Chapter 5
Harmonisation of Civil Procedure: Policy Perspectives

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Abstract European civil procedure is a rapidly growing field, judging by the numbers of directives and regulations churned out by the European Commission over the past decade. However, the practical impact of legislative acts passed under the provision of Article 81 TFEU remains very limited. These measures of 'horizontal harmonisation' create uniform rules for disputes of every kind, yet they remain confined to cross-border cases. As the Commission moved beyond the issues of international jurisdiction and enforcement of foreign judgments, it placed European institutions alongside the national ones, which continued to govern domestic disputes. This results in duplicative sets of procedural rules which place a heavy burden on the judges who have to work with them. Another thread of European legislation does not bear the label of civil procedure at all, but purports to harmonise the domestic system of law enforcement and protection of subjective rights in selected substantive areas, such as intellectual property rights, competition law and consumer law. Such measures of 'vertical harmonisation' remain confined to specific kinds of disputes, but they apply regardless of whether the dispute is international or domestic. In so doing, their practical impact is much greater than that of horizontal measures. For European lawmakers, it is essential to bear in mind that the policies of law enforcement and protection of property rights

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deeply involve principles of civil procedure and that account must be taken of this when drafting pertinent legislation.

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5.1 The Current State of European Civil Procedure

To an observer, the image currently conveyed by European civil procedural law suggests that the field is rapidly growing. Since the European Union (EU) gained the competence to legislate in this field of the law through the Treaty of Amsterdam of 2 October 1997,[1] which introduced Article 65 of the then Treaty establishing the European Community (EC Treaty), we have seen a rapid expansion of European legislation.

Before the Treaty of Amsterdam was agreed, the stronghold of European law in the area of civil procedure was the Brussels I Convention dating back to 1968, which has been in force since 1973. The Convention on Jurisdiction and the Recognition and Enforcement of Judgments was agreed and signed by the Member States in the course of intergovernmental cooperation under the former Article 293 (fourth point) EC Treaty. Given such a framework it was impossible to react quickly to new challenges, as even the mere accession of new Member States triggered a protracted and cumbersome process of revision, after which the dust settled only when a fresh version of the Brussels I Convention was negotiated and

[1] OJ 1997 No. C 340, 1 et seq.

agreed between the old and the new Member States and the several processes of ratification had been completed. As ratification never occurs at the same time by every signatory State, it was not unusual that different versions of Brussels I happened to be in force within the European Community (later, the European Union) at any given time. Obviously, such a state of affairs was highly unsatisfactory from a policy point of view. Instruments like Brussels I aim at harmonisation, or rather unification, of divergent rules in force in the several Member States.[2] The goals associated with the policy of unification cannot be achieved if different versions of the same legal instrument are floating around in the Member States and are applicable in one case or another. This makes life harder for the judges and lawyers preparing cases for litigation in the courts of any given country. In addition, and more importantly, it eats away at one central goal of the unification of civil procedure, i.e. the foreseeability and predictability of outcomes from the perspective of the parties.[3] If the parties cannot readily foresee which set of jurisdictional rules will be applied should a dispute arise between them in the future, they will be unable to draft their contracts and set their prices accordingly.

Against this backdrop, the switch of civil procedure from the so-called 'third column' of European Union law, i.e. intergovernmental cooperation, to the 'first column,' i.e. a direct competence of the Union itself, was a major step towards 'real' harmonisation, or rather unification. Article 65 EC Treaty provided a competence to legislate in the area of 'judicial cooperation in civil matters with cross-border implications' and particularly included measures to improve and simplify the system of cross-border service and notification of judicial and extrajudicial documents, cooperation between courts in the collection of evidence, recognition and enforcement of decisions in civil and commercial cases, including non-judicial decisions, the promotion of the compatibility of rules applicable in the Member States concerning jurisdictional conflicts, and the elimination of obstacles hindering the proper functioning of civil proceedings including, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the Member States.

After the Treaty of Amsterdam had come into force, the Commission immediately used its new powers to regulate and legislate in this area. Up to the present day, eleven legislative acts have piled up which may be grouped under the rubric of civil procedure:

- Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)[4];
- Regulation No. 1346/2000 on insolvency proceedings (Insolvency Regulation)[5];

[2] ECJ 1 March 2005, Case C-281/02, ECR I-1383 (*Owusu v Jackson*) paras 34, 38 et seq.

[3] ECJ 23 April 2009, Case C-533/07, ECR I-3327 (*Falco Privatstiftung v Weller-Lindhorst*) para 21.

[4] Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 012.

[5] Regulation No. 1346/2000 on Insolvency Proceedings, OJ 2000, L 160.

- Regulation No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation)[6];
- Directive No. 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[7];
- Regulation No. 805/2004 creating a European enforcement order for uncontested claims[8];
- Regulation No. 1896/2006 on a European order for payment[9];
- Regulation No. 861/2007 on a European small claims procedure[10];
- Regulation No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service Regulation), which repealed and replaced Regulation No. 1348/2000[11];
- Directive No. 2008/52/EC on mediation in civil and commercial matters.[12]

And relating to family matters

- Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels IIA), which repealed Regulation No. 1347/2000 (Brussels II),[13]
- Regulation No. 4/2009 on maintenance obligations.[14]

The Lisbon Treaty did nothing to alter, expand or scale back the powers of the EU in the area of civil procedure. Rather, Article 65 EC Treaty was transformed more or less 'as is' into Article 81 of the Treaty on the Functioning of the European Union (TFEU). The latter continues to vest the Union with the power to develop cooperation in civil matters with cross-border implications. To this end, and for the purpose of the 'proper functioning of the internal market,' the Union may adopt 'measures for the approximation of the laws and

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6 Regulation No. 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, OJ 2001, L 174.

7 Directive No. 2003/8/EC to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules relating to Legal Aid for such Disputes, OJ 2003, L 26.

8 Regulation No. 805/2004 creating a European Enforcement Order for uncontested claims, OJ 2004, L 143/15.

9 Regulation No. 1896/2006 creating a European Order for Payment Procedure OJ 2006, L 399.

10 Regulation No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199.

11 Regulation No. 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (service of documents), OJ 2007, L 324/50, and repealing Regulation No. 1348/2000 (OJ 2007 L 324).

12 Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, OJ 2008, L 136.

13 Regulation No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, OJ 2003, L 338.

14 Regulation No. 4/2009 on Jurisdiction, Applicable law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations, OJ 2009, L 7.

regulations of the Member States,' and it may do so by using the ordinary legislative procedure set out in Article 294 TFEU. Article 81(2) TFEU provides a non-exhaustive list of subject-matter areas that are open to legislation by the European Union, namely:

- Mutual recognition and enforcement of judgments and non-judicial decisions;
- Cross-border service of judicial and non-judicial documents;
- Compatibility of Member States' rules on jurisdiction;
- Cooperation in the taking of evidence;
- Effective access to justice;
- Elimination of obstacles to the proper functioning of civil proceedings, including the promotion of the compatibility of the rules on civil procedure applicable in the Member States;
- Development of alternative methods of dispute settlement;
- Support for the training of judicial staff.

