Chapter 13

Conclusions and outlook

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1. Impact, in various ways

The first and clear conclusion from the papers in this book is far from surprising: law of the European Union has impact on national civil procedure. This might concern primary EU law, secondary EU law, case law, fundamental legal principles or soft law instruments. At the same time, there seems to be significant variation on several aspects of the impact of EU law on national civil procedure law. It appears that there is variation in the level of influence and in the way EU law has impact on national procedural systems. The various countries display considerable variation as to the extent of the influence both in terms of width and depth of the impact. In some countries, many different areas of civil procedure have undergone some change, while in others change is more limited in scope, or on certain areas even absent,. Some national civil procedure systems have faced profound impact in some areas. While change in other systems has, at least so far, been limited to a much lower level of just concerns peripheral areas. In some of the countries studied, Europeanisation of EU law has met more resistance than in others. In this concluding chapter, we go into some general conclusions by analysing and comparing the various contributions.

All of the papers are of course limited in length and scope. The particular viewpoint of contributors may perhaps be of influence on the various contributions. The scope of the book does not allow for a full picture of each of the countries. Within the boundaries of the limited scope of the findings of the various papers, some general conclusions and observations can be made.

2. General conclusions from the papers

a. Variety in impact. The first conclusion, already stated, is clear and not unexpected: the impact of varies by Member State. In section 4 of this chapter, we will go into this.

b. Diminishing procedural autonomy. As a starting point, national civil procedure law is up to the Member States. It follows from the procedural autonomy that, in absence of EU law Member States are free to construct there procedural system as they deem fit. It is, in the words of the ECJ, for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[1] Result of the growing influence of EU-law is that the procedural autonomy of

[1] See inter alia Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* [2010] ECLI:EU:C:2010:739), para 63; Case C-310/14 *Nike European Operations Netherlands BV vs Sportland Oy* [2015] ECLI:EU:C:2015:690, para 28; and recently Case C-74/14 *"Eturas" UAB m.fl. mot Lietuvos Respublikos konkurencijos taryba* [2016] ECLI:EU:C:2016:42, para 32. See on procedural autonomy in general *inter alia* W. van Gerven, 'Of Rights, Remedies and Procedures' [2000] CMLR 2000, 501, John McKendrick, 'Modifying Procedural Autonomy: Better Protection for Community Rights' [2000] ERPL 565, Leo Flynn, 'When National Procedural Autonomy Meets the Effectiveness of Community law, Can it Survive the Impact [2008] 8 ERA Forum 245; and Anne-Marie Van den Bossche, 'Private Enforcement, Procedural Autonomy and Article 19(1) TEU: Two's Company, Three's a Crowd [2014] 33 Yearbook of European Law 41.

Member States is diminishing.[2] The growing amount EU case law and EU rules have impact on the national procedural systems, at least up to a certain level.

It is widely known that EU law is relevant for procedural cross border issues.[3] The EU Treaty refers to 'judicial cooperation in civil matters having cross-border implications'.[4] However, EU law can be relevant for purely domestic cases. The case law on *ex officio* application of consumer law serves as an example for several Member States. The Directive on enforcement of intellectual property rights offers several examples.[5] In several Member States European case law is followed by a discussion addressing the question to what extent national law is compliant with the requirements formulated by the ECJ.[6] Some the contributions demonstrate that, at least in some Member States, there is also attention for Europeanisation through 'soft-measures'.[7]

b. Differences in approach. At the EU level, there seems to be a more sectoral approach than at the national level. EU legislation concerns for example IP-rights or consumer sale. The new elements introduced by EU mechanisms need to find a decent place in the several national procedural systems.[8] The different way of law making at the EU level and at the national level may lead to questions on the national level. *Ex officio* application of EU consumer law, as resulted from the case law, may serve as an example. The scope of EU instruments, such the Directive on IP-rights, may also lead to questions. The doctrine touches upon central concepts and ideas in civil procedure, including the role of judges and the division of labour between the court and the parties, thus it has spurred numerous requests for preliminary rulings and much discussion.[9]

c. Spontaneous harmonisation. As a result of the differences in approach in several Member Sates questions has arisen concerning spontaneous harmonisation.[10] In some Member States, it has been discussed if collective redress should be extended beyond consumer rights and competition cases. The Danish paper deals *inter alia* with the question how sectoral harmonization can affect the coherence by requiring Member States to adopt rules for a particular type of dispute that do not affect the general values and principles of its national civil justice system.[11]

d. Uncertainty. New EU rules may be cause for a certain level of judicial uncertainty. For example, in the chapter on Germany it is mentioned that certain ECJ decisions are usually followed immediately

