters (horizontal measures) and within various sectors of substantive law (‘sectoral’ procedural measures), have limited application. They cover specific procedures, motions, and situations, and many only apply to cross-border litigation in addition to procedures and mechanisms introduced under national procedural laws. Further, they do not cover all the aspects and stages of civil procedure. To follow the structure of the ALI/UNIDROIT Rules of Transnational Civil Procedure, one can point to the following matters that are currently not covered at all: the right of the parties to engage a lawyer, confidential legal advice, structure of civil proceedings (stages, appeals, etc.), intervention, and Amicus Curiae submission.

It can be concluded that a citizen or a resident of an EU Member State wishing to commence litigation in another EU Member State will not be able to expect to approach courts and authorities in any Member State as easily as in their own. When involved in litigation, he or she still cannot expect the same procedural guarantees. When enforcing a judgement or settlement

\textsuperscript{220}Article 34(2) of the Brussels I Regulation. Case C-283/05 ASML Netherlands.

\textsuperscript{221}\textit{JUST/2014/RCON/PR/CIVI/0082}


\textsuperscript{223}Ibid. Vitkauskas and Dikov, at p. 32.

\textsuperscript{224}Article 46, Brussels I (Recast).
in another Member State, EU citizens and residents may also encounter difficulties (for instance related to the uncertainty over the meaning of the ‘public policy’ clause). Various aspects of access to justice, jurisdiction, standing, judicial independence and impartiality, costs and funding of litigation, legal representation, the stages of proceedings, the roles of the parties and the court, evidential rules, requirements concerning language and translation of documents, specific procedural steps, timelines and time limits, sanctions, interim relief, decisions, appeals, recognition and enforcement retain significant differences. The courts applying EU procedural standards are national courts, and their different approaches as well as the results they produce do not always encourage mutual trust.

Our review of the existing standards systematically along the lines of the categories of principles specified above was a complex process and revealed gaps, inconsistencies, and the general lack of a systematic approach. The attempt to review the existing standards along the general structure of civil proceedings was abandoned because the results it produced were difficult to systematise and revealed even more significant gaps.

The more general principles contained in the Charter of Fundamental Rights and the ECHR are binding upon all European courts in all civil cases (although the Charter is only binding with regard to enforcement of EU law), but the levels of adherence to them differs between Member States and even between different courts within one Member State. Further, their exact meaning is not always clear, and the jurisprudence of CJEU and ECHR concerning these principles places them in the context of a particular case, thus drawing general conclusions from specific judgements may be problematic. While this conclusion on the value of jurisprudence reflects the sentiments of a principle-based continental legal system rather than a case-based approach of a common law system, there are a number of reasons why it remains valid in the context of the EU. First of all, the majority of the EU Member States are such principle-based systems. Second, and more importantly, a case-based approach may well retain its clarity and coherence in a single, stable common law system, but it may lose the said coherence and clarity in a Union of 28 Member States, where there is a need for clearly stated, defined and explained standards. Only such form of clarity ensures more uniformity in application of those principles and rules in cases before courts in various Member States. This uniformity is the aim of the EU legal system, and of course also the aim of the European area of justice.

Below (Section 2) we review the potential steps that can be taken to realise these objectives, including the introduction of CMS at the EU level. First of all, however, we set out further reasons why action at the EU level may be necessary and the obstacles to such action.

1.5. The need for EU action

Below we introduce our assessment of the question why EU action towards the harmonisation of civil procedure rules among MSs may be necessary to complement the available national rules and existing EU legal framework. These issues are developed in much more detail in Section 3 of the Report.

The Reports on the application of the existing legislation in civil procedure, as well as the qualitative and quantitative research leading to the writing up of this Report, unveil a number of crucial features of the EU civil justice:

225 This conclusion is to some extent supported by the analysis above, but the Report does not focus on the practical application of these general principles.

• We know very little about how the EU civil procedure legislation works in practice because there is no reliable data on how many times and how it is used, or alternatively why it is not used.

• What transpires from the available data is very low usage of EU civil procedure mechanisms. For instance, the 2013 Commission Report on the application of the Small Claims Procedure revealed that, while leading to faster and cheaper proceedings in cross-border cases, it is not often used.\textsuperscript{227} Even the relatively successful Brussels I Regulation is used infrequently, especially when compared to the overall numbers of cases brought before national courts.\textsuperscript{228}

• The minimum standards which are operating currently, based on the EU legislation in force, leave significant issues to national civil procedures, and even the aspects expressly regulated by EU measures do not receive the same interpretation and application on the national level. There are fears about the implications of these divergences for the aims of mutual trust and mutual recognition. They were expressed for instance with reference to the European Order for Payment Procedure. The Commission as well as some commentators expressed concerns with regard to the balance of the rights of the parties when the Regulation is applied in practice by different national courts. The Regulation’s requirements, while quite clear, are not always detailed and no guidelines have been issued so far.\textsuperscript{229} What filters, if any, should be applied by national courts reviewing applications in order to block unmeritorious claims?\textsuperscript{230} Another example is the European Small Claims Procedure, where, even after the recent amendment including the requirement for court fees to be proportionate, those fees and the methods of collecting them have not been harmonised.\textsuperscript{231}

• The level of knowledge and awareness of common standards in civil procedure, and the procedures and other mechanisms carrying them, is very low not only among businesses and consumers but also among the judiciary and other members of the legal profession. As an example: the Report on the application of the European Small Claims Procedure mentions that over 80% of consumers and 50% of courts do not know about the procedure.\textsuperscript{232}

• While the EU Charter of Fundamental Rights and the European Convention of Human Rights (and the jurisprudence of the CJEU and ECHR) establish a set of principles concerning the general principles of civil procedure, their practical application through detailed procedural rules remains within the scope of each national civil procedure.

The problems identified here cannot be solved exclusively by actions on the Member State level. They require an exercise in coordination, coherence and systematisation that goes beyond the borders and interests of one State. In the light of the key aims of the EU legal system, and the aims of the policy of judicial cooperation in civil matters, action at the EU level seems necessary. This conclusion is supported by the respondents to our Survey. Only 12% of stakeholders were satisfied that the current EU approach to harmonisation of civil procedures was sufficient to remove obstacles to trade and to bringing cross-border cases. An overwhelming majority (81%) held favourable views on the possible greater harmonisation of the civil procedure rules in the EU (for 25% these were very favourable views).

\textsuperscript{228}See the Heidelberg Study 2007 for numbers of cases.
\textsuperscript{229}The Commission’s Green Paper on the Payment Order highlighted the need for guidelines on the thoroughness of the judicial review of application and on the safety valve application (COM (2002) 746, p. 30f).
\textsuperscript{231}Ibid., Report from the Commission, COM(2013) 795 final, at p. 9.
With regard to difficulties in systematisation of the existing EU standards and the related lack of data on national implementation and use of these standards, another important element and potential contribution of the contemplated CMS should be noted here. It is facilitating, fostering and perhaps even directly establishing, as part of the CMS system, a framework for empirical metrics on performance of specific procedures, mechanisms and standards, and thus also on the performance of the entire CMS system. This framework needs to be carefully drafted, possibly using the methodology adopted in the work of the ELI/UNIDROIT project as well as in the CEPEJ evaluations of justice systems. The framework, with clear and transparent criteria, would focus attention on the operation of these procedures, mechanisms and standards. Problems and weaknesses would be identified at an early stage, and experimentation in response to new challenges would be encouraged. It would potentially also foster greater awareness and perhaps greater use of the EU procedures, mechanisms and standards.

### 1.6. Obstacles to common minimum standards

One of the most significant obstacles to the development of any new procedural measure by the EU, especially one of a potentially horizontal, fundamental nature, is the limited constitutional mandate to regulate civil procedures. It is difficult to ignore the comments from some scholars as to the limited practical impact of the current legislation, especially that they are supported by empirical data deriving from official reports on the application of the legislation. Also respondents to our survey expressed concern as to potential duplication of procedural standards leading to complexities and even increased costs. This is why this Report recommends widening the scope of the notion ‘cross-border implications’ in order to include a wider category of cases, possibly also purely domestic cases.

Another significant obstacle is the very nature of civil procedure, and the differences in national civil procedure principles, rules, practices and cultures. Civil procedure is difficult to harmonise. It is ‘deeply enshrined in each nation’s political organisation, social and economic structure, its constitutional and social identity, as well as arrangements for wealth distribution’. It was referred to as ‘a complex area of policy-driven rules the application of which is irrevocably linked to legal cultures and judicial practices’. It is also clear that national civil procedure rules of the now 28 EU Member States are very different. The immense effort going into developing common principles of civil procedure among a number of different legal systems was clear from the deliberations of the ALI/UNIDROIT group working on the ‘Transnational Rules of Civil Procedure’, and it is clear now in the discussions of the ELI/UNIDROIT group. While at times it is discovered that the ostensibly insurmountable differences are not significant and can be overcome, sometimes the scholars need to abstain from conclusions in the face of such, at least for the moment, insurmountable differences.

The complexity of the process of introducing harmonised civil procedure rules in the EU, and the related intricacies of the EU legal system, were exposed in the jurisprudence of CJEU concerning civil procedures. Its experiences can be instructive in negotiating this difficult process. After having exhibited a very dynamic, teleological stance in creating the requirements of equivalence and efficiency, the Court started adopting a more restrained approach beginning in 1990s. The Court had to confront a range of values and policy arguments. These involved national laws and legal cultures. They touched upon fundamental rights recognised by national constitutions and by EU law. Civil procedure rules aim at maximising efficiency of justice systems while at the same time not limiting the fundamental rights of litigants. Whilst the

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236 The contribution of CJEU to procedural harmonisation was explored above. See also Tulibacka, ‘Europeanisation’, at pp. 1535-1540.
requirements of the internal market, and effective enforcement of EU law, would indicate the need for uniformity in this regard, the other considerations mentioned here such as fundamental rights led the Court to refrain from interfering in national civil procedures. The experience of CJEU jurisprudence leads us to believe that the approach focused on building common minimum standards in civil procedure can reconcile this tension.

The current, piecemeal nature of the procedural harmonisation at the EU level received very critical reviews from scholars. Further criticism was added of the recent trend of ‘sectoral harmonisation’ – which entails EU-level harmonisation of procedural rules within specific areas of substantive EU law (consumer and competition law are good examples). The path taken by the EU, determined by its constitutional limitations and the very nature of civil procedure, may not have proven as successful as was hoped and there is a need to return to focusing on general principles and minimum standards.

1.7 Conclusions:

This Section examined the current state of academic and policy debates concerning harmonisation of civil procedure in the European Union. It demonstrated lack of consensus as to the possible future steps in this harmonisation process. It assessed the civil procedure standards in force in the EU: those introduced by the Treaties, by the Charter and the ECHR, and by secondary legislation of a horizontal and sectoral nature. It concluded that there is no coherent, clear and transparent system of standards in the European Union, highlighted the key problems, and presented a preliminary case for introduction of a set of common minimum standards at the EU level and the potential problems.
2. **EU competencies and options**

This section addresses the following issues:

- The legal bases provided in the Treaties for actions related to civil procedure.
- The benefits and limitations of undertaking further harmonisation efforts based on each specific legal basis identified.
- The possibility of adopting legal instruments based on the combination of two legal bases.
- The options for EU action in the area of civil procedure.

2.1. **Legal bases**

This section presents the legal bases provided in the Treaties for actions related to civil procedure.

2.1.1 Introduction

The constitutional mandate of the EU to regulate civil procedure is limited. The Treaty provisions related to civil justice are contained in Title V TFEU (‘Area of Freedom, Security and Justice’). Article 67 heralds the need for respect of fundamental rights, and the legal systems and traditions of Member States. It also mandates that the EU should facilitate access to justice, particularly by promoting mutual recognition of judicial and extra-judicial decisions in civil matters. Chapter 3 (‘Judicial cooperation in civil matters) of Title V contains only one provision – Article 81. It specifies the scope and limits of the EU involvement, also through legislation, in civil procedure. This provision, as well as two other potential legal bases for legislation in the area of civil procedure (not expressly meant for civil procedure), are explored below. The analysis commences with setting out the general framework for the legislative mandate of the EU.

2.1.2 Conferral and shared competences

The European Union’s legislative mandate is a conditional one. It is subject to the principle of conferral, according to which the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties (the TEU and the TFEU) in order to attain the objectives set out in these Treaties. Other competences remain with the Member States.