Article 81(3) TFEU goes on to impose special hurdles in terms of the legislative process for such measures in the field of family law.

5.2 The Limitations of Horizontal Harmonisation

5.2.1 Application to Cross-Border Disputes Only

The list supplied by Article 81(2) TFEU is impressively long and comprehensive. However, it must not be overlooked that the subject-matter areas listed in Article 81(2) TFEU must still be related to the 'purposes of paragraph 1,' i.e. the development of judicial cooperation in civil matters with cross-border implications. Even under the TFEU, the authority of the European Union in the area of judicial cooperation remains limited to international civil procedure, i.e. conflicts of jurisdiction. Put differently, it does not extend to domestic disputes that have no cross-border aspect to them, like those involving parties resident in the same Member State. Accordingly, the jurisdictional scheme of the Brussels I Regulation, for example, remains limited to cases that involve a cross-border element.[15]

For the time being, this restriction of the legislative power of the European Union must be taken seriously. The Commission was forced to acknowledge this when it suggested defining the scope of application of new legislative acts based upon the former Article 65 EC Treaty more broadly. The initial proposals of the

[15] Recitals (2) and (3) Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 012; ECJ 1 March 2005, Case C-281/02, ECR I-1383 (*Owusu v Jackson*) (1456) para 25; ECJ 7 February 2006, ECR I-1145 Opinion 1/03, para 145.

Commission for regulations introducing a European payment order[16] and a European small claims procedure[17] were not limited to cross-border disputes but were supposed to apply equally to domestic ones. The inherent expansion of the legislative powers of the European Union met with so much resistance that these plans had to be abandoned. In the current versions, which were finally enacted, both instruments apply only to cross-border disputes. As their respective Articles 2 explain, both regulations remain limited in scope to 'civil and commercial matters in cross-border cases.'

As the Commission explained in its original proposal for a regulation introducing a European payment order, there are 'vast differences between national systems' regarding the mechanism for the swift enforcement of monetary claims while 'an efficient procedure for the recovery of undisputed debts' is of 'fundamental economic significance' for the internal market.[18] While this certainly involves an exaggeration, there is also a grain of truth to it. If the goal is to create a uniform system of debt recovery across the Union and thus to supply creditors with an equally efficient mechanism in every Member State, then it does not make a difference whether the legal relationship which gave rise to the dispute extended across the border or not. The interest of a creditor in the speedy and efficient enforcement of a monetary claim is undiminished if the dispute grew out of a domestic transaction rather than involving a cross-border element.

For the time being, the distinction between domestic and cross-border disputes remains a cornerstone of the system of competences under the EU Treaties and of the underlying constitutional principle of conferral. However, it makes no sense at all for a potential creditor who operates within the European Union and has a keen interest in the speedy and efficient enforcement of his or her claims. The limitation placing domestic disputes beyond the reach of the legislative powers of the Union is based on the constitutional law of the European Union, not on any logic inherent in the subject matter concerned.

5.2.2 Limited Impact

However well-founded the distinction between international and domestic disputes may be as a matter of the constitutional make-up of the EU and of the division of labour between the Union and the Member States, it takes much of the practical steam out of the legislation referenced above. The growing number of legal instruments stands in sharp contrast to the small difference these instruments make

[16] Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure, 25.05.2004, COM(2004) 173 final/3, 7 et seq, 20.

[17] Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, 15.3.2005, COM(2005) 87 final, 11.

[18] Proposal for a Regulation of the European Parliament and the Council creating a European order for payment procedure, 25.05.2004, COM(2004) 173 final/3, 7.

with regard to real-world transactions and the legal disputes growing out of them every day.

The diminished practical impact of European civil procedure is particularly striking with regard to the two regulations which received praise not only for alleviating cross-border judicial cooperation but also for setting up distinct 'European' proceedings on the merits. In this vein, Regulation No. 1896/2006 on a European order for payment designs and sets up a legal mechanism for the enforcement of monetary claims,[19] and Regulation No. 861/2007 on a European small claims procedure[20] even carries its main characteristic, i.e. the introduction of a separate track for proceedings involving small claims, in its name. Both regulations go beyond the mere coordination of the civil justice systems of the Member States, as they supply procedures that directly recommend themselves for use by creditors seeking enforcement of their claims.[21]

Far-reaching as the Regulations on orders for payment and on small claims may be, their impact is still a far cry from the one enjoyed by national law. This may be exemplified by the Regulation on a European payment order. In German law, this instrument exists alongside the traditional and well-established domestic procedure for a payment order (*Mahnverfahren*). Strikingly, the latter is not limited to domestic disputes but equally covers the enforcement of monetary claims established elsewhere, outside of Germany (Section 703d, German Code of Civil Procedure—*Zivilprozessordnung*, ZPO), against a debtor. The German procedure for a payment order, which has been in place for many decades, works like a well-oiled machine and continues to attract many users. Why then should a creditor seeking enforcement of a monetary claim turn to the European payment order, even if it may offer advantages in terms of facilitated cross-border enforcement?[22]

5.2.3 Limitations for Future Development

Assuming that European procedural institutions, which supplement the national systems and are placed alongside domestic institutions, work well and are in fact utilised in practice, it seems obvious that there are limits as to the scale to which this approach may be carried. With every European regulation or directive supplementing the national systems, another layer of complexity is being added. There is no doubt that little harm is done if national procedures for a payment order are in fact duplicated by a European regulation which in essence provides

[19] Regulation No. 1896/2006 creating a European order for payment procedure, OJ 2006, L 399.

[20] Regulation No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199.

[21] Kramer 2008, 253 et seq; Kramer 2010, 17 et seq.

[22] The court order made under the domestic procedure may even be enforced in other Member States under Regulation No. 805/2004 as a European enforcement order for uncontested claims. As to modifications of Section 703d ZPO in the European context, cf. Voit 2009, para 2.

for the same mechanism but offers numerous variations in detail. On the other hand, it seems equally clear that this rationale must not be maximised. If the European Union continued to legislate using this model, large chunks of the national systems of civil procedure would be supplemented by neighbouring European institutions for procedures involving cross-border disputes. The result, taken to its extreme, would be double-tracked systems of civil procedure in which domestic and European procedures, essentially serving the same purpose existed alongside each other. Such a world may be interesting to scholars but it is loathed by judges, as they would have to switch back and forth between different procedural frameworks. The loss in terms of procedural efficiency caused by such a double-tracked system must not be underestimated. Throughout Europe, courts have tried to avoid the costs and losses associated with operating different systems of procedure by stubbornly applying their respective *lex fori*, even to disputes involving a foreign element.[23] This is all the more striking as courts have shown no reluctance in applying another legal system's rules in the area of substantive law. For centuries, foreign substantive law has been applied by European courts without hesitation where the applicable choice of legal rules so required. Their unwillingness to follow the same course in the area of procedure is striking evidence of the considerable loss in litigation efficiency associated with such a move.

