THE 2017 DIRECTIVE PROPOSAL ON COMMON MINIMUM STANDARDS OF CIVIL PROCEDURE IN THE EUROPEAN UNION

Fernando GASCÓN INCHAUSTI

Departamento de Derecho Procesal

Universidad Complutense de Madrid

fgascon@ucm.es

***The Future of the European Law of Civil Procedure: Coordination or Harmonisation?* (Fernando Gascón Inchausti and Burkhard Hess, eds.), Intersentia, Cambridge 2020 (págs. 241-264).**

ISBN: 978-1-78068-859-6

Documento depositado en el repositorio institucional Docta Complutense

https://docta.ucm.es/home

Los números de página de este documento no se corresponden con los del texto publicado.

Fernando Gascón Inchausti, «The 2017 Directive Proposal on common minimum standards of civil procedure in the European Union», en F. Gascón Inchausti / B. Hess (eds.), *The Future of the European Law of Civil Procedure: Coordination or Harmonisation?*, obra colectiva dirigida por Fernando Gascón Inchausti y Burkhard Hess, Intersentia, Cambridge, 2020, 290 pp., pp. 241-264. ISBN 978-1-78068-859-6.

THE 2017 DIRECTIVE PROPOSAL ON COMMON MINIMUM STANDARDS OF CIVIL PROCEDURE IN THE EUROPEAN UNION: AN OVERVIEW AND A GENERAL ASSESSMENT

Fernando GASCÓN INCHAUSTI

Universidad Complutense de Madrid

Instituto de Derecho Europeo e Integración Regional (IDEIR)

I. ORIGINS AND SCOPE OF THE PROPOSAL
- A. *Origins*
- B. *Scope of the proposal*

II. CONTENT: THE PROPOSED MINIMUM STANDARDS
- A. *Minimum standards on fair and effective outcomes*
  - **1.** *Effective judicial protection*
  - **2.** *Personal appearance in oral hearings*
  - **3.** *Provisional and protective measures*
- B. *Minimum standards on the efficiency of proceedings*
  - **1.** *Efficiency as a general principle*
  - **2.** *Motivation of judicial decisions*
  - **3.** *Active case management*
  - **4.** *Evidence*
- C. *Minimum standards on access to courts and justice*
  - **1.** *Settlement of disputes*
  - **2.** *Court fees*
  - **3.** *Orders for costs*
  - **4.** *Legal aid*
  - **5.** *Litigation funding*
- D. *Minimum standards on fairness of the proceedings*
  - **1.** *Service of proceedings*
  - **2.** *Legal representation*
  - **3.** *Translation and interpretation*
  - **4.** *Procedural good faith*
  - **5.** *Public proceedings and confidentiality*
  - **6.** *Independence and impartiality*
  - **7.** *Training*

III. A GENERAL ASSESSMENT

I. ORIGINS AND SCOPE OF THE PROPOSAL

A. *Origins*

Since the development of the well-known «Storme Project»[1], there have been several indications that the EU institutions do not disregard a possible harmonization of (some aspects of) civil procedure. The Action Plan for the implementation of the

[1] M. STORME (ed.), *Approximation of judiciary law in the European Union*, Kluwer, 1994.

Stockholm Program,[2] approved in 2010, already contained the expectation that the Commission would prepare a green paper on minimum standards for civil proceedings (in 2013) and that it would formulate a legislative proposal to improve coherence of the existing legislation in the Union in the field of civil procedural law (in 2014); however, these objectives did not materialize in the foreseen terms. After the exhaustion of the Stockholm Program, the «Strategic Guidelines for the Area of Freedom, Security and Justice», approved by the European Council of 26-27 June 2014[3], returned to the field of generality, without direct mention of a possible approximation of the civil procedural legislations (the document refers, for instance, to «simplifying access to justice» or «improving the mutual recognition of decisions and judgments in civil matters», but it does include further details).

However, the issue has remained very active in the agenda of the EU institutions: various projects sponsored by the Commission have been focused on exploring the possibilities of civil procedural harmonization; [4] and there is an open work line in the European Parliament[5], which has organized meetings[6] and commissioned studies.[7] This work line led eventually to the resolution of the European Parliament of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union[8]. This document represents a very outstanding initiative in terms of harmonization, not only because of its «official» nature, but namely because it includes the draft text of the

[2] Doc. COM(2010) 171 final; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0171.

[3] http://register.consilium.europa.eu/doc/srv?f=ST+79+2014+INIT&l=en#page=2

[4] See, namely, the «Luxembourg Study», developed under the leadership of the Max-Planck-Institute Luxembourg for Procedural Law: B. HESS et al., *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Strand 1: mutual trust and free circulation of judgments* (2017) https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

[5] The interest of the European Parliament in advancing along the path of harmonization is already announced by R. BRAY, “Common Rules and Best Practices From the Perspective of the European Parliament”, in B. HESS / X.E. KRAMER (eds.), *From common rules to best practices in European Civil Procedure*, Nomos, Baden-Baden, 2017, 35-42.

[6] See, for instance, the *workshop “Common minimums standards of civil procedure”*, held on 15 June 2016 (https://europa.eu/newsroom/events/workshop-common-minimum-standards-civil-procedure_en).

[7] See, for instance, R. MAŃKO, *Europeanisation of civil procedure. Towards common minimum standards?*, European Parliamentary Research Service, In-Depth Analysis, PE 559.499 (2015); M. TULIBACKA / M. SANZ / R. BLOMEYER, *Common minimum standards of civil procedure*, European Parliamentary Research Service, European Added Value. Assessment. Annex I, PE 581.385 (2016); B. HESS, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure*, European Parliamentary Research Service, In-Depth Analysis PE 556.971 (June 2016, http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA(2016)556971_EN.pdf).

[8] (2015/2084(INL) http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0282&language=EN&ring=A8-2017-0210

proposal for a Directive on common minimum standards of civil procedure in the European Union. The proposed text comprises indeed 28 articles, divided into three chapters: a first chapter, on subject matter, scope and definitions (Articles 1 to 3); a second chapter, establishing the minimum standards of civil procedure (Articles 4 to 24); and a third chapter, with the final provisions on transposition, review and entry into force (Articles 25 to 28).

The presentation of this proposal constitutes, without a doubt, a qualitative leap. Since the parliamentary vote no further steps seem to have been taken; it is therefore uncertain if the text will be finally enacted and, anyhow, one would always expect differences in the content of a possible final text. Nevertheless, it is worth taking it into consideration, since it has the potential to set the pace for the future.