According to Article 2.2 TFEU, ‘(w)hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence’. While this definition of shared competences may suggest that the EU is the chief legislator in the relevant areas, this conclusion ought to be

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237 Article 67.1 and 67.4.
238 According to Article 1 of the Treaty on European Union (TEU), the European Union is founded on the TEU and the Treaty on the Functioning of the European Union (TFEU) – both Treaties have the same legal value.
239 Article 5.1 and 5.2 TEU, former Art. 5 EC Treaty.
240 Article 4.2(j) TFEU.
weighed against the two further principles limiting the EU legislative powers. These are: subsidiarity and proportionality. They are examined below.

### 2.1.3 Subsidiarity and proportionality

The exercise of the EU legislative competences is further limited by the principle of subsidiarity, and the content of the legislative measures must be subject to the principle of proportionality.

Subsidiarity is applicable to shared competences of the EU (as well as to supporting, coordinating and supplementing Member State actions), and it mandates that the EU only acts if and in so far as ‘the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. Article 69 TFEU reiterates the commitment to subsidiarity and proportionality in the area of freedom, security and justice.

Proportionality requires that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. It is commonly accepted that proportionality entails choices of less intrusive, less comprehensive, and less binding measures (if the Treaty indeed does not mandate a specific type of measure in a particular area). Thus, recommendations are preferred to binding sources, and directives are preferred to regulations.

### 2.1.4 Legal bases for harmonisation of civil procedures

There are three potential legal bases upon which legislative measures harmonising civil procedures may be based. The EU adopted legislation regulating civil procedures based on the first two provisions examined below. An additional potential legal basis was suggested in literature and is also considered below.

#### 2.1.4.1 Judicial cooperation in civil matters

The first and indeed the main legal basis is the provision concerning judicial cooperation in civil matters (Article 81 TFEU). Article 81 holds:

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.

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:

   (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

   (b) the cross-border service of judicial and extrajudicial documents;

   (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

   (d) cooperation in the taking of evidence;

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241 Article 5.3 TEU. Further elaboration of the considerations which are required in order for subsidiarity to be complied with can be found in the Protocol on the application of the principles of subsidiarity and proportionality attached to TFEU.

242 Article 5.4 TEU. Again, the more detailed guidelines on how proportionality should be achieved are in the Protocol on the application of the principles of subsidiarity and proportionality.

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff.’

The provision also introduces special arrangements for measures in the area of family law. These are outside the scope of this Report.

A measure introducing common minimum standards in civil procedure would thus find its legal basis in Article 81.2, especially points (a), (e) and (f) of this provision, possibly also other points if the common standards reach further into the issues of service of documents or jurisdiction.

Article 81 TFEU served as legal basis for all the measures adopted in the area of judicial cooperation in civil matters: those establishing separate procedures (for instance the Small Claims Procedure), and those providing for optional titles (the European Enforcement Order). However, procedural rules and measures adopted in substantive areas of EU law (‘sectoral measures’) were based on Article 114 TFEU (former Article 95 EC Treaty – see below).

3. According to Article 81 TFEU, the proposed measure would need to be limited to ‘matters with cross-border implications’. However, this Report recommends revisiting the debate concerning the interpretation of this notion to also include domestic cases. Such proposals were put forward before, notably by the Commission in the course of debating the shape of the European Order for Payment Procedure.244 The latter choice would no doubt affect the scope of the measure, narrowing it down to the principles that are indeed common to all participating Member States, or can be agreed upon by them. It is submitted that with regard to general standards of civil procedure, procedural standards applied in purely domestic litigation may impact the overall functioning of the civil justice system of the EU. Those standards, if applied consistently by courts irrespective of the scope (cross-border or domestic) of the case, increase mutual trust that is the basis for mutual recognition – the cornerstone of the EU civil justice policy. The aim of establishing the European area of justice cannot be achieved without working towards harmonisation of legal practice, and this harmonisation is contingent upon agreeing on minimum standards that are indeed common to all civil proceedings. These issues are examined in more detail below.

2.1.4.2 Internal market/harmonisation

Article 114 enables the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, to adopt ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’. The internal market is defined by Article 26.2 TFEU as an area ‘without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.

244Eva Storskrubb described in detail the attempts of the Commission, as well as the ESC, to introduce a procedure applicable to cross-border as well as domestic situations in the proposal for the European Order for Payment Regulation. The European Parliament was more cautious, in favour of giving Member States the discretion to adopt the same procedure for domestic cases as well. The discussions concerned the interpretation of the phrase ‘cross-border implications’, used in Article 61 EC Treaty. While for the Commission even differences in treatment of purely domestic cases may have cross-border implications because of the potential for reverse discrimination and distortions of competition, the Member States and the Council were in favour of stricter interpretation of the notion. Ultimately, the stricter approach prevailed (Storskrubb, ‘Civil Procedure’, at pp. 206-207).
Article 114 is a general legal basis, a ‘lex generali’, and thus it applies where there are no other, more specific legal bases for EU legislation. For instance, in the area of consumer law, the Consumer Injunctions Directive was adopted on the basis of Article 114 TFEU (then Article 100a EC). The Consumer Injunctions Directive is a mechanism seen as an element of the system of enforcement of substantive consumer laws. Similarly with the differences in the national consumer protection laws and their potential disruptive effect on the internal market, on competition and consumer confidence that underpin the internal market, the differences in effectiveness of enforcement of consumer laws enacted by the EU are also said to be disruptive to internal market.\(^\text{245}\) The addition of an element of enforcement appears therefore as a necessary step in establishing an effective, complete system for protection of EU-conferred rights. Thus, providing this element of enforcement with the internal market-building legal basis that often also served as a legal basis of the very substantive laws the enforcement of which is at stake, is logically and legally sound even if it produces what some scholars refer to as ‘proceduralisation through the back door’.\(^\text{246}\)

A question that needs further inquiry is, however, as follows: can Article 114 serve as a legal basis for a measure harmonising the principles or rules civil procedure that are detached from any specific area of substantive law? The answer to this question is most likely negative. First of all, there is the ‘lex generali’ nature of the provision. Article 114 applies ‘save where otherwise provided in the Treaties’\(^\text{247}\) and it expressly excludes provisions relating to free movement of persons.\(^\text{248}\) Thus, it is not conceivable for an independent, horizontal measure harmonising civil procedure principles and/or rules to be exclusively based on Article 114 TFEU, as there is a Treaty provision specifically designed to be used for such measures (Article 81, above). Further, it was made very clear in the jurisprudence of the CJEU that in order for a measure to be based on Article 114, a true contribution to the internal market must be established. In the Tobacco Advertising judgement, the Court emphasised that Article 114 (then Article 100a EC) does not vest in the Community legislature ‘a general power to regulate the internal market’.\(^\text{249}\) Measures based on this provision must be genuinely intended to improve the conditions for the establishment and functioning of the internal market. The test the measure must pass involves true contribution to the elimination of obstacles to free movement of goods, freedom to provide services, or to removing distortions of competition.\(^\text{250}\) Article 114 is an attractive legal basis for regulating civil proceedings, as in contrast to Article 81 TFEU it does not entail any limitation to matters with cross-border implications. Interestingly, both provisions contain a reference to the internal market, although with regard to Article 81 this relationship of the regulated matters with the internal market is not required.

What would be the contribution of a legislative measure containing common minimum standards in civil procedure to the ‘object of the establishment and operation of the internal market’ of the EU? Some of the arguments towards such contribution, relating to potential economic benefits of this measure, are explored in Section 3 of this Report. It is demonstrated there that EU action establishing a set of common minimum standards in civil procedure could produce tangible economic benefits in the form of cost savings to businesses and consumers, as well as administrative savings to the Member States’ justice infrastructure. These cost savings can translate into greater levels of cross-border activity: travel, consumer transactions, business transactions, other movement and activities. Thus, the potential contribution of the measure to the operation of the internal market can be documented. Overall, the links between the policy of judicial cooperation in civil matters and the internal market have always been strong, especially the links with free movement of persons – one of the pillars of the internal market. They are

\(^{245}\)Preamble to the Directive on Consumer Injunctions, Recitals 4 and 5.

\(^{246}\)Of course the Consumer Injunctions Directive is only one example of a sectoral measure based on Article 114 TFEU. Another example is the Competition Damages Directive, and yet another: the IP Rights Enforcement Directive. For more examples and detailed analysis: see the contributions to the Review of European Administrative Law, Vol. 8, No. 1, 2015.

\(^{247}\)Article 114.1.

\(^{248}\)Article 114.2.


\(^{250}\)Weatherill, ‘European Private Law and the Constitutional Dimension’, at p. 92.
emphasised in the 2009 Stockholm Programme promoting, inter alia, the full benefits of the
dright to free movement of persons.

The decision concerning this issue needs to be taken with due regard to the dangers of
‘competence creep’, as defined by scholars, in particular Professor Weatherill. He points to the
development of some consumer protection measures, based formally on the internal-market-
making provision of Article 95 of the EC Treaty (now 114 TFEU). According to Weatherill, the
fact that some consumer protection directives (for instance the Distance Selling Directive
85/577) were ‘largely motivated by the prevailing political consensus in favour of EC consumer
protection’ rather than genuinely attempting to create laws eliminating barriers to the
functioning of the internal market ‘stands an example of the EC legislature surreptitiously ‘self-
authorising’ an extension of its own competence, contrary to the fundamental principle of
attribution’.252

It would perhaps be possible for Article 114 to be used as a legal basis in addition to Article 81.
The issue of choice of legal basis and the potential for combining two different legal bases is
examined below.

2.1.4.3 An alternative legal basis – Article 352 TFEU

Another potential legal basis for EU legislation in the area of civil procedure was mentioned in
literature and merits a short note here. It is Article 352 TFEU, former Article 235 EC Treaty. This
is a general legal basis for EU action if it should prove necessary for one of the policies
defined in the Treaties. However, the legislative mandate so entrusted onto the Union is limited
by the principle of subsidiarity, and it is unlikely that a measure establishing common
minimum standards in civil procedure (especially as there is a specific legal basis for such a
measure) would pass the subsidiarity test.254

2.1.4.4 Choice of legal basis - recommendations

According to the jurisprudence of the CJEU, choice of a legal basis must be based on objective
factors which are amenable to judicial review, particularly the aim and content of the
measure.255 While the Court indicates that a single legal basis is preferable (by holding that if
’examination of (an EU) measure reveals that it pursues a twofold purpose or that it has a
twofold component and if one of these is identifiable as the main or predominant purpose or
component whereas the other is merely incidental, the act must be based on a single legal basis,
namely that required by the main or predominant purpose or component’),256 it is also possible
for a measure to have two different legal bases. According to the Court, ‘if it is established that
the measure simultaneously pursues several objectives which are inseparably linked without
one being secondary and indirect in relation to the other, the measure must be founded on the
corresponding legal bases’.257 However, it is also apparent from the Court’s jurisprudence that
no such dual basis is possible where the procedures laid down for each legal basis are
incompatible with one another.258 With regard to harmonisation of civil procedures, there is one
more difficulty with pursuing such dual legal basis. It involves the ability of some Member
States (Denmark, the United Kingdom, Ireland) to remain outside the scope of measures
adopted within the area of judicial cooperation in civil matters, and not for measures based on
Article 114 TFEU.

251Weatherill, ‘Constitutional Issues: How much is better left unsaid?’.  
252Weatherill, ‘Constitutional Issues’, at pp. 91 and 92.  
254Ibid. Dubos.  
255C-300/89 Commission v Council (Directive on waste from the titanium dioxide industry), para. 10, and C-269/97
Commission v Council, para. 43.  
256C-211/01 Commission v Council, para. 39. See also: C-155/91 Commission v Council, paras. 19 and 21, and C-96/98
Spain v Council, para. 59.  
257C-211/01 Commission v Council, para. 40. See, also inter alia, Case C-336/00 Huber para. 31; Case C-281/01
258See, inter alia, Case C-300/89 Commission v Council, paras 17 and 21, and Joined Cases C-164/97 and C-165/97
It is recommended that a binding measure containing common minimum standards in civil procedure should be based on Article 81 TFEU. Even if the measure were to be based on Article 81 as well as Article 114 TFEU, the former provision would be the main legal basis because of the nature, contents and aims of the measure.

2.2. Options for action

This section of the Report addresses the following question: given the competencies of the Member States provided in the Treaties and discrepancies in Member States’ current regimes on civil procedure law, what are the options for the EU action in the area of civil procedure?

The Report recommends a systemic approach to minimum standards in civil procedure at the EU level, specifically one entailing drafting an ‘umbrella instrument’ containing such minimum standards. The Survey we presented to stakeholders offered a whole array of options, and the respondents were divided. Improvement and filling the gaps in existing legislation was an option preferred by 27%. 17% of respondents preferred new legislation, and the same proportion opted for a multiple-step project involving consolidation of the existing legislation and drafting of minimum procedural standards as an optional instrument as a first step, further harmonisation and gradual convergence of procedural rules as the next step, and introduction of an EU code of civil procedure to replace national civil procedure codes as the final step. 13% preferred introduction of CMS as a binding piece of EU law, and the same number – CMS accompanied by more detailed rules in civil procedure as an optional mechanism for cross-border cases. 10% opted for the CMS accompanied by more detailed rules in civil procedure as an optional mechanism for all cases, domestic and cross-border. Only 3% preferred an immediate introduction of a European code of civil procedure replacing national civil procedure rules, and no one opted for introduction of CMS as a piece of non-binding EU law.

We singled out three options for establishing such an umbrella instrument. The options presented below reflect the preferences of the stakeholders. However, for reasons of greater coherence, the options consolidate the choices presented to them. Each one of these options involves, to a lesser or greater extent, introduction of a set of clear procedural standards applicable to civil proceedings. In fact, seen together they present a pathway towards what is effectively codification (in the understanding of establishment of a set of generally binding principles) of civil procedure standards across the EU. This codification would involve binding principles for domestic as well as cross-border cases. This is where we see the greatest advantages for the EU.

Another potential contribution of establishing CMS at the EU level, in all three options proposed below, is the already mentioned framework for empirical metrics on performance of specific procedures, mechanisms and standards, and thus also on the performance of the entire CMS system. We propose that such framework be set up irrespective of which option is ultimately selected.

2.2.1 Option One – Compilation and consolidation

The first option involves compilation and consolidation (understood as writing up) of the existing minimum standards: those present in the procedural legislation of the EU (horizontal measures) in one instrument. For reasons of completeness and clarity, this instrument may also include the right to an effective judicial remedy in Article 47 of the Charter of Fundamental Rights and Articles 6 and 13 of ECHR as interpreted by CJEU and ECtHR. The preparatory work would include a comprehensive review of these existing standards, with all their gaps and problems.

While this is the lowest cost option and entails the lowest level of regulatory involvement, it also results in effectively maintaining the status quo with regard to the CMS at the EU level. The current problems with lack of sufficient systematisation and comprehensiveness as well as
incomplete coverage of civil procedure would remain. Further, the limited applicability of the
majority of the standards to narrowly defined matters with cross-border implications would be
difficult to challenge (indeed, this would be the case in all three options as regards the
standards adopted by horizontal measures within the area of ‘judicial cooperation in civil
matters’ under Article 81 TFEU - see below for a detailed analysis of this limitation and our
recommendations – we recommend revision of the interpretation of this limitation).

Nevertheless, the benefits of this approach would be: greater clarity and certainty brought by
the presence of all standards in one instrument, greater visibility of these standards and a
renewed attention on them. These benefits would be conditional upon a clear structure of the
measure containing the standards. It is recommended that the structure follow either the
categories of principles (an example of such categorisation can be seen in this Report) or the
structure of civil proceedings, in order to ensure clarity and accessibility. It is also
recommended that, if this option were to be selected, a set of guidelines should be adopted as
aids in interpretation and application of specific standards. The contents of these guidelines
would reflect the most current consensus as to these standards and any problems occurring in
practice: taking into account reports on the application of particular pieces of legislation, as well
as the jurisprudence of CJEU and ECtHR.

Considering that the Commission, the Parliament, and national authorities would continue to
work towards better and more uniform application of these standards, Option One would be a
step towards greater coherence, greater mutual trust, and a better sense of justice across the EU.
This would be the case specifically if the adequate methodology for measuring the performance
of the existing standards were also to be adopted as part of the package. Option One should be
seen not as an end in itself, but rather as a stage in the evolution of the EU civil justice, headed
towards more comprehensive, systematic coverage of civil proceedings.

As the standards consolidated under Option One are already contained in binding EU
measures (the Treaties, Regulations and Directives, also potentially the Charter of Fundamental
Rights and the principles deriving from ECHR), one could envisage another binding measure -
a Regulation - containing the compilation of minimum standards. A Regulation, as a directly
applicable measure, does not rely for its legal force on national implementing measures. Thus, it
lacks the flexibility and discretion characteristic of Directives. The contents of this type of
binding measure would have to reflect the fact that certain existing standards are quite flexible
and leave discretion to national rules of procedure and national courts. However, it appears
that a Regulation is a better choice than a Directive in the context of codification of the existing,
binding legal standards for civil procedure. The very aim of this measure is greater coherence
and uniformity in application, thus the flexibility and discretion may be undesirable (see below
for a more detailed elaboration on the choice of legal form of the contemplated measures).

Importantly, this initiative would not include the standards adopted within various sectors of
substantive EU law (this Report highlights consumer law, competition law and IP rights
protection). These have different scope, different legal basis, and for the purposes of
consolidation should be seen in the context of their respective substantive law areas.

2.2.2 Option Two – Comprehensive review, a ‘Roadmap’ and
subsequent further legislation

Option Two involves going beyond the mere compilation of the existing standards. It would
include a significant amount of preparatory work including a comprehensive review of these
existing standards, with all their gaps and problems, as well as of the reforms taking place in
the civil justice systems at the national level of the Member States. An assessment of the current
position would be the basis for formulating the new common minimum standards for EU civil
procedure. The recommendations of the ELI/UNIDROIT project (expected in 2018) and the
Commission’s ‘Evaluation study of national procedural laws and practices in terms of their
impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' would serve as basis for discussions with stakeholders on the content of the CMS. Those revised, amended, and new standards would need to accommodate and perhaps extend more horizontally, as far as possible and practicable, the standards adopted sectorally: in consumer law, competition law, IP rights protection, and further.

The costs of following Option Two would be higher. However, such a comprehensive review and discussions are one of the most significant benefits of this option. They would accommodate the calls for greater coherence, greater consistency, greater clarity noted in this Report. It should also be noted that many of the benefits highlighted in Option One would be relevant under Option Two (greater clarity and transparency, as well as visibility of the CMS). Again, this option would involve drafting of a framework for empirical metrics on performance of the introduced procedural standards.

Taking into account the potential challenge and size of the task involved here, we recommend that Option Two follow the example of the developments in the EU criminal procedure by including a Roadmap setting out the key principles and the scope for further pieces of binding legislation covering specific aspects or stages of civil procedure. This could proceed along the lines of general principles delineated in our Report: for example standards concerning access to justice in a separate measure, or even along the lines of specific issues: such as standing, or costs of litigation. Under this option the Roadmap – the primary set of common minimum standards in civil procedure, would be put into a legal form of a Recommendation. While a non-binding measure, a Recommendation carries a certain level of legal force. According to the CJEU, national courts must take Recommendations into account when applying EU law. Further legislation would be binding, and decisions on its legal basis, its limitations, as well as its legal form would be fundamental – potential challenges, choices and implications are explored below.

2.2.3 Option Three - a binding instrument containing minimum standards

This is an option entailing the heaviest regulatory burden and the most robust changes to the EU and the national procedural frameworks. What sets Option Three apart from Option Two, rather than the scope of the regulated standards, is the manner in which the EU would proceed in adopting the CMS. Option Three entails, following the preparatory work mentioned below, an immediate introduction of a binding measure instead of the more careful, gradual path of a Roadmap followed by binding legislation on specific standards/groups of standards. Such a significant step in procedural integration of EU Member State, even more than in Option Two, should account for the nature of civil procedure and the difficulties in regulating civil procedures highlighted in this Report.

Option Three involves, following the review and debate involved in Option Two, adoption of a binding instrument in the form of a regulation or a directive (choosing the form of regulation as opposed to directive has significant implications on the contents of the measure, which the Report explores below) containing common minimum standards in civil procedure for the European Union. Alternatively, a binding instrument containing CMS in civil procedure could be accompanied by a non-binding instrument (a recommendation) concerning further, more detailed standards and some detailed rules as a suggested method of application of these standards in practice (those may draw on the ELI/UNIDROIT Project findings). The latter approach would entail wider scope of the regulated standards, and greater depth of regulation facilitating building uniform approaches, interpretations and cultures. Irrespective of which alternative is selected, the adoption of this instrument would ultimately mean a comprehensive codification of procedural standards in civil matters for the European Union. The codification

would also need to be accompanied by very comprehensive metrics for assessing the performance and usage of the CMS.

Initially the set of standards adopted here could be offered as optional standards, applicable only to cases with cross-border implications. However, the ultimate aim of Option Three is extending the application of these standards to domestic procedures as well. Again, the decisions on the legal basis of legislation contemplated here, its limitations, as well as its legal form would be fundamental – potential challenges, choices and implications are explored below.

Table 3 contains an illustration of the three options and their key features:

<table>
<thead>
<tr>
<th>Option</th>
<th>Preparatory work</th>
<th>Main features</th>
<th>Legal form</th>
<th>Coverage</th>
<th>Benefits and problems</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>Comprehensive review of existing standards</td>
<td>Compilation and consolidation (writing up) of existing minimum standards</td>
<td>Regulation</td>
<td>Only horizontal measures + (possibly) CFREU and ECHR</td>
<td>Lowest cost option and lowest level of regulatory involvement</td>
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<td></td>
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<td></td>
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<td></td>
<td>Greater clarity and certainty</td>
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<td></td>
<td></td>
<td>Greater visibility of CMS</td>
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<td></td>
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<td></td>
<td></td>
<td>Maintaining the status quo with regard to the CMS at the EU level</td>
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<td></td>
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<td></td>
<td>Problems with lack of sufficient systematisation and comprehensive nature, incomplete coverage of civil procedure</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Matters with cross-border implications only</td>
</tr>
<tr>
<td>Two</td>
<td>Comprehensive review of existing standards, and of Member State-level reforms. Need to take into account ELI/UNIDROIT Recommendations. Extensive consultations</td>
<td>Roadmap with the key principles and further pieces of binding legislation covering specific aspects or stages of civil procedure</td>
<td>Recommendation + Regulations or Directives</td>
<td>Horizontal measures + CFREU and ECHR + sectoral measures</td>
<td>Greater clarity and certainty</td>
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<td></td>
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<td>Greater visibility of CMS</td>
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<td></td>
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<td></td>
<td>Comprehensive review and discussions would accommodate the calls for greater coherence, greater consistency, greater clarity noted in this</td>
</tr>
<tr>
<td>Option</td>
<td>Preparatory work</td>
<td>Main features</td>
<td>Legal form</td>
<td>Coverage</td>
<td>Benefits and problems</td>
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<tr>
<td>Three</td>
<td>Comprehensive review of existing standards, and Member State-level reforms, plus assessment of the potential common standards. Need to take into account ELI/UNIDROIT Recommendations. Extensive consultations required.</td>
<td>Adoption of a binding instrument containing CMS, or a binding instrument containing CMS accompanied by a non-binding instrument concerning further, more detailed standards and some detailed rules as a suggested method of application of these standards in practice. Ultimately – the aim is adoption of an EU Code of Civil Procedure</td>
<td>Regulation or a Directive, possibly accompanied by a recommendation</td>
<td>Horizontal measures + CFREU and ECHR + sectoral measures</td>
<td>Possible opposition to greater procedural integration: difficulties in regulating civil procedures.</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Greater clarity and certainty</td>
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</tbody>
</table>
2.2.4 The limitation to ‘matters with cross-border implications’

There are two further key issues that must be resolved when binding instruments are contemplated within any of the options proposed above. The first issue is the legal basis of the measure with its inherent limitation to ‘matters with cross-border implications.’ It is presented here along with our recommendations on extending the scope of legislative power of the EU in the area of civil procedure.

As elaborated above, the choice of a legal basis for a binding measure containing common minimum standards in civil procedure appears to fall on Article 81 TFEU. We considered the possibility of using Article 114 TFEU as the sole legal basis and rejected it. Whereas the specific legal basis exists for civil procedure measures, Article 114, as a lex generali concerning measures for building the internal market, should not be used as a legal basis for a horizontal piece of legislation concerning civil procedure. Even if one accepts the possibility of this measure having two legal bases, Article 81 would be the dominant legal basis because of the nature, contents and aims of the measure. The latter option does not challenge the main limitation of the measure adopted. We also rejected the possibility of the measure being based on Article 352 TFEU.

The fundamental limiting feature of Article 81 TFEU is that the EU has the power to only regulate ‘civil matters with cross-border implications’. It should be noted that the currently accepted interpretation of this phrase is rather narrow. It is indeed narrower than even a literal interpretation would indicate. For the existing EU legislation on civil procedure adopted on the basis of Article 81 (formerly: 65 EC) ‘cross-border implications’ entail a cross-border case: one with a cross-border element. For instance the Small Claim Procedure Regulation defines a cross-border case as one in which ‘at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised’. A more liberal interpretation we suggest here may take into account, in addition to the scope of the case itself, the nature of the matters regulated (in our case – common minimum standards in civil procedure) and seek to establish whether those matters have cross-border implications. We also recommend seeing the limitation in the context of the aims and desired results of the provision.

While the Commission attempted to challenge this limitation or at least narrow it down in a

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260Article 3.1.
number of draft legislative instruments, the consensus among Member States and in the European Parliament has been in favour of maintaining it. The Commission’s proposal for the Regulation on the European Small Claims Procedure argued that procedural law, by nature, often has cross-border implications, including in disputes which are purely national. However, this interpretation was not approved by 21 out of 25 Member States. The same attempt was made in the proposal for the Regulation on the European Order for Payment Procedure, also unsuccessfully.261 The Commission as well as the Economic and Social Committee attempted to challenge the narrow interpretation in the work leading to the adoption of the Regulation on European Order for Payment Procedure. They proposed a procedure applicable to cross-border as well as domestic situations.262 While for the Commission even differences in treatment of purely domestic cases may have cross-border implications because of the potential for reverse discrimination and distortions of competition, the Member States and the Council were in favour of stricter interpretation of ‘cross-border implications’. Ultimately, the stricter approach prevailed. The European Parliament was also cautious, in favour of giving Member States the discretion to adopt the same procedure for domestic cases.

We wish to reiterate the validity of the Commission’s assertions on the need for a wider outlook on the notion of ‘cross-border implications’. Further, in the light of the current developments in the ‘sister policy’ to civil procedure: judicial cooperation in criminal matters, additional arguments should be added in favour of such wider outlook. As mentioned above, the criminal and civil justice systems of the EU are pursuing the idea of common standards somewhat in parallel, both motivated by their main purpose: mutual recognition of judgements and mutual trust between judiciaries. However, under current interpretation, the scope of the legislative power of the EU is different in those two areas. While both Article 81.1 (civil justice) and Article 82.2 (criminal justice) use the cross-border concept, the former refers to ‘matters with cross-border implications’ and the latter to ‘matters with cross-border dimension’. This Report argues that the similarities here are more significant than it is assumed.

For some scholars, the deliberately different expressions in fact entail a true difference in the scope of the legislative mandate of the EU, the mandate in the area of criminal procedure being wider.263 A pragmatic justification for the wider legislative mandate in criminal matters is the difficulty in determination whether a criminal case does or does not have a cross-border dimension until later in the proceedings (when some of the principles and guarantees would already be applicable).264

This approach was adopted in the EU legislation on criminal procedure. The legislation applies to cross-border as well as domestic cases. For instance, the Impact Assessment to the Directive on access to a lawyer265 states that Article 82.2 provides a legal basis for legislation applicable to cross-border as well as domestic cases ‘as precise, ex ante categorisation of criminal proceedings as cross-border or domestic is impossible in relation to a significant number of cases’.266

This difficulty in categorisation is not as eminent in civil proceedings, where normally at the time the case is brought before a court with jurisdiction the identities of the parties, the matter in dispute and the evidence are known. It is nevertheless possible to imagine a situation where one of the parties moves to another Member State after the proceedings are commenced, or a situation where it becomes clear during the proceedings that a document, another piece of evidence, or a witness, are located in another Member State. Further, judicial decisions, judicial

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261 See below for the elaboration of the legal basis of the EU procedural laws. See also: X. Kramer, ‘A major step’, at p. 265.
262 Ibid, at pp. 206-207.
266 Ibid. COM (2011) 326 final, at p. 23.
settlements and authentic instruments, once final, may need to be enforced in another Member State because this is where the defendant or the claimant moved to. This cross-border enforcement may not have been contemplated from the outset, and the case would have proceeded using the rules of domestic civil procedure.

An example of anomalies the narrow understanding of ‘cross-border implications’ can lead to is a complaint to the European Commission noted in the Technical Specifications document to the ‘Evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law’ mentioned above. The complaint was made recently with respect to Article 19 of the Regulation on Service of Documents by German citizens living in Portugal ‘who had not been able to defend themselves in proceedings instituted against them in Germany following a lack of service of the document instituting proceedings on them. The procedural safeguards of the right of defence set out in Article 19 of the Service Regulation could not be applied in the case at hand because the precondition for its application as defined by national law (‘the writ of summons had to be served from one Member State to another’) was initially not fulfilled. This led to a situation under national law where by the time the defendants were informed about the substance of the claim, they were prevented from any remedy ensured by EU law to object on the merits even though they had made use of the right to free movement enshrined in the EU’s treaties.’

Further, there are other reasons for the legislative power of the EU to be extended to domestic cases. The Impact Assessment to the Directive on access to a lawyer is instructive here, and the views it presents have relevance in the area of civil justice as well. It is argued that in order for the two main objectives of the Directive to have a chance of being fulfilled, the standards must be applicable to domestic as well as cross-border proceedings. These objectives are: to improve judicial cooperation in the EU by enhancing mutual trust between Member States in the fair operation of the criminal justice systems by ensuring a high level of protection of fundamental rights, and to ensure an adequate level of protection of fundamental rights in criminal proceedings for all individuals irrespective of their nationality; to contribute to fostering free movement of citizens of the EU; to promote EU values. These objectives are no doubt also relevant in the context of adopting a set of common standards in civil procedure. It is important for the general level of mutual trust between judicial authorities, and effective enforcement of decisions, for domestic procedures to be following procedural principles and standard as robust in ensuring fairness as the principles and standards applicable to cross-border cases.

There are potential concerns this proposal to extend the application of the legislative mandate of the EU in the area of civil procedure leads to. The limitation to cross-border matters has been linked to the principle of subsidiarity, and as such it can be seen as an expression of the general constitutional framework for EU legislative action. Further, similarities between civil and criminal procedure may not be as significant when the actual content of procedural rules and features of the procedural systems are considered. It may well be, albeit this proposition has not been tested, that differences between the Member States’ civil procedure rules, systems and infrastructure are more significant than the rules, systems and infrastructure in criminal procedure. Thus, the extension of the scope of civil procedure legislation of the EU onto domestic procedures may involve a much more significant adjustment, reforms, and related costs. Further, by advocating an extension of the legislative mandate of the EU in the area of civil procedure this Report goes against what seems to remain the consensus among Member States.

However, in the matter of common minimum standards, it should be submitted that adoption of a set of standards only for cross-border cases creates further problems, as indicated by some

267 The Evaluation, at p. 7.
268 Ibid. COM (2011) 326 final, at p. 25.
respondents to our Survey. By introducing a parallel system of principles, it creates two systems, two sets of procedures, and ultimately two categories of litigants.
2.2.5 The legal form

A further issue to be resolved when a binding measure is contemplated is its legal form. This Report does not make a recommendation concerning this legal form, but below are a number of points to consider. Article 81 refers to ‘measures’ to be adopted in the area of judicial cooperation in civil matters. Thus, the actual legal form of the measure is not pre-determined.

Decision on the legal form of a binding instrument is closely linked to its contents: specifically to the question whether only general principles or also some more detailed rules would be included, and also whether and to what extent differences in national application and implementation of the regulated standards are acceptable considering the aims of the measure.

While a Regulation has general application and leaves no flexibility to the Member States, its scope may need to be more limited: it may need to contain only general principles. A Regulation may well be a ‘blunt instrument, which compensates its ‘one size fits all (domestic systems)’ mechanism by a possibly convoluted limitation of scope and application’.270 Thus, in line with the current tendency in procedural law of the EU for Regulations to contain optional mechanisms applicable alongside national procedures, the measure may be more detailed. However, the latter option may bring further difficulties in the context of common standards in civil procedure, as it entails duplication of standards. This Report argues for avoiding such duplication. In spite of its limitations the form of a Regulation has clear advantages: the most significant being timeliness and immediacy of effects.

A Directive, on the other hand, requires national implementation and thus inclusion of general standards as well as more detailed rules would be less problematic. Each Member State would be able to fit these rules in with their procedural systems. The final proposal of the Storme Working Group entailed adoption of a Directive.271 While this was the only available option in the area of civil procedure at the time, it is possible that even today Professor Storme would not have revised the legislative form he proposed. His recommendations seem to have accepted that in many respects the way in which national rules give effect to the principles he suggested would differ.272 Thus, the consequence of adopting a Directive is the a priori acceptance of different approaches to implementation of the standards set in it. While such different approaches are not of course eliminated by the presence of Regulations (as demonstrated by the problems in practical application of the Regulations on aspects of civil procedures examined in this Report), their legal form seems to indicate that the purpose is to eliminate rather than retain them.

2.3 Conclusions:

Section 2 demonstrated some of the difficult issues to consider when determining the regulatory path concerning CMS. It examined the potential legal bases and their limitations, and proposed three options for action, noting their respective benefits and disadvantages. It highlighted the need to deal with the current interpretation of the legislative power of the EU in the area of civil procedure: it recommended a revision of the manner in which the EU interprets the notion ‘matters with cross-border implications’.

272This is the conclusion reached also by Crifo, ibid., at 368.
3. Added value of harmonisation

3.1. Added value and quantification

3.1.1 Introduction – the concept of ‘European added value’

When addressing the benefits of introducing a new EU legislative measure, the costs of not having the measure should be assessed as the first step. Our Study follows the methodology used in ‘Costs of Non-Europe’ Reports, specifically the Report on European Code on Private International Law referred to in Sections 1 and 2.\footnote{The European Parliament, Added Value Unit, ‘The European Code on Private International Law: Cost of Non-Europe Report’, 2013.} In seeking the potential benefits of the courses of action proposed here we were attempting to ascertain their ‘European added value’. This notion refers to the value ‘additional to the value created by actions of individual Member States’\footnote{http://ec.europa.eu/chafea/documents/health/hp-factsheets/added-value/factsheets-hp-av_en.pdf.} Such added value may be the sum of a variety of factors, for instance coordination gains, legal certainty, greater effectiveness, complementarities. The starting point for establishing the ‘European added value’ of a proposed course of action within a specific policy must be the objectives and desired results of the policy. A further step is the confrontation of the true position with these objectives (the Report dealt with this in Section 1).

In Section 2 of the Report we suggested three possible options for EU action. Each of these options involves, to a lesser or greater extent, introduction of a set of clear procedural standards applicable to civil proceedings. In fact, seen together they present a pathway towards what is effectively codification (in the understanding of establishment of a set of generally binding principles) of civil procedure standards across the EU. This codification would involve binding principles for domestic as well as cross-border cases. This is where we see the greatest advantages for the EU. Thus, while the examination of potential added value of introduction of CMS below applies, albeit to a somewhat different extent, to all three options, we see a gradation of benefits we identify with the greatest benefits produced by the codification in OPTION THREE. On the other hand, the costs would also grow with each following option, and the costs of OPTION THREE would be very significant indeed. The greatest burden would fall on the Parliament and the Commission. On the national level OPTION THREE would involve the most significant adjustment, reform and reorganisation. These costs are also examined below.

3.1.2 The objectives of the civil justice policy of the EU and the need for EU-level action

The aims of the policy of judicial cooperation in civil matters, set out in the EU justice programmes and reiterated in the Treaties, include establishment of the ‘genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own’.\footnote{http://ec.europa.eu/chafea/documents/health/hp-factsheets/added-value/factsheets-hp-av_en.pdf.} This objective, specifically tailored to the nature of civil justice, should be seen in the wider context of the aims of the EU internal market and its four freedoms, including freedom of movement of persons and freedom of establishment. The realisation of ‘the border free Europe’ is facilitated if consumers and businesses trust in the justice systems of other Member States. We believe that the options for action proposed in this Report are capable of enhancing this trust.

The consecutive EU action programmes (Tampere, The Hague, Stockholm) established the principle of mutual recognition as the cornerstone of the policy. Also the TFEU refers to mutual
recognition as the key aim of the policy of judicial cooperation in civil matters (Article 81.1). In essence the aim is freedom of movement of judgements from one Member State to another – what was referred to as the ‘fifth freedom’, and at the same time respect of fundamental rights of EU citizens and residents.\textsuperscript{276} At the basis of mutual recognition lies the need for mutual trust. With the elimination of *exequatur* by the recast of Brussels I Regulation and by a number of other legislative measures (the European Small Claims Regulation, the European Enforcement Order for Uncontested Claims, the European Order for Payment Procedure, the European Account Order Preservation Procedure), the issue of mutual trust becomes ever more pressing and requires common approach to the principles and standards of civil procedure. According to The Hague Programme, mutual trust can only be fully achieved by ‘the certainty that all European citizens have access to a judicial system meeting high standards of quality’.\textsuperscript{277}

The Member States of the EU, bound by the procedural standards introduced by EU law, and required to protect the fundamental right to effective remedy under the Charter of Fundamental Rights and the right to fair trial under the ECHR, have taken a variety of steps to satisfy these obligations. However, the existing divergences in national civil procedures, in the implementation, interpretation and application of the procedural standards contained in EU legislation, in the Charter and the ECHR are significant. The majority of the respondents to our Survey (56%) considered them an obstacle to cross-border trade, especially by increasing the costs. We submit that the full realisation of the aims of the policy of judicial cooperation indicated above with the emphasis on protection of fundamental rights of the litigants require an exercise in coordination, coherence and systematisation that goes beyond the borders, interests, and resources of one State. In the light of the key aims of the EU legal system, and the aims of the policy of judicial cooperation in civil matters, action at the EU level seems necessary.

### 3.1.3 The current status of the EU civil justice

In Section 1 of the Report we reviewed the current status, concluding that a citizen or a resident of an EU Member State wishing to commence litigation in another EU Member State will not be able to expect to approach courts and authorities in any Member State as easily as in their own. When involved in litigation, he or she still cannot expect the same procedural guarantees. When enforcing a judgement or settlement in another Member State, EU citizens and residents may also encounter difficulties (for instance related to the uncertainty over the meaning of the ‘public policy’ clause under Brussels I (Recast)).

Both the results of our Survey and other published papers demonstrate that the current position concerning the state of harmonisation of civil procedures in the EU, and the remaining differences in the principles and rules of civil procedure among Member States are perceived unsatisfactory. The European Commission’s DG Justice published the Special Eurobarometer Report 351 ‘Civil Justice’ in 2010. The key issues were, among others:

- ‘The role of the EU in cross-border civil justice,
- EU citizens’ experience of civil justice in other Member States and non-EU countries,
- EU citizens’ perceptions of difficulties in cross-border civil justice, and
- Awareness and experience of the EU’s cross-border legal procedures.’\textsuperscript{278}

The results were striking. First of all, less than 2% of respondents declared they were involved in civil or commercial proceedings with a person or company from another Member State or from a non-EU country. However, 9% expected to be involved in legal proceedings with a person or company from another Member State in future (8% expected to be involved in such

\textsuperscript{276}Crifo, ‘Civil Procedure in the European Order’, at p. 364.

\textsuperscript{277}Hague Programme, Document 16054/04 (JAI 559), 13 December 2004, at 3.2.

\textsuperscript{278}Special Eurobarometer 352, at p. 4.
proceedings in a non-EU country). Further, 56% (+1% in comparison with the December 2007 report) believed that access to civil justice in another Member State was ‘difficult’. Only 14% (3% less than in 2007) believed it was ‘easy’. About three quarters of respondents felt that ‘additional measures should be taken to improve access to civil justice in other Member States.’ 52% thought ‘these additional measures should be taken at EU level through common rules.’ 84% believed it was ‘important that the EU took additional measures to simplify the enforcement of court decisions between Member States.’

The main perceived worries for Europeans in starting legal action in another Member State are not knowing the applicable legislation (42%) or the appropriate procedures (38%). The potential cost (33%) and language barriers (30%) were the third and fourth concerns respectively. The main concerns of Europeans in enforcing decisions in another Member State are identifying which authorities to apply to in order to enforce the decision (48%) and potential language issues (40%). The potential cost (of enforcing the decision) was again the third concern among Europeans (35%).’ Awareness of the European cross-border procedures is relatively low: the awareness of cross-border legal aid (12%) is greater than that of the small claims procedure (8%) or the European Payment Order (6%). Personal experience of these procedures is marginal.279

3.1.4  ‘European added value’ – economic and political perspective

3.1.4.1. Economic perspectives. Quantification

In line with the current approach to the matter of ‘European added value’, we singled out economic and political perspectives of this added value. ‘Economic perspectives usually refer to the additional benefits that could be realised (…) including the attainment of economies of scale, tackling market failure and addressing externalities (both positive and negative). (…)political perspectives consider heterogeneous political preferences, the legitimacy of policy choices and the interest of European citizens.’280 The principles of subsidiarity and proportionality, examined in Section 2 of the Report, also come into play, as they delimit the scope and size of the EU activities in the areas where the EU has the power to act.

In the context of this report, economic perspectives throw light upon the costs and efficiency benefits of establishing the common procedural standards across the EU, the economic benefits of increased cross-border trade which may result from the greater level of mutual trust, and the economic benefits of a more uniform application of substantive laws of the EU. Thus, we consider the following forms of impact of the non-action on consumers and businesses, on society, on the operation of the internal market of the European Union, and on the general functioning of the European Union’s legal system:

- Costs to the operation and conduct of business (costly insurance coverage, the need for advice concerning civil litigation systems of other Member States)
- Administrative and legal costs of negotiating different procedural systems, different procedural standards and rules
- Social costs (including emotional costs of dealing with different procedural systems, uncertainty and insecurity)
- Wider costs for the European society: hindrance to free movement of persons and goods, hindrance to cross-border business and cross-border consuming
- Wider costs for the EU legal system: lack of uniformity in application of EU law, effet utile, lack of legal certainty and predictability of outcomes. This type of costs is also related to lack of what the EU civil justice policy is aiming to achieve: the general impression of a just system.

279 Special Eurobarometer 352, at p. 7.
281 See the elaboration of the criteria for maximising the European added value (in the context of climate change policy): http://www.ieep.eu/assets/888/IEEP_-_EU_value_added_and_climate_change_March_2012.pdf.
Focusing more specifically on quantification, this section addresses the research interest in the quantification of possible benefits of common minimum standards (CMS) of civil procedure or other harmonisation initiatives, or in other words, can harmonisation, e.g. in the form of CMS, be expected to bring about an economic benefit in terms of reduced cost of cross-border civil law litigation?

Indeed, the Technical Specifications note ‘The analysis should be performed on the basis of quantitative and qualitative research methods. If the available data exists, the added value should be expressed in terms of number (quantified). For example, the numerical estimate should be provided for the added value related to the decreased administrative burden or reduced litigation costs on the national level. The methodology for quantification must be transparent, explained in detail and justified. The methodology should clearly state the methods and data used to come up with the quantitative estimates as well as challenges and resulting limitation of the chosen approach’.

We first present the approach to the quantification of possible benefits deriving from harmonisation (section 3.1.4.1.1.), thus addressing the requirement for explaining and justifying the adopted methodology, and then proceed with the actual quantification exercise (section 3.1.4.1.2).

3.1.4.1.1 The approach to quantification

The approach consists of three steps:

(1) We first attempt to identify the volume of cross-border civil law litigation, e.g. how many claimants from an EU Member State seek justice in a civil law case in an EU Member State where they are not residing? This first question thus aims to identify the number of cross-border civil law cases in the European Union.

(2) We then turn to the question of the actual cost of going through civil law litigation in a different Member State, e.g. what does it cost to seek justice in a different Member State. Multiplying the number of cases (step 1) with the cost per case (step 2) aims to allow a first estimate of the cost of cross-border civil law litigation in the EU.

(3) We finally discuss the question of the possible cost reduction inherent in harmonisation initiatives (according to the Technical Specifications, the ‘reduced litigation costs on the national level’), i.e. by how much would the three different harmonisation options outlined above reduce the cost identified under the first two steps?

At this stage it is worth noting that the academic peer review of the draft final version of this report validated the approach to quantification, however, noted concerns with regard to the scope of the estimated cost reduction. In agreement with these concerns, mainly related to important data gaps, we recommended to consider the figures in this report as a very first attempt to quantify the cost reduction, and in the light of the important data gaps, recommend further research efforts on actual costs.

The following sections elaborate on the three steps noted above.

Step 1 - Quantifying the number of cross-border cases

The first question was addressed on the basis of a comprehensive literature review (including in-depth research in a series of Member States), interviews with relevant stakeholders and a survey, asking stakeholders to report the number of cross-border cases in their country.

Literature

Our literature review confirmed the absence of systematic data on the volume of cross-border cases in the EU.
Academic research frequently refers to the increasing volume of cross-border transactions and the resulting increase in cross-border claims and cases, however, generally, no quantification is provided. Other research acknowledges the data gaps; limits quantitative analysis to data for specific Member States (in Germany); or refers to European Commission research.

Research also notes that only a very small percentage of civil law cases relates to cross-border cases within the EU, and this is explained by uncertainties over engaging with a ‘foreign’ legal system and fears over limited enforceability.

In 2001, EC research on Brussels I and its Recast (Brussels Ia – now in force) noted difficulties with the quantification of cross-border civil law cases. ‘In most Member States, there is no systematic collection of statistical data on the application of the Regulation. It has been possible, however, to gather some data from central databases of the Ministries of Justice in certain Member States, direct contacts with the courts in the Member States, interviews with other stakeholders, commercial and academic databases, and publications in legal literature. A distinction must be made between the jurisdiction rules on the one hand and the rules on recognition and enforcement of judgments on the other hand. In general, the Regulation is mostly applied in economic centres and border regions. The jurisdiction rules generally apply in a relatively small number of cases, ranging from less than 1% of all civil cases to 16% in border regions (data for 2003-05). The rules on recognition and enforcement are more frequently applied but it has not been possible to obtain comprehensive data on the number of declarations of enforceability delivered by the courts. The numbers range from very low (e.g. 10 declarations in 2004 in Portugal) to higher (e.g. 420 declarations in 2004 in Luxembourg) with again a peak in border regions (e.g. 301 declarations in the courts of the Landgericht Traunstein in Germany, located near the Austrian border).’

In 2007, EC research on the costs of civil judicial proceedings referred to the rising number of cross-border disputes within the EU. However, again there is no systematic quantification of cross-border disputes. It is also worth noting that the number of cross-border disputes is considered only a proxy; the study considers that there is a large number of citizens / businesses not exercising their rights in the first place because of the lack of transparency and costs.

More recently, EC research on the European Small Claims Regulation comprised a quantification. On the basis of Eurostat and Eurobarometer data, a series of estimates were prepared, differentiating between consumers and enterprises (see Table 4 below). Existing European Parliament research also refers to this data.

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282See for example, Hess, B. (2010) Europäisches Zivilprozessrecht
283See for example, Adolphsen, J. (2015) Europäisches Zivilverfahrensrecht
284See for example, Adolphsen, J. (2015) Europäisches Zivilverfahrensrecht
Table 4 - Volume of cross-border litigation per year

<table>
<thead>
<tr>
<th></th>
<th>Consumers</th>
<th>Enterprises</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of problematic cross-border transactions</td>
<td>18.6 million</td>
<td>1.2 million</td>
</tr>
<tr>
<td>Number of cases concerning claims up to EUR 15,000</td>
<td>678,000</td>
<td>293,300</td>
</tr>
</tbody>
</table>

Source: European Commission (2013)

Moreover, some quantification exists with regard to the European Orders for Payment. The EC indicates that between 12,000 and 13,000 applications for European Orders for Payment are received by the courts of the Member States per year. 'The highest numbers of applications (more than 4,000 annually) are in Austria and Germany where also most European orders for payment are issued. Between 300 and 700 applications are received annually in Belgium, the Czech Republic, France, Hungary, the Netherlands, Portugal and Finland. In the other Member States, the procedure has been taken up to a more limited extent'.

The following table shows data for all Member States, except Denmark (not applicable), Latvia, Romania and Italy (in Italy, there are no separate statistics for European Orders for Payment).

Figure 1 – Data on the number of applications related to the European order for payment procedure in 2013

Finally, it is worth noting that in recognition of the data gaps, the European Commission has recently launched a research assignment, looking inter alia at quantitative data to support the case for possible CMS.

The literature review was complemented by in-depth research focusing on a selection of Member States. This comprised a review of existing statistical data collected by the relevant Member State authorities, e.g. ministries, statistical authorities, court administrations etc. The following bullets present the main findings:

- **Austria**: There is no statistical data on cross-border cases. Notwithstanding, an exchange with stakeholders in Austria facilitated relevant data on cases with a ‘foreign element’, however, the data failed to differentiate between cross-border cases affecting the EU Member States or third countries; moreover, the available data go beyond our definition of a cross-border case since they include all cases involving a foreign witness (i.e. cases with all parties residing in the same Member State, but involving a foreign witness).