5.2.4 No Optional System

For these reasons, the recent trend in European law-making in the area of civil procedure, to supplement the national systems by European instruments, which in effect introduce distinct procedural frameworks even though they perform essentially the same functions as their domestic counterparts, has no long-term future. Carrying this argument only a little further generates the insight that—as opposed to substantive law—procedural law lacks the compromise solution of an optional system.[24] In the area of substantive law, it may be possible to bridge the controversy between the proponents of legal diversity in the form of different national systems and the promoters of harmonisation by the compromise-solution of a 28th legal system, which the parties may opt into if they so wish.[25]

[23] Wagner 1998, 353 et seq.

[24] Max Planck Institute for Comparative and International Private Law, Policy Options for Progress Towards a European Contract Law, Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final, 2011, paras 69 et seq.

[25] Cf. Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, 1.7.2010, COM (2010) 348 final, 9 et seq; Beale 2007, 260 and 269 et seq.

With regard to procedural law, such an intermediate solution is not available. The courts would be overburdened if they were required to alternate between two different procedural systems on a day-to-day basis. This is not because judges are too silly, lazy or hardwired to work with different sets of procedural frameworks. They could certainly do so if they tried hard enough. The crucial point is that judicial resources are limited and thus must be put to their most efficient use. Given that civil procedure is no end in itself but rather serves the function of enforcing and protecting legal rights, there is a general interest that judges focus on the resolution of the dispute on the merits rather than wasting whatever analytical and legal capacities they have for the purpose of operating different systems of civil procedure. Therefore, the duplication of procedural institutions, which essentially serve identical purposes, does not seem to propose a fruitful strategy for the future.

5.3 Vertical Harmonisation

5.3.1 The Concept of Vertical Harmonisation

The limitations of the former Article 65 EC Treaty and the current Article 81 TFEU are the real cause for the exploration and development of additional bases for European legislation in the area of civil procedure. European legislation in the area of civil procedure is no longer confined to the foothold of the chapter on judicial cooperation in civil matters. Rather, the legislative acts passed under these titles are being supplemented by others, which were based on Treaty provisions conferring powers in particular 'substantive' policy areas. In this context, the term 'substantive' is used in opposition to 'procedural.' It thus denotes a title of authority, which is not concerned with the procedural treatment of claims and the resolution of disputes involving private rights, but with substantive rights created or protected by European law. As they remain confined to distinct subject-matter areas only, these policies shall be labelled as 'vertical harmonisation.'

The concept of vertical harmonisation is employed to designate those areas where the EU introduces procedural rules without legislating in the area of civil procedure and, therefore, without relying on the authorisation granted by Article 81 TFEU. Instruments of this type of community legislation focus on specific subject-matter areas for which the EU has a competence other than that granted by Article 81 TFEU. The subject-matter area where the European Treaties bear the closest relation with rights and obligations between private parties is the case of competition law. The former Articles 85 and 86 EC Treaty (which have become Articles 101 and 102 TFEU) directly regulate the behaviour of companies in the market. However, there are other examples as well.

5.3.2 The Enforcement Directive

5.3.2.1 Scope

Directive 2004/48/EC on the enforcement of intellectual property rights introduces an array of procedural rules, particularly with regard to fact-gathering, evidence and injunctive relief. The so-called Enforcement Directive was not based on the predecessor of then Article 65 EC, which is now Article 81 TFEU, but on ex-Article 95 which has become Article 114 TFEU. Under Article 114 TFEU the EU has the power to take legislative measures for the approximation of the laws of the Member States 'which have as their object the establishment and functioning of the internal market.' While the availability of judicial protection and assistance in the enforcement of legal rights certainly has some bearing on the 'functioning of the internal market' it would be a stretch to maintain that the harmonisation of rules of civil procedure as such constitutes a valid function of Article 114 TFEU. If it were otherwise, Article 81 would be rendered obsolete.

For this reason, it seems, the Commission did not even try to sell the Enforcement Directive as an instrument for harmonising certain aspects of civil procedure. Taken as such, ex-Article 95 EC would have been unavailable. Similarly, under the heading of civil procedure, it was impossible to bring the Enforcement Directive within the ambit of ex-Article 65 EC too, as it applies indiscriminately to international and to domestic disputes, while Article 65 EC was, and Article 81 TFEU remains, limited to measures aimed at facilitating and improving judicial cooperation in civil matters that 'have cross-border implications.'[26] The only option left was to classify the directive not as a means of harmonising certain aspects of civil procedure, but of improving the enforcement of intellectual property rights. In substance, the directive is not really about the 'enforcement' of property rights but about their protection from infringements, or even more precisely: about the enforcement of claims for compensation for the harm caused by infringements of intellectual property rights, as well as, for enjoining future infringements.

5.3.2.2 Contents

Outcome-determinative

Whereas the procedural directives and regulations passed under ex-Article 65 EC remain confined to international cases involving some foreign element, the Enforcement Directive—like all measures passed under the predecessors of Article 114 TFEU—covers both domestic and international cases. But not only is the scope of the Enforcement Directive exceptional, the same is true for its contents. Whereas

[26] See Sects. 5.2.1 and 5.2.2.

the truly 'procedural' legislative acts passed under what is now Article 81 TFEU tend to focus on rather marginal issues like debt collection and undisputed claims, the Enforcement Directive covers a range of topics which lie close to the heart of any system of civil procedure and are often determinative of the outcomes reached in individual cases. While it is true that the Enforcement Directive contains provisions dealing with issues of a substantive-law nature, epitomised by Article 13 on damages, for the most part its provisions sit close to the core of civil procedure.

Access to and production of evidence

Pursuant to Article 6(1) (cl. 1) of the Enforcement Directive, Member States must ensure that 'on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information.' Article 6(2) of the Enforcement Directive goes on to explain that the opposing party may even be ordered to produce banking, financial or commercial documents relevant to the resolution of a dispute involving the infringement of intellectual property rights on a commercial scale.

Even though these obligations to produce evidence may seem harmless and are well understood by scholars from jurisdictions embracing rather broad duties to disclose, they are by no means self-evident. Some jurisdictions in Europe, among them Germany, are far more restrictive in requiring the parties to a legal dispute to contribute to the establishment of the true facts of the case.[27] The German Federal Supreme Court (*Bundesgerichtshof*—BGH) even committed to the view that a party need not disclose information that is relevant to the resolution of the dispute to which the other side lacks access but which would harm the interests of the party controlling the information.[28] In effect, the court allows a party to frustrate a potentially meritorious claim brought by its less informed opponent.[29] Against this background, Article 6 of the Enforcement Directive appears to be a major step in the direction of a general duty to disclose and produce evidence.

Preservation of evidence

There are more provisions in the directive that suggest that the framers saw the judicial process as a means of establishing the true facts of the case and to

[27] Wagner 2007, 711.

[28] BGH, NJW (*Neue Juristische Wochenschrift*) 1958, 1491, 1492; NJW 1990, 3151 = ZZP (*Zeitschrift für Zivilprozess*) 104 (1991), 203 with critical note Stürner = JZ (*Juristenzeitung*) 1991, 630 with critical discussion Schlosser, JZ 1991, 599; BGH, NJW 1997, 128, 129; 2000, 1108, 1109; BAG (*Bundesarbeitsgericht*), NJW 2004, 2848, 2851; in the same vein Leipold 2005, paras 26 et seq.

[29] For a critical account, cf. Wagner 2007, 706 et seq.

force both parties to contribute to the attainment of this aim. Thus, for example, Article 7 of the Enforcement Directive authorises the courts (or rather requires the Member States to ensure that their courts are authorised) to take provisional measures to preserve relevant evidence in respect of the alleged infringement of an intellectual property right. Pursuant to Article 7(1) (cl. 3) of the Enforcement Directive, such measures may be taken without the other party having been heard where this is necessary in order to fend off irreparable harm to the rightholder. In this case, Article 7(2) of the Enforcement Directive requires the court to inform the parties immediately after the protective order becomes effective, and to schedule a hearing at the request of the aggrieved party. In appropriate circumstances, the applicant may be required to provide security ensuring that any harm suffered by the respondent as a consequence of the measure will be compensated. Where the applicant fails to institute proceedings on the merits within a reasonable time, the court must revoke the protective measure at the request of the respondent under Article 7(3) of the Enforcement Directive. In cases of revocation and in cases where the applicant fails with his or her claim on the merits, the respondent must be compensated for any losses incurred (Article 7(4), Enforcement Directive). Finally, Article 7(5) of the Enforcement Directive authorises the Member States to take measures for the protection of the identity of witnesses.

The provisions of Article 7 of the Enforcement Directive were set out in such detail in order to dispel any doubts that the real subject matters of major parts of the directive are in fact within the domain of civil procedure—and nowhere else. If the language derived from the intellectual property world were eliminated or, rather, replaced by the general concepts of applicant and respondent, Article 7 of the Enforcement Directive would fit in well with any decent Code of Civil Procedure, under a subchapter on preservation of evidence.

Interim relief

Any list of illustrations of the procedural nature of the Enforcement Directive will include Article 9, pursuant to which Member States must authorise their courts to issue interlocutory injunctions against alleged infringers 'where appropriate' (para 1). Article 9(3) of the Enforcement Directive specifies that the judicial authorities must 'have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.'

The contrived language employed by Article 9(3) and many of the other provisions of the Enforcement Directive must not conceal the fact that it defines the requirements for granting interim relief and sets the necessary threshold of probability for the establishment of these requirements. It seems that Article 9(3) could not say so explicitly for the sole reason that the EU lacks the competence to legislate in the area of civil procedure. If this were otherwise, the European lawmakers could have addressed the issue head-on and said that the court may issue an interim injunction where the applicant has provided reasonable evidence,

establishing with a sufficient degree of certainty that the applicant is the right-holder, and that his or her rights are being infringed or that such infringement is imminent. Article 9(3) of the Enforcement Directive instead says that the judicial authorities of the Member States shall behave in this way, probably because the relevant perspective was one of protection of intellectual property rights. From this perspective courts are mere enforcement agencies of the respective Member State, operating in much the same way as 'market police.' For this reason, the Directive is not framed in terms of defining requirements for obtaining interim relief from courts of law, but in terms of the obligation of Member States to intervene against infringers through the strong arm of their courts.

It is not the aim of the present analysis to argue that the Enforcement Directive was outside the scope of Article 95 EC (Article 114 TFEU) but rather to show that it clearly operates within the domain of civil procedure. This point immediately comes to the fore with some minor editing of Article 9(3). It is even possible to go one step further and to purge all language related to the world of intellectual property rights from Article 9(3) in order to arrive at a fairly general and operational formulation of the standard for granting an interim injunction:

> The court must grant such an interlocutory injunction where the applicant establishes with a sufficient degree of certainty that his or her rights are being infringed or that such infringement is imminent.

Such a provision would be more precise than, for instance, their counterparts in the English Civil Procedure Rules of Part 25 CPR,[30] and it would come very close to those governing interim relief in continental legal systems, such as Sections 920 and 936 of the German Code of Civil Procedure (ZPO).[31] To carry this a little further, Article 9(4) on ex-parte interim relief resembles Sections 924 and 944 ZPO, Article 9(5) on the repeal of interim measures upon failure to institute an action on the merits appears to have been modelled on Section 926 ZPO, Article 9(6) on the provision of security by the applicant has a parallel in Section 921 ZPO, and Article 9(7) on granting a right to compensation in cases where the provisional measure in question was revoked, had lapsed due to an act or omission of the applicant, or turned out to have been unfounded because there was no infringement or threat of infringement of a right of the applicant, is predicated in Section 945 ZPO.

In summary, Article 9 of the Enforcement Directive supplies a comprehensive framework for measures of interim relief which may easily be generalised and applied to cases other than those involving intellectual property rights. In order to arrive at a general scheme one would simply have to remove the language of enforcement and insert a specification of the requirements of interim relief, written

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[30] For their interpretation, cf. Andrews 2003, ch. 18.

[31] Wagner 2004, 69 et seq.

from the perspective of the court or, what amounts to the same thing, from the perspective of a potential applicant seeking a protective measure from the court. If such a general scheme were in place, lawmakers could still add provisions addressing issues particular to the area of intellectual property rights such as Articles 10–12 of the Enforcement Directive, which set out particular categories of interim relief.

Fee-shifting

The same exercise could be administered with regard to other sections of the Enforcement Directive. The procedural nature is particularly obvious for Article 14 of the Directive which orders Member States to ensure that legal costs and other expenses incurred by the successful party, to the extent that they are reasonable and proportionate, shall be borne by the unsuccessful party, unless equity requires otherwise.

5.3.3 Collective Redress

5.3.3.1 Current Proposals

A second area where vertical integration may work its way into national systems of civil procedure is collective redress. The term collective redress is meant to include procedural mechanisms to aggregate damages claims for harm caused by the same behaviour or event or by a series of similar and related actions or events. It covers more or less the same ground as the famous or, to many European observers infamous, U.S.-style class action.[32] Plans developed within the Commission to adopt or introduce legal institutions paralleling the American class action have progressed farthest within the Directorate General for Competition (DG COMP) which, in April 2008, produced a White Paper on Damages Actions for Breach of the EC Antitrust Rules that envisages the introduction of two separate mechanisms: representative claims brought by consumer associations and other qualified entities and, in addition, opt-in class actions brought by the victims themselves.[33]

The objective of improving mechanisms of collective redress has not remained confined to competition law. The European Commission Directorate General for Health and Consumers (DG SANCO) intends to move further, as the Green Paper on Consumer Collective Redress of 27 November 2008 has made clear.[34] There, the Commission outlines a range of measures for strengthening consumer

[32] Cf. Issacharoff and Miller 2009.

[33] White Paper on Damages actions for breach of the EC anti-trust rules, COM (2008) 165 final, 4.