B. ***Scope of the proposal***

The aim of the proposal is «to approximate civil procedure systems», as a mean to ensure full respect for the right to an effective remedy and to a fair trial as recognised in Article 47 CFREU and in Article 6 ECHR; this approximation is promoted «by laying down minimum standards concerning the commencement, conduct and conclusion of civil proceedings before Member States' courts or tribunals» (Article 1).

This objective, which in itself is very broad, is nevertheless limited in its scope of application –at least in appearance. Indeed, the approval of the directive should be based on the regulatory competence conferred by Article 81.2 TFEU, so that its application should be restricted to litigation «with cross-border repercussions» in civil and commercial matters[9]. However, the determination of what is meant by «litigation with cross-border repercussions» is done in a fairly loose and generous manner (Article 3.1),[10] so that the provisions of the Directive would come into play when:

> (a) at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized; or
>
> (b) both parties are domiciled in the same Member State as that of the court or tribunal seized, provided that the place of performance of the contract, the place where the harmful event takes place or the place of enforcement of the judgment is situated in another Member State; or

[9] United Kingdom (assuming Brexit would not materialize before any Directive would have been passed), Ireland and Denmark would be outside of its geographical scope of application (Article 2.2). And the determination of what is meant by civil and commercial matters would be done according to the usual parameters (excluding revenue, customs or administrative matters and the liability of the State for 'acta iure imperii': Article 2.1).

[10] On the possibility of enlarging the interpretation of what are to be considered «cross-border implications», M. TULIBACKA et al. (*supra*, note 7), 66-67.

(c) both parties are domiciled in the same Member State as that of the court or tribunal seized, provided that the disputed matter falls within the scope of Union law.

The expansive potential is tremendous, especially if one takes into account the large number of areas of private law in which Union law is applicable, the most paradigmatic example being, of course, consumer law.

II. CONTENT: THE PROPOSED MINIMUM STANDARDS

Against these backgrounds, the text proposes a grouping of the minimum standards into four thematic blocks, which make up each of the sections of the second chapter: fair and effective outcomes; efficiency of proceedings; access to courts and justice; and fairness of proceedings. As will be seen below, there is certain arbitrariness when configuring these categories and when including –sometimes, rather «fitting in»– in them some safeguards.[11] Nevertheless, the issues addressed by the proposal are symptomatic of the matters in relation to which the European lawmaker is considering appropriate to advocate minimum standards.

A. *Minimum standards on fair and effective outcomes*

Under the umbrella of fairness and effectiveness of the outcomes, the proposal believes that minimum standards should be ensured in relation to three different issues: the right to effective judicial protection, personal appearance in oral hearings, and provisional and protective relief.

1. *Effective judicial protection*

In the first place, Article 4 makes a general proclamation of the Member States' duty to provide judicial relief to the rights conferred by Union law in civil matters, by means of measures, procedures and remedies that shall be fair and equitable, that shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

The provision is a more than obvious transposition of Article 47 CFREU from its «constitutional position» to the level of what we could call «ordinary legality»: nothing can be objected to what is established in it, since it is ultimately a reflection of the principles of equivalence and full effectiveness to the level of the regulation of civil proceedings –something, indeed, very frequent in the recent case law of the Court of Justice.

2. *Personal appearance in oral hearings*

---

[11] The proposal follows the systematization used by M. TULIBACKA et al. (*supra*, note 7) 19-20.

Article 5, on the contrary, deals with a more daily problem, especially in cross-border litigation: the difficulty of the parties to physically appear in oral hearings (due, e.g., to distance, cost and/or other obstacles). At this point, a general duty is established for Member States to facilitate the holding of hearings by making use of any appropriate distance communication technology, such as videoconferencing or teleconferencing, available to the court or tribunal. More precisely, if the person to be heard is domiciled or habitually resident in a different Member State, it is established that that person's attendance at an oral hearing by way of videoconference, teleconference or other appropriate distance communication technology shall be arranged by making use of the procedures provided for in Regulation (EC) No 1206/2001 (Evidence Regulation):[12] this implies the involvement of the judicial authority of the State of domicile or habitual residence, as a way of giving proof of the examination, although it may also mean a limitation to the simplicity invocation that usually accompanies the proposals to substitute physical appearances by video or teleconferences. In practice, indeed, videoconferencing does not always function as expected, due mostly to technical problems and language issues.[13]

3. *Provisional and protective measures*

The third element that is considered key to ensure the fairness and the effectiveness of the outcomes of the procedure are provisional and protective measures. At this point, Article 6 of the proposal synthesizes the minimum basic elements that should characterize any advanced regulation of this institution:

i) Litigants must have at their disposal measures of a protective nature (i.e., «measures for the preservation of a factual or legal situation so as to secure the full effectiveness of a later judgment on the substance of the matter», including measures for the preservation of assets and of evidence), but also measures for the prevention of any imminent infringement or for the immediate termination of an alleged infringement. Proportionality must be the general rule regarding the determination of their content in each specific case (taking into account the features and the seriousness of the situation against which the measures are requested, and allowing where appropriate the provision of guarantees for the costs and the harm caused to the defendant by unjustified requests).

[12] This rule is clearly based on Article 8.1 of the European Small Claims Procedure regulation, as amended in 2015 (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199 31.7.2007).

[13] On the troubles that videoconferencing may entail in cross-border litigation, see F. GASCÓN INCHAUSTI / M. REQUEJO ISIDRO, "A Classic Cross-border Case: the Usual Situation in the First Instance", in *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Strand 1: mutual trust and free circulation of judgments* (*supra*, note 4) 44-167, at 119 and 125.

ii) Provisional and protective measures shall be available prior to proceedings on the substance of the matter being initiated and at any stage during such proceedings.

iii) Provisional and protective measures shall be granted on the basis of a *fumus boni iuris* (sustained by prima facie evidence –«reasonably available evidence», in the terms of the proposal) and requiring the applicant to assume full responsibility, which allows the court to demand the provision of guarantees for the costs and the harm caused to the defendant by unjustified requests.

iv) In certain circumstances of specific or aggravated *periculum in mora*, it must be possible to take these measures without the defendant having been heard, although, of course, with a right of the defendant to request a full –and adversarial– review, which may lead to compensation for any damages suffered as a result of those measures.

