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25 Chapter: Wider Challenges – the EU, Europe, and the world

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A. Mutual (Dis)trust – An Illusory Area of Justice?

I. Not All (National) Courts Are Made Equal!

#1 European civil procedure is part of the broader framework of European integration. Its fundamental ideological foundation, most clearly defined in the **1999 Tampere** milestones, is rooted in the creation of an area of freedom, security, and justice. The cornerstone of a genuine European area of justice is the principle of **mutual trust** and respect.[1] While the mutual trust may be the 'most elusive principle' of EU law, it is certainly related to inter-institutional trust which *inter alia* assumes that, for the protection of their civil rights and obligations, EU citizens can equally rely on the courts of their home jurisdiction, as well as on the courts of any other Member State. An alleged adherence to the

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[1] See more on the development of the doctrine of mutual trust in Chapter 4 by Matthias Weller.

shared values, and the effective protection of EU law form the basis for the broad mutual recognition of judgments. In short, an ideal common area of justice would be one in which every European citizen enjoys equal protection of their rights, regardless of the EU Member State in which the court handling their legal matter is situated.

#2 The requirement of **mutual trust** applies both to individual decisions and to the legal and judicial systems of the Member States as a whole.[2] While the principle of mutual trust holds constitutional status in the EU, it is by no means absolute. The President of the CJEU argued that it should not be mistaken for **blind trust**.[3] However, he also emphasized that exceptions—limitations to mutual trust—must remain rare and should not weaken the overall force of the principle, which should be restored as soon as possible.[4] Ultimately, trust in judicial institutions that apply EU law—both EU courts and national courts—must exist; or, at the very least, it must be presumed to exist.

#3 In the present time, trust can be evaluated and quantified, which may reveal a more fundamental challenge to the **ideological foundations of mutual trust**. The doctrine of mutual trust—namely, the presumption that the judicial systems of Member States are capable of fairly and independently upholding the **rule of law**—has been questioned, particularly in light of several infringement procedures initiated by the European Commission against Poland. Similarly, Hungary's EU funding was suspended 'to protect the Union budget from breaches of the principles of the rule of law in Hungary'.[5] The public and political nature of these procedures suggests that, empirically, not all civil justice systems in Europe are equally trusted by all EU Member States.

#4 If the judicial systems in the EU are not unequivocally trusted among Member States, questions also arise about their internal trustworthiness. Do European citizens trust their courts and judges, including their ability to uphold the fundamental values of a state governed by the principles of the rule of law? Can these institutions be relied upon when they apply civil procedural law or EU law? The instruments created by the EU to foster **harmonization** of civil and criminal

[2] Evelien Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Papers MWP 2016/13) 59, 61.

[3] Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017) 54 Common Market Law Review 805.

[4] ibid 805.

[5] European Commission, 'Questions and Answers on Hungary: Rule of Law and EU funding' (December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6466> accessed 15 February 2025.

justice systems suggest that the level of **trust** enjoyed by courts and judges within the Member States is hardly satisfactory. Indeed, only a slim majority—53% in 2023—of EU citizens view their national courts and judges positively.[6] The 2023 **EU Justice Scoreboard** indicates that this unimpressive level of trust has persisted for at least a decade.[7]

#5 From this information, it may be inferred that when **trust in (civil) justice** is concerned, the glass is half empty. But is it also half full? Some comfort may be found in the fact that, in many other areas of the world, courts and judges enjoy even less trust. For instance, in **Latin America**, **trust levels** are significantly lower, ranging between 23% and 37%.[8] However, this level of trust is still far from the public trust traditionally enjoyed by the judicial branch of government in the **US**, where 'a great deal' or 'a fair amount' of trust used to be expressed by up to 80% of US citizens.[9]

#6 Since EU civil procedure is applied by national courts, it is more important to note that **public (dis)trust** in courts is not evenly distributed among European states. Quite the opposite, this trust is greatly divergent from state to state. When asked 'how would you rate your justice system', European citizens gave ratings that ranged from almost complete trust to almost complete distrust. For instance, a positive assessment of the national justice system was given by 89% of Finns, but only by 17% of Croatians.[10]

#7 The official **mutual trust narrative**, which assumes that equivalent and effective enforcement of EU law can be equally granted by all national courts, is further jeopardized by clear regional and geographic lines in the distribution of public (dis)trust. On one side, the highest level of **public trust** is visible in the **North and West** of the EU. Scandinavian countries are at the top (Finland, Denmark, Sweden), followed by the traditionally solid judiciaries of Germany and Austria, and by the Benelux states. Ireland is also among the 'trusted' group (as was

[6] Flash Eurobarometer 519, 'Perceived Independence of the National Justice Systems in the EU among the General Public – January 2023 Report' 1 <https://europa.eu/eurobarometer/surveys/detail/2667> accessed 15 February 2025.

[7] The *2023 EU Justice Scoreboard*, COM(2023)309, 41, Figure 49.

[8] Latinobarometro, Informe 2021, 'Confianza en el poder judicial 1995-2020', <http://www.latinobarometro.org> accessed 15 February 2025 70.

[9] Gallup, data from 2000-2010. In recent years, after highly controversial appointments of Supreme Court judges in the first Trump's mandate and the shift of its case law, this level was of trust is however dramatically reduced, see <https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx> accessed 15 February 2025.

[10] Flash Eurobarometer 489, Croatia, 2021 (4% 'very good' and 13% 'fairly good'). This should be contrasted to 35% of those who assessed the situation in judiciary as 'fairly bad' and 43% as 'very bad'.

England while it belonged to the EU). France is the last member of the group in which the public has more trust than distrust in the national judiciary—it is approximately at the average European levels of **'slim trust'**.

#8 However, the other half of EU member states, consisting of countries from the **European South and East**, clearly displays a group where distrust predominates. This group is divided into two parts: Mediterranean countries (Italy, Greece, Spain, Portugal) and former Socialist countries (Romania, Bulgaria, Poland, Hungary, Czechia, Slovakia, Slovenia, Croatia, etc). Quite consistently, in these countries, **negative public assessments** of the courts outweigh the positive ones.