[34] Green Paper on Consumer Collective Redress, COM (2008) 794 final.

confidence in the functioning of the internal market and stimulating cross-border trade. Among those, the proposal to introduce EU legislation establishing mechanisms of collective redress is by far the most interesting—and the most controversial. In particular, DG SANCO is considering the introduction of class actions, representative actions, e.g. of consumer associations, and of test-case procedures.[35] Whether such instruments should take the form of an opt-in mechanism or rather follow the opt-out approach is left open.

5.3.3.2 Competence of the European Union

As to the legislative competence of the EU in the area of collective redress, it must be noted that both projects of DG COMP and DG SANCO, respectively, would remain outside the ambit of Article 81 TFEU. Again, the Commission is not concerned with improving the cooperation between the courts and judges in the several Member States or the jurisdictional and procedural rules governing the resolution of cross-border disputes. Rather, the objective is to improve the enforcement of, and compliance with, EU law, be it the law regulating business-to-consumer transactions or the rules safeguarding competition within the internal market. As a consequence, the legislative measures envisaged, which would introduce mechanisms of collective redress, would have to be based on the competence for the 'substantive' policy in question, i.e. Articles 101 and 102 TFEU for mechanisms enhancing the collection of damages caused by infringements of competition law[36] and on Articles 114 and 169(2) (b) TFEU with regard to collective redress in consumer law.

5.3.3.3 Procedural Nature of the Proposals

This is not the right place to discuss the merits of these proposals.[37] In the present context, the interesting question to ask is how they relate to the advancement of European integration in the area of civil procedure. In answering this question, it is submitted that one must distinguish between representative actions brought by associations and opt-in class actions or, to use a better term, group actions, which join together a multitude of actions brought by claimants who suffered similar harm.[38] The former would amount to an extension of the Injunctions Directive of

[35] Green Paper on Consumer Collective Redress, COM (2008) 794 final, 16, paras 54 et seq.

[36] Cf. White Paper on Damages actions for breach of the EC anti-trust rules, COM (2008)165 final, 2 et passim, referring to then Arts. 81 and 82 EC.

[37] Wagner 2011.

[38] For a thorough discussion, cf. Wagner 2011, 61 et seq.

May 1998 into the area of claims for damages.[39] Even though this directive created something like a representative action of associations for the 'protection of the collective interests of the consumer,' it remains limited to the remedy of injunctive relief, excluding damages actions from its purview.

More importantly for present purposes, the Injunctions Directive remains an isolated legal instrument in the sense that it does not have a great connection with the law and practice of civil procedure. The genuine procedural problems raised by representative actions are essentially confined to the doctrines of standing and *res judicata*. Extending the entitlement of consumer associations to the remedy of redress for harm caused raises difficult issues of the calculation of damages and distribution of proceeds, but does not involve the general rules of civil procedure significantly more than the Injunctions Directive did. Nonetheless, even the introduction of representative actions into civil practice in the aftermath of the Injunctions Directive amounted to a small-scale revolution for some legal systems and therefore was not met with open arms but sometimes with outright hostility.[40] This illustrates how a purportedly 'substantive' policy of improving the enforcement of, and compliance with, substantive rules of consumer protection may upset the community of practitioners and scholars active in the area of civil procedure.

The plans of the Directorate General for Competition to introduce an opt-in class action mechanism into European law will prove to be much more disruptive for the national systems of civil procedure. This characterisation does not imply that these plans are flawed from the outset or that the attempt must be abandoned in order to avoid the harm done to civil practice otherwise. Rather, it is meant to suggest that the introduction of a group action mechanism into the national legal systems, if it is going to work efficiently, needs careful fine-tuning with the procedural frameworks in place in the Member States. Group actions touch upon many more procedural topics and doctrines than representative actions and pose problems that are much more difficult to resolve. Lawmakers must answer questions such as how the multitude of claims will be joined together, how the lead case or the several test cases singled out for full trial are to be selected, what the appeals process with regard to the test case should look like, or how the findings reached within the proceedings on the test case relate to the deferred cases that are still pending at first instance. In addition, the intricate problems of remuneration of counsel, fee-allocation between winners and losers and within groups of claimants must be answered consistently and with great care because mistakes in these areas are likely to destroy the effectiveness of the mechanism altogether.

The legislative history of the German 'Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets' (*Kapitalanleger-*

[39] Directive 98/27/EC of the European Parliament and the Council of 19.05.1998 on injunctions for the protection of consumer interests (OJ 1998 L 166/51).

[40] For the problems raised in German law, cf. Greger 2000, 399, 406 et seq.

Musterverfahrensgesetz—KapMuG)[41] provides ample illustration of the many controversial problems that need to be solved along the way.[42]

Again, the fact that there are many difficulties does not in itself imply that the project should be abandoned. What must be kept in mind, however, is the fact that the introduction, by European legislation, of a class action mechanism of the opt-in variety, allowing the grouping together of related claims of a multitude of victims, would cut deeply into the national systems of civil procedure. Lawmakers must be aware of the nature of the problems they face and be alert to the ramifications that a solution to an isolated problem may have for neighbouring fields of practice. Even if the opt-in class action mechanism remained confined to the field of competition law, it would still require the harmonisation of important parts of civil procedure. This may not be a bad thing, since harmonisation of civil procedure with regard to discrete subject-matter areas allows lawmakers to experiment with particular solutions, to receive feedback, to gather experience and ultimately to learn from their successes and failures. As long as the experiment remains confined to a particular subject area, the harm caused by mistakes may be easier to bear.

5.3.4 Problems of Vertical Harmonisation

5.3.4.1 Focus on Law Enforcement

For some scholars of civil procedure it will be a source of unease and consternation that the harmonisation of key features of civil procedure is approached from the political angle of enforcement of European law in specific subject-matter areas and not regarded as a subject in itself, worthy of undivided attention. The danger exists that in the course of developing and improving the procedures providing for the efficient enforcement of European competition and consumer law, as well as, for the efficient protection of intellectual property rights, milestones are placed in spots where they would not have been placed if a broader perspective had been taken which focused on civil procedure as an end in itself, and not as a tool for law enforcement. One may even argue that the Commission started from the wrong principle as civil justice is not about law enforcement at all, but about striking the right balance between vindication and protection of entitlements and denial of judicial protection for unwarranted claims.

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[41] An English translation of the statute may be found on the homepage of the Federal Ministry of Justice, at http://www.bmj.bund.de/files/-/1110/KapMuG_english.pdf (last consulted in June 2011).

[42] For details, cf. Wagner 2006, 115 et seq; Wagner 2011, 66 et seq.

