

**‘Judicial Cooperation in Civil Matters’ (EUstitia):
The Politics of Civil Justice under the EU's
Area of Freedom, Security and Justice (AFSJ)**

Professor Helen E. Hartnell
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This paper maps the EU’s civil justice policy field, and offers some ideas about the broader significance of these developments. Since 1999, when the Amsterdam Treaty communitarized “judicial cooperation in civil matters” and the European Council laid out a five-year plan at its Tampere Summit, the EU's efforts to create a “genuine area of justice” (Tampere Milestones, ¶¶ I.3.5 & I.3.7) have been rapid and dramatic. The AFSJ field was “transformed ... into a huge ‘building site’ ” (Weyembergh 2000). More than a dozen substantial – and in some cases highly ambitious and controversial – legislative and other civil justice measures have been adopted, and more are in the pipeline.¹ These measures permeate the legal infrastructure upon which the EU’s legal order is built. Some of them surpass even the broadest reading of the formal Treaty language on “judicial cooperation”. The scope and pace of these developments have been so dramatic that even experts in the affected fields were initially caught by surprise.²

Together, Amsterdam (1997) and Tampere (1999) breached the crumbling wall of national legal sovereignty, and unleashed a deluge of legal and other institutional measures in the civil justice field. The movement towards harmonization in this field is not, however, “a triumphal parade: it looks more like a [conquest], house by house, of the fortified town of national self-determination” (Biavati 2001: 90). A decade later, a prominent UK solicitor and scholar in the field greeted Brussels’ latest effort to upend

¹ Developments in other AFSJ subfields have followed different trajectories and logics since 1999, and are in any case beyond the scope of this paper. However, they too were set in motion by Amsterdam and Tampere, which suggests an additional reason for subjecting these historical events to close scrutiny.

² For example, a well-informed Dutch expert (van Erp 2001) observed that the “changes . . . follow one another so rapidly that it sometimes takes even specialists by surprise as to which legal areas can be ‘Europeanised’ – I need only refer to the recent regulations in the area of private international law.”

centuries of legal tradition by asking, tongue in cheek, “When will we ever be allowed to rest?” (Dickinson 2009). The likely answer to this question, in view of the innovations introduced by the Lisbon Treaty in 2009, is no time soon. The following discussion, which focuses on what has been accomplished to date, lends considerable support to the exhausted expert’s comment on the dynamic transformations that have occurred.

The developments documented in this paper have dramatically altered – and have large potential further to transform – Europe’s legal order.³ The three sub-fields that make up the EU’s composite civil justice field – civil procedure (broadly understood), the administration of justice, and the conflict of laws (choice of law) – have historically been lodged in, and compromise core features of national legal sovereignty. They reflect local culture, legal philosophy, and the trajectory of national history, and tend to vary in significant ways from one country to another.⁴ Marx (1842) observed that procedure is the “way of life of the law, the manifestation of its inner life.”⁵ Some comparative scholars go so far as to claim that “legal procedure is the purest (perhaps the defining) expression of legal traditions” (Balas et al. 2009: 139, quoting Damaška 1986 and Zweigert & Kötz 1998). However, these three civil justice sub-fields do not have the same history or meaning, nor do they vary to the same degree.⁶ For this reason, any assessment of the significance of the EU’s emerging civil justice field requires attention to each component part. That said, Europeanization must also be viewed holistically, in regard to their role in the

³ There has been a great deal of criticism of the results of this process, which are beyond the scope of this paper. Lindblom (1997: 15-16) admires the boldness of the ambition but not the “annoying unevenness” of the execution.

⁴ The Commission Communication on Judgments (1998:¶ 32) notes the “the deep-rooted situation of procedural law in national traditions,” and explores the diverse procedural rules found in Member States (e.g., those pertaining to enforcement of judgments, availability of provisional and protective measures, and procedures for handling small claims). *See also* Juenger (1997: 33) (“[C]ertain ‘core’ elements of procedural law are bound to resist harmonization.”). Other scholars, conversely, argue that “some of the major differences that for a long time have set the various systems of civil procedure in the world apart from each other are disappearing” (van Rhee & Verkerk 2006: 131-2).

⁵ “[D]er Prozeß ist ... die Lebensart des Gesetzes, also die Erscheinung seines innern Lebens.”

⁶ Some scholars have argued that there are greater similarities in the sub-field of European private international law, and hence fewer impediments standing in the way of common European conflict of laws rules. von Hoffman (1998: 14-15), for example, asserts that “a common conceptual framework exists” in Europe (including the U.K.) – a *ius commune* – because European private international law (particularly conflicts theory) was predominantly judge-made, unlike Continental private substantive law, which was “affected by the nationalization of private law by way of codification.” *Compare* Forsyth (2005) (UK perspective).

larger framework of the EU's evolving legal order.⁷

A holistic grasp of EUstitia's meaning is impeded by the lack of overarching agreement on the nature of the EU's legal order. Indeed, this remains among the most contested issues in the study of European integration. Dickson (2008) evaluates three possible models⁸ for grasping its peculiarity – the EU is a “distinct legal system”, it is “part of Member States’ legal systems”, or there is “one big legal system” in the EU – and finds all three lacking. In the end, