The Impact of EU Law on Civil Procedure

Anna Wallerman

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Ms. A. Wallerman*

1. Introduction

Procedural lawyers sometimes entertain an attitude towards EU law which ressembles that of medieval map makers towards the unknown; we feel comfortable in our own jurisdictions, we may even venture into comparative research, but beyond the borders of our national legal systems, there be dragons. This preference for national law – which is hardly a unique trait of procedural lawyers – has frequently been justified with reference to the idea that procedural law is somehow shielded from the influence of EU law. This idea is not entirely without merit; however, it is the purpose of this paper to challenge it.

In its seminal *Rewe* and *Comet* judgments in 1976 the Court of Justice of the European Union (CJEU) ruled that in the absence of harmonising procedural legislation, Union rights would have to be enforced in national courts in accordance with the national procedural law applicable.[1] That principle, which has since been confirmed in a long line of case law, has in academic writing[2] and later also in the Court's own case law[3] come to be known as the *national procedural autonomy of the Member States*. That 'autonomy', and why the word should be put between quotation marks, will be discussed in section 2. Section 3 will provide a brief overview of the CJEU's case law on civil procedure and some more in-dept examples of its reasoning, whereas the concluding section 4 deals with the questions of how these European elements of civil procedure can be integrated or at least dealt with within a national legal order.

2. EU Law, Private Law and Civil Procedure

2.1 National Procedural Autonomy

The principle of procedural autonomy means that substantive EU law will, where no Union enforcement mechanism is available, be enforced in national courts in accordance with the procedures and remedies prescribed in national law, provided, however, that said procedures and remedies are no less favourable than what follows from the rules applicable to similar actions based on domestic law, and do not make the exercise of EU law rights virtually impossible or excessively difficult. These two minimum requirements have been labelled the principles of equivalence and effectiveness respectively.

However, the label 'national procedural autonomy' is, as has been suggested by several commentators,[4] somewhat unfortunate. Two main reasons will be highlighted here. First, the very imposition of conditions such as the abovementioned principles of effectiveness and equivalence shows that the Member States are not truly autonomous. Secondly, as the CJEU has explicitly and consistently held, Member State procedural 'autonomy' can only be exercised in the absence of EU law, *i.e.* when the EU either lacks competence to legislate,[5] or has chosen not

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* A. Wallerman is a doctoral candidate at the University of Gothenburg.

1 Cases 33/76 *Rewe,* ECR 1976 p. 01989, para. 5, and 45/76 *Comet,* ECR 1976 p. 02043, paras. 12-16.

2 See *eg.* Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (5 ed.). Oxford: Oxford University Press (OUP) 2011, pp. 219ff.

3 The first time in case C-201/02 *Wells,* ECR 2004 p. I-00723, paras. 65 and 67.

4 See *eg.* Kakouris, C.N., *Do the Member States Possess Judicial Procedural "Autonomy"?,* Common Market Law Review (CLMRev) 1997, pp. 1389-1412, p. 1411 and van Gerven, W., *Of Rights, Remedies and Procedures,* CLMRev. 2000, pp. 501-536, p. 502.

5 The notion of 'autonomy' seems to imply that the EU does not have legislative competence covering procedural law. However, this is incorrect. There is an express legal basis for such measures in Art. 81 of the Treaty on the Functioning of the European Union (TFEU). Procedural harmonisation can also be achieved through the sectoral

to do so (yet). The EU procedural measures that actually do exist will take precedence over national procedural rules, when both are applicable and conflicting. The procedural 'autonomy' of the Member States can thus neither be described as a (complete) liberty in a Hohfeldian sense, nor as an immunity.

2.2 The Principles of Effectiveness and Equivalence

The tests of effectiveness and equivalence are a dual competence shared between the CJEU and the national court before which a case is pending. In principle it is for the CJEU to elaborate the criteria in the abstract, while it is the task of the national court to interpret the challenged national rule and to review its compatibility with EU law as interpreted by the CJEU. However, as lower courts are not required to make a reference to the CJEU[6] – but still, of course, required to uphold EU law – the whole operation will often fall to be performed by national first instance and appeal court judges, relying on case law of the CJEU as precedent.