5.3.4.2 The View Towards Generalisation

However plausible these worries about the proper focus of vertical harmonisation in selected subject-matter areas may sound, they are not borne out in reality, i.e. by the legal instruments and proposals which are currently on the table. Presently, the true concern is not that vertical integration moves the law of civil procedure in the wrong direction, but that it precipitates harmonisation in selected areas only, even though these subject-matter areas have nothing special about them. The Enforcement Directive is the most straightforward example to demonstrate this. If one believes that fee-shifting along the principle of 'loser pays' is appropriate, why is it confined to disputes involving the infringement of intellectual property rights as Article 14 of Directive 2004/48/EC implies? If there is a need for a European framework of interim relief, including the authority of the court to order the applicant to provide security, to revoke the measure in case the applicant fails to institute proceedings on the merits, and to award damages to the respondent where the measure turns out to have been unwarranted—if all this is needed, then why are Articles 9, 11, 12 and 13 of Directive 2004/48/EC confined to the protection of intellectual property rights within the meaning of Article 1 of Directive 2004/48/EC? The same questions must be asked with a view towards the provisions dealing with evidence and its preservation (Articles 6 and 7, Directive 2004/48/EC) and access to information (Article 8, Directive 2004/48/EC). The procedural provisions made in the Enforcement Directive may be controversial at one point or another, but all in all they seem well balanced and are thus suitable for generalisation.

From this perspective, rather than from the point of view of enforcement of intellectual property rights, it is perplexing that Article 2(1) of Directive 2004/48/EC allows Member States to deviate from the provisions made in the directive and introduces measures that are 'more favourable to the rightholders.' Assuming that the procedural rules of Article 6 et seq of Directive 2004/48/EC strike a fair balance between the interests of both parties, Member States should not be allowed to depart from them in any direction. On the assumption that the framers of the Enforcement Directive got it wrong at one point or another, these mistakes call for correction at the European level, and not for a one-sided intervention by some Member States. Finally, under the theory that there are no single right answers to the problems addressed in the Enforcement Directive and that legal diversity should be allowed in the interest of natural variation and adaptive evolution of legal systems,[43] Member States should have discretion to depart in both directions, by introducing rules which are either more or less favourable to 'rightholders' as potential claimants. Whichever way one looks at the problem, the solution embraced by Article 2(1) of Directive 2004/48/EC is never justified. The simple explanation for its existence is that lawmakers were concerned with the enforcement of intellectual property rights and not with the harmonisation of civil

[43] For details, cf. Wagner 2002, 995 et seq, 999.

procedure and therefore implicitly accepted the proposition that ‘more is better’ and that Member States should be free to protect intellectual property rights as intensively and comprehensively as they might wish to.

This proposition is wrong even on its own premise as intellectual property rights confer monopoly powers on their holders and thus lend themselves to abuse for the purpose of restricting competition.[44] For example, patents are sometimes used as ‘weapons’ launched at competitors who strive to enter the market formerly dominated by the owner of the patent. Of course, such use of the patent is perfectly legitimate if the new entrant actually takes a free ride on the technology protected by the patent. However, the new entrant is free to replicate the result achieved by the patent owner by adopting another technological route that does not draw on the development protected by the patent. Problems with procedure and law enforcement arise in the familiar situation that it is difficult for a court or other decision maker to distinguish between the two cases and to quickly resolve the case in one direction or the other. To counteract the incentive of patent owners, and holders of other intellectual property rights, to blackmail competitors for the purpose of defending their monopoly more broadly than is warranted, the German courts have developed a category of quasi-strict liability of rightholders who wrongfully enforce intellectual property rights against competitors.[45] This may serve as an illustration of the point, made earlier, that in disputes involving intellectual property rights ‘more’ is not always ‘better.’ Rather, lawmakers must try to strike the right balance and devise rules that ensure that the true facts of the case are brought to the fore and that up to the time when these facts have been gathered interim relief is available on the basis of a preliminary and tentative establishment of the facts. In essence, this is what Article 6 et seq of Directive 2004/48/EC provide for, and thus Member States should not be allowed to add more on top of it in a misguided attempt to favour rightholders.

With regard to collective redress, an argument along the same lines can be made. Where a multitude of victims each incurred serious losses, the problem for lawmakers is how to aggregate those claims in order to prevent the courts from bottlenecking. Contrary to the impression that may have been raised by the White Paper on Damages Actions for Breach of the EC Antitrust Rules, such cases are by no means restricted to competition law. While some categories of ‘mass torts’ may primarily be an affair of competition law, airplane and train crashes, shipwrecks, as well as mass torts involving design defects of certain product categories, raise exactly the same problem of an avalanche of claims involving roughly the same facts and legal issues which would clog the judicial system for years if they were disposed of on a claim-by-claim basis. If the European Union were to introduce a mechanism allowing for the joining and aggregation of damages claims, which are related in the sense just described, then there would be no reason to limit this

[44] For a critical discussion, cf. Dam 1994, 247, 249 et seq.

[45] BGHZ 62, 29, 36 et seq = NJW 1974, 315, 317; BGH NJW 1976, 916; NJW-RR 1998, 331, 332; RGZ 94, 248, 250; cf. also Wagner 2009, paras 199 et seq.

group-action-type mechanism to the field of competition law. Rather, it should encompass damages claims of any kind, provided only that they satisfy the criteria justifying joint trial and decision-making.

The same reasoning applies to the ambit of the Green Paper on Consumer Collective Redress. Capital markets fraud, for example, is by no means an exclusive affair of consumer protection as institutional investors will be the victims most seriously affected. It would be absurd to divide the cake in two and to offer aggregate proceedings to victimised consumers only, to the exclusion of victims who incurred losses in the course of running their businesses.

5.3.4.3 Preliminary Conclusions

To sum up, vertical integration is a valuable tool for experimenting with harmonisation. It allows lawmakers to limit their decisions to particular fields of law only and to gather feedback from them before settling on a general solution governing the full range of civil disputes. The downside of this process of trial and error is that it may dissect general issues into particular ones which are resolved for a limited group of cases only, without any justification except the catalogue of EU competences enshrined in the TFEU and the principle of subsidiarity safeguarding it. From the point of view of civil procedure, the limitation of EU competences is just happenstance which needs to be overcome by comprehensive solutions. In the meantime lawmakers should be conscious of their actions, i.e. be aware of the fact that they are legislating in the area of civil procedure, even if the constitutional basis for their actions is some substantive policy of the EU, like competition law, consumer protection and the approximation of laws for the benefit of the internal market. Therefore, it is inappropriate to subscribe exclusively to a perspective of law enforcement and to ignore the dangers that may result from over-enforcement of rights enjoyed by the parties. Rules of civil procedure must strike the right balance between enforcement of valid rights and rejection of alleged claims that turn out to be unfounded.

5.4 Privatisation of Dispute Resolution

5.4.1 The Range of Options

Another basic choice faced by European lawmakers is the one between public and private forms of dispute resolution. The courts of law of the Member States are but one institution to which the parties may turn for a resolution of their dispute. There are plenty of alternatives to the public courts, which may be ordered on a continuum that ranges from dispute resolution by the authoritative decision of a judge, holding public office and exercising sovereign power to a privately negotiated

settlement which involves and concerns only the parties to the dispute. In between are mechanisms like arbitration, where the decision is made by a private judge or judicial panel charged with establishing the facts and applying the relevant law in the same manner as a court of law would, and mediation, where a neutral third party—the mediator—steps in and assists the parties in reaching a consensual settlement of their dispute.