[2] Some commentators argue there is no longer any procedural autonomy, just residual competencies. See Michael Bobek, 'Why there is no Principle of "Procedural Autonomy" of the Member States, in B de Witte and Hans Micklitz (eds.) *The European Court of Justice and the Autonomy of Member States* (Intersentia 2011).
[3] See on the Brussels I Regulation, European enforcement order cross etc. in Harsági this volume, section 3.
[4] Art. 65 TFEU.
[5] See Taelman in this volume, section 2 and Petersen in this volume, sections 2.2 and 2.3.
[6] Hau in this volume, section 3.1 and Piszcz in this volume, section 4; compare Krans in this volume, section 3.3.
[7] Piszcz in this volume, section 2.
[8] See Bart Krans, 'EU Law and National Civil Procedure Law: An Invisible Pillar' 23 European Review of Private Law 567, 582-584.
[9] See inter alia Després in this volume, section 3; Wallerman in this volume, section 5; Krans in this volume, section 2; Taelman in this volume, section 2; Harsági this volume, section 4.2; Piszcz in this volume, section 4.
[10] For example Petersen in this volume, section 3; Piszcz in this volume, section 2; and Krans in this volume, section 4.
[11] Petersen in this volume, section 2.

by a discussion addressing the question to what extent the German law is compliant with requirements formulated by the ECJ.[12]

e. Lack of knowledge of EU law. Despite the ongoing training efforts through the European Judicial Training Network, many judges – and legal counsel – seems to have insufficient knowledge of EU law and policies on civil justice. The situation seems to be ubiquitous regardless of the length of membership. The rapid development of all three pillars of EU civil procedure contributes to inadequate awareness of the role of European law for national civil procedure. The result of deficient understanding of Europeanisation may be displayed in numerous ways, including lack of references to EU law and as treating EU law as foreign law.[13]

3. Differences between Member States

The variety in level and way of influence of EU law on national law is up to a certain level not surprising. There were differences between the procedural systems in the various Member States. The pre-existing situation was not equal. It explains why the influence of EU law varies.

At least six types of legal system are represented in the EU: two types of civil law systems, the Germanic and Romanic, common law, Nordic – or Scandinavian- law[14], former communist or socialist legal systems[15] and mixed legal systems.[16] Although Nordic and former communist systems can be considered as legal families in their own right, they have an affinity with civil law, sharing many fundamental structures and concepts with civil law. The legal system of the EU draws on elements from major European legal families: precedent and court made law comes from common law; the structure and organisation of courts from Romanic (or French) civil law; many legal concepts such as proportionality are transplants from Germanic (or German) civil law; and the principle of transparency from Nordic law. Former communist law has so far had a limited impact on EU law. Yet some elements of EU law are inherently foreign for some legal systems.

English civil procedure seems to be at odds with the views of the CJEU.[17]

In France, courts and case law had have a limited role in development of law and the legal system. Since the French revolution, the courts have had the role to be the mouth that speaks the law, not a law-maker. The French Supreme Court writes only scarce reasons for its decisions. The European courts, particularly the European Court of Human Rights (ECtHR), provide more extensive reasoning for their decisions. The reasoning of national courts sometimes influence the outcome in European courts. The French debate on whether the Supreme Courts should provide more extensive grounds for its decisions, illustrates how EU law may trigger far-reaching changes.[18]

[12] Hau in this volume, section 3.1.
[13] See Galič in this volume, section 2.1.
[14] See e.g. Ulf Bernitz, 'What is Scandinavian law? Concept, characteristics, future' 50 Scand Stud Law 13.
[15] Alan Uzelac, 'The Survival of the Third Tradition?' 49 Supreme Court Law Review 377.
[16] Anna Nylund, 'Introduction to preparatory proceedings' in Laura Ervo and Anna Nylund (eds), *Current Trends in Preparatory Proceedings* (Springer forth coming).
[17] Andrews in this volume, section 5.
[18] Després in this volume, section 4.

German civil procedural thinking seems to have some traits that resonate with EU civil justice. This has resulted in a positive attitude towards European civil procedure.[19]

Slovenia and Poland seem to struggle with the question of judicial discretion and (excessive) formalism. The European courts seem to expect national court to have discretion and to use their discretionary powers. Literal interpretation gives little room for weighing and balancing legal principles and arguments pro and contra, contrary to the style of European courts. The different approach to legal methods and the role of courts, results in problems when national courts acts as EU courts applying EU law.[20]

However, attributing changes to the underlying legal system is not always fruitful. There are considerable differences between countries having a similar legal culture, structure of civil procedure or same legal institution. Some countries face rapid changes, while a neighbouring country may not do so.

