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WORKING DOCUMENT

on establishing common minimum standards for civil procedure in the
European Union – the legal basis

Committee on Legal Affairs

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I. Introduction

A. **Overview**

The aim of this working document is to give an overview of the scope of the European Union's legislative competence in the field of civil procedural law.

The free movement of judicial decisions is associated with the need to create a sufficient level of mutual trust between judicial authorities of different Member States. In this way, the principle of mutual trust serves for more legal certainty, providing citizens and businesses of the Union with sufficient stability and predictability. This document considers that – in line with the European Commission's past initiatives and the outcome of the joint projects of the European Law Institute and Unidroit¹ – the time has come for a legislative proposal setting out common minimum standards of civil procedure law. Such a system of common minimum standards in the form of principles and rules, would serve as a basis for convergence of national regulations concerning civil procedure, establishing a balance between the fundamental rights of litigants in the interest of full mutual trust between the judicial systems of the Member States. This working document is mainly based on the in-depth analysis of the European Parliamentary Research Service entitled "*Europeanisation of civil procedure - Towards common minimum standards?*"²

In light of the increasing amount of EU legislation in the field of civil procedure, and with a view to striking a balance between the interests of claimants and defendants in civil litigation,³ while promoting at the same time mutual trust between the judiciaries of the Member States, the issue of setting up 'common minimum standards' of civil procedure at EU level has become increasingly relevant. The question was explicitly raised by the European Commission in its discussion paper⁴ for the *Assises de la Justice* conference in November 2013, where it emphasised the need for 'full mutual trust' between EU judiciaries, as well as for increased legal certainty by codifying existing Union rules of civil procedure.

B. **Legislative options in the field of civil procedure**

In order to increase mutual trust – a precondition of mutual recognition – three legislative options can be pursued, which are not mutually exclusive. First of all, certain types of

¹ The European Law Institute (ELI) and the International Institute for the Unification of Private Law (Unidroit) have examined, in several papers, the possibility of drafting 'European Rules of Civil Procedure'. See below the corresponding documents in this respect:

Vienna, 18-19 October 2013; *ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure*: <http://www.unidroit.org/english/documents/2014/study76a/201310-eli-progr-e.pdf>

Rome, 12-13 May 2014; *Transnational Civil Procedure - Formulation of Regional Rules: ELI - UNIDROIT Rules of Transnational Civil Procedure*:

<http://www.unidroit.org/english/documents/2014/study76a/s-76a-sc01-02-e.pdf>

Rome, 27-28 November 2014; *Transnational Civil Procedure - Formulation of Regional Rules: ELI - UNIDROIT Rules of Transnational Civil Procedure*:

<http://www.unidroit.org/english/documents/2014/study76a/s-76a-sc02-misc01-e.pdf>

ELI-UNIDROIT Joint Meeting and JURI Committee Presentation:

[http://www.europeanlawinstitute.eu/home/news-contd/article/eli-unidroit-joint-meeting-and-juri-committee-presentation/?tx_ttnews\[backPid\]=180991&cHash=e22b106c2c6ca8ee70225cc29593b7a0](http://www.europeanlawinstitute.eu/home/news-contd/article/eli-unidroit-joint-meeting-and-juri-committee-presentation/?tx_ttnews[backPid]=180991&cHash=e22b106c2c6ca8ee70225cc29593b7a0).

² http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/559499/EPRS_IDA%282015%29559499_EN.pdf.

³ See Article 47 of the Charter of Fundamental Rights of the European Union on a right to fair trial and effective remedy.

⁴ http://ec.europa.eu/justice/events/assises-justice-2013/files/civil_law_en.pdf.

procedure can be unified at EU level, and the judgments issued will benefit from mutual trust since they are based on a uniform set of procedural principles. This approach is implemented in the form of so-called 'optional instruments', which strike an EU-wide balance between the rights of claimants and defendants. These optional instruments rely on to a large extent upon background rules of national procedural law (e.g. on the composition of the court, and detailed rules on evidence).

A second option is the introduction of common (minimum) standards by way of directives. Until now, this has been done in two ways: by way of (1) sector-specific directives and (2) piecemeal horizontal directives, which address a given aspect of civil procedure in a non-sector-specific (i.e. horizontal) way, but are nevertheless limited to specific aspects of civil procedure (e.g. legal aid, mediation).

A third option is to adopt an across-the-board horizontal approach, which would not only be horizontal, but also address the fundamental principles of a fair civil procedure in a comprehensive way.

In the following, the working document will identify possible provisions in the Treaties that could serve as a legal basis for future approximation of civil procedure laws at EU level. It will thus look in detail at Article 81 TFEU on civil justice cooperation and Article 114 TFEU on internal market approximation, as the main alternatives for further action in the field. It will then consider the possibility to combine the two provisions and the advantages and limitations attached to such a solution. It will conclude with some suggestions and areas for further discussion.

II. Development of the legal basis

Based on the fundamental principle of conferred powers, the EU may legislate in a given area only if it has explicit competence to do so (principle of conferral: Articles 4(1) and 5(1) TEU) and in so far as it complies with the principles of subsidiarity and proportionality. In other words, even where the EU has the competence to enact legislation in a given area, it may not do so if the issue could be regulated better at national level (principle of subsidiarity: Article 5(3) TEU), or if the measures are not proportionate to the aim pursued (principle of proportionality: Article 5(4) TEU).

Civil procedure as an area of EU activity was already present in the *Treaty establishing the European Economic Community* (EEC, Treaty of Rome), where Article 220 EEC provided the legal basis for the approximation of Member States' civil procedural laws under a public international law regime. Specifically, Article 220 EEC provided that Member States should undertake to enter into negotiations with each other with the aim of simplifying the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards. However, Article 220 EEC was based on intergovernmental cooperation between the Member States, rather than on Community (now Union) competences. On this basis, the *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (signed on 27 September 1968) was enacted, and entered into force in 1973. Article 220 EEC was only repealed by the Treaty of Lisbon.

In the 1992 Maastricht Treaty, civil procedure was explicitly recognised as an intergovernmental area of activity and included in the then 'Third Pillar'. It was only in the

1996 Amsterdam Treaty that civil justice moved to the 'First Pillar' of Union activity, thereby enabling EU civil justice measures to be adopted in the form of regulations and directives. More importantly, the Amsterdam Treaty introduced for the first time the objective of creating an 'area of freedom, security, and justice' in order to facilitate the free movement of persons across the EU. Unlike in the field of substantive private law, where the EU does not enjoy an explicitly formulated general competence¹, its regulatory powers in the field of cross-border civil procedure have been acknowledged beyond any doubt ever since the Amsterdam Treaty.

As a consequence of a consistent evolution of the Union's competence in the area of civil procedure law, the entry into force of the Lisbon Treaty, further reinforced the EU's regulatory powers by clearly identifying civil justice as a separate field of EU competence introducing for that purpose in the *Treaty on the Functioning of the European Union* (TFEU) a separate chapter entitled '*Judicial cooperation in civil matters*' within Title V on an '*Area of Freedom, Security and Justice*'. However, despite the paradigm shift, the requirement of a cross-border element for Union competence to be triggered has been maintained under Lisbon. This means, in other words, that EU action in the area of civil justice is only possible if there are connecting factors in a case (e.g. residence, place of performance, etc.) pointing to at least two different Member States.

Regardless of the above developments, a considerable part of EU legislation in the field of civil procedure has been enacted on a different legal basis than the one on judicial cooperation in civil matters. Specifically, the general provision of Article 114 TFEU (ex Article 95 TEC) on the approximation of the internal market, has been and is still being used as the legal basis for a variety of sector-specific measures of civil justice, such as for example the Intellectual Property Rights Enforcement Directive (IPRED) and the most recent Directive on Antitrust Damages, which is often described as proceduralisation through the back door. In the remaining part of this document, both legal bases, Articles 81 TFEU and 114 TFEU will be examined in more detail and the possibility to be combined for the adoption of an instrument under a dual legal basis will be further explored.

III. Article 81 TFEU: Judicial cooperation in civil matters

Within the current Treaty framework, the legal basis for the harmonisation of cross-border civil procedure is provided in Title V TFEU, on the Area of Freedom, Security and Justice. Specifically, Article 67(4) TFEU gives the EU competence to facilitate access to justice, particularly through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

This rule is exemplified in Article 81 TFEU, where it is provided that the EU is vested with the power to enhance judicial cooperation in civil matters with cross-border implications, based on the aforementioned principle. It is thus explicitly stated that the EU may adopt appropriate measures for the approximation of national laws, which may be adopted "*particularly*" when necessary for the proper functioning of the internal market, without such

¹*EU competence in private law: The Treaty framework for a European private law and challenges for coherence*, PE 545.711 (EPRS, 2015), p. 4.
http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA%282015%29545711_REV1_EN.pdf.

a link being obligatory anymore - as opposed to the previous regime under Article 65 TEC. It should be emphasised at this point that the notion of 'cross-border *implications*' should be construed in a broader manner and should thus not be perceived as synonymous to 'cross-border *litigation*'; almost pure domestic litigation with a limited cross-border element could be included in the scope of Article 81 TFEU.

According to the Treaty, measures for the approximation of the laws and regulations of the Member States may be adopted for: (a) the mutual recognition and enforcement of judgments and extrajudicial decisions, as between the Member States; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the private international law rules of the Member States (conflict of laws and conflict of jurisdictions); (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, which may include making national civil procedures more compatible; (g) the development of alternative dispute resolutions (ADR); and (h) support for training of judges and other court staff.

By referring to legal acts indiscriminately as 'measures', it is arguable that Article 81 TFEU may serve as a basis for the harmonisation of national laws by means of either directives or regulations. This is further supported by Article 296(1) TFEU, providing that in situations where the Treaties "do not specify the type of act to be adopted" (as is the case in Article 81 TFEU), "the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality". The principle of proportionality is commonly interpreted as meaning that it is preferable to resort to non-binding instruments rather than binding ones, and – among binding instruments – to resort to directives rather than regulations.