As has been mentioned above, the criterion of effectiveness is that national procedure must not make the enforcement of EU law by individuals *virtually impossible or excessively difficult*. When applying the principle the challenged national rule should be analysed 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole', and taking into consideration 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'.[7] This balance of interests between, on the one hand, the enforceability of EU substantive law and, on the other, procedural safeguards in, mainly, national law is to be carried out *in casu*, taking into account the actual circumstances of the individual case at hand.[8]

Whether EU law rights are subject to treatment *not less favourable* than that afforded to rights based on national law, is decided by means of the two-step test of equivalence: Is there a similar action avaliable on the basis of domestic law, and if so, are the rules applicable to an EU law action as favourable as those applicable to that domestic action? The first question is, according to the CJEU, to be answered by comparing the purpose, cause of action and 'essential characteristics' of the relevant actions.[9] If no domestic action is deemed to be similar to the pending EU law action, the national rules cannot be in breach of the principle of equivalence, and the second question thus needs not to be answered. In the second step, the rules governing the two comparable actions are compared. This comparison ressembles the holistic effectiveness test in that it is to be carried out with regards to 'the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts'.[10] However, contrary to the principle of effectiveness, the principle of equivalence is to be applied in the abstract, without reference to the circumstances of the individual case giving rise to the question.[11]

2.3 Particularly on Private Law Relationships

The *rationale* of the procedural minimum harmonisation outlined in the above is to ensure the effective enforcement of EU law. Therefore the European impact on procedural law depends largely on the level of harmonisation of substantive law. In an historical perspective, private law

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competences of the Union (see Tulibacka, *Europeanization of Civil Procedures: In Search of a Coherent Approach,* CMLRev 2009, pp. 1527-1565, pp. 1546ff.).

6 Art. 267(2) TFEU.

7 Joined cases C-230/93 and C-231/93 *van Schijndel,* ECR 1995 p. I-04705, para. 19.

8 See *eg.* case C-473/00 *Cofidis,* ECR 2002 p. I-10875, para. 37.

9 See *eg.* case 261/95 *Palmisani,* ECR 1997 p. I-04025, paras. 34 *et seqq.*

10 Case C-326/96 *Levez,* ECR 1998 p. I-07835, para. 44.

11 Case C-78/98 *Preston,* ECR 2000 p. I-03201, para. 62.

has largely been left out from Union law-making.[12] Consequently, points of EU law are more rarely relied on in private law relationships and as a result the claim of procedural autonomy is stronger in the field of *civil* procedure. Could one make the argument that even if the Member States are not so procedurally autonomous after all, at least *civil* procedure constitutes a last safe haven?

Such a position would quickly become untenable. There is a growing body of European private law, some of it reaching to the very core of the field. Consumer and competition law are prime examples of private law areas with a comparatively long history of integration.[13] Certain aspects of employment law has also long been subject to EU interventions,[14] and the increasing importance of EU law in labour law relations is illustrated by the much discussed *Viking* and *Laval* judgments.[15] The EU has over the last two decades produced some 20 directives on private law, in addition to various soft law instruments,[16] and one commentator has asserted that contract law clearly tends towards further Europeanisation.[17] Additionally, a survey of the case law of the CJEU shows that private law disputes are in no way exempt from the jurisdiction of the Court, even in the absence of legislative instruments.[18]

3. Civil Procedure in the Case Law of the CJEU

As has been seen, the principles of effectiveness and equivalence remain abstract, vague and frankly not very helpful for a national judge adjudicating a case, unless that judge is particularly amused by EU law teleological reasoning. More interesting than the question of the interpretation of the principles is that of their application.[19] The tests of effectiveness and, although to a somewhat lesser extent, equivalence, have effectively been transformed in the case law of the CJEU, from minimum criteria to multifaceted tools for judicial review, capable of having distinct implications for all stages of proceedings. Even restricting the survey to cases that have arisen in civil litigation, case law from the CJEU covers issues such as contractual jurisdiction clauses,[20] the *res judicata* principle,[21] admissibility of certain types of action,[22] the party autonomy and *iura novit curia* principles,[23] the conditions for setting aside an arbitral award,[24] legal aid,[25] and evidentiary matters such as allocation of the burden of proof.[26] Additionally, international private law has been substantially harmonised and adjudicated upon.[27] For reasons