Ex officio application of aspects of consumer and competition law has raised many questions in Sweden and the Netherlands, but does not seem to have spurred the same amount of interest in Belgium and Germany.[21] In Norway, *ex officio* application of EU law seems to cause less problems than in the Netherlands and Sweden.[22] The reason may be the court structure. Because Norway does not have administrative courts, general courts are used to mandatory, indispositive cases and balancing between public interest and public policy on the one hand, and individual interests on the other hand.

Thirty years ago, Scandinavian Supreme Courts were reluctant towards judicial review, today the Danish and Norwegian Supreme Courts perceive their role differently, and act – at least to some extent – as genuinely European courts. The Swedish Supreme Courts are still desultory to acting as European courts and performing judicial review. Yet, Norwegian courts display the same reluctance towards direct dialogue with the Luxembourg courts as the Swedish courts, whereas the Danish courts are more open.[23]

The impact of Europeanisation on national civil procedure may also depend on specific features of the national civil procedure. The texts on Poland, Hungary and Slovenia indicate that these countries are still in the process of transforming their respective civil procedure systems from communist systems to “western” civil procedure systems.[24]

Interestingly, the impact Europeanisation on Norwegian civil procedure does not seem to be radically smaller than in the other states, despite the fact that Norway is not a Member State. Europeanisation of civil procedure seems to permeate the law of EEA/EFTA Member States.

[19] See Hau in this volume, section 2.2.2.
[20] Galič in this volume, section 6 and Piszcz in this volume, section 4.
[21] See Krans in this volume, section 2; and Wallerman in this volume, section 5.
[22] Nylund in this volume, section 3.
[23] See Nylund in this volume, section 4 and Wallerman in this volume, sections 3 and 4.
[24] Galič in this volume ,section 1; Piszcz in this volume, sections 1-3; and Harsági this volume, section introduction.

4. Level of knowledge and understanding of EU law amongst judges

Another probable cause for differences between Member States are differences between knowledge of EU law and its methods and differences between knowledge of impact on national civil procedure.

Many of the contributions mention the lack of knowledge of EU law, and in particular, procedural dimensions of EU law, among judges (and lawyers in general). National judges must have sufficient knowledge of EU primary and secondary law and case law, and they must understand the method employed by the European courts.[25] Some Slovenia judges tend to treat EU law as foreign law.[26] Judges must also learn how to write references for preliminary rulings to actively contribute to clarification (and development) of European procedural law.[27]

The chapters on Poland and Slovenia, both former communist legal systems, discuss if difference in legal thinking and understanding of the role of courts could be a barrier to using European law. Both authors discuss the rendezvous of a legalistic national legal culture with an EU legal culture stressing flexibility and discretion.[28] Knowledge of EU civil procedure law – both legislation and case law – is not sufficient, national courts must also understand their role as European courts.[29] Hungarian courts – on the other hand – have been far more active in making requests for preliminary rulings.[30]By embracing European civil procedure as a field of study early, German academics have made information more easily accessible to practitioners.[31] In France, European civil procedure has mainly been seen as part of international private law and consumer law, thus many questions have received little attention from in literature on civil procedure.[32]

5. Attitudes towards Europeanisation

The attitude towards the EU on the national level may influence the level and methods of EU scepticism. Countries with most widespread scepticism towards EU have either chose not to become members at all, such as Norway, or they are not fully participating in cooperation in civil justice, such as Denmark and England. However, limited participation in the area of freedom, justice and security applies only to certain legal instruments. Procedural rules in legislation having their legal basis in the functioning of the internal market are either directly or indirectly applicable in these countries. Harmonisation through the invisible pillar[33] of both through general EU law principles, such as non-discrimination and effective application of EU law, and through procedural rules in directives applies fully to these countries. Thus, EU law has a significant impact on national civil procedure in these countries as well.

Although one can discern some resistance towards European law from English and Norwegian courts, Danish courts do not seem to be particularly reluctant to EU law. The Janus-faced approach towards Europeanisation of the Norwegian Supreme Courts is partly a result from a hesitance to the EFTA

[25] See chapter on Dutch law, section 1 and Piszcz in this volume, section 4.
[26] Galič in this volume, section 6.
[27] See Nylund in this volume, section 3.
[28] See Piszcz in this volume, section 4 and Galič in this volume, section 5.
[29] See Piszcz in this volume, section 4, and Galič in this volume, section 6. The same seems to be true for Norway, see Nylund in this volume, sections 4.1 and 5.
[30] See Harsági this volume, section 4.2.
[31] Hau in this volume, section 2.2.2.
[32] Després in this volume, section 1.
[33] Krans [n 9]