#9 In about a decade since public trust in courts has been surveyed, there have been only a few major changes and exceptions to the above delineation of 'trusted' and 'distrusted' groups of national judiciaries. Reforms in Portugal have significantly raised the level of trust in its judiciary. Some **Baltic states** (**Estonia, Lithuania**) have also raised their profile and now even belong to the countries above the EU trust average, with Estonia leading by a solid 10 percent increase.[11]

#10 A few successful reform stories may give rise to cautious optimism, but the fact remains that **divergences in public perception** of courts and judges, as well as the **differences in the level of trust** they enjoy both at home and among knowledgeable outside observers, remain enormous. Some countries, which are supposed to belong to the EU because they share fundamental judicial values and observe the same rule of law principles, obviously struggle with the practical implementation of these values and principles. For any further integrative processes—which include the further development of European civil procedure—overcoming this challenge will be a great hurdle. How can we aim to develop joint judicial practices in the common area of justice if we cannot trust our own courts? Pretending that all courts in the Member States are equal, and equally competent and capable of providing the same level of effective protection of European law is hardly convincing if there is no basic public trust in their capability to render effective judicial protection domestically. So far, the Union has not proved that it can foster significant progress in this area, and in the future, this may lead to further problems.

[11] See 2023 EU Justice Scoreboard (n 7). Of course, the Scoreboard as 'the first attempt of the European Commision to venture into the field of evidence-based justice policies' is not a perfect instrument, but in the area of measuring attitudes of citizens and businesses towards judiciary, it provides a solid starting point. On its limits and use in another area, see Adriani Dori, 'In Data We Trust? Quantifying the Costs of Adjudication in the EU Justice Scoreboard' (2021-4) ELR 281.

II. Same but Different: Dissimilar Understanding of Common Procedural *Acquis*

#11 As an emerging area of law, European civil procedure has evolved from simple forms of judicial cooperation in civil and commercial matters—such as mutual recognition of judgments and assistance in service of documents and taking of evidence—to more complex and demanding ones. The development of **optional autonomous European procedures** gives national courts the opportunity to apply uniform procedural regimes in a select number of matters, both **contentious and non-contentious.** This includes processing small claims, issuing payment orders, enforcing various enforceable instruments, and even some forms of provisional and protective relief through tentatively uniform and harmonized common European procedures. Future procedural arrangements, which aim to further develop collective redress, promote alternative dispute resolution (ADR), and introduce third-party funding, are even more ambitious.

#12 The prolific production of European procedural instruments is, however, not accompanied by an enthusiastic embrace among those for whom they were intended to benefit. **Uniform European procedures**, such as **European payment orders** or **European small claims**, have generally achieved underwhelming effects. EU-backed studies aimed at analysing and comparing European procedures designed to foster and improve the **cross-border enforcement of civil claims** show a rather disappointing use of optional European instruments. These studies identify 'horizontal deficiencies' and 'major weaknesses of the system', as well as 'a number of defects and divergences in Member States' legislations which impair the effectiveness' of EU acquis in the field of civil procedure.[12]

#13 For some ambitiously drafted EU instruments, like the **European Account Preservation Order** (**EAPO**), the balance sheet of the first five years of application is practically empty. A recent book that provided a systematic insight into case law answers the question 'Is the EAPO fulfilling its purpose?' with a confirmation that it is 'seldom being used', which may be taken as an understatement, as there were a few or none successful instances of EAPO

[12] See Francesca C. Villata and Burkhard Hess (eds), 'Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU – "EFFORTS": Final Study', Project JUST-JCOO-AG2019-881802, 1 <https://efforts.unimi.it> accessed 15 February 2025 ('EFFORTS Final Study'). See similar results of other studies at < https://www.ipr.uni-heidelberg.de/forschung/studien_en.html> and <https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=18575> all accessed 15 February 2025.

issuance, even in countries with fairly efficient domestic systems of enforcement on monetary funds.[13] Among legal practitioners, the negative perception of such EU instruments is more the rule than the exception, to the extent that the very announcement of the EAPO Regulation was accompanied by views that it would 'join the **club of largely unused EU civil justice instruments**'.[14]

#14 Among the reasons for the underuse of **EU procedural *acquis***, an important one is the deceptive impression that EU procedural regulations create uniform procedural regimes. As expressed by a learned observer, there is a 'counterintuitive' plurality of regimes for the implementation of EU acts that are, in theory, directly applicable and uniformly interpreted by the CJEU.[15] While the 'law in books'—the text of EU instruments in the civil procedure field—is easy to locate, the 'law in action,' which includes national operative rules and implementation practices, is not simple to trace. Without proper guides and commentaries (and even more, personal knowledge from a few individuals responsible for the rare cross-border cases submitted to national courts), it is difficult to navigate the system. Europeans entangled in cross-border civil cases often find it easier to use well-established **local procedures** and **local lawyers** rather than experiment with the 'rare birds' of 'uniform' EU procedures, which are differently understood and applied from country to country. Instead of a uniform interface, there is a **dissonant interplay of EU instruments with national rules (and customs**), signifying a major weakness of the current system. This makes it difficult for practitioners, and even more so for consumers and businesses, to be cognizant of the mere existence and practical functioning of the available procedures and mechanisms.[16]

III. Crippling Nomotechnical Effects of EU Consensus Policies

#15 A constantly present challenge to EU civil procedure arises from the nature of **European legislation**. The principles of **nomotechnics** ('the science of good law-making') require clarity, consistency, precision, and ease of use. Historically, procedural legislation in Europe was drafted in codes that were transparent,

[13] See Nicholas Mouttotos, 'Is the EAPO Fulfilling its Purpose' in Nicolas Kyriakides, Heikki A. Huhtamäki and Nicholas Mouttotos (eds), *European Account Preservation Order: A Multi-Jurisdictional Guide with Commentary* (Bruylant 2024) 27.