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12 Cf Caruso, D., *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration,* European Law Journal (ELJ) 1997, pp. 3-32, pp. 3ff.
13 See Caruso 1997 pp. 10f.
14 See *eg.* the 1978 ruling in 149/77 *Defrenne,* ECR 1978 p. 01365.
15 Cases C-438/05 *Viking,* ECR 2007 p. I-10779 and C-341/05 *Laval,* ECR 2007 p. I-11767.
16 Smits, *Dutch Report: Coherence and Fragmentation of Private Law,* European Review of Private Law (ERPL) 2012, pp. 153-168, p. 157.
17 Hesselink, M., *A European Legal Method? On European Private Law and Scientific Method,* ELJ 2009 pp. 20-45, p. 42.
18 Suffice it here to mention cases such as C-144/04 *Mangold,* ECR 2005 p. I-09981, and C-555/07 *Küçükdeveci*, ECR 2010 p. I-00365. See also the CJEU case law on general principles of private law, described in Hesselink, M., *The General Principles of Civil Law: Their Nature, Role and Legitimacy,* in Leczykiewicz, D., and Weatherill, S. (eds.), *The Involvement of EU Law in Private Law Relationships.* Oxford: Hart 2013, pp. 131-180.
19 Cf. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation.* Oxford: Hart 2004, p. 32.
20 Joined cases C-240/98 to C-244/98 *Océano* ECR 2000 p. I-04941 and case C-243/08 *Pannon* 2009 p. I-04713.
21 Case C-234/04 *Kapferer,* ECR 2006 p. I-02585.
22 Case C-492/05 *Unibet*, ECR 2007 p. I-02271.
23 *Van Schijndel* and several cases concerning unfair terms in consumer contracts, *eg.* case C-397/11 *Jőrös,* nyr. and case C-488/11 *Asbeek Brusse,* nyr.
24 Cases C-183/05 *Mostaza Claro,* ECR 2006 p. I-10421, C-126/97 *Eco Swiss,* ECR 1999 p. I-03055, and C-40/08 *Asturcom*, ECR 2009 p. I-09579.
25 Case 279/09 *DEB,* ECR 2010 p. I-13849.
26 Cases 109/88 *Danfoss,* ECR 1989 p. 03199, C-415/10 *Meister,* n.y.r., and C-427/11 *Kenny,* n.y.r.
27 For an overview see Storskrubb, *Civil Procedure and EU Law; A Policy Area Uncovered.* Oxford: OUP 2008..

of space it will be impossible to cover all of this case law here. Instead I will highlight some examples.

3.1 Designation of Competent Court

The competence of the court seized of a civil action has, from different points of view, repeatedly been subject to CJEU review. The *Océano* and *Pannon* judgments, delivered in 2000 and 2009 respectively, concerned the applicability of a term in consumer contracts conferring jurisdiction on a certain court, which was also the *forum domicilii* of the applicant companies. In *Océano,* the clause was held to be unfair, but it was unclear whether the court was competent to declare the actions inadmissible of its own motion, *i.e.* without a request to that end being filed by the defendants.[28] Similarly in *Pannon,* it was clear that under national law, the court was competent to raise the issue of territorial competence *ex officio*, but only if the defendant had not entered an appearance to dispute the application in substance, which, unfortunately, she had.[29]

According to the CJEU, the competence and indeed the obligation[30] of a national court to assess the unfairness of prorogation clauses of its own motion follows from EU law as a consequence of the consumer protection afforded by the Union,[31] and that obligation arises as soon as the court 'has available to it the legal and factual elements necessary for that task'.[32] It may be noted that the jurisdiction by submission rule, which entails that a court is *not* allowed to reject a claim of its own motion for lack of jurisdiction unless requested to do so by the defendant, is a well-known feature in civil procedure, codified *inter alia* in the Brussels I regulation[33] and the Swedish Procedural Act[34] and the general principle in the Dutch civil procedure.[35] Under the two first-mentioned Acts, the prohibition to raise matters of territorial competence *ex officio* applies even in consumer cases.[36] Not only does this case law serve to emphasise the rule that prorogation clauses with consumers, in order to be enforceable, should be individually negotiated. Also, and more importantly, it undermines the possibility to combine private law consumer protection with civil procedure party autonomy; in blurring the border between substantive and procedural law, the existence of protective legislation in the former field necessitates corresponding protection in the latter.[37] I will return to this point in my conclusions.