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290All data refer to 2012, except for the following Member States that include data for 2013: Czech Republic, Cyprus, Luxembourg, Finland, Slovakia, Sweden, Hungary and the United Kingdom.

291Idem. Annex Statistical data on the use of the European order for payment procedure


293https://www.justiz.gv.at/web2013/html/default/8ab4a8a422985dc30122a92f257563a2.de.html
• **Belgium:** There is no statistical data on cross-border cases. There is statistical data by year on the nature of cases and the various outputs produced by the judicial system on the website of the federal public service, however, there is no differentiated data for cross-border cases.\(^{294}\) There is no statistical data on civil justice on the website of the national institute for statistics (Statbel).\(^{295}\)

• **France:** There is no statistical data on cross-border cases. The website of the Ministry of Justice provides some detailed statistics on civil justice until 2014,\(^{296}\) without any reference to cross-border cases. The national economic studies and statistics institute (INSEE) collects data on civil procedure, however, again there is no specific consideration of cross-border cases.\(^{297}\) An exchange with stakeholders in facilitated an estimate of some 10,000 cross-border cases per year.

• **Germany:** Statistical data differentiating by the claimant’s residence is available for ‘general’ civil law courts,\(^{298}\) but not for family law courts.\(^{299}\) For the year 2014, this reports a total of 18,573 claimants residing in different EU Member States (excluding Germany) seeking justice in German civil law courts (see table below).

• **Ireland:** The Courts Service of Ireland does not collect statistical data on cross-border cases, e.g. number of claimants from an EU Member State (excl. Ireland) seeking justice in Ireland.\(^{300}\) Note that there have been some 120 European Payment Order applications in 2014. Moreover, the 2014 Annual Report provides statistics on ‘Foreign proceedings’, with the following numbers:\(^{301}\) Service of documents: High Court, 85 incoming and 83 outgoing; Circuit Court, 2,755 incoming and 456 outgoing. Maintenance (foreign) High Court, 187 incoming and 58 outgoing; District Court, 65 incoming and 33 outgoing. Other District Court taking of evidence, 107 incoming.

• **Italy:** There is no statistical data on cross-border cases.\(^{302}\) The website of the Ministry of Justice includes some statistics on Civil Procedures (2009-2012)\(^{303}\) and on ‘civil mediations’\(^{304}\) (until June 2015) without any references to cross-border cases. The review of the last three annual reports of the Ministry of Justice did not reveal any quantitative data on cross-border cases. Finally, the National Institute for Statistics (Istat) collected data on civil procedures from 2008 to 2013,\(^{305}\) however, again there is no data on cross-border cases.

• **Luxembourg:** There is no statistical data on civil law cross-border cases. The annual report of activities 2014 includes some statistics on the nationality of prisoners and inquirers of the information service (service d’accueil et d’information judiciaire).\(^{306}\) It also includes statistics on the nationality of complainants in administrative courts,\(^{307}\) however,

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\(^{294}\) Statistiques, Service Public Fédéral Justice: http://justice.belgium.be/fr/information/statistiques
\(^{296}\) Tableaux de l’annuaire statistique, Ministère de la Justice: http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/tableaux-de-annuaire-statistique-27054.html
\(^{298}\) Statistisches Bundesamt (2014) Rechtspflege, Zivilgerichte, 2014. Data differentiates by type of subject matter, with commercial law cases accounting for 12.9% of the total number of resolved cases at the level of the ‘Amtsgericht’, and about 9.6% at the ‘Langericht, First Instance’.
\(^{300}\) Note that there have been some 120 European Payment Order applications in 2014. Moreover, the 2014 Annual Report provides statistics on ‘Foreign proceedings’, with the following numbers:
\(^{301}\) Service of documents: High Court, 85 incoming and 83 outgoing; Circuit Court, 2,755 incoming and 456 outgoing. Maintenance (foreign) High Court, 187 incoming and 58 outgoing; District Court, 65 incoming and 33 outgoing. Other District Court taking of evidence, 107 incoming.
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\(^{304}\) There is no statistical data on civil justice on the website of the national institute for statistics (Istat) - Tableaux de l’annuaire statistique, Ministère de la Justice: http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/tableaux-de-annuaire-statistique-27054.html
\(^{305}\) There is no statistical data on cross-border cases. The review of the last three annual reports of the Ministry of Justice did not reveal any quantitative data on cross-border cases. Finally, the National Institute for Statistics (Istat) collected data on civil procedures from 2008 to 2013, however, again there is no data on cross-border cases.
\(^{306}\) There is no statistical data on civil law cross-border cases. The annual report of activities 2014 includes some statistics on the nationality of prisoners and inquirers of the information service (service d’accueil et d’information judiciaire).
\(^{307}\) It also includes statistics on the nationality of complainants in administrative courts, however,
there is no systematic data available on cross border cases in civil justice. There is no cross-border justice data on the national statistics institute website.308

- **The Netherlands**: The Central Bureau for Statistics (Centraal Bureau voor de Statistiek- CBS) publishes data on civil law cases in the Netherlands.309 This data provides information on, *inter alia*, the amount of cases per year, types of cases, and assigned courts.310 There is no information on the cases that involved citizens from other (EU) countries. An information request made on 8 February 2016 also confirmed that this information is not available to the Central Bureau for Statistics. The Judiciary’s annual report for 2014 sheds more light on civil court cases in the Netherlands.311 It notes that in 2014, the amount of cases initiated decreased with 5% to a total of 295,000.312 A slight decrease in family cases was noted (4%) to around 184,000. A steeper decrease comes from business cases (8% to 90,100) which is attributed to slow economic recovery. A review of the annual reports 2011-2014 shows no information on cases involving citizens from other (EU) countries.

- **Spain**: No statistical data is available for cross-border cases.313 The annual panorama on justice 2014 provides information on the number or European Order for Payment Procedure (total of 1,355 cases in 2014 in Spain).314 The annual report 2015 of the Ministry of Justice,315 only refers to the number of cases received by jurisdiction. In 2014, the civil jurisdiction received 1,845,173 cases, 10.5% more than those received in 2013. According to Global Legal Insights, in 2012 Spanish courts addressed almost 2,000 requests for judicial support within the EU framework.316

- **Sweden**: Sweden’s Court Administration issues annual civil law statistics, however, this does not provide data on cross-border cases.317

- **UK**: Ministry of Justice statistics comprise quarterly statistics bulletins.318 A review of the latest bulletin shows that there are no statistics on ‘cross-border cases’.319


312 p. 38

313 [http://www.ine.es/inebmenu/mnu_justicia.htm](http://www.ine.es/inebmenu/mnu_justicia.htm)


317 [http://www.domstol.se/Ladda-nir--bestall/Statistik/](http://www.domstol.se/Ladda-nir--bestall/Statistik/)

### Table 5 - Civil law cases in Germany in 2014

<table>
<thead>
<tr>
<th></th>
<th>Number of resolved cases</th>
<th>Number of claimants</th>
<th>Number of claimants based in EU (excluding DE)</th>
<th>Claimant (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>DE</td>
</tr>
<tr>
<td>Amtsgericht</td>
<td>1,107,215</td>
<td>1,107,648</td>
<td>11,076</td>
<td>98.6</td>
</tr>
<tr>
<td>(local court, lowest level of ‘ordinary’ jurisdiction in civil judicial matters)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Landgericht First Instance</td>
<td>334,499</td>
<td>334,948</td>
<td>6,364</td>
<td>97</td>
</tr>
<tr>
<td>(regional court)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Landgericht Second Instance</td>
<td>55,386</td>
<td>55,437</td>
<td>333</td>
<td>99.1</td>
</tr>
<tr>
<td>Oberlandesgericht</td>
<td>49,790</td>
<td>50,010</td>
<td>800</td>
<td>97.3</td>
</tr>
<tr>
<td>(highest regional court)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total 2014</td>
<td>1,546,890</td>
<td>1,548,043</td>
<td><strong>18,573</strong></td>
<td>1.2</td>
</tr>
</tbody>
</table>

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Interviews and survey feedback

With four notable exceptions (Austria, Finland, France and Germany), interviews and survey feedback confirmed the absence of systematic data on cross-border civil law litigation.

Interviews confirmed the absence of data. For two Member States (Austria and France), stakeholder feedback offered an estimate based on personal experience.

Turning to the survey, the survey asked respondents to indicate the approximate number of cross-border cases, differentiating between consumers and enterprises. In total the survey received 33 responses. Looking at the question on the number of cross-border cases, 22 respondents choose to skip the question, eight respondents answered ‘don’t know’ and three respondents offered an estimate. The three estimates include for Austria ‘up to 1,000 cases per year brought by consumers’ and ‘between 1,001 and 5,000 cases brought by enterprises’; and for Finland ‘up to 1,000 cases per year’ (without differentiating between consumers and enterprises).

Moreover, one respondent (Researcher, The Netherlands) offered additional feedback: ‘Such approximations are difficult to make in view of the type of statistics that are collected and made available by the Ministries of Justice and/or Judiciary bodies. I am conducting research in various Member States and rarely (if virtually never) have I encountered differences in Annual Statistics that distinguish between purely internal claims and cross-border claims made by using a specific national procedure. An additional point is that it is very difficult to calculate to what extent a specific national procedural rule or a set of national procedural rules is increasing the costs of cross-border trade or is regarded as an obstacle/barrier to develop trade relationships. I have some doubts that this is an element extensively and consciously used for deciding a priori on the costs of cross-border trade. Maybe only when it is expected that the national procedural system towards which the trade is directed is expected to perform very poorly.’

A further respondent (Judge, Italy), whilst having answered ‘don’t know’ notes an estimate for Trieste: ‘In my experience there are more than 50 cross-border civil law claims per year’.

Step 2 - The cost of cross-border civil procedure

This section reviews data availability concerning the cost of cross-border civil procedure. To date, the most comprehensive research project on the costs of civil judicial proceedings was commissioned by the EC (2007).321

This study considered access to justice to be affected by a series of constraints, including a lack of transparency in the costs of civil judicial proceedings.

The study noted serious deficiencies with regard to the availability and quality of statistical data on costs of civil procedure in many Member States. The study aimed to

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collect, inter alia, information on the cost of civil procedure in EU27, and on the number of cross-border cases.

The study’s insights into costs can only be considered rough approximations, since there are many variables (existence of different cost elements) that differ between countries and within countries; moreover, costs depend on the scope and stage of the proceedings. It is also noted that calculations focus on the costs to the parties, but do not consider the costs of the justice system (e.g. salaries of judges, construction / maintenance of court houses). The report’s cost estimates are based on ‘meticulous and arduous work spread over nearly nine months and that required from national experts to contact members of all legal professions’.

On the basis of case study work in EU27, the study identified costs of civil procedure for ‘typical cases’ in the areas of family law (divorce) and commercial law (disputed delivery of goods worth EUR 20,000) in a cross-border context (see table below).

Table 6 - cost of civil procedure (extract from pages 287 and 291)

<table>
<thead>
<tr>
<th>Member State</th>
<th>Total of the costs of justice (1st degree, including costs of proceedings, appeal, lawyer, bailiff)</th>
<th>Commercial law (EUR 20,000)</th>
<th>law (EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family law</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AT</td>
<td>2,259.74</td>
<td>9,477.42</td>
<td></td>
</tr>
<tr>
<td>BE</td>
<td>1,552.00</td>
<td>2,455.00</td>
<td></td>
</tr>
<tr>
<td>BG</td>
<td>100</td>
<td>2,773.25</td>
<td></td>
</tr>
<tr>
<td>CY</td>
<td>3,972</td>
<td>3,972.00</td>
<td></td>
</tr>
<tr>
<td>CZ</td>
<td>410</td>
<td>3,634.00</td>
<td></td>
</tr>
<tr>
<td>DE</td>
<td>638</td>
<td>1,806.80</td>
<td></td>
</tr>
<tr>
<td>DK</td>
<td>1,589</td>
<td>3,209</td>
<td></td>
</tr>
<tr>
<td>EE</td>
<td>5,272.60</td>
<td>6,841</td>
<td></td>
</tr>
<tr>
<td>ES</td>
<td>1,650</td>
<td>4,200</td>
<td></td>
</tr>
<tr>
<td>FI</td>
<td>1,201</td>
<td>6,582</td>
<td></td>
</tr>
<tr>
<td>FR</td>
<td>1,085</td>
<td>5,130</td>
<td></td>
</tr>
<tr>
<td>GR</td>
<td>1,511.50</td>
<td>2,512.96</td>
<td></td>
</tr>
<tr>
<td>HR</td>
<td>Not covered by the study</td>
<td>Not covered by the study</td>
<td></td>
</tr>
<tr>
<td>HU</td>
<td>448</td>
<td>3,000</td>
<td></td>
</tr>
<tr>
<td>IE</td>
<td>3,025</td>
<td>4,170</td>
<td></td>
</tr>
<tr>
<td>IT</td>
<td>4,000</td>
<td>6,328</td>
<td></td>
</tr>
<tr>
<td>LT</td>
<td>1,057.92</td>
<td>2,928.96</td>
<td></td>
</tr>
<tr>
<td>LU</td>
<td>2,650</td>
<td>4,050</td>
<td></td>
</tr>
</tbody>
</table>
More recently, a European Parliament research assignment reported the costs of civil law litigation, this time looking at a domestic dispute worth some EUR 200,000.\textsuperscript{322} The findings are shown in the table below.