[14] See Clifford Chance, 'European Account Preservation Orders: Must Try Harder' (Briefing Note, September 2014) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2014/09/european-account-preservation-orders-must-try-harder-10-september-2014.pdf> accessed 15 February 2025.

[15] Gilles Cuniberti, 'Preface' in Nicolas Kyriakides, Heikki A. Huhtamäki and Nicholas Mouttotos (eds), *European Account Preservation Order: A Multi-Jurisdictional Guide with Commentar*y (Bruylant 2024) 9.

[16] Marco Buzzoni, 'The Certification of Judgments under the EFFORTS Regulations' in EFFORTS Final Study (n 12) 7, 11.

precise, and comprehensive. Their design was universal and intended to last for at least a few decades, considering that legal practitioners needed a stable and generally applicable framework to use daily, irrespective of the nature of the legal matter assigned to a particular procedure. Judged from that perspective, the EU procedural acquis is far from being a model of well-structured and accessible legal infrastructure. The words 'fragmented', 'inconsistent', 'cumbersome', and 'user-unfriendly' regularly appear in the honest descriptions of European procedural instruments.

#16 The unappealing character of the EU procedural *acquis* is not the result of accidental mistakes. It is the inevitable outcome of the **EU legislative process and policies**, which makes it difficult, if not impossible, to repair. Seeking **consensus** among the key players—the European Commission, Parliament, and Council—has two disabling effects. First, it impairs comprehensive and general legislative projects. Even disregarding the **limited competences of the Union**, EU law progresses only in baby steps, by incremental progress achieved through acts targeted to reach minor improvements in limited fields and largely insignificant 'recasts' of previous normative documents.

#17 Secondly, the **strive towards unanimity** results in an inconsistent patchwork of rules and exceptions, tailored to satisfy the interests of individual states or other specific interests. This leads to the dilution of the scope of adopted instruments (typically: optional procedures reduced to a cross-border environment), exceptions and exclusions for individual Member States (Denmark is not the only such example), and even departures from fundamental principles and definitions as a trade-off for the formal blessing of individual states.[17] In the field of procedural law, which is governed by key principles of equality and fairness, this is deeply discouraging. Whether or not national civil justice systems are rooted in antiquated and outdated procedural codes and models, for insiders they will continue to be preferable due to their relative familiarity and simplicity. A clear framework, no matter how archaic, is always perceived to be better than progress wrapped in a set of **fragmented**, inconsistent, and opaque rules. In such a way, paradoxically, the harmonizing EU efforts in the field of civil procedure

[17] For instance, due to an exception in Art 3(a) of Brussels Ibis Regulation, Hungarian public notaries are considered a 'court' under EU law in summary payment order proceedings. However, despite having an almost identical role and status, Croatian public notaries were for the same purpose declared **not** to be a 'court' under the Brussels Ibis Regulation by the CJEU in the *Pulaparking* and *Zulfikarpašić* cases (C-551/15, EU:C:2017:193 and C-484/15, EU:C:2017:199).

may stimulate parochial sentiments and inspire centripetal and anti-European forces within the national civil justice systems.

IV. Procedural Autonomy 2.0: from Procedural Cohesion to Procedural Autarchy?

#18 The lacking efficiency of optional EU civil procedures ultimately means that national systems of civil procedure remain the key guarantee of the effectiveness of legal protection, both in respect to local and EU substantive law. But will local courts and their procedures continue to be the glue that connects national justice systems to EU law? The precondition for this is to embrace **procedural autonomy** as the vehicle for enforcing EU law and to take the **principles of equivalence and effectiveness** seriously. So far, the CJEU has ensured that these principles are enforced, but its authority has depended on the willingness of national courts to exercise their power to submit **preliminary references**. Historically, the number of such references has varied significantly from jurisdiction to jurisdiction. Even in areas of European 'success stories', such as **consumer protection** law, the number of cases per jurisdiction has been relatively modest.[18]

#19 According to research from the **Max Planck Institute Luxembourg** in 2016, the number of CJEU judgments in **consumer protection cases** fluctuated from two to eighteen per annum, with eleven Member States having no cases in the period between 2006-2016.[19] In the following period, there were increasingly significant judgments. Over the past five years, the **CJEU** issued over 400 judgments dealing with consumer protection.[20] However, the proliferation of judgments may also indicate the **uncertainty of EU law** in this field and the lacking interface of EU law with national procedural mechanisms. The selective availability of recourse to the highest EU court has been used by various courts and economic players to protract proceedings and deflect and/or discourage litigation of consumer cases. At the same time, some of the highest national courts are still struggling with consumer protection cases that were the product

[18] See also Chapter 21 by Eva Lein on the development of collective consumer protection rights in the EU.

[19] See European Commission: Directorate-General for Justice and Consumers, '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 2 – Procedural Protection of Consumers', Study JUST/2014/RCON/PR/CIVI/0082 (Publications Office, 2017).

[20] The search in the CJEU database for 2020-2025 period reveals 418 judgments tagged with subject matter 'consumer protection' <https://curia.europa.eu/> accessed 15 February 2025.

of the **2008 economic crisis**, with no intent to refer the disputed issues to the CJEU.[21]

#20 The complexity of national procedural instruments and the differences in **national legal cultures** significantly limit the unification of approaches to enforcing core EU policies in the area of civil procedure. The emerging centripetal trends do not create a conducive environment for the voluntary submission of national courts to institutions that challenge core procedural principles of national law. Civil courts in many EU countries are traditionally reluctant to act ex officio, often adhering to **formalism** and perceiving enforcement procedures as merely formal and technical processes.

#21 This *status quo* remained unchallenged until the CJEU intervened, reshaping expectations through its case law. The **CJEU** now requires that courts exert **ex officio control** over the fairness of consumer contract clauses as part of mandatory EU law. If necessary, such control should also extend to enforcement proceedings initiated based on abstract instruments like bills of exchange or uncontested payment orders. While this tectonic shift is undoubtedly well-intended and progressive, it has not been enthusiastically embraced by all European national courts. Their reaction could potentially be a retreat into autarchy. While this has not yet occurred on a large scale, it does not mean that such a development is not on the horizon.

#22 While the CJEU's case law on **consumer protection** is still a good example of a relatively well-functioning system that collaborates with the national judiciary, efforts to introduce effective alternative means of consumer protection have met with much higher levels of resistance.[22] After ten years since their adoption, the EU instruments aimed at introducing **effective, low-cost, and fair alternative procedures** for resolving disputes between consumers and traders have failed to achieve almost any of their objectives.[23] This is particularly evident with the **ODR** Regulation, which is being repealed, and the ODR platform, which is on the way

[21] For instance, the Supreme Court of Croatia has been split for quite some time regarding the interpretation of the consequences of consumer loan conversion, which was based on the national legislation, enabling conversion of loans denominated in Swiss Francs to Euro-denominated loans. Later, the original consumer contracts were found to contain unfair consumer terms. The validity of the converted contracts, although closely connected to EU law, was never referred to the CJEU by the Supreme Court. When a reference was finally made by a first-instance court, the results were underwhelming. See CJEU judgment in *Zagrebačka* banka (C-567/20, judgment of 5 May 2022, ECLI:EU:C:2022:352).

[22] On alternative dispute resolution in consumer cases see more in Chapter 20 by Emma Van Gelder.

[23] See Directive (2013/11/EU) on alternative dispute resolution for consumer disputes (the 'ADR Directive') [2013] OJ L165/63 and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the 'ODR Regulation') [2013] OJ L165/1.

to being permanently closed. Over a whole decade, the EU has been unable to change the landscape of consumer dispute resolution, which remains divided between a few countries with effective out-of-court consumer dispute resolution mechanisms and the majority that have not been able to make any significant progress in this sector.

#23 More importantly, the fundamental ideals of the EU framework, such as **transparency, affordability,** and **effectiveness**, did not materialize in most EU countries. The **ADR entities** generally failed to provide meaningful **activity reports**, the behaviour of the traders was not affected, and the entire procedure was perceived in many jurisdictions as a waste of the consumer's time and money. Consequently, the ambitiously designed European system clashed with the **national procedural autarchy**, resulting in the ADR instruments joining the club of 'largely unused EU instruments.'

#24 The current proposals to amend the **ADR Directive** to 'improve' and 'simplify' ADR may, from a certain angle, be viewed as an admission of failure, especially as they fundamentally abandon some of the most innovative elements of the directive related to information obligations. Moving away from all elements of traders' obligation to participate in **CADR** (**Consumer Alternative Dispute Resolution**) proceedings and comply with the recommendations and evaluations of the dispute resolution bodies will hardly promote the use of alternative dispute resolution. Reducing **C2B** (Consumer to Business) dispute resolution to voluntary mediation will likely have the same effect as mediation in **C2C** (Consumer to Consumer) and **B2B** (Business to Business) disputes: no more than a fraction of disputes will be successfully resolved in this manner.[24]

#25 The fate of **ADR instruments** has apparently not altered the trajectory of EU policies. History often shows that those involved have difficulty learning from past mistakes. The same test of the (**in)efficiency of ADR procedures** will likely occur in the context of new, ambitious EU instruments like the **Digital Services Act** (DSA).[25] Under the DSA, for dispute settlement between users of online platforms, out-of-court dispute settlement bodies are provided to supplement the internal complaint-handling systems of platforms and offer later judicial

[24] As a 2014 study of the European Parliament showed, only about one percent of court cases are submitted to mediation. Giuseppe De Pal and others, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (European Parliament 2014).

[25] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services [2022] OJ L277/1.

redress. The ambition is to enable engagement in an optional ADR procedure by certified dispute resolution bodies that are 'independent' and 'have the means and expertise to carry out … fair, swift, and cost-effective' proceedings under fees that are 'reasonable, accessible, attractive, inexpensive for consumers, and proportionate, and assessed on a case-by-case basis'. However, just as with previous ADR instruments, almost everything regarding the process is fully optional and non-binding: Member States are not required to establish ADR bodies, engaging in proceedings before them may be refused by both providers and users, there is no pressure to reach a settlement, and any result of the process is further subject to contestation in judicial proceedings.[26] For the ADR bodies tasked with resolving disputes regarding digital services, there is even no obligation to offer native digital handling of these inherently digital disputes.

#26 The generous drafting of the **out-of-court dispute settlement** schemes, which operate like an 'empire of freedom', will most likely result in the same outcome across most EU jurisdictions—they will be irrelevant or even practically non-existent, satisfying only the interests of a narrow group of private ADR providers who will successfully capitalize on the remaining EU verbal support for **'certified' ADR schemes**. There is already evidence supporting this conclusion. Since the end of August 2023, the 'VLOPs' and 'VLOSEs' (ie, the very large providers of digital services) have an obligation to submit their transparency reports, which include data about the functioning of internal and external dispute settlement mechanisms.[27] The first empirical test is already present and it conforms to our expectations. For instance, the latest Facebook report on out-of-court dispute settlement submissions reported that 'as of 30 September 2024, we did not receive any disputes from certified out-of-court settlement bodies pursuant to Article 21 DSA'.[28] The gravity of this fact is underscored by information about complaints received through Facebook's internal complaint-handling systems, which reports on millions of complaints and enforced decisions in the same period.[29]

#27 Thus, in this area, as well as in many other areas of genuine EU consumer protection jurisdiction, the EU-backed dispute settlement mechanisms are being

[26] See in particular para 59 of the Preamble and Art 21 DSA.

[27] Compare <https://digital-strategy.ec.europa.eu/en/policies/dsa-brings-transparency> accessed 15 February 2025.

[28] Regulation (EU) 2022/2065 Digital Services Act Transparency Report for Facebook (25 October 2024) 25 <https://transparency.meta.com/reports/regulatory-transparency-reports/> accessed 15 February 2025.

[29] ibid 16-17 (Table 15.1.d.(1)): only in one category (organic content removal complaints) there were 3,5 million complaints and 870 thousand affirmative decisions (restored content after removal complaint).

overshadowed and absorbed by another form of '**procedural autonomy**'— the autonomy (or, rather, autarchy) of **private providers**, in particular those very large ones – the VLOPs and VLOSEs.

B. *Sicut Rota Sine Axis*: Disintegration Trends After Brexit

I. How to Stay Calm and Go on Without Perfidious Albion?

#28 Among the wider challenges to the successful development of European civil procedure, several arise from the broader geopolitical landscape. The foundational premise of the EU, as expressed in Article 1 of the Treaty on European Union (TEU), is that it aims to create an '**ever closer Union**'. For a long time, it was also an 'ever growing Union' with a continuous policy of enlargement. As the Nobel Committee noted when the EU won the Nobel Peace Prize in 2012, the global achievements of the EU were seen in its promotion of peace and reconciliation between former enemies, the expansion of democracy and human rights, and the creation of a stable and cooperative economic and political environment that reduced the likelihood of conflict.[30] A decade later, many of these achievements have been questioned: peace and stability have faded, tensions and polarizations have grown, and the previously stable and cooperative economic and political environment is receding. For the development of European civil procedure, the first case of the **shrinking** of the 'ever closer Union' is especially significant. The 'leave' vote for **Brexit** in 2016 and the UK's departure from the EU in 2020 meant much more than simply reducing the number of EU Member States by one.

#29 This significant event not only altered the geopolitical landscape but also impacted the legal framework within the EU. During the 1973-2020 period of its membership in the European Union, the UK's contributions to the EU were substantial. Despite often being seen as a 'reluctant European', the UK played a pivotal role in shaping EU policies, governance, and global influence. With its historic influence on the development of **constitutionalism, democracy, human rights, and judicial independence** worldwide, the **UK** was instrumental in drafting EU instruments that harmonized civil procedures across the member states. The UK was a key architect of the **Brussels I Regulation**, which aims to simplify the rules of jurisdiction and the recognition and enforcement of judgments across EU countries. Additionally, the UK played crucial roles in the drafting of regulations such as the European Enforcement Order (**EEO**), the

[30] See <https://www.nobelprize.org/prizes/peace/2012/press-release/> accessed 15 February 2025.

European Payment Order (**EPO**), and the European Small Claims Procedure (**ESCP**).

#30 The UK's experience in handling **insolvency** cases, characterized by its corporate rescue culture and expertise in restructuring and bankruptcy law, helped establish a more efficient insolvency system across the EU. This influence extended beyond merely procedural aspects, influencing substantive legal frameworks and fostering a more integrated legal environment.

#31 Moreover, the UK's historical experience in reaching compromises and drafting legislation for an empire full of divergence, amplified by the native use of English, which is the most used language in the EU, facilitated its significant role in legal drafting and policy-making.[31] But these are not the only reasons why **post-Brexit development** of the EU civil procedure will be challenging.

#32 The legal interplay between the UK and the EU was a story of mutual influence between **common law** and **civil law** traditions. Legal and institutional reforms in the UK, which took place as a result of EU membership and its willingness to adopt decisions of the **CJEU** and the **ECtHR**, demonstrated that harmonization between the two most influential global legal traditions is not impossible. Conversely, the EU benefited from the pragmatism and diplomatic skills of UK representatives and incorporated progressive elements inspired by common law best practices in shaping the EU procedural *acquis*. With the UK's departure, the divide between common law and civil law traditions may begin to widen once again. As Ireland, and to a certain extent Malta and Cyprus, remain the only common law jurisdictions within the EU, there is a likelihood that the traditionally conservative civil law approach will dominate future projects in the area of civil justice, leaving less room for innovation and change. Without the UK's influence, procedural harmonization efforts may become more rigid, potentially slowing the evolution of EU civil procedure.

#33 The potentially devastating impact of Brexit on the future development of EU civil procedural law is further underscored by the fact that the most influential contemporary reforms of civil procedure in the West originate in England. The **Woolf Reforms**, which led to the 1999 changes in the Civil Procedure Rules in England, marked a series of reform actions that are widely regarded as a rare

[31] The contribution of UK reaches beyond drafting binding EU legal instruments. The most important project of drafting model legislation for civil procedure in Europe would be impossible without the skilful and diplomatic leadership of Diana Wallis as the past president of the European Law Institute. See more on ERCP in ELI-UNIDROIT, *Model European Rules of Civil Procedure* (OUP 2021). On the role of ELI-UNIDROIT project in the context of soft law harmonization of procedural law in Europe see Chapter 24 by Emmanuel Jeuland.

example of coherent and successful modernization efforts in civil procedure. These reforms have served as a model for procedural reform worldwide, demonstrating how procedural efficiency, access to justice, and judicial case management can be improved through well-structured changes. Within the EU, both the Woolf and **Jackson reforms** were closely observed by several Member States, influencing procedural reform efforts. Some of their principles—such as judicial case management, cost proportionality, and active court involvement in planning of proceedings—have been partially echoed in EU civil procedure, but there remains significant room for further improvement. However, after Brexit, promoting procedural reforms modelled on UK examples will become increasingly difficult.

#34 In many civil law countries, traditionalist forces that adhere to the old reactive style of civil procedure—where judicial intervention is minimal, and proceedings are predominantly party-driven—continue to resist the introduction of more dynamic, multi-dimensional procedures based on the overriding objective, procedural cooperation, and proportionality. Without the UK's influence within EU legislative processes, these forces are more likely to hinder future reforms, weaken EU legislative initiatives, and potentially undermine past achievements in modernizing civil procedure.[32] The absence of the UK's pragmatic approach to **procedural efficiency** may ultimately slow or even stall the evolution of EU civil procedural law, reinforcing rigid, formalistic procedural traditions rather than fostering flexibility and innovation.