5.4.2 Virtues of Alternative Dispute Resolution

If national lawmakers look at this spectrum, the best solution clearly remains litigation in public courts because this mode of dispute resolution ensures optimal degrees of fairness and law enforcement, given that lawmakers have the power to adjust the procedures followed by their courts so that they fit these goals. Nonetheless, the turn towards 'alternative'—namely private—modes of dispute resolution has been one of the dominant trends in recent decades in almost all European countries. The major driving force for this development was the high cost of litigation and the resulting demands on the public purse which were increasingly difficult to meet, even for comparatively rich countries.

On the European level, institutions of private dispute resolution out of court may be a different matter. Compared to courts of law, their major advantage is that they are not creatures of the Member States and thus may be more amenable to European regulation and more willing to enforce the substantive law of the Union. It is hard to say whether this view of alternative dispute resolution as a mechanism largely independent from the Member States figures prominently in the minds of Brussels lawmakers. However, it may be one of the reasons why mechanisms of alternative dispute resolution receive increasing attention at the European level. In fact, the landscape of alternative dispute resolution is rather diverse across Europe. With some generalisation it may be said that there is a North/South downward slope, with non-judicial dispute resolution particularly strong in Scandinavia, but also in the Netherlands, and to a lesser degree in the United Kingdom, and particularly weak in southern Europe.

5.4.3 The Mediation Directive

Against this background, the Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters is not only, and not even, primarily an instrument of harmonisation of otherwise divergent laws.[46] There are so few statutes on mediation in the Member States that there simply was not enough

[46] Directive 2008/52/EC, OJ 2008, L 136, 3 et seq.

divergence requiring harmonisation in any meaningful sense. Consequently, the directive is cheerfully open-hearted in regard to its objectives. Article 1(1) of Directive 2008/52/EC describes them in the following terms:

> The objective of this directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

To this end, Article 9 of Directive 2008/52/EC obliges Member States to inform the public about the availability and the virtues of dispute resolution via mediation as compared to litigation.[47] If the use of mediation in fact needs and deserves encouragement because it provides better access to justice, as the Recitals to Directive 2008/52/EC suggest, such support should not be limited to cross-border cases. The same problems the directive tries to solve—arresting limitation periods and prescription, ensuring confidentiality of the proceedings, enabling enforceability of settlements—affect mediation in domestic cases in exactly the same way as cross-border cases.[48] Not surprisingly, therefore, the Commission initially wanted a broader scope of application, including domestic cases, but was forced to abandon this plan for the sake of remaining within the limits of Article 81 TFEU. Still, Recital No. 8 of Directive 2008/52/EC encourages Member States to extend the scope of their transposition statutes to purely domestic disputes. It is to be expected that this option will be utilised by many European lawmakers. Germany is one example.[49]

5.4.4 Vertical Harmonisation, ADR, the Objective of Law Enforcement

The Green Paper on Consumer Collective Redress draws on these considerations when it pulls alternative dispute resolution into the context of vertical harmonisation, which does not need to be restricted to cross-border disputes:

> The EU could encourage Member States to establish collective consumer alternative dispute resolution schemes making sure that such schemes are available on their entire territory for all consumer claims and accessible to consumers from other Member States.[50]

The price for the possibility to broaden the scope of application of vertical instruments comes at the expense of the dominance of policy objectives other than those particular to civil procedure. In the case now under consideration the policy is again the one of law enforcement. Mechanisms of alternative dispute resolution are portrayed as facilitating access to justice and therefore allow for the

[47] Cf. also Recital No. 24 to Directive 2008/52/EC.

[48] Wagner 2010, 794.

[49] Wagner 2010, 794.

[50] Green Paper on Consumer Collective Redress, COM (2008) 794 final, para 39.

enforcement of small claims which would never be brought in public court because the costs of litigation are prohibitive.

While it is certainly true that mechanisms of alternative dispute resolution may be more accessible than courts of law, it seems problematic to combine this goal with the objective of improving the enforcement of the law or of subjective rights in the hands of consumers.[51] This is particularly striking with regard to mediation because it does not even purport to imitate the result that would have been obtained had the parties litigated the case in public court. The very idea of mediation is to seek out the potential for a consensual resolution of the dispute, regardless of the outcome a court would have reached had it decided the case on the merits after a full-blown trial. To the extent that this is true, mediation is simply incompatible with the function of law enforcement. A mechanism that is prepared to compromise the law for the benefit of the parties involved is anathema to the vindication of subjective legal rights. Of course, matters are entirely different if one envisages mechanisms of alternative dispute resolution to reflect the outcome of court proceedings, or at least to represent the expected value of a civil claim, i.e. the amount of a potential court award, multiplied by the probability that it would in fact be rendered. To illustrate this, imagine that a potential plaintiff believes he or she has a claim for €100 against the other party, and that a thorough legal analysis of the case reveals that a court would enter a judgment against the potential defendant in the amount of €90. Then, in order to achieve the same result, a mediator who helps the parties to negotiate a settlement would have to make sure that the settlement amount is set at €90. This assumes that the costs of litigation and mediation are equal, which they tend not to be in practice. Assuming that the total costs of court proceedings, to the extent that they must be borne by the parties, exceed the costs of mediation, the settlement amount would have to be reduced accordingly. The reverse correction would be appropriate if the 'winner' were entitled to recover the fees he or she incurred from the losing party. Even in theory, these calculations are not always obvious, and in practice they are too difficult to manage effectively. If a mediator had to know what the outcome of the case would have been had it been litigated in court, then he or she would have to be omniscient or would have to engage in a trial of the factual issues and in analyses of the legal issues involved. It goes without saying that mediation operating under such a demand would be meaningless and far too costly to be utilised in practice.

If one abandons the idea that mediation or other modes of alternative dispute resolution simply replicate, or rather imitate, the result that would have been reached in court, it is still possible to rescue the law enforcement function of alternative dispute resolution by assuming that the results reached reflect the expected value of a court judgment. Assuming again that the hypothetical judgment would have amounted to €90 but that it was uncertain whether a court would rule in favour of the claimant, the mediator could simply determine the probability of success, multiply the amount in judgment by that probability and see to it that the parties settle on this amount. In the present hypothetical, if both sides

[51] Wagner 2011, 81 et seq.

nominated witnesses to prove their case, instead of hearing all the witnesses and making a decision based on their testimony, the mediator might hear no witness at all and just estimate the probability of success. Assuming the probability that the claimant would have prevailed is 60 per cent, the mediator would help the parties settle for €54 ($90 \times 0.6 = 54$). Elegant as this approach might seem, it still ascribes supernatural powers to the mediator. How would a neutral observer know what the odds were without thorough information on the testimony of witnesses and the analyses of legal issues?