At this point, therefore, the proposal does not innovate, but reflects the traditional scholarship on provisional and protective measures, long ago assumed by the Court of Justice itself, who defined what should be understood as «provisional and protective measures» using a functional approach, as those «intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought (…) from the court having jurisdiction as to the substance of the matter»[14], a broad notion which encompasses also those measures able to satisfy the plaintiff's interest, even if only provisionally [15]. This commonly shared notion of provisional and protective measures underpins also, indeed, the first «European» protective measure, the European Account Preservation Order.[16]

B. ***Minimum standards on the efficiency of proceedings***

Under the label of efficiency, safeguards and harmonization proposals are grouped which refer to very heterogeneous issues, including the motivation of judicial resolutions, a more active case management and evidence.

1. *Efficiency as a general principle*

From the outset, Article 7 attributes to efficiency the value of a general principle and, thus, of a basic interpretative canon when making procedural decisions of all kinds, making it clear that celerity –and not only costs– is part of that notion, and giving as an example three situations: the need for an oral hearing, the means of

[14] Judgment of the Court of 26 March 1992,C -261/90, *Reichert*, ECLI:EU:C:1992:149, § 34.

[15] Judgments of the Court of 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543 and of 27 April 1999, C-99/96, *Mietz*, ECLI:EU:C:1999:202.

[16] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ L 189, 27.6.2014).

taking evidence and the extent to which evidence is to be taken. It should therefore be understood that, with respect to the general principles of civil procedure and especially the principle of an adversarial process, the court must opt for the solution it considers most efficient, which may be not to hold a hearing (if the proceeding would be delayed), not to admit a certain means of proof (if it is considered very costly or delaying and the evidence is substitutable by another that is less costly or less time-consuming) or limit, according to equivalent parameters, what should be the scope of the taking of evidence (e.g., reduce the scope of an expert report to diminish its costs and the time it would take to prepare it). These ideas, indeed, also transpire from existing European regulations on civil procedure: the EAPO regulation, for instance, when it comes to the evidence necessary to sustain the application for an order, shows a clear preference for documents, although it allows the court to use other appropriate method «provided that this does not delay the proceedings unduly» (Article 9.2);

2. *Motivation of judicial decisions*

Much more specifically, Article 8 establishes a general duty to motivate or give the reasons for judicial decisions: this motivation must be «sufficiently detailed» and is linked to the possibility of effectively exercising the right to challenge them. Motivation is, therefore, attributed a first-rank value, which is commonly recognized in most Member States[17] and in the CFREU itself.[18] What the rule does not require is that the reasons be given at the very moment in which the decision is announced to the parties: it would be possible, therefore, to give them at a different moment, provided that it is done within a reasonable time. This proposal would serve to put an end to the problems that, in some occasions, lack of motivation can generate when seeking abroad the enforcement of judicial decisions.[19]

3. *Active case management*

Article 9 offers the vision of what the role of the court should be in relation to the direction of proceedings: it seems necessary for the courts to have sufficiently powerful tools for the «active management of the cases», at the service of a fair and efficient disposition of disputes, in terms of time and costs.[20] Of course, the proposal

[17] F. GASCÓN INCHAUSTI / M. REQUEJO ISIDRO (supra, note 13) 130.

[18] The Court of Justice has held that the observance of the right to a fair trial requires that all judgments be reasoned to enable the defendant to see why judgment has been pronounced against him and to bring an appropriate and effective appeal against it (see Judgments of 14 December 2006, C-283/05, *ASML*, ECLI:EU:C:2006:787, § 28, and of 6 September 2012, Case C‑619/10, *Trade Agency*, ECLI:EU:C:2012:531, § 53.

[19] F. GASCÓN INCHAUSTI / M. REQUEJO ISIDRO (supra, note 13) 132.

[20] C.H. VAN RHEE, "The development of civil procedural law in twentieth-century Europe: from party autonomy to judicial case management and efficiency", *Russian Yearbook on Civil Procedure & Arbitration*, 7-8, 2011, 82-95; A. CABRAL, "New Trends and Perspectives on Case Management", *International Journal of Procedural Law*, 2018-1, 10-36.

does not intend to replace the principle of party disposition: therefore, it is expressly stated that active management should not impair «the freedom of the parties to determine the subject-matter of, and the supporting evidence for, their case» and, in addition, it establishes the duty of the court, as far as possible, to manage the case in consultation with the parties.[21]

There are several examples of «active case management» that, according to the proposal, should be incorporated into national legislation so that they can be said to be efficient and, therefore, that they meet the minimum standards for dealing with cross-border litigation in accordance with European parameters: (a) encouraging the parties to co-operate with each other during the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and disposing summarily of other issues; (d) deciding the order in which issues are to be resolved; (e) helping the parties to settle the whole or part of the action; (f) fixing timetables to control the progress of the action; (g) dealing with as many aspects of the action as possible for the court on the same occasion; (h) dealing with the action without the parties needing to attend in person; (i) making use of available technical means. At this point, the proposal may be more innovative, especially with regard to some national procedural models, which tend to rigidity.

4. *Evidence*

Also included in the section of efficiency are the two single provisions that the proposal devotes to evidence.[22] In general terms, a sort of fundamental right to evidence is enshrined, which obliges Member States to ensure that effective means of presenting, obtaining and preserving evidence are available, with the explicit limit of the protection of confidential information (Article 10.1). The efficiency approach becomes visible when it comes to the taking of evidence itself: the court will have to opt for the simplest and least-costly method, encouraging the use of modern communication technologies (Article 10.2).

Among the different types of evidence, only court experts disserve the proposal's attention in Article 11. Without excluding party-appointed experts, the proposal considers it necessary that the court may at any time appoint experts «in order to provide expertise for specific aspects of the case», who shall be subject to the same requirements of independence and impartiality as judges and whose reports are to be brought to the attention of the parties, who will have the right to comment on

[21] On the need to harmonize the rules on case management, see A. UZELAC, "Towards European Rules of Civil Procedure: Rethinking Procedural Obligations", *Hungarian Journal of Legal Studies* 58, No 1, 3-18 (2017); C.H. VAN RHEE, "Case Management in Europe: A Modern Approach to Civil Litigation", *International Journal of Procedural Law*, 2018-1, 65-84.