II. Beyond EU enlargement: how much of the East can be digested without digestive disorders?

#35 Exiting the EU is not the only wider geopolitical challenge. Entering the EU can also create tensions and affect further developments. From 2004 to 2013, the last three waves of **EU enlargement** brought thirteen (13) new EU Member States, which is almost half of the present EU membership. A large number of the new Member States belong to the group of post-Socialist states. They come from three different regions: Central Europe (Czechia, Hungary, Poland, Slovakia), Baltic States (Estonia, Latvia and Lithuania) and Western Balkans/Southeastern Europe (Slovenia, Croatia, Bulgaria, Romania). The current

[32] The development of CDR (dispute resolution in consumer disputes) in the EU was under strong influence of English approach, marked by a functional landscape of public and private dispute resolution bodies (ombudsmen and other DR entities). Key elements of the underlying approach like transparency, regulatory objectives and systemic pressure on traders (all best described in the works of Christopher Hodges) are after Brexit being gradually dismantled.

list of **candidates** and potential candidates includes ten (10) further countries. These include more Western Balkan nations (Albania, Bosnia and Herzegovina, Montenegro, Serbia, and Kosovo) but also extend further into Eastern Europe (Moldova, Ukraine) and even into Western Asia (Georgia, Turkey).

#36 The prospects for a quick further expansion of the EU are, at present, more unlikely than likely. However, rapidly changing geopolitical realities may accelerate this process, as the EU has expressed a renewed commitment to enlargement in light of **Russia's invasion of Ukraine**. Officially, the precondition for enlargement is a rigorous accession process that requires alignment with EU standards, including those on the rule of law and human rights. In practice, however, past accessions have demonstrated the significance of political considerations. While some EU standards relate to civil justice systems (such as an independent and accountable judiciary, fair and efficient judicial proceedings, effective access to justice, and a functional legal aid system), they remain fluid in many aspects and subject to interpretation. Therefore, as clearly shown in the case of accession of **Bulgaria** and **Romania**, EU enlargement could proceed irrespective of whether sufficient reforms in justice sector have been made.[33]

#37 The past two decades have proven that the idea of a quick transition from old regimes to modern democracies is illusory. Particularly in the field of the rule of law and justice, tectonic changes are difficult to achieve. Statistics from the ECtHR show that among the top ten countries in terms of pending applications concerning human rights violations, five are EU members. Of these, three (Romania, Poland, and Slovenia) belong to **post-Socialist countries**, while two (Greece and Italy) are from Southern Europe.[34] The challenges the EU has faced with attacks on **judicial independence** in Hungary and Poland[35] demonstrate that accession reforms have not fundamentally changed some features of these legal systems. The persistence of the **Socialist legal tradition**, which appears capable of surviving even without the ideological foundation of communism, has

[33] On the experiences with the 'two laggards of the Eastern Enlargement' see more in Florian Trauner, 'Post-accession compliance with EU law in Bulgaria and Romania: a comparative perspective' In: Frank Schimmelfennig and Florian Trauner (eds), 'Post-accession compliance in the EU's new member states', (2009) European Integration online Papers (EIoP), Special Issue 2, Vol. 13, Art. 21, <http://eiop.or.at/eiop/texte/2009-021a.htm.> accessed 15 February 2025

[34] See <https://www.echr.coe.int/documents/d/echr/stats-pending-month-2025-bil> accessed 15 February 2025.

[35] See Ula Aleksandra Kos, 'Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies' (2023) 23 Human Rights Law Review <https://doi.org/10.1093/hrlr/ngad035> accessed 15 February 2025; Jonathan Freeberg, 'Don't Judge Me: Declining Judicial Independence in Hungary and Poland' (2022) *WWU Honors College Senior Projects* 601 <https://cedar.wwu.edu/wwu_honors/601> accessed 15 February 2025.

been raised by various authors and remains a subject of interest among procedural scholars and legal theorists who developed the concept of 'legal survivals'.[36]

#38 The further aspects of the EU enlargement process, together with its many open issues, is elaborated in detail in the next chapter.[37] However, in the context of the wider challenges to European civil procedure, it is worth noting that the changing composition of the Union may have far-reaching consequences for its further development. If we assume that the EU will, in ten years, be composed of 37 Member States, 20 of them—or 54%—would be **post-Socialist countries**. These states would encompass approximately 165 million people, representing about 30% of the EU population. How would this affect the development of civil procedure, both at the EU and national levels? Various scenarios are possible.

#39 On one side, this change could further accelerate a move towards **procedural autarchy**. At present, over two-thirds of all applications before the **ECtHR** relate to human rights violations in just four countries—Turkey (35.4%), Russia (13.3%), Ukraine (12.5%), and Romania (6.4%).[38] Many of these cases stem from dysfunctions within their justice systems. The experience of current **post-Socialist EU Member States** has shown that while justice sector reforms were partially effective during the accession period, they were often slowed down, stalled, or even reversed after full membership was achieved.[39] A shift in EU composition could exacerbate difficulties in reaching consensus on procedural reforms. The divide between national dispute resolution systems and EU procedural instruments could widen further, and in the worst-case scenario, we will experience a process of **de-Europeanization** of national civil courts. EU civil procedure could become illusory and obsolete.

#40 On the opposite side, the multiplication of **dysfunctional justice systems** could serve as a strong motivation for further **harmonization** and **unification**.

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[36] See for instance Rafal Mańko, 'Survival of the Socialist Legal Tradition? A Polish Perspective' (2013) 4(2) Comparative Law Review 1-28; Alan Uzelac, 'Survival of the Third Legal Tradition?' in Janet Walker and Oscar Chase (eds), *Common Law, Civil Law and the Future of Categories* (Lexis Nexis 2010) 377.

[37] Chapter 26 by Monica Canco, Ana Harvey and Iryina Izarova.

[38] Compare figures in ECtHR chart n 34.

[39] For instance, in Croatia, efforts to implement the recommendations of European observers were half-hearted and met with reluctance from judicial insiders. Once Croatia's accession to the EU became certain, the reforms necessary for the modernization of the judiciary were either interrupted or reversed. Examples of reversed judicial reforms include dismantling the private bailiff system, which had been introduced based on agreements with EU experts, abandoning efforts to introduce objective criteria for the selection of judges, and degrading the State School for Judicial Officials and the Judicial Academy to the level of optional courses or evening schools. Alan Uzelac, 'Judiciary in Croatia 2020. Current situation, causes of crisis and possible reform measures' 5 <https://www.alanuzelac.from.hr/pubs/C04_Judiciary_in_Croatia_preprint.pdf> accessed 15 February 2025.