It may well be that the perspective of dispute resolution at bargaining prices blinded DJ SANCO thus making it hard to realise that mechanisms of alternative dispute resolution may be faster and cheaper than litigation in court precisely because they dispense with the idea of accurate ‘enforcement of legal rights’ and instead count on a reconciliation of the parties beyond the enforcement of each and every legal entitlement. While it remains possible to include the law in the array of concerns that are brought to bear in alternative proceedings such as mediation, this comes at a cost and still remains a far cry from the objective to enforce the law or subjective legal rights. It is for good reason that Directive 2008/52/EC mandates that courts must enforce settlement agreements reached in mediation only up to the point where their content is contrary to the law of the Member State in which enforcement shall take place (Article 6(1), Directive 2008/52/EC). It is understood that this proviso reflects the public policy exception known from the law of arbitration, as represented by Article V(2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[52] By no means does it require the court asked to enforce the agreement to compare it to the outcome that would have been reached had the case been resolved in litigation. Were this otherwise, mediation would not make sense at all.

It seems that the European Court of Justice (ECJ) shares these concerns about the compatibility of mechanisms of alternative dispute resolution and the objective to enforce EU law. On the one hand, the Court views the courts of the Member States as enforcement agencies of the European Union[53] which have to ensure that EU law is complied with and that remedies for violations of EU law honour the principles of equivalence and effectiveness.[54] On the other hand, the Court did not jump on the train favouring alternative dispute resolution insofar as it has denied arbitral tribunals the privilege to use the referral procedures under Article 267

[52] For the interpretation of the public policy proviso in International Arbitration, see ECJ 1 June1999, Case C-126/97, ECR I-3055 (*Eco Swiss China Time Ltd v Benetton International NV*) (3092 et seq) paras 38 et seq.

[53] ECJ 10 April 1984, Case C-14/83, ECR I-1892 (*von Colson and Kamann v Land Nordrhein-Westfalen*) (1908) paras 23 et seq; ECJ, 30 September 2003, Case C-224/01, ECR 2003, I-10239 (*Köbler v Republik Österreich*) (10310) paras 50 et seq.

[54] ECJ 30 September 2003, Case C-224/01, ECR I-10239 (*Köbler v Republik Österreich*), paras 32 et seq; ECJ 10 April 1984, Case C-14/83, ECR 1892 (*von Colson and Kamann v Land Nordrhein-Westfalen*) (1909) para 28.

TFEU, refusing to place them on the same footing as courts of law.[55] In addition, the ECJ has displayed a hostile attitude towards arbitration agreements in consumer contracts, treating arbitration not as an equally qualified mode of dispute resolution, but as a way to abridge the rights conferred upon the consumer by European law.[56] If this scepticism is warranted, then why does the Commission encourage the use of mediation and other mechanisms of alternative dispute resolution in settling disputes over EU law? If arbitration is not good enough to ensure the correct application of EU law and the vindication of the rights created by the European treaties and by legislation, why would the Union encourage the use of mediation and other modes of alternative dispute resolution which are much farther removed from the function of applying the law to the true facts of the case and thus reaching an outcome prescribed by the law?

The two policies of improving the enforcement of EU law and of expanding and encouraging the use of mechanisms of alternative dispute resolution are incompatible with one another. A lawmaker who focuses on strict enforcement of the laws that he or she has put in place must be zealous in ensuring that whatever disputes arise end up in courts of law that apply whatever rules govern the particular case. On the other hand, legislators whose primary aim is to let the parties have their way, particularly their peace, regardless of the teachings of the applicable law, should encourage the use of alternative ways of dispute resolution. It is not possible to pursue both goals at the same time. This is particularly true in the field of consumer law where disputes usually involve small claims. Where sums of less than €1,000 are at stake, it is a challenge for any mediator to work in the best interest of the parties and provide them some benefit without moving beyond the price these parties are willing to pay for his or her services. With stakes so low, it is simply impossible for a third party to engage in any kind of legal and factual analysis of the issues involved and to approximate—at least broadly—the outcome that would have been reached in court. Therefore, contrary to the suggestion of the Green Paper, damages claims for breach of consumer law are particularly unsuited for alternative dispute resolution, at least if the overriding goal is law enforcement—and not the satisfaction of the parties involved regardless of the commands of the law.

5.5 Conclusion

In the current state of European law-making, horizontal and vertical harmonisation co-exist alongside each other. The anchor of horizontal harmonisation is within Article 81 TFEU, which explicitly allows for measures approximating the laws

[55] ECJ 23 March 1982, Case C-102/81, ECR 1982, 1095 (1110) (*Nordsee v Reederei Mond*) para 10; ECJ 1 June 1999, Case C-126/97, ECR 1999, I-3055 (*Eco Swiss China Time Ltd v Benetton International NV*) (3092 et seq) paras 34, 40.

[56] ECJ 26 October 2006, Case C-168/05, ECR 2006, I-10421 (*Mostaza Claro v Centro Móvil Milenium SL*) (10445 et seq) paras 24 et seq = SchiedsVZ 2007, 46 with note G. Wagner.

and regulations of the Member States. During the first decade of the twenty-first century, the Commission has made intensive use of this authority and passed almost a dozen regulations and directives that harmonise important aspects of the law of civil procedure. However, the impact of these instruments on civil practice in the Member States remains limited because the competence conferred by Article 81 TFEU is restricted to 'civil matters with cross-border implications' and thus does not allow for the harmonisation of the rules of procedure governing domestic cases. In addition, the directives and regulations already on the books cover a wide range of minor issues and—perhaps with the exception of the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgments—never touch upon the heart of civil practice, i.e. the complicated and controversial topics of fact gathering, case management, judgments, appeals and interim relief.

For a naïve reader of the EU Treaties it may come as a surprise that some of these important and controversial issues have in fact been the subject of European legislation or will be in the near future. However, these legislative acts remain confined to specific subject-matter areas for which the Union has the competence to legislate, e.g. competition law and—arguably—intellectual property. As a consequence they do not bear the label of a measure harmonising the law of civil procedure. Instead, their aim is, or is said to be, the protection of the substantive legal rights involved, e.g. intellectual property rights. The same approach may soon be followed by European legislation introducing mechanisms of collective redress in the field of competition law and potentially even in consumer law. Thanks to the fact that the 'substantive' powers of the Union are not limited to cross-border trade, instruments of vertical harmonisation remain confined to specific subject-matter areas but in these areas they reach domestic and international cases indiscriminately.

The fact that, in terms of practical impact and significance, vertical harmonisation has overrun horizontal harmonisation may be a source of unease for scholars harbouring the ideal of a well-defined system of Union powers. From a pragmatic point of view, it looks rather attractive as it allows Europe to follow the same piecemeal process of integration that has worked so well in the past. In addition, a process that allows for a limited trial and therefore limited consequences of error offers more chances of success than bold leaps forward which may eventually end in a crash. However, it remains crucial for European lawmakers to realise that even if they engage in vertical harmonisation they still legislate in the area of civil procedure and that for the law of civil procedure, the vindication of legal rights is an important objective—but not the only one involved.

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