Secondly in *Impact* a number of civil servants assisted by their trade union had brought claims against their employers, a number of Irish government departments, for not respecting the rights of fixed-term employees laid down in Directive 1999/70. Their action was based partly directly on the Directive, which Ireland had failed to implement on time, and partly on the implementing Protection of Workers Act (PWA).[38] The claim was filed with a Rights Commissioner and subsequently appealed to the Labour Court, both of whose jurisdictions in the case were based

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[28] *Océano,* para. 18. Cf. the opinion of the AG, para. 13. A similar question was recently addressed by the CJEU in *Jőrös,* paras. 39-48.
[29] *Pannon* para. 18.
[30] Cf. *Asbeek Brusse,* para. 41, and *Jőrös,* para. 28, and the case law there cited.
[31] *Océano,* para. 29. See also *Pannon,* paras. 23-24.
[32] *Pannon,* para. 35.
[33] Council Regulation 44/2001 of of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 24.
[34] Rättegångsbalken (1942:740) (SCJP) Ch. 10 Section 18.
[35] Van Hooijdonk, M., and Eijsvoogel, P., *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation.* The Hague, Wolters Kluwer 2012, p. 19; Asser Procesrecht/Van Schaick 2 2011/22; Van de Hel-Koedoot 2012 (*Te&C Rv*), art. 110, aant. 1.
[36] SCJP Ch. 10 Sections 8a, 17 and 18 compared, and case C-111/09 *Bilas* ECR 2010 p. I-04545 respectively.
[37] Cf. *Océano,* paras. 26-29*,* where the CJEU inferred the existence of a *procedural* duty of the courts from the existence of a *private* law remedy of non-enforceability and a *public* law duty on the state to take preventive actions against unfair trade practises.
[38] Case C-268/06 *Impact,* ECR 2008 p. I-02483*,* paras. 17-21.

upon the implementing Act. However, neither body had express jurisdiction to adjudicate claims based on directly effective EU legal acts.[39] Such claims instead fell under the jurisdiction of the ordinary courts, which were also competent, alongside the Rights Commissioner, to hear claims based on the PWA.[40] The Labour Court requested that the CJEU rule on, *inter alia,* whether or not it was required, as a matter of EU law, to assume jurisdiction also for the part of the claim based on the (allegedly) directly effective Directive.

The CJEU ruled that if a requirement placed upon the defendants to divide their claim and pursue two separate actions before different courts would result in procedural disadvantages as compared to bringing only one action for the entire claim, a rule conferring jurisdiction on a court to hear one part of the claim but not the other would be contrary to the principle of effectiveness.[41] The fact that the complainants could have chosen a court with express jurisdiction to hear their entire claim (the ordinary courts) and thus had not been obliged to commence proceedings with the Rights Commissioner did not alter that position.[42] Apart from the obvious conclusion concerning the Irish rules on court competence, there seems to be another inference to be drawn from *Impact*. As bringing two separate actions will probably without exception be more arduous than bringing one, it seems that EU law will preclude national rules hindering related cases from being joined (and presumably require national courts to invent possibilities to join cases if none exists). Any designation of specialized courts is a potential liability.[43] It is however unclear how far-reaching this obligation is: how closely do the two claims have to relate to one another? Does it have to, as in *Impact,* be two portions of the same right (and if so, how to delimit one right from another?), or will the rule also apply to different rights arising from a particular situation? Does the entire claim have to emanate from EU law, or could the *Impact* rule also require that a claim based on EU law be joined with one based on domestic law?

3.2 Party Autonomy and Court Activity

It has already been demonstrated *supra* that the party autonomy principle in civil procedure has not been unaffected by CJEU interventions. In consumer law, the cases cited above form part of an intricate case law on the enforcement of EU consumer rights. That case law has established relatively far-reaching *ex officio* duties of the national courts to ensure the protection of the consumer, in some cases even stretching to an obligation to engage in fact-finding – and those duties apply regardless of the extent to which national civil procedure relies on the adversarial principle.[44] Outside the consumer law area the CJEU has chosen another path. However, even in holding the national provision at stake to be compatible with EU law, the CJEU cannot be said to defer to Member State procedural 'autonomy'. This will be illustrated by reference to the well-known *van Schijndel* ruling.

It is not necessary to extensively reproduce the facts of the case here. Suffice it to mention that the claimants sought to have the judgments of lower courts quashed on the grounds of those judgments being contrary to EU law and the courts in question having been obliged to raise that issue *ex officio.*[45] The CJEU however upheld the principle of court passivity, ruling that, in civil litigation, both a rule prohibiting the court to raise points of law of its own motion (such a rule

[39] *Impact,* para. 16.
[40] *Impact,* paras. 16, 36 and 52.
[41] *Impact,* para. 51. This rather odd way of putting it is most likely due to the limited jurisdiction of the CJEU, which prevents it from assessing the factual consequences of its legal interpretations.
[42] *Impact,* paras. 52-53.
[43] Cf. to that effect *Jőrös,* paras. 49-53.
[44] See further Trstenjak, *Procedural Aspects of Euopean Consumer Protection Law and the Case Law of the CJEU,* ERPL 2013, pp. 461-472.
[45] *Van Schijndel,* para. 10.

did not, however, exist in Dutch civil procedure)[46] and an obligation on the court to rely only on facts and circumstances presented by the parties, are compatible with EU law.[47] The party autonomy principle in civil procedure is thus in principle – although not in consumer cases – consistent with EU law.