However, this scenario is not very likely, as it would require a shared awareness of the problems rather than a top-down modernization effort led by 'advanced' EU jurisdictions. Additionally, even if political consensus were achievable, the independent judicial structures of an enlarged EU would have the means to resist and neutralize such efforts. The involvement of large jurisdictions with serious rule of law challenges, such as **Ukraine** or **Turkey**, would introduce further obstacles, making meaningful procedural reform even more difficult to implement.

#41 Therefore, the only viable path to a sustainable EU approach to civil procedure in an enlarged Europe seems to be gradual progress and a slow process of supporting reforms that begin with improvements to national civil procedure. Experience in the **Western Balkans** has shown that the presence of European experts or even an EU protectorate, accompanied by a supervised overhaul of procedural legislation, does not guarantee lasting **harmonization of procedural law**.[40] Change must come from within: the harmonization of national law and practice with EU procedural standards should be the result of conscious and voluntary adoption rather than external imposition. In this context, model instruments such as the **ELI-UNIDROIT European Rules of Civil Procedure** may ultimately prove more important and influential than EU directives and regulations, as they offer a framework that jurisdictions can integrate at their own pace, fostering a more organic and sustainable alignment with European procedural norms and standards.

III. From the EU to a United States of Europe: Where Does the American Path Lead?

#42 Continuing the project of an **'ever closer Union'** that can substantially guarantee **mutual trust** in the justice sector calls for further **harmonization** of procedural law, which does not only affect 'law in books' but brings a common set of convictions, affecting behaviour of all involved. Achieving harmonization that is substantial and effective, rather than formal and illusory, requires a positive environment, inspiring role models, and, above all, a shared determination to move forward together on a common path. In the past, encouraging examples that diversity can be overcome were regularly coming from the United States. ***E pluribus unum,*** strength through diversity, is the ideal that Europe was also striving to achieve.

[40] Examples of such developments are most visible in Kosovo and Bosnia and Herzegovina. Despite significant progress, old practices have re-emerged whenever external monitoring has been reduced.

#43 In the area of justice and legal reforms, Europe has often followed the **American** path – and *vice versa*. Many contemporary achievements in European civil procedure either originated from or were inspired by American models. These include promotion of **alternative dispute resolution** (ADR), a high level of **consumer protection** through various legal mechanisms, the development of **collective redress**, strong **judicial independence**, and broad availability of **legal aid**. American procedural models, despite their special features that were difficult to be adopted elsewhere (often referred to in the literature as aspects of **American exceptionalism**[41]), were for a long time perceived as modern and progressive, serving as an inspiration for future-oriented procedural reforms in Europe.

#44 For some time, it seemed that this mutual respect was reciprocal. At least some American law professors, such as John Langbein and James Maxeiner, studied and praised certain elements of the **European tradition in civil procedure**, describing them as 'civilized' and 'advantageous'.[42] Leading American scholars of civil procedure, such as Geoffrey Hazard, contributed to important projects aimed at the **international harmonization of procedural law**.[43] It seemed that there was a 'modern trend towards **convergence** between the United States and the rest of the world'.[44]

#45 From a European perspective, the United States of America has also provided an appealing example of a federal state in which a diverse mosaic of state and federal courts manages to operate harmoniously, creating the impression of a coherent and functional system. The binding force of this system has traditionally been a highly respected judicial institution—the Supreme Court of the United States (**SCOTUS**). Highly regarded both domestically and internationally for its independence and progressive impact on legal development, SCOTUS was once praised as the 'least dangerous branch' of government.[45] It was an institution that could serve as a valuable reference point for Europe's highest tribunals.

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[41] See Oscar G. Chase, 'American "Exceptionalism" and Comparative Procedure' (2002) 50 Am J Comp L 277, 288-292; Richard Marcus, 'Putting American Procedural Exceptionalism into a Globalized Context' (2005) 53 Am J Comp L 709.

[42] See John H Langbein, 'The German Advantage in Civil Procedure' (1985) 52 U Chi L Rev 823; Ernst C. Stiefel and James R. Maxeiner, 'Civil Justice Reform in the United States—Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?' (1994) 42 Am J Comp L 147, 157.

[43] See American Law Institute and UNIDROIT, *Principles of Transnational Civil Procedure* (CUP 2006).

[44] Scott Dodson, 'Global Civil Procedure Trends in the Twenty-First Century' (2011) 34 Boston College Int and Comp L Rev 1-26.

[45] Hamilton, in *The Federalist* No. 78 (1788).

#46 In the preface to the ALI-UNIDROIT Principles, the reporters—a diverse team from the United States, Europe, and Brazil—concluded their introduction with an insightful remark on the future trajectory of civil procedure. Their perspective on the bifurcation of this path was as follows:

> *In this era of globalization, the world is marching in two paths. One path is of separation and isolationism, with war and turmoil: in such a world, this project is useless and unwelcome. The other path is increasing exchange of products and ideas among the peoples of the world; this path underscores the need for a transnational civil procedure*.[46]

#47 Evaluating the current state of this 'fork in the road,' it appears that the world is moving toward the first path—the path of **separation** and **isolationism**. This may present the ultimate wider challenge to European unity—and with it, to the very **idea of a common European area of justice.** By the mid-2020s, both the American and European political and socio-legal landscapes have changed significantly. What has also shifted—especially during the second term of President Trump—is the perception that the EU and the US remain strategic allies. The promotion of the **'MAGA' doctrine** and the concrete political moves of Trump's administration increasingly position much of the world as either latent or actual adversaries of the United States. In this adversarial environment, the potential for using American procedural models as a template for the development of EUstitia[47], based on convergence with U.S. legal and procedural frameworks, is severely compromised.