A final aspect that could have a considerable impact on measures adopted under this head of competence, and that should be taken into account by the legislator is the situation of a minority of Member States to the EU, namely the UK, Ireland and Denmark. According to Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, both States have opted out of measures in the AFSJ and only have the choice to opt-in on a case-by-case basis. Denmark, on the other hand, has permanently opted out from any measures adopted in the AFSJ (Protocol No 22). As a result, considerations of mutual trust and balancing of access to justice rights via harmonised EU rules of civil procedure adopted under Article 81 TFEU will never be applicable to all 28 Member States.

IV. Article 114 TFEU and its relation to Article 81 TFEU

Although the Europeanisation of civil procedure is provided with a specific legal basis in Article 81 TFEU, a number of purely procedural legal acts, or legal acts with procedural implications, have been adopted on the basis of Article 114 TFEU (harmonisation in the internal market).

Article 114 TFEU is commonly considered to be appropriate for enacting legislation applicable both to cross-border and purely domestic cases, provided that the measures adopted at EU level have as their object the establishment and functioning of the internal market. In other words, the cross-border element is simply not required for the application of Article 114 TFEU, and the only prerequisite is the functioning or establishment of the internal

market.

Furthermore, Article 114 TFEU has the character of a *lex generalis*, i.e. a rule which is applicable only insofar as no other, more detailed rule (a *lex specialis*) is applicable. This is also supported by the wording of Article 114 TFEU, which starts with the expression "[s]ave as otherwise provided in the Treaties...".¹ In particular, in areas excluded from Article 114 TFEU by its second paragraph (i.e. the free movement of persons, the rights and duties of employees, and fiscal provisions), the enactment of procedural rules would have to be based on Article 81 TFEU, and not on Article 114 TFEU.

In line with the requirements set out by the CJEU,² if a given legislative act mainly pursues the objective of harmonising civil procedure, it should be based exclusively on Article 81 TFEU. However, if it mainly aims to harmonise rules governing the internal market, the legal act ought to be based exclusively on Article 114 TFEU. As Article 81 TFEU is exclusively concerned with civil procedural and private international law, it may not be invoked as a legal basis for measures aiming to harmonise substantive private law.

Furthermore, the main difference is that Article 81 TFEU requires the existence of a cross-border element, which is not required in the scope of Article 114 TFEU, as it requires the measure to contribute to the functioning of the internal market, which is, however, not required by the former following the changes brought about by the Lisbon Treaty.

It can be concluded that the harmonisation of substantive private law and the harmonisation of purely domestic civil procedure are within the scope of Article 114 TFEU, but not within the scope of Article 81 TFEU, owing to its requirement of cross-border implications.

The lack of harmonised rules of civil procedure in the EU can be viewed as an obstacle to the smooth functioning of the internal market. This explains the presence of a growing body of EU instruments harmonising procedural law on the basis of Article 114 TFEU, such as the IPR Enforcement Directive or the Antitrust Damages Directive. In fact, these legal acts harmonise civil procedure of both a cross-border and a domestic nature.

The harmonisation of civil procedure which is required for the functioning of the internal market, but which is concerned with cases with cross-border implications, is covered by both Article 114 TFEU and Article 81 TFEU. This is because there is an area of overlap. According to the CJEU case law, if one of the legislative aspects is primary, and the other only secondary (as in the vast majority of cases), only one legal basis may be invoked. However, if both regulatory aims are on an equal footing, the act in question is to be based jointly on both legal bases. In our case, this would be Articles 81 and 114 TFEU. It is however to be noted that, until now, no legal act in this field has had a dual legal basis. The existence of the two Protocols on the position of the UK and Ireland as well as Denmark mentioned above, pose serious obstacles to a potential combination of the two legal bases.

V. Conclusions

¹ See also, S. Peers, *EU Justice and Home Affairs Law* (3rd ed., Oxford University Press, 2011), p. 611

² See e.g. Case C-300/89 *Commission v Council (Titanium Dioxide)*, para. 10; Case C-269/97 *Commission v Council*, para. 43; Case C-211/01 *Commission v Council*, para. 38.

In order to increase mutual trust between Member States' judiciary systems, harmonising national civil procedure is of crucial importance. In contrast to optional instruments, which create a set of civil procedural rules working in parallel with national legal regimes, harmonising instruments touch upon national civil procedure and oblige Member States to approximate their respective national rules in order to conform to the EU model.

This process of harmonisation can take place in two ways. On the one hand, the EU legislature can adopt sector-specific instruments based on Article 114 TFEU, thus addressing civil-procedural aspects of certain types of claims under EU law. On the other hand, the EU legislature can adopt horizontal instruments, harmonising national civil procedural laws with cross-border implications regardless of subject matter. According to the specific content, we can determine more precisely the most appropriate legal basis for the introduction of minimum standards in civil proceedings.

The creation of a well-functioning mechanism of minimum standards in civil proceedings does not happen through one action but through a process. Therefore, this working document starts the process towards creating a draft report.