Some additional remarks deserve to be made in relation to the *van Schijndel* ruling. First, it should be pointed out that whereas the ruling can be construed as an approval of Dutch civil procedure and at least a partial victory for the party autonomy principle, it can hardly be interpreted as proof of national procedural autonomy. Had there been such autonomy, the CJEU should have declared itself incompetent to even review the national provisions. The fact that it found itself competent to approve of the rules demonstrates something else: that it would also have been competent to disapprove. Secondly, as regards the *iura novit curia* principle, the CJEU stated that a national court is *obliged* to rely on points of law *ex officio*, where national civil procedure *allows* for it.[48] This covers not only situations where national law places upon courts an obligation to raise points of law of its own motion, but also situations where such court activity is permitted (but not prescribed). The ruling in *van Schijndel* should therefore not be interpreted as an unconditional acceptance of whatever position the national legislator takes on party autonomy and court passivity. This is also illustrated by the case law on public policy. While the CJEU accepts that procedural law restricts the court's ability to act *ex officio* to matters of public policy, it retains the right to define which substantive rules actually belong to that category, and has construed it widely, thereby indirectly altering the range of court activity.[49] Thirdly, it is worth noting that both conclusions from *van Schijndel* have subsequently been confirmed in administrative rather than civil procedural settings, without this transfer from one type of procedure to another even being commented upon by the CJEU.[50]

4. Conclusion

As should be clear by now, EU law has tangible and potentially far-reaching effects on the civil procedure regimes of the Member States. In occasionally striking down on provisions of Member State civil procedure, the CJEU also calls into question core procedural principles such as party autonomy and the adversarial nature of litigation. The Court develops its case law *ad hoc*. General conclusions are difficult to arrive by and difficult to transpose into a procedural system different from that in which the original judgment was delivered. Harmonisation of civil procedure is as a result erratic and piecemeal – but it *is*.

Can nothing then be said about the impact of EU law on civil procedure at large? Well, maybe the one conclusion to be had is that, from the EU law perspective, there is no such thing as 'civil procedure at large'. There are strands of case law – such as that on *res iudicata,* where the CJEU has seemed more willing to uphold national law in private law disputes such as *Kapferer* than in administrative cases such as *Kühne & Heitz* and *Lucchini*[51] – where the CJEU seems to distinguish between administrative and civil procedure, but these are the exceptions. This should prompt us to rethink the concept of civil procedure as a delimitation.

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[46] See *van Schijndel,* para. 11. Cf also van Hooijdonk and Eijsvoogel 2012, pp. 3 and 42 f.

[47] *Van Schijndel,* paras. 15 (*a contrario*) and 20-22.

[48] *Van Schijndel,* para. 14. This rule has subsequently been upheld *i.a.* in the recent rulings in *Jőrös,* paras. 30 and 36, and *Asbeek Brusse*, paras. 45-46.

[49] See *i.a. Eco Swiss* para. 37 and *Asturcom,* paras. 52-53.

[50] Notably in case C-71/95 *Kraaijeveld,* ECR 1996 p. I-05403, and joined cases C-222/05 to C-225/05 *van der Weerd,* ECR 2007 p. I-04233.

[51] Cases C-234/04 *Kapferer,* ECR 2006 p. I-02585, C-453/00 *Kühne & Heitz,* ECR 2004 p. I-00837, and C-119/05 *Lucchini,* ECR 2007 p. I-06199.

EU law rarely distinguishes between private and public law.[52] Quite on the contrary, as illustrated by the *Océano* case discussed *supra,* public and private law are both often seen by the CJEU as means towards a common goal.[53] Therefore, the civil/administrative (and criminal) procedure divide cannot be relied upon when analysing CJEU case law. An example of this is provided by the judgment in *Cartesio,* restricting the possibility of appeal courts to review a lower court's decision to request a preliminary ruling from the CJEU.[54] Although delivered in proceedings before an administrative court, the reasoning quite clearly also applies to references by civil courts.