#48 But this is not the only reason why following the American path is becoming increasingly unlikely. It is also becoming more difficult to define what the 'American path' in civil justice and civil procedure reforms actually entails. The main U.S.-inspired achievements in European justice are, in the meantime, becoming less and less recognizable in their country of origin. While Europe was once guided by the high level of **consumer protection** in the United States, the 2011 SCOTUS decision in *AT&T Mobility LLC v. Concepcion*[48] marked a turning point. By allowing traders to bypass state courts and class actions through arbitration clauses in consumer contracts, the ruling significantly weakened consumer protections in the U.S., leaving American consumers virtually

[46] See ALI-UNIDROIT Principles (n 43) (signed by Geoffrey Hazard, Rolf Stürner, Michele Taruffo and Antonio Gidi).
[47] On the notion of EUstitia as both pragmatic and aspirational concept of the Euroepan governance project see more in Helen Hartnell, 'EUstitia: Institutionalizing Justice in the European Union' (2002) 23 NW J Int'l Law & Bus 65, 67.
[48] *AT&T Mobility LLC v Concepcion,* 131 S. Ct. 1740, 1753 (2011).

unprotected in many cases.[49] Europe has often looked to the United States as a model when promoting human rights, the rule of law, and a high level of **judicial independence**. However, in the present time, the U.S. is experiencing an unprecedented level of challenges to human rights and judicial independence.[50] The **American Supreme Court**, once praised and highly respected, is now facing a crisis of legitimacy, with historically low public approval ratings. For the first time, its trust levels have fallen below the average levels of **public trust** in courts across the EU.[51]

#49 There is an even more dangerous turn in the 'American path'. The United States has historically supported the European integration process, viewing it as a means to promote stability, economic prosperity, and transatlantic security. Free trade with an integrated Europe was seen as beneficial, and the process of EU enlargement was actively supported. However, much of this has significantly changed, bringing new challenges to integration efforts in Europe. The failure of the **Transatlantic Trade and Investment Partnership (TTIP)** and the imposition of tariffs on EU goods exported to the U.S. have not only made economic cooperation more difficult but also prevented the creation of mutually trusted judicial institutions for dispute settlement. The current U.S. administration has aggressively undermined the work of **international tribunals.**[52] It praised Brexit, openly supporting **disintegrative forces** within the EU. The effect of this shift in policy remains to be seen. At present, the EU is 'bracing for a new era',[53] and it is certain that the effort to strengthen Europe as 'a genuine area of justice' will face multiple challenges. All we can do is hope that, despite the stern warning of the ALI-UNIDROIT team, the project of further developing European civil procedure will not become 'useless and unwelcome'.

C. Conclusion: Progress Should Not Be Taken for Granted, It Should Be Earned

[49] See Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law J <https://ssrn.com/abstract=2601132> accessed 15 February 2025.

[50] The threats made by an American president who opposes judicial decisions and declares that 'maybe we have to look at the judges,' while qualifying court rulings prohibiting government actions as 'a very serious violation,' have not been seen since President Jackson's refusal to enforce a Supreme Court decision in the Cherokee case in 1832. See <https://www.npr.org/2025/02/12/nx-s1-5294666/trump-white-house-constitutional-crisis-judges> accessed 15 February 2025.

[51] For the evolution of public reception of the SCOTUS see Scott Dodson, 'The U.S. Supreme Court and Public Opinion' (2024) 111(1) Iowa Law Review 1–52.

[52] See <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/> accessed 15 February 2025.

[53] See 'Europe Braces for a New Trump Era, Uncertain About What It Means' *New York Times* (21 January 2025) <https://www.nytimes.com/2025/01/21/world/europe/trump-eu-policy.html> accessed 15 February 2025.

#50 The project of creating **'a genuine European area of justice'** is a grand and ambitious task. Such an area is unimaginable without a coherent and meaningful **Europeanization of civil procedure**. It is only natural that a project of this magnitude requires time, sustained efforts, and a fair amount of luck in navigating internal and external geopolitical and social developments.

#51 In July 2000, the French Justice Minister stated: **'**If it has taken forty years to create an Internal Market, and thirty years to create a single currency, we will be doing well if we achieve a single judicial space within twenty years.'[54] Twenty-five years later, this statement seems overly optimistic. However, the challenge lies not only in the timeline but also in the assessment itself: while the criteria for establishing an Internal Market or a single currency are clear and measurable, defining what exactly constitutes a **'single judicial space'** remains uncertain and open to interpretation.

#52 This 'brave new horizon for the rule of law in the European Union'[55] is not a fixed destination, but rather a continually evolving goal, where new perspectives are constantly being explored. For some—to extend the metaphor—it is a place where dreamers are chasing rainbows.

#53 In this paper, wider challenges on the path toward developing a **common European approach to civil procedure** have been identified. While these challenges are significant, they are not insurmountable. However, successfully addressing them requires persistent efforts. These efforts cannot be limited to the proliferation of new rules or the recasting of old ones in European civil procedure.

#54 The institutionalists' claim that it is sufficient to create common rules and expect them to 'generate a self-sustaining dynamic' and lead to a 'gradual deepening of integration'[56] has proved to be flawed. Europe needs a clear and comprehensive concept of civil procedure that goes beyond the current **'minimal standards of civil procedure'** and results in simpler, more coherent, and more user-friendly rules. It must work harder to develop a **common procedural culture** of efficient and accessible **judicial and extrajudicial institutions**, drawing on **best practices**—whether from within or outside the EU.

[54] Guigou, cited in Hartnell (n 47) at 65.
[55] ibid at 66.
[56] Alec Stone Sweet and Wayne Sandholtz, 'Integration, Supranational Governance, and the Institutionalization of the European Polity' in Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein (eds), *The Institutionalization of Europe* (Oxford 2001) 1, 5.

#55 Last but not least, Europe needs a renewed confidence in the idea that **European civil justice** should continue to develop as a ***ius commune***—a **common area of justice** that ensures the highest and most equal level of protection of human and other rights for everyone under the jurisdiction of any EU Member State.