[22] N. TROCKER, "From ALI-UNIDROIT Principles to common European rules on access to information and evidence? A preliminary outlook and some suggestions", *Uniform Law Review*, Vol. 19, 2014, 239-291.

them. The wording is ambiguous enough to conclude clearly if it is forcing national legislators to allow in any case ex officio expertise –something that would clash with the vision of things in many legal systems– or if it is limited to demand from Member States to set up a system that allows the courts to find experts, when they shall or may appoint them, that is, ex officio –if their legislation permits it– or at the request of a party. This second interpretation appears sustained by paragraph 3 of proposed Article 11, which obliges the Commission to draw up a European directory of experts shall be drawn up by the Commission by bringing together existing national lists of experts and shall be made available via the European e-justice portal.[23]

In the more specific domain of cross-border cases, Article 11.2 of the proposal seems to have enshrined the solution offered by the Court of Justice in its *ProRail* judgment:[24] the courts may appoint an expert and order him or her to carry out «investigations» *–rectius*, expert actions– in another Member State without having to resort to the formal channels of cooperation between courts of the Evidence Regulation, unless that carrying out the expert investigations requires coercive measures or access to places restricted or prohibited to certain persons.

C. *Minimum standards on access to courts and justice*

1. *Settlement of disputes*

Section 3 of Chapter 2 of the proposal groups, above all, minimum standards related to the economic dimension of procedure, with the exception of the first one, addressing the settlement of disputes. Article 12, consistent with the notion of «active case management» of the procedure, establishes the need to empower the court so that, at any stage of the proceedings, if it considers that the dispute is suitable for a settlement, it may propose to the parties the recourse to mediation in order to settle or to explore the possibility of a settlement. In any case, and to avoid misunderstandings, the right of the parties to abandon mediation and resort to judicial proceedings or arbitration is explicitly recognized –in line with the decision of the Court of Justice in *Menini and Rampanelli*, where it was stated that the 2013 Directive on consumer ADR[25] precludes national legislation which provides that consumers may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision.[26]

---

[23] More specifically, the directory shall be drawn up by bringing together existing national lists of experts and shall be made available via the European e-justice portal.

[24] Judgment of 21 February 2013, C-332/11, *ProRail*, ECLI:EU:C:2013:87.

[25] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (OJ 2013 L 165).

[26] Judgment of the Court of 14 June 2017, C-75/16, *Menini and Rampanelli*, ECLI:EU:C:2017:457.

2. *Court fees*

Court fees are the first of the economic aspects of proceedings in relation to which the implementation of minimum standards is considered necessary. Article 13 assumes that they are possible –but not compulsory, of course– and insists that they must be proportionate to the value of the claim and they shall not discourage citizens from bringing a case before a court or hinder in any way access to justice: how to translate this rather indeterminate legal notions in practice can be a source of difficulties. With a clearer approach to cross-border litigation, it is considered imperative that court fees can be paid by means of distance payment methods, also from another Member State other than that in which the court has its seat, by bank transfer or by credit or debit card payment.[27] In addition, the information in this regard must be easily accessible (and understandable) through the Internet and, in particular, through the European e-Justice Portal.

3. *Orders for costs*

The proposal has also had the courage to venture into a much thornier terrain, the order for costs; and it has done so with the will to establish as a minimum standard –and therefore as a common standard– the *loser-pays principle* (i.e., the unsuccessful party bears the costs of the proceedings). Although it is a common rule to the procedural systems of almost all Member States, there are significant differences when it comes to specifying its reach and its exceptions and modulations.[28] Article 14 makes the following proposals in relation to this:

i) An order for costs shall include those resulting from the fact that the other party was represented by a lawyer or another legal professional –regardless if their intervention was legally mandatory or not-. Having in mind the cross-border nature of the case, mention is also made to any costs arising from the service or translation of documents. Common requirement for the expenses to be included in the order for costs is that they are proportionate to the value of the claim and they were necessarily incurred.

ii) An order for costs shall not include unnecessary costs, i.e., incurred either by raising unnecessary issues or by being otherwise unreasonably disputatious.

iii) Where a party succeeds only in part or in exceptional circumstances, courts have a discretionary power to order an equitable apportion of costs or that the parties bear their own costs.

[27] Here again, the proposal is clearly inspired in Article 15a of the ESCP Regulation, as amended in 2015.

[28] F. GASCÓN INCHAUSTI / M. REQUEJO ISIDRO (*supra*, note 13) 133-138; A. DORI / V. RICHARD, "Litigation Costs and Procedural Cultures – New Avenues for Research in Procedural Law", in *From common rules to best practices in European Civil Procedure* (*supra*, note 5) 303-351.

iv) The court shall also have the power to adjust its award of costs to reflect – rather, sanction– unreasonable failure to cooperate or bad-faith participation in settlement endeavours.

4. *Legal aid*

Article 15 focuses on the flip side of the coin, legal aid. Although at this point the European Union already has the minimum standards of Directive 2003/8,[29] it is intended to go one step further proclaiming not only the duty of Member States to grant it, but specifying the elements that should be covered, in whole or in part, by legal aid: a) court fees, through total or partial discounts or rescheduling; b) costs of legal assistance and representation regarding pre-litigation advice with a view to reaching a settlement prior to commencing legal proceedings; c) costs of legal assistance and representation regarding commencing and maintaining proceedings before the court; d) all costs relating to proceedings including the application for legal aid; e) costs of legal assistance and representation regarding enforcement of decisions; f) other necessary costs related to the proceedings to be borne by a party, including costs of witnesses, experts, interpreters and translators and necessary travel, accommodation and subsistence costs of that party and his representative; g) the costs awarded to the successful party, in the event that the applicant loses the action.

With regard to natural persons, the proposal aims to offer a kind of general benefit to all Union nationals or legal residents in the Union, subject to three requirements which, in this way, also become minimum standards: a) lack of economic capacity (which, however, is not defined with greater precision); b) reasonable prospect of success of the action; c) the claimant seeking legal aid shall be entitled to bring actions under the relevant national provisions.

The proposed text goes beyond the scope of Directive 2003/8 by addressing the possibility of granting legal aid to legal persons. At this point, it is considered that, at least, they should have the right to obtain as legal aid a dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. And, as for the elements to be taken into consideration to grant them legal aid, certain elements or criteria are offered in an open manner: 1) the form of the legal person in question and whether it is profit-making or non-profit-making; 2) the financial capacity of the partners or shareholders; 3) the ability of those partners or shareholders to obtain the necessary amounts to initiate legal proceedings.

In addition, the proposal establishes the duty to provide information to potential beneficiaries of legal aid about the right and, above all, the procedure to be followed to seek it.

[29] Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26, 31.1.2003).