Court and strong national opposition towards EU membership, not resistance to Europeanisation in and of itself. Despite widespread Euroscepticism, Danish courts are the most active Scandinavian court having dialogue with the CJEU, with the highest frequency of request for preliminary rulings both in absolute numbers and per capita.[34]

In Sweden, the influence on EU law on national civil procedure and EU law on civil procedure in general has received limited attention. The legislator has sparsely explored the need for and possibilities of harmonisation of national rules with similar European rules. Most academics show little interest in Europeanisation of civil procedure and the Swedish courts, in particular the Swedish Supreme Court, have made very few references for preliminary rulings.[35]

German and Dutch lawyers and academics have shown a particular interest in Europeanisation of civil procedure law. The courts in both countries have taken an active role in developing EU law by making many references for preliminary rulings. The style and content of European procedural legislation follows the German style, yet German law has retained some of its particularities. Further, German academics have embraced Europeanisation and even developed a specific subfield of procedural law dealing with Europeanisation. There are numerous textbooks and monographs on the topic.[36] A similar development can be traced in the Netherlands, where courts and lawyers alike are increasingly aware of the European dimension of civil procedure and willing to make use of it in their daily work. The Dutch Supreme Court has dealt with the question of *ex officio* application of EU law in a number of cases, and academics have debated that and other topics.[37]

Academics may also influence Europeanisation of national civil procedure. In Germany, European civil procedure has emerged as a sub discipline of its own including a body of literature consisting of textbooks, commentaries and scholarly publications. In other countries, academic interest has been more limited, sometimes focused on a few particular topics, and still in others almost absent. Academics may contribute by raising awareness of relevant European law and by making information more readily available.

6. Methods of implementation

Member states choose different methods for absorption of EU procedural law. Depending on the methods for implementation, the willingness and ability of courts and lawyers to recognise questions related to EU law, and the interplay between these and other factors, EU procedural law may either become an appendix, a satellite orbiting national civil procedure, or an integrated part of national civil procedure with potentially transformative, though not always unproblematic, capabilities. In some countries, European civil procedure seems to have become an appendix rather than an integrated part of civil procedure. Therefore, lawyers may consider EU law to be relevant for cross-border cases only.

When implementing EU law, legislators in some countries tend to be open about the European origin of the new legislation, while others are tacit. If the legislator does not express the source of the legislation, interpretation and application of the law can be more difficult. The underlying EU law –

[34] See Nylund in this volume, section 4.1.
[35] See Wallerman in this volume, sections 1, 3 and 4. This seems also to be a common approach in England, see Andrews in this volume, section 4.
[36] See Hau in this volume, sections 1 and 2.2.2; and Krans in this volume, section 1.
[37] See Krans in this volume, sections 1 and 2.

be it a directive or soft law – serves as a source for interpretation of the national legislation. Although Poland has implemented collective redress for consumers, the Polish legislator did not disclose on a national level that the background for the measure was a recommendation from the EU.[38] Euroscepticism may be a reason for choosing "hidden" implementation and approximation of European law. In France, EU procedural law has been implemented in sectorial laws, rather than the Code of Civil Procedure. However, mediation has been introduced by adding a new book to the Code.[39]

The regulations creating European cross-border proceedings, such as the European order for payment procedure[40], are not freestanding and independent of the national civil justice system. On the contrary, national procedural rules govern part of the procedure and the national legislator should fill gaps and build bridges between the European proceedings and national proceedings.[41] Slovenia has chosen a "minimalistic" approach for implementation, with no additional measures to implementing regulations, and a "copy paste" method of implementing some directives. The result has been uncertainty.[42] In Hungary, the legislator has chosen to implement EU law by amending the Hungarian Code of Civil Procedure in a fragmented manner. Changes are made in different parts of the Code, which has resulted in a weakened and less user-friendly structure of the Code.[43] Germany, on the other hand, has chosen to add an eleventh book to the Civil Procedure Code, where rules implementing European procedural law are collected.[44]

European rules on cross-border proceedings and special proceedings for consumer, collective redress and IP cases can serve as model laws for developing national law. However, several authors in this volume point at missed opportunities for advancement of national law. Aligning European procedures, or proceedings induced by European law, with existing national procedures is often rational, as the structure will be more navigable and streamlined. There are nevertheless several examples where Europeanisation result in overlapping procedures and institutions. For example in Belgium, the existing ADR-platform, Belmed, was not included in the implementation of the Consumer ODR Regulation[45] was implemented.[46] Neither has the Belgian summary order for payment been amended to mirror the European order for payment procedure, although the Belgian system is according to Taelman in need of amelioration.[47] Similar observations are made in several other papers.[48]