\textbf{Table 7 - cost of civil procedure (domestic dispute worth EUR 200,000)}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Cost in EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>14,660</td>
</tr>
<tr>
<td>BE</td>
<td>16,000</td>
</tr>
<tr>
<td>BG</td>
<td>17,885</td>
</tr>
<tr>
<td>CY</td>
<td>6,796</td>
</tr>
<tr>
<td>CZ</td>
<td>21,004</td>
</tr>
<tr>
<td>DE</td>
<td>9,854</td>
</tr>
<tr>
<td>DK</td>
<td>46,600</td>
</tr>
<tr>
<td>EE</td>
<td>45,337</td>
</tr>
<tr>
<td>ES</td>
<td>30,000</td>
</tr>
<tr>
<td>FI</td>
<td>17,046</td>
</tr>
<tr>
<td>FR</td>
<td>20,500</td>
</tr>
<tr>
<td>GR</td>
<td>14,700</td>
</tr>
<tr>
<td>HR</td>
<td>Not available</td>
</tr>
</tbody>
</table>

\textsuperscript{322}ADR CENTER (2010), The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation, p. 49
Closing this section, it is worth noting that all the above data refers to the costs of general civil law litigation; however, no systematic data was identified for the costs of cross-border civil law litigation. Interviewees confirmed the absence of any systematic data on the cost of cross-border civil law litigation. Notwithstanding the absence of statistical data, interviewees confirmed that the cross-border ‘quality’ of a civil procedure case can be expected to multiply the cost by an estimated two- to three times. The most important cost factors noted include the cost of lawyers, with lawyers specialised in cross-border cases considered more expensive, and translation costs.

**Step 3 - Applying a cost reduction resulting from common minimum standards**

Finally, this section discusses a possible cost reduction inherent in pursuing further harmonisation, according to the Technical Specifications, the ‘*reduced litigation costs on the national level*’.

Stakeholder feedback clearly suggests that harmonisation has the potential to reduce costs of cross-border litigation, mainly in terms of reduced efforts of claimants and their lawyers to familiarise themselves with a different country’s civil law procedure (in addition there are savings in terms of translation costs).

Notwithstanding, interviewees found it very difficult to estimate the scale of this cost reduction, and this was mainly explained with data gaps, uncertainties over the actual content and coverage of the CMS, and whether CMS would take the form of recommendations or be binding. Despite these uncertainties, some of the practitioners
consulted (lawyers, judges dealing with cross-border cases) volunteered an estimate, considering it reasonable to expect a cost reduction in the range of 5 to 15% of total procedure costs, depending on the harmonisation option finally pursued. It is worth noting that the academic peer review of the draft final version of this report noted concerns with regard to the estimate: doubting ‘that by adopting CMS alone the cost of either national or cross-border claims would be reduced by much, and certainly not by the 5% to 15% figures claimed there’. It is therefore recommended to consider the figures in this report as a very first attempt to quantify the cost reduction, and in the light of the important data gaps, further research efforts on actual costs are recommended.

3.1.4.1.2. Quantification
Section 3.1.4.1.1 has noted a series of data gaps relevant to all elements of a possible calculation. Indeed, systematic statistical data on the number of cross-border cases in the European Union does not exist; the exact cost of cross-border civil procedure litigation is not known; and there are uncertainties surrounding the possible cost reduction deriving from CMS, since the scale of the reduction depends on the coverage / content of the CMS and their nature (recommendations / binding).

Notwithstanding these important caveats, this section comprises a series of calculations, aiming to give the reader a tentative approximation of the costs of cross-border civil law litigation and possible savings deriving from CMS.

The number of cross-border cases
Taking the first element, namely the number of cross-border cases, our calculations take the form of an extrapolation based on the data available for Germany, i.e. the above noted total of 18,573 claimants residing in different EU Member States (excluding Germany) seeking justice in German civil law courts in 2014 (excluding family law), and assuming a relation between the number of cross-border cases handled in a country (in this case Germany) and the country’s intra-EU trade performance (share of intra-EU28 exports in 2014).

The caveats are clear; whilst it is not unreasonable to assume a relation between the number of cross-border cases and trade performance, there are likely to be many other factors influencing the volume of cross-border cases. Several interviewees discussed language barriers, and suggested that certain countries might experience a higher volume of cross-border litigation because of language similarities or because or easier ‘access’ to the language, e.g. English, French, etc.

The results of the extrapolation are shown below. It is worth noting that the extrapolations find themselves largely validated by survey / interview feedback on the number of cross-border cases for Austria, Finland and France.323

In total, the calculation establishes the figure of 83,222 cross-border civil law cases for the European Union (excluding family law).

323The estimate for France of some 10,000 cross-border cases per year is higher than the figure produced by the extrapolation exercise of some 7,500 cases for France. Notwithstanding, the extrapolation only excludes family law cases, and the somewhat higher estimate for France covers all civil law cross-border cases, including family law cases.
Note, that when conducting the extrapolation using population data (EUROSTAT, 2015) instead of exports, the total number of cross-border cases is 116,277.

Table 8 – Extrapolation – volume of cross-border civil law cases in 2014 (excluding family law, using export data)\textsuperscript{324}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of cross-border cases</th>
<th>Share of exports (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>2653</td>
<td>3,2</td>
</tr>
<tr>
<td>BE</td>
<td>7131</td>
<td>8,6</td>
</tr>
<tr>
<td>BG</td>
<td>415</td>
<td>0,5</td>
</tr>
<tr>
<td>CY</td>
<td>25</td>
<td>0,03</td>
</tr>
<tr>
<td>CZ</td>
<td>3068</td>
<td>3,7</td>
</tr>
<tr>
<td>DE</td>
<td>18573</td>
<td>22,4</td>
</tr>
<tr>
<td>DK</td>
<td>1492</td>
<td>1,8</td>
</tr>
<tr>
<td>EE</td>
<td>249</td>
<td>0,3</td>
</tr>
<tr>
<td>ES</td>
<td>4395</td>
<td>5,3</td>
</tr>
<tr>
<td>FI</td>
<td>912</td>
<td>1,1</td>
</tr>
<tr>
<td>FR</td>
<td>7462</td>
<td>9</td>
</tr>
<tr>
<td>GR</td>
<td>332</td>
<td>0,4</td>
</tr>
<tr>
<td>HR</td>
<td>166</td>
<td>0,2</td>
</tr>
<tr>
<td>HU</td>
<td>1907</td>
<td>2,3</td>
</tr>
<tr>
<td>IE</td>
<td>1410</td>
<td>1,7</td>
</tr>
<tr>
<td>IT</td>
<td>6136</td>
<td>7,4</td>
</tr>
<tr>
<td>LT</td>
<td>415</td>
<td>0,5</td>
</tr>
<tr>
<td>LU</td>
<td>332</td>
<td>0,4</td>
</tr>
<tr>
<td>LV</td>
<td>249</td>
<td>0,3</td>
</tr>
<tr>
<td>MT</td>
<td>33</td>
<td>0,04</td>
</tr>
<tr>
<td>NL</td>
<td>10862</td>
<td>13,1</td>
</tr>
<tr>
<td>PL</td>
<td>3565</td>
<td>4,3</td>
</tr>
<tr>
<td>PT</td>
<td>995</td>
<td>1,2</td>
</tr>
<tr>
<td>RO</td>
<td>1078</td>
<td>1,3</td>
</tr>
<tr>
<td>SE</td>
<td>2073</td>
<td>2,5</td>
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<td>SI</td>
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</tr>
<tr>
<td>SK</td>
<td>1575</td>
<td>1,9</td>
</tr>
<tr>
<td>UK</td>
<td>5141</td>
<td>6,2</td>
</tr>
<tr>
<td>EU</td>
<td>83222</td>
<td>100</td>
</tr>
</tbody>
</table>

The cost of cross-border litigation

\textsuperscript{324}Source for export data: Eurostat (2014) http://ec.europa.eu/eurostat/data/database
Turning to the second element of the calculation, we now aim to establish the cost of cross-border civil law litigation by multiplying the number of cases with the cost per case, differentiating between two scenarios, a first scenario of a civil law case worth EUR 20,000, and a second scenario with a case valued at EUR 200,000.

For the EUR 20,000 scenario, the total cost for the European Union amounts to some EUR 370 million (excluding Croatia and Romania, data on costs not available); for the EUR 200,000 scenario, the total cost amounts to nearly EUR 2.1 billion (excluding Croatia, data not available).

Again, using population data instead of export data as the basis for extrapolation, the total cost for the European Union for the EUR 20,000 scenario amounts to some EUR 511 million (excluding Croatia and Romania); for the EUR 200,000 scenario, the total cost amounts to nearly EUR 3.1 billion (excluding Croatia).

<table>
<thead>
<tr>
<th>Country</th>
<th>EUR 20,000 scenario</th>
<th>EUR 200,000 scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>25146303</td>
<td>38897169</td>
</tr>
<tr>
<td>BE</td>
<td>17505882</td>
<td>114091286</td>
</tr>
<tr>
<td>BG</td>
<td>1149723</td>
<td>7414690</td>
</tr>
<tr>
<td>CY</td>
<td>98802</td>
<td>169047</td>
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<tr>
<td>CZ</td>
<td>11148609</td>
<td>64437365</td>
</tr>
<tr>
<td>DE</td>
<td>33557696</td>
<td>183018342</td>
</tr>
<tr>
<td>DK</td>
<td>4789347</td>
<td>69549252</td>
</tr>
<tr>
<td>EE</td>
<td>1701668</td>
<td>11277376</td>
</tr>
<tr>
<td>ES</td>
<td>18456919</td>
<td>131835134</td>
</tr>
<tr>
<td>FI</td>
<td>6003225</td>
<td>15547093</td>
</tr>
<tr>
<td>FR</td>
<td>38281938</td>
<td>152978504</td>
</tr>
<tr>
<td>GR</td>
<td>833450</td>
<td>4875413</td>
</tr>
<tr>
<td>HR</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>HU</td>
<td>5721147</td>
<td>21572540</td>
</tr>
<tr>
<td>IE</td>
<td>5877857</td>
<td>75834222</td>
</tr>
<tr>
<td>IT</td>
<td>38826857</td>
<td>119812267</td>
</tr>
<tr>
<td>LT</td>
<td>1214276</td>
<td>8876070</td>
</tr>
<tr>
<td>LU</td>
<td>1343226</td>
<td>5140741</td>
</tr>
<tr>
<td>LV</td>
<td>765761</td>
<td>1716344</td>
</tr>
<tr>
<td>MT</td>
<td>55984</td>
<td>268645</td>
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<td>NL</td>
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<td>347580429</td>
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<td>PL</td>
<td>17491620</td>
<td>167571576</td>
</tr>
<tr>
<td>PT</td>
<td>3326723</td>
<td>11370656</td>
</tr>
</tbody>
</table>
However, Table 9 fails to consider the additional cost of civil procedure related to the cross-border ‘quality’ of the case. Considering stakeholder feedback, the following table shows the costs when multiplying the cost of litigation with a ‘cross-border’ factor of 2.5 (feedback suggested that a cross-border case is two to three times as expensive as a regular domestic case), again for the two scenarios (EUR 20,000 / EUR 200,000).

For the EUR 20,000 scenario, the total cost for the European Union amounts to some EUR 924 million (excluding Croatia and Romania); for the EUR 200,000 scenario, the total cost amounts to nearly EUR 5.2 billion (excluding Croatia).