5. *Litigation funding*

Article 16, for its part, deals with the new phenomena related to the financing of litigation and, more specifically, to third party funding. Rather than regulating them, the aim is to establish certain limits, stemming from what had already been recommended in 2013 for collective actions:[30] 1) the private third party shall not seek to influence the plaintiff's procedural decisions, including those relating to settlements; 2) a private third party must not be allowed to fund a class action that is directed against a defendant who is a competitor of the fund provider or on whom the fund provider is dependent; 3) the private third party must not charge «excessive» interest on the funds provided; 4) the remuneration or interest that goes to the private third party should not be based on the amount set in the settlement reached or in the compensation granted, unless the funding agreement is regulated by a public authority guaranteeing the interests of the parties. This last requirement will undoubtedly be a source of controversy, if one takes into account the usual dynamics of these funding schemes, frequently «allergic» to public supervision.

D. ***Minimum standards on fairness of the proceedings***

1. *Service of proceedings*

The last block of minimum standards includes those aimed at guaranteeing the fairness of the proceedings. Perhaps for that reason, the first provision is dedicated to the service of documents and, in a special way, to the documents instituting the proceedings.

Article 17 condenses to a large extent the *acquis communautaire* on service, which can be deduced, in particular, from the regulations on the European enforcement order[31], the European order for payment procedure[32] and the European small claims procedure, and from the case-law of the Court of Justice and the European Court of Human Rights.[33]

---

[30] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013). See on this *Statement of the European Law Institute on Collective Redress and Competition Damages Claims* (2014) at 31-35 and 56, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf (last access 11.1.2019).

[31] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004).

[32] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006).

[33] Cfr. F. GASCÓN INCHAUSTI, "Service of proceedings on the defendant as a safeguard of fairness in civil proceedings: in search of minimum standards from EU legislation and European case-law", *Journal of Private International Law*, Vol. 13, 2017-3, 475-518.

Starting from the preference for service methods guaranteeing receipt of the served documents, the proposal places at the same level personal service, postal service and service by electronic means, such as fax or email (taking for granted, in relation to these, that appropriately high technical standards guaranteeing the identity of the sender and the safe transmission of the served documents shall be used). Service shall be attested by an acknowledgment of receipt including the date of receipt, which shall be signed by the addressee. In case of personal service, it may also be attested by a document signed by the competent person who effected it, stating that the addressee has received the documents or refused them without any legal justification, and the date of the service.

As subsidiary methods of service, but provided that the defendant's domicile is known with certainty, the following are considered acceptable –but not of necessary incorporation to national legislations–: a) in person at the defendant's personal address, on persons who are living in the same household as the defendant or are employed there; b) in the case of a self-employed defendant or a legal person, personal service at the defendant's business premises, on persons who are employed by the defendant; c) deposit of the documents in the defendant's mailbox; d) deposit of the documents at a post office or with competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the documents as being court documents or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits; [34] e) postal service without proof of receipt where the defendant’s address is in the Member State of origin; f) electronic means attested by an automatic advice of delivery, provided that the defendant has expressly accepted this method of service in advance.[35]

In all cases –i.e., with or without acknowledgement of receipt by the addressee-service may also be effected on the defendant’s legal or authorised representative. And for cross-border service of documents referral is made to the Service Regulation or to the 1965 Hague Convention, depending on their scope of application.

The proposal, however, does not address one of the main problems generated by the need to make the plaintiff's access to justice compatible with the defendant's

[34] In the first four mentioned situations, service shall be attested by a document signed by the competent person who effected the service, indicating all of the following: (i) the full name of the person who served the notification or communication; (ii) the method of service used; (iii) the date of service; (iv) where the served documents have been served on a person other than the defendant, the name of that person and his or her relationship to the defendant; and (v) other compulsory information to be provided under national law. As an alternative, but only for the first two mentioned situations, the proposal also admits an acknowledgement of receipt by the person served.

[35] As mentioned above, this list of direct and subsidiary methods of service is not original, but based on the pre-existing provisions of Articles 13 and 14 of the EEO Regulation, 13 and 14 of the EOP Regulation, and 13 of the ESCP Regulation.

right to a fair trial: what to do when the defendant's domicile is unknown and/or how to operate when, despite the diligence and efforts of the court or of the plaintiff, it is not possible to obtain an acknowledgment of receipt attesting service. Most legal systems admit methods of fictitious service, which the proposal does not prohibit explicitly, since the general rule is that methods guaranteeing receipt of the served documents shall be used *as a matter of principle*. The silence of the proposal –understandable given the thorny nature of the issue– would have to mean, in practice, the need to manage, at least in cross-border situations, with the provisions of the Service Regulation –regarding the possibility or not of pursuing the process (Article 19)–, of the Brussels I bis Regulation –on the refusal of recognition and enforcement in case of involuntary default (Article 45.1 b)[36]– and of the regulations on the European enforcement order, the European order for payment procedure and the European small procedure –regarding the possibility of obtaining a review in case of ignorance of the existence of the proceedings.

2. *Legal representation*

For obvious reasons, the proposal also links to the fairness of proceedings the need to guarantee the right to use a lawyer. In particular, Article 18 seeks to provide a balance between the different legal traditions regarding legal representation and the special needs of cross-border litigation. The general rule, of course, is the right of the parties to use a lawyer of their choice, who is associated with the confidentiality of communications of all kinds between the parties to a case and their lawyers (including meetings, correspondence and telephone conversations or other forms of communication). The special feature, for cross-border litigation, is the recognition of the right to the «double lawyer»: the parties should have the right to a lawyer in their State of origin for preliminary advice and another in the host State to conduct the litigation. It would be coherent to understand that both lawyers are covered by the privilege of confidentiality and that requests for legal aid could be formulated in relation to both.

As far as self-defense is concerned, it should be remembered that European procedural law is favorable to exempt litigants from mandatory legal representation (e.g., European order for payment procedures, European small claims procedures or consumer ADR schemes). The situation is heterogeneous within the national systems,[37] something that the proposal is aware of. However, even assuming that there are Member States where the main rule is mandatory legal representation, the proposal establishes the right to waive it if two conditions and a safeguard are met. The

[36] See the Judgments of the Court of 17 November 2011, C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745; 15 March 2012, C-292/10, *G / De Visser*, ECLI:EU:C:2012:142; and 11 September 2014, C-112/13, *A / B*, ECLI:EU:C:2014:2195 (§ 60).