[38] See Piszcz in this volume, section 2.
[39] Després in this volume, section 4.
[40] Regulation (EC) 1896/2006 creating a European order for payment procedure [2006] OJ L399/1.
[41] If the debtor opposes the European order for payment, proceedings continue before the national courts according to national procedural rules (see article 17 of the regulation). By introducing national rules governing the transition from the European order for payment procedure to national civil proceedings, the legislator can enhance legal certainty of both parties.
[42] See Galič in this volume, section 2.1.
[43] See Harsági this volume, section 4.
[44] For a list of sections of ZPO, see Hau in this volume, section 2.2.2.
[45] Regulation (EU) 524/2013 on online resolution for consumer disputes [2013] OJ L165/1.
[46] See Taelman in this volume, section 2.
[47] See Taelman in this volume, section 2.
[48] See Piszcz in this volume, section 3; Galič in this volume, section 2.2; Wallerman in this volume n, section 1. For criticism towards the approach of "model laws" see Andrews in this volume, section 5.

Sometimes EU law function as an argument for specific reforms. Proponents of certain changes can use European law to impel their conceptions. Case law from the European Court of Human Rights was a central argument for the advocates of a strict separation of power in the English debate on constitutional reform and the role of the Lord Chancellor and House of Lords.[49]

7. Enforcement, coherence and fragmentation

Member States and the EU have different attitudes towards the second and third pillars of European influences on national civil procedure. From a European point of view, the second and third pillars enhance enforcement of EU law both in a national and cross-border perspective. The emphasis is on more efficient enforcement. From a national perspective, the second and third pillar threaten the coherence of the national civil procedure law by introducing special rules for certain types of cases or for cross-border cases.[50] Although special measures in intellectual property right cases increases access to court and efficient remedies, one may ask why a party owning a patent or licence for production should have far better opportunities to secure evidence through disclosure and a better chance to recover legal expenses from the opposing party, than for instance a person injured in a car accident. Why should consumer law be applied *ex officio* to protect the weaker party, when labour law does not even though the employee is in a comparably weak position vis-à-vis the employer? National law becomes inevitably more fragmented.

The aim of the second and third pillar – increased and equivalent enforcement – may paradoxically lead to external fragmentation instead of harmonisation.[51] The regulations creating European cross-border proceedings have to be implemented as they are "torsos" relying partly on national law. The proper functioning of the regulation is then dependent on the existence and the quality of the "bridge" between the EU law cross-border proceeding and national proceedings. Implementation of directives always require transposing EU law to national law, which in turn inevitably creates some differences between the countries. Sometimes a change in the conduct of proceedings, the role and duties of the judge, and non-codified principles of evidence is required to bring national civil procedure in conformity with EU law. The underlying legal culture will naturally have a significant influence on the outcome. The result is far from full harmonisation. Full harmonisation is, however, not a *sine qua non* for efficient and equivalent enforcement of EU law and smooth cross-border proceedings.

The underlying legal system and method of implementation may also be part of the explanation of the limited success of the regulations creating special European proceedings for cross-border cases. As the proceedings are party dependent on existing national proceedings, problems with the existing national proceedings will rub off on the European proceedings. Lack of bridges between European proceedings and national proceedings will also decrease the appeal of European proceedings. Where the national proceedings are attractive, the need for European proceedings will be perceived as significantly lower.

8. Outlooks

Our outlook can be short: this project has revealed many aspects on EU law and national civil procedure law. It has also revealed several unanswered questions. It is advisable that academics do

[49] See Andrews in this volume, section 6.
[50] See also Petersen in this volume, section 4; and Krans in this volume, section 5.
[51] For more details, see Krans [n 9], 582-585.

not turn away from this topic, but embrace it. Further research might serve as an academic foundation for developing ideas and understanding ongoing processes, but also – and perhaps even foremost – judicial practice, both in domestic cases as in cross border cases.

There are several options for questions for further research. All or some of the countries in this book can be studied more in detail, or research could be expanded to other Member States. Countries with a similar underlying legal culture and length of membership can be studied to try to reduce the impact of these two factors and to concentrate on other factors, such as the strategies chosen for implementation, or how the interest of legal academics influence Europeanisation. What if the scope is narrowed to take a close look at one specific Directive or topic? A more detailed look at specific types of EU-legislation (Regulations, Directives or the Treaties itself) is another option. Does the level and way of impact of EU law somehow related to legal culture? One can also consider in particular each of the different pillars. There is an interesting road ahead.