This extrospective approach of transposing or importing concepts and conclusions from administrative (and criminal) to civil procedure, should be coupled with a parallel, introspective trend of further distinguishing between different types of cases *within* civil procedure. The influence of EU law may prompt, or force, civil procedure to abandon the basic assumption that civil law disputes occur between equal parties acting freely.[55] In the case law of the CJEU a more ambitious, intrusive approach can be discerned in the parts of private law that have a social or public dimension, such as consumer law, employment law, and competition law. It remains to be seen whether this will change as the EU private law *aquis* widens.

At least when EU law rights are at stake, civil procedure thus seems to be in need both a more receptive approach towards public law, and, at the same time, greater differentiation within the private law area. This development places new demands on national judges, and litigators. First, they should be aware of the fragmentary case law that actually does exist and apply it whenever applicable. This includes sometimes adopting an unconventional approach. National demarkation lines between judicial fields should not be taken for granted. Parties may of course use these arguments to further their own cases.[56] Secondly, as it is hardly satisfactory or even practically possible that all cases are referred to Luxembourg in order to be correctly adjudicated, they need to draw the inferences of this case law for cases not as such covered by it. Often this involves a comparative element, as most cases will have originated in a jurisdiction other than one's own. Furthermore, in line with the CJEU's history (and, at least in rhetorics, current practise) as a co-operating 'partner' of the national courts rather than a superior authority, its rulings will often closely follow the facts of the individual case referred, making it more difficult to establish the *ratio decidendi.*

One strategy to deal with the impact of EU law, from a legislative point of view, is to increase the discretion of the judge, which facilitates the adaptation of national procedure to EU law.[57] 'Euro-friendly' use of judicial discretion can – and as we have seen *infra,* on some occasions, must[58] – be used to avoid violations of EU law.[59] The consequence of such an approach is

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[52] Claes, M., *The European Union, its Member States and their Citizens,* in Leczykiewicz and Weatherill 2013, pp. 29-52, p. 33.

[53] Cf. Smits, M., *European Private Law: A Plea for a Spontaneous Legal Order,* Bepress Legal Series 2006, paper 1904, pp. 3f.

[54] C-210/06 *Cartesio,* ECR 2008 p. I-09641, paras. 95-96. See further Bobek, *Cartesio – Appeals Against an Order to Refer under Article 234 (2) EC Treaty Revisited,* Civil Justice Quarterly 2010, pp. 307–316.

[55] Cf. Caruso 1997, p. 7.

[56] So-called 'euro-defence', see *eg.* Odudu, O., *Competition Law and Contract: The Euro-defence*, in Leczykiewicz and Weatherill 2013, pp. 395-416.

[57] A similar solution has been proposed by Biavati, P., *Is Flexibility a Way to the Harmonization of Civil Procedural Law in Europe?,* in Carpi, F. and Lupoi, M.A. (eds.), *Essays on Transnational and Comparative Civil Procedure.* Turin: G. Giappichelli Editore 2001.

[58] See *van Schijndel*, para. 15, *Kraaijeveld,* para. 58, *Asturcom,* para. 54, *Jőrös,* paras. 30 and 36, and *Asbeek Brusse*, paras. 45-46.

[59] However, if the discretion can be seen as an arbitrary hinderance to the enforcement of EU law rights it can also be deemed contrary to EU law, see case C-406/08 *Uniplex,* ECR 2010 p. I-00817*,* paras. 41-43.

however that power is delegated from national parliaments to, on the one hand, the national judges who will apply the rules and, on the other hand, the EU and particularly its Court of Justice. While this simultaneous centralisation and decentralisation seems to correspond well with the overall impact of EU law, it also (further) lessens state control of the procedure and risks enhancing fragmentation to the detriment of coherence and foreseeability.[60]

The introduction of new legislative levels creating new hierarchies and rendering established categorisations and dichotomies (partially) obsolete, coupled with the, at least for a civil law lawyer, extensive use of judge-made law, is among the greatest challenges so far offered by the Europeanisation of civil procedure. However, in order for EU law to become, as envisioned and indeed decreed by the CJEU,[61] an integral part of the legal order of the Member States, procedural lawyers need to start looking to legal sources beyond and above our national borders. We may have to acquaint ourselves with a number of exotic species, but we need hardly fear being devoured by dragons.

[60] Cf. on a similar development in private law Smits 2012, pp. 164ff.
[61] In its seminal ruling in case 26/62 *van Gend en Loos,* English special edition p. 00001.