[37] For an overview, F. GASCÓN INCHAUSTI / M. REQUEJO ISIDRO (*supra*, note 13) 100-103.

conditions are: 1) parties must have been provided orally or in writing with clear and sufficient information in simple and understandable language about the possible consequences of the waiver; and 2) the waiver must be voluntary and unequivocal. And the safeguard is the revocability *ad libitum* of the waiver at any time (which includes the duty to inform the parties about that possibility).

Perhaps with a minor rank –although not at all negligible– Article 19 recognizes the duty of Member States to provide citizens with transparent and easily available information regarding the commencement of various procedures, limitation or prescription periods, the competent courts to hear different disputes, and the necessary forms that need to be filled in for that purpose. It is, obviously, a complement to the self-defense powers that are recognized, but also an additional manifestation of the duty of the States to facilitate active citizenship and a better knowledge of the rights of each one, as a means to face the monopolies *–de iure* or *de facto–* of legal professions in many systems. The proposal clarifies, however, that the information to be provided on the basis of this safeguard must be general, not specific and related to a specific case («legal assessment of a specific case»): this will only be required, where appropriate, under the rules on legal aid.

3. *Translation and interpretation*

In close relationship to the right of the parties to understand the entire proceedings, Article 20 of the proposal includes the duty of Member States to ensure that interpretation and written translation of all *essential* documents are available in order to safeguard the fairness of proceedings.[38] This concern is directly linked to cross-border litigation and is aligned with the most recent trend in EU legislation on civil procedure to reinforce the fairness of proceedings also from a linguistic point of view (Art. 8 Service Regulation; Art. 49 EAPO Regulation; Art. 7 Legal Aid Directive; and, more recently, Article 43.2 of the Brussels I bis Regulation, requiring, where appropriate, translation of the judgment into a language that the defendant understands –or is deemed to understand).[39]

4. *Procedural good faith*

Article 21, on the other hand, deals with a question as controversial as it is old, procedural good faith. Under the somewhat ambiguous rubric of «obligations of the

[38] What documents are to be considered essential can only be assessed on a case by case basis. Nevertheless, the Court of Justice –when it comes to the scope of Article 8 of the Service Regulation– has established that this notion encompasses the document instituting the proceedings or equivalent document, but not those attachments which are of a merely evidentiary nature and are not necessary for understanding the purpose or cause of the claim (Judgment of the Court of 8 May 2008, C-14/07, *Weiss und Partner*, ECLI:EU:C:2008:264).

[39] An overview on how Members States deal with translation and interpretation issues can be found, again, in F. GASCÓN INCHAUSTI/M. REQUEJO ISIDRO (*supra*, note 13) 95-100 and 116.

parties and their representatives», it establishes the duty of Member States to ensure that the parties and their representatives «conduct themselves in good faith and with respect» when interacting with the court and with other parties and do not «misrepresent cases or facts» either deliberately or recklessly. It should be noted that the direct addressees of the provision are Member States: for that reason, the transposition of a possible directive with such content would probably oblige them, even if it is not expressly stated, to establish a sanctions or consequences regime in case of infringement to the duty of good procedural faith; and a delicate issue would be to calibrate what would be the catalogue of consequences and, above all, their proportionality.[40]

5. *Public proceedings and confidentiality*

The general principle of public proceedings, which also belongs to the bundle of safeguards associated with the notion of fairness, is recognized in Article 22 of the proposal. Hearings must be open to the public, unless the court decides that they take place behind closed doors in the interest of one of the parties, third parties, justice or public order. The publicity of written proceedings shall also be encompassed in the provision, enabling the court to keep «confidential» written pieces of the judicial files. It might be advisable to link this rule with a regulation –absent in the proposal– of the protection of personal data contained in judicial files.[41]

6. *Independence and impartiality*

The catalogue of principles ensuring fairness of proceedings is completed by Article 23 with judicial independence and impartiality, which are defined in a simple and peacefully accepted manner: absence of instructions, influences or pressures on judges in the performance of their duties; and a composition of courts and tribunals that excludes any reasonable doubt about their impartiality, with exemption of any personal prejudice or bias in any given case. Both requirements stem directly from Article 47 CFREU and have been considered by the Court of Justice[42] as prominent pillars to ensure smooth and lawful cooperation between Members States in civil and criminal matters –something that justifies their mention in a proposal directly linked with cross-border litigation.

---

[40] See A. UZELAC (*supra*, note 21) 12-13.

[41] See, in this regard, the recent developments in France with the *Rapport "L'open data des décisions de justice"* (November 2017), drafted by a working group led by Prof. L. CADIET, which analyzes the necessary changes and arrangements to allow open accesss to any judicial decision while safeguarding the fundamental right to the protection of personal data (http://www.justice.gouv.fr/publication/open_data_rapport.pdf, last access 11.1.2019).

[42] Judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C 64/16, EU:C:2018:117 ; Judgment of the Court of 25 July 2018, LM, C-216/18 PPU, EU:C:2018:586; Order of the Court of 17 December 2018, *European Commission v. Republic of Poland*, C-619/18, ECLI:EU:C:2018:1021.

7. *Training*

The last factor to be considered sufficiently prominent as to be included in the proposal for a directive is the training of judges and legal professions in Union law and procedures, covered by Article 24: these matters will have to be included in the training plans for them. The purpose is to force Member States to mitigate one of the biggest problems affecting European civil procedure legislation: its lack of knowledge or its deficient knowledge.[43] The proposal, moreover, is singularly detailed when specifying the scope and the methodological orientation of those «compulsory» training programs: orientation to practice, link to practitioners' everyday work, short duration, use of active and modern learning techniques, combination of initial and continuing training possibilities or training in foreign languages, among others. The limits between the content of a directive and a recommendation are blurred here, although the concern underlying this proposal seems clear.

III. A GENERAL ASSESSMENT

The value –not only symbolic– of this proposal and the impact it will undoubtedly have on future developments are undeniable. A more exhaustive analysis will only become meaningful if the initiative moves forward, but in any case what has been analyzed so far serves to verify, above all, that harmonization of civil proceedings has not reached its ceiling and that it is starting to be considered necessary to achieve developments that should be at the same time direct and general: direct, in the sense that the European lawmaker is not satisfied with the possible indirect impact that its rules on cross-border litigation may have on the level of internal litigation;[44] and general, that is to say, not limited only to the judicial relief regarding certain parts of substantive law, as has been happening to date with the genuine and directly harmonizing provisions that have emanated from the European Union –the so-called horizontal harmonization.