Using population data instead of export data as the basis for extrapolation, the total cost for the European Union for the EUR 20,000 scenario amounts to some EUR 1.3 billion (excluding Croatia and Romania); for the EUR 200,000 scenario, the total cost amounts to around EUR 7.7 billion (excluding Croatia).

<table>
<thead>
<tr>
<th>Country</th>
<th>Pop.</th>
<th>Cost (EUR 20,000)</th>
<th>Cost (EUR 200,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>RO</td>
<td>0</td>
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<td>5488985</td>
<td>136208910</td>
<td></td>
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<tr>
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<td>4699549</td>
<td></td>
</tr>
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<td>9767408</td>
<td>81909169</td>
<td></td>
</tr>
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<td>33342847</td>
<td>264933232</td>
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<tr>
<td>EU</td>
<td>369772184</td>
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<td></td>
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</tbody>
</table>
Table 10 - Total cost of civil law cross-border litigation (considering the cross-border quality, using export data)

<table>
<thead>
<tr>
<th>Country</th>
<th>EUR 20,000 scenario</th>
<th>EUR 200,000 scenario</th>
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</thead>
<tbody>
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<td>AT</td>
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<td>18536725</td>
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<td>FI</td>
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<tr>
<td>HR</td>
<td>0</td>
<td>0</td>
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<tr>
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<tr>
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</tr>
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<td>IT</td>
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<tr>
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<td>868951071</td>
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<td>418928940</td>
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<td>83357116</td>
<td>662333080</td>
</tr>
<tr>
<td>EU</td>
<td><strong>924430459</strong></td>
<td><strong>5156278298</strong></td>
</tr>
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</table>
The CMS reduction

Finally, coming to the possible reduction inherent in the introduction of CMR, the following table shows different scenarios, based on the three options outlined in section 3.2, and thus applying a related reduction of 5% (option 1), 10% (option 2) and 15% (option 3) to the two scenarios (EUR 20,000 / EUR 200,000).

For the EUR 20,000 scenario, the total cost reduction for the European Union ranges from EUR 46 million (5%) to EUR 139 million (15%) (excluding Croatia and Romania); for the EUR 200,000 scenario, the total cost reduction for the European Union ranges from EUR 258 million (5%) to EUR 773 million (15%) (excluding Croatia).

Using population data instead of export data as the basis for extrapolation, for the EUR 20,000 scenario, the total cost reduction for the European Union ranges from EUR 64 million (5%) to EUR 192 million (15%) (excluding Croatia and Romania); for the EUR 200,000 scenario, the total cost reduction for EU 28 ranges from EUR 387 million (5%) to EUR 1.2 billion (15%) (excluding Croatia).

As noted above it is important to underline that the academic peer review of the draft final version of this report noted doubts concerning the estimates: ‘that by adopting CMS alone the cost of either national or cross-border claims would be reduced by much, and certainly not by the 5% to 15% figures claimed there’. It is therefore recommended to consider the figures in this report as a very first attempt to quantify the cost reduction, and in the light of the important data gaps, further research efforts on actual costs are recommended.
## Table 11 - Cost reduction (using export data)

<table>
<thead>
<tr>
<th></th>
<th>Option 1 - reduction of 5%</th>
<th>Option 2 - reduction of 10%</th>
<th>Option 3 - reduction of 15%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EUR 20,000 scenario</td>
<td>EUR 200,000 scenario</td>
<td>EUR 20,000 scenario</td>
</tr>
<tr>
<td>AT</td>
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<td>4862146</td>
<td>6286576</td>
</tr>
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<td>14261411</td>
<td>4376470</td>
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<td>BG</td>
<td>143715</td>
<td>926836</td>
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<td>12350</td>
<td>21131</td>
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3.1.4.2. Political perspectives

Political perspectives indicate the wider policy objectives of greater harmonisation between the Member States’ legal orders, greater coherence of legal orders, legal clarity and predictability of outcomes. Many aspects of economic analysis have political connotations. In addition to those aspects already mentioned above, other potential benefits of introduction of common procedural standards include:

- Greater awareness of EU procedural rules and the procedural mechanisms already existing – the new common principles would give greater exposure to those existing mechanisms.
- Encouraging cross-border trade (both by consumers and by businesses): greater trust for the procedural systems of other states, greater confidence that if things go wrong the procedures for enforcing rights will be based on common (known) principles.
- Greater trust between judiciaries based on the respect for common procedural standards.
- Greater general feeling of justice across the EU.
- Better monitoring and assessment of operating standards through introduction of metrics that this Report recommends.

3.2. Other benefits

The existing EU legislation, the jurisprudence of the CJEU, the Charter of Fundamental Rights and the ECHR already offer a set of procedural standards binding upon the Member States. However, in order to fully achieve the political and economic benefits examined in this section of the Report, what is contemplated should be more than simply a codification of what already has been achieved. By proposing to start discussions on these standards, the EU has the chance to take the leading role in the process of rethinking and reforming civil procedure at the EU as well as at the national level. Many EU Member States have been conducting reforms of their civil procedures, sometimes very significant reforms involving redrafting of civil procedure codes or reshaping of civil justice systems.325 These reforms have resulted from reflections on the need for transformations in the roles of civil procedure and litigation, their main features, and the principles governing civil justice systems in general.326 Many more reforms: of the structure of civil proceedings, of the use of technology and e-courts, of litigation costs and funding, of collective or class actions, or of the role of ADR in litigation, and many other aspects of civil procedure, are being contemplated.

The minimum procedural standards for the EU entail minimum level of protection for the parties (minimum level of protection for their fundamental rights), but they leave detailed rules of proceedings to national procedures and to the growing number of EU

326These reforms are taking place both across the EU 15 (for instance the England and Wales, in Portugal, Switzerland, the Netherlands, Germany) and in the Central and Eastern European states where they accompany wider transformations from socialist systems. For academic analyses see for instance: Zuckerman, ‘Civil Justice in Crisis’, Hodges, ‘Reform of…’; D. Dwyer, ‘The Civil Procedure Rules’.
procedural measures. This approach to procedural approximation: entailing a ‘community of general standards’, was priced in the context of the ALI/UNIDROIT project for encouraging experimentation and seeking best solutions, and enabling ‘different jurisdictions to find their own way of providing adjudication that is effective and attractive.’ Despite their general nature, however, the general minimum standards require scrutiny of national procedural rules, stimulate change if those rules do not fulfil the minimum requirements, generate greater attention and focus on civil procedure in general, enhance cooperation among various actors in the area of civil procedure (policy makers, judiciary, the legal profession, academia), and, what this Report highlights, by increasing legal certainty and predictability, they enhance the smooth functioning of the Internal Market. In the longer term, they may also lead to a deeper level of coordination, approximation and even harmonisation – the type of harmonisation covering procedural rules, ultimately leading to the adoption of a single code of civil procedure rules.

3.3. Conclusions

Each of the three proposed options involves, to a lesser or greater extent, introduction of a set of clear procedural standards applicable to civil proceedings. In fact, seen together they present a pathway towards what is effectively codification of civil procedure standards across the EU. This codification would involve binding principles for domestic as well as cross-border cases. This is where we see the greatest advantages for the EU. On the other hand, the costs would also grow with each following option, and the costs of OPTION THREE would be very significant indeed. The greatest burden would fall on the Parliament and the Commission; on the national level OPTION THREE would involve the most significant adjustment, reform and reorganisation.

This section has noted a series of important economic and political benefits inherent in CMS. Notwithstanding, in particular the section on quantification shows that further in-depth research in all Member States is required to address the data gaps with regard to the actual number of cross-border cases and the scope of a cost reduction inherent in CMS.

Annex - Survey on common minimum EU standards in civil procedure

A survey was sent on the 11th of January 2016 to 163 organisations from all Member States.328

The following figures represent the main issues addressed in the survey:

Figure 1 - Do the current differences in national civil procedure rules constitute a barrier to trade, for instance by increasing the costs of cross-border trade or by creating other obstacles?

- Strong barrier: 8%
- Barrier: 48%
- Don’t know: 13%
- Rarely a barrier: 13%
- Not at all a barrier: 22%

328The following Member States answered to the Survey: Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Italy, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden. 30% of the answers belong to the University, 16% to Judges Associations, 16% to Government / Administration, 15% to Lawyers Associations, 15% to Consumers Associations and 12% to others.
Figure 2 - Do they constitute a barrier to bringing cross-border claims?

Figure 3 - What is the approximate number of cross-border civil law claims brought by your country (consumers/enterprises)?

The figure clearly shows the lack of data. One of the respondents clarified that such approximations are difficult since he could not find any statistical distinction between purely internal claims and cross-border claims made by using a specific national procedure. An additional point is that it is very difficult to calculate to what extent a specific national procedural rule or a set of national procedural rules is increasing the costs of cross-border trade or is regarded as an obstacle/barrier to develop trade relationships.
Figure 4 - Is the current approach to harmonisation of civil procedure rules in the EU sufficient to remove the obstacles noted above?

Figure 5 - What are your views on the possible greater harmonisation of rules of civil procedure in the EU?
Figure 6 - If your views are very favourable or favourable, what in your opinion should this greater harmonisation involve? \(^{329}\)

- Improvement and filling the gaps in the existing legislation
- New legislation
- Introduction of CMS in civil procedure as a piece of non-binding EU law
- Introduction of CMS in civil procedure as a piece of binding EU law
- Introduction of CMS in civil procedure, accompanied by more detailed civil procedure rules, as an optional procedural system for all cross-border disputes
- Introduction of CMS in civil procedure, accompanied by more detailed civil procedure rules, as an optional procedural system for all (cross-border and domestic) disputes
- A multiple-step project

- Introduction of an EU code of civil procedure to replace national civil procedure codes

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\(^{329}\)The complete seventh option for this question is: A multiple-step project involving consolidation of the existing legislation and drafting of minimum procedural standards as an optional instrument as a first step, further harmonisation and gradual convergence of procedural rules as the next step, and introduction of an EU code of civil procedure to replace national civil procedure codes as the final step.
Figure 7 - What are your views on the potential introduction of CMS in the EU?

- **Very favourable**: 12%
- **Favourable**: 18%
- **Don't know**: 23%
- **Unfavourable**: 47%
Figure 8 - Please rate the importance of the following CMS (scale of 1-10, 10 being 'essential to harmonise', 5-somewhat important, 1-unimportant).

<table>
<thead>
<tr>
<th>Category</th>
<th>Rating</th>
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<tbody>
<tr>
<td>Finality</td>
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<tr>
<td>Effective enforcement of decisions</td>
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<td>Protective relief</td>
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<td>Accurate decisions</td>
<td></td>
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<td>Duty of the court to provide reasons</td>
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<td>Avoidance of undue delay</td>
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<tr>
<td>Judicial control over the process</td>
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<td>Equal access to information</td>
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<tr>
<td>The obligation to duly notify the parties</td>
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<td>Equality between the parties</td>
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<tr>
<td>Transparency of the proceedings (openness)</td>
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<td>Judicial impartiality</td>
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<td>Judicial independence</td>
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<td>Mechanisms for filtering unmeritorious claims</td>
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<tr>
<td>Proportionate costs of litigation: court fees, lawyers' fees, experts and...</td>
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<td>Funding: Access to mechanisms enabling litigation to be funded,...</td>
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<td>Choice between litigation and alternative modes of dispute...</td>
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<tr>
<td>Choosing a lawyer (including confidential legal consultation)</td>
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<td>Access to legal advice and information</td>
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- Essential to harmonise: 9, 8, 7, 6
- Somehow important: 4, 3
- Unimportant: 2
- Don't know
Figure 9 - Please indicate which benefits listed below may in your view be brought about by the introduction of CMS in the EU?

- The economic benefits of increased cross-border trade which may result from the greater level of mutual trust
- Lower costs of cross-border litigation
- A more uniform application of substantive laws of the EU
- Greater harmonization between the Member States’ legal orders
- Greater coherence of legal orders
- Legal clarity
- Predictability of outcomes

- Greater awareness of EU proc. rules and the proc. mechanisms already existing – the new CMS would give greater exposure to those existing mechanisms
Some respondents added as possible disadvantages the following issues:

- The need of training in national courts and practitioners in order to apply the CMS, otherwise it might result in greater complexity of the rules and a lack of uniform interpretation and application.
- The national courts do not behave exactly in the same way in different Member States. For this reason, a legislative activity in specific areas is needed to overcome specific problems.
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This research paper provides an analysis of the current shortcomings in the EU regulation in the area of civil procedure as well as estimates on possible costs and benefits of introducing common minimum standards of civil procedure at the EU level. It offers a detailed analysis of the type and substantive scope of the possible EU action that could potentially bring European Added Value.