The proposal contains a conglomerate of provisions grouped under the label of «minimum standards», which combine proclamations of fundamental procedural safeguards –such as judicial independence, impartiality or public proceedings– that could be deduced directly from Article 47 CFREU or Article 6 ECHR (and which, to that extent, may be redundant), together with true «legal» provisions, addressing issues that support diverse legislative policy approaches and in which the final solution obeys to the will of the lawmaker to choose the one it considers best –as occurs, e.g., with the promotion of mediation, with the loser-pays rule in matters of

---

[43] See on this the findings in F. GASCÓN INCHAUSTI/M. REQUEJO ISIDRO (*supra*, note 13) 49.

[44] See on this Chapter 4 of this book.

costs, with the limits to the financing of litigation by third parties or with the extent of the case management.

This heterogeneity in the content of the proposal also affects the level of detail with which the matters and the minimum standards are treated –or left untreated. The detail when establishing minimum standards relating to active case management, service or legal aid, for instance, contrasts with the shortness when providing content to issues that are more directly linked to Article 81.2 TFEU, like the right to interpretation and translation, or the procedural expenses associated to the cross-border nature of the proceedings.

It is, possibly, one of the weakest flanks of the proposal. On the one hand, it may seem unnecessary to approve a directive that seeks only to «legalize» provisions that already have fundamental rank. On the other hand, it may be considered as an unnecessary immission in the battered procedural autonomy of Member States, since the European lawmaker would be taking legal policy options regarding aspects of civil procedure with little or no impact on the «European dimension» of legal life in Member States –both in terms of cross-border litigation and internal market.

Indeed, the formulation of the proposal does not seem to follow the same logic of the harmonization of criminal proceedings, which has been focused on the safeguards of victims, suspects and accused persons, as a basis for legitimizing intensive judicial cooperation. In civil and commercial matters cooperation has always been prior and the acceptance of mutual recognition –and of the mutual trust in which it is based– has been at the same time less controversial, possibly because the public policy clause has always been considered as an appropriate piece to maintain the balance between mutual trust and the safeguard of national essential values. Good proof of the above are the discussions that, on the occasion of the recasting of the Brussels I Regulation in the Brussels I bis Regulation, raised the need to maintain or delete the public policy clause as a ground for refusal of recognition and enforcement,[45] and that culminated in its survival – a survival, in fact, that was re-

[45] The possible suppression of the public policy clause gave rise to strong criticism and discussions. Among others, see P. BEAUMONT / E. JOHNSTON, "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?", *IPRax* 2/2010, 105-111; G. HOHLOCH, "Zur Bedeutung des Ordre public-Arguments im Vollstreckbarerklärungsverfahren", in D. BAETEGE / J. VON HEIN / M. VON HINDEN (eds.), *Die richtige Ordnung: Festschrift für Jan Kropholler*, Mohr, Tübingen, 2008, 809-818; F. POCAR, "Révision de Bruxelles I et ordre juridique international: Quelle approche uniforme?", *Rivista di diritto internazionale privato e processuale*, 2011-3, 591-600; T. SCHILLING, "Das Exequatur und die EMRK", *IPRax* 1/2011, 31-40; P.F. SCHLOSSER, "The Abolition of Exequatur Proceedings – Including Public Policy Review?", *IPRax* 2/2010, 101-105; A. STADLER, "Das Europäische Zivilprozessrecht im Spannungsfeld zwischen Beschleunigung und Beklagtenschutz", in E.-M. KIENINGER / O. REMIEN (eds.), *Europäische Kollisionsrechtsvereinheitlichung*, Nomos, Baden-Baden, 2012, 165-184. On the real impact of the public policy clause, see B. HESS / T. PFEIFFER, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law* (2011), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

emphasized shortly afterwards by the EAPO regulation, the enforcement of which must also be rendered ineffective if it is manifestly contrary to the public order of the Member State of enforcement.[46] In short, we do not seem to be facing a harmonization that is necessary to legitimize judicial cooperation in civil matters, nor to legitimize the so-called «European procedures», in that part in which their provisions refer to the national procedural rules of the Member States.

In a different way, the aim is rather to raise the quality standards of national procedural systems, so the impact would be different for each of them. And this seems to be due to the fact that such a way to proceed is considered positive –perhaps necessary?– for a better development of cross-border litigation, insofar as Article 81.2 TFEU is being invoked as its underpinning basis.

The relationship between the content of the proposal and cross-border litigation, however, can be quite voluntarist in some aspects. Many minimum standards are clearly and directly related to it, as happens with those regarding the holding of hearings, expert investigations abroad, distance payment of court fees, the reimbursable nature of procedural expenses associated with the cross-border nature, legal aid in this type of litigation, interpretation and translation, or the right to «double lawyer».

On the other hand, many other minimum standards affect internal aspects of civil proceedings that do not have a direct impact on cross-border litigation: this is the case, for example, with the Member States' duty to ensure the independence and impartiality of judges, the principle of procedural good faith, public proceedings and public hearings, provisional and protective relief, reasoned judicial decisions, the efficiency of proceedings, an active case management, encouragement of mediation, reasonable court fees, effective service of decisions and of the claim or equivalent document instituting proceedings, the loser-pays principle as the main criterion to rule the decision on costs, the limits to litigation funding by third parties or, as a last example, the possibility to waive legal representation by a lawyer.

To the extent that they help rising or clarifying standards, these «general» provisions can be very useful to reinforce a trust[47] with which, in principle, it was already counted, as well as to eliminate certain obstacles for the circulation of judicial decisions –some of them already detected, like the absence of motivation or a disproportionate amount of an order for costs–. From this perspective, its legitimacy could be upheld under Article 81.2 TFEU: they foster a better effective access to justice [Article 81.2 e) TFEU]; they also serve to eliminate obstacles to the proper

[46] See Article 34.2 of the EAPO-Regulation.

[47] See also E. STORSKRUBB, "Mutual Trust and the Dark Horse of Civil Justice", *Cambridge Yearbook of European Legal Studies*, 2018, 1-23, at 22.

functioning of civil proceedings and to promote the compatibility of the rules on civil procedure applicable in the Member States [Article 81.2 f) TFEU]; they also contribute to the development of alternative methods of dispute settlement [Article 81.2 g) TFEU]; in addition, the minimum standards for training are anchored directly in the provision of Article 81.2 h) TFEU, which empowers the Union to adopt measures to support the training of the judiciary and judicial staff. In a more global way, it must be noted that the existence of effective and reliable systems of judicial resolution of disputes is essential for the proper functioning of the internal market (Article 81.2 TFEU), thereby reinforcing the contents of the proposal with its alleged source of competence.

It should also be noted how the proposal has made an obvious use of the existing *corpus iuris processualis europaeum* and of the case law interpreting it.[48] The minimum standards on service are directly linked to what has already been established by some European regulations (those that create the European enforcement order, the European order for payment procedure and the European small claims procedure; the rules on financing of litigation by third parties find their precedent in the 2013 Commission Recommendation on collective proceedings;[49] the relationship between the minimum standards for provisional measures and the EAPO regulation is also clear; the «essential» nature of the documents whose translation may be required has its origin in the case law of the Court of Justice in the *Weiss und Partner* case,[50] in the same way as it is in the *ProRail* judgment[51] where the origin of the proposal regarding expert investigation abroad is to be found. It is evident, then, that the progress in the construction of a European civil procedural law is not based on disconnected impulses; on the opposite, there is a framework of preexisting rules, case law and good practices that are being fed back.

If successful, an initiative with this content –or any similar one– would have a harmonizing effect on national civil processes. Some provisions may be no more than the reflection of realities already existing in a common way in all Member States, because they are logical rules or because they are the result of a more or less spontaneous harmonization that has been developing as over time in a slightly

[48] See also E. STORSKRUBB (supra, note 47) 22; in a very detailed manner, TULIBACKA et al. (*supra*, note 7) 33-51.

[49] Recently followed by the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM/2018/0184 final), dated 11 April 2018.

[50] *Supra*, note 38.

[51] *Supra*, note 24.

perceptible way.[52] For other matters the minimum standards are so general that Member States may not need to develop specific implementation measures to comply with them. But the proposal also addresses issues in relation to which the starting situations are different in the Member States, so that their transposition could force to modify certain sectors of some national legal systems. It should also be noted that there are several aspects of cross-border civil procedure that are potentially harmonizable but that, however, are not addressed: one may miss a more clear focus on the rights of the defendant in cross-border settings, like the deadline to reply to the claim,[53] to react against an enforcement carried out abroad, or a definition of the cases in which fictitious notifications are allowed in cross-border litigation.

Therefore, despite this transformative potential, the proposal is still far from representing the way for a deep harmonization of civil procedure. And, of course, it is even further from offering the design of a common European civil procedure for cross-border cases, equivalent to the European small claims procedure. It is obviously just a first step and it is logical that first steps be cautious. But, even being cautious in the content, the proposal is daring insofar as it clearly opens a door that until now was rather closed.

Moreover, the fact that the European institutions begin to make visible their interest in advancing more decisively on the path of approximation of laws in civil procedural matters entails the activation of a competence that until now had not been used openly, and the consideration that a European regulatory action has become necessary due to the dysfunctions associated to the procedural autonomy of Member States. Of course, it would also break the situation of relative tranquility at this point between European and national lawmakers, which, for now, is only sporadically shaken by the Court of Justice, but not by the Council or the Parliament.

An absolute approximation of civil procedural legislation would be, at least in the immediate future, a disproportionate measure from the point of view of subsidiarity, which would have no European constitutional support.[54] The assessment would be different in case of a more limited intervention, involving the harmonization of some elements of civil proceedings, such as first service of proceedings, the linguistic dimension of proceedings or other factors directly associated with its cross-border nature. It would even be possible for the European lawmaker to create the model of a cross-border civil procedure, similar to the European small claims procedure, but without amount limits and with a much more detailed regulation that

[52] On this phenomenon, see also C.H. VAN RHEE, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective", in X.E. KRAMER / C.H. VAN RHEE (eds.), *Civil Litigation in a Globalising World*, Asser Press, The Hague, 2012, 39-63.

[53] See on this, again, F. GASCÓN INCHAUSTI/M. REQUEJO ISIDRO (*supra*, note 13) 112.

[54] B. HESS, "Ein einheitliches Prozessrecht?", *International Journal of Procedural Law*, 2016-1, 55-85

would leave less room to national procedural law:[55] although the use of such a proceeding should be restricted, we should count on the expansive force of these hypothetical European rules, if they turn out to be «better» or more effective than the internal ones with which they would have to compete.

In any case, procedural harmonization, by itself, cannot be seen as a panacea,[56] neither for cross-border litigation, nor for the effectiveness of national civil justice systems. [57] First of all, because experience shows that not even the most exhaustive and detailed regulations can be applied in a homogeneous manner and without imbalances in all Member States.

But it is not just a matter of effectiveness. It would also mean recognizing that the European lawmaker has the capacity to force the insertion in national systems of decisions and solutions that could have been previously rejected by them. Therefore, from a more political perspective, harmonization of civil proceedings –more or less intense– can raise in itself strong reluctance, both among European authorities and among Member States, including highly organized professional sectors. The Union itself seems to be well aware of this and that it could generate strong tensions in a hypersensitive matter, given the close link between jurisdiction and civil justice with the sovereignty and cultural idiosyncrasy of each country. [58]

It should be remembered, in this regard, that Article 67.1 i.f. TFEU expressly recognizes that the construction of the European area of freedom, security and justice must be done with due respect for «the different legal systems and traditions of the Member States». Diversity of legal-procedural cultures, therefore, also deserves to be preserved, except in what is truly essential for the maintenance of the architecture of the European Area of Justice.

---

[55] See also B. HESS (*supra*, note 7) 9-10.

[56] As stated, "simply latching on the promise of harmonization may not lead us to a functional regulatory strategy" [E. STORSKRUBB (*supra*, note 47) 23].

[57] A strong –and very interesting– criticism to harmonization in the field of civil procedure, from a law and economics approach, can be found in L. VISSCHER, "A Law and Economics View on Harmonisation of Procedural Law", in *Civil Litigation in a Globalising World* (*supra*, note 52), 65-91. According to this author, procedural harmonization would not serve to reduce transaction costs, but would deprive legal operators of the ability to choose justice systems according to different preferences, would reduce the capacity for legal systems to learn from each other and would leave the legislator in a position of greater vulnerability in the face of pressures from interest groups.

[58] In a similar vein, M. TULIBACKA, "Europeanization of civil procedures: in search of a coherent approach", *Common Market Law Review*, Vol. 46, 2009-5, 1527-1565, esp. at 1565, insisting on the need to be very aware of the close link between civil procedure and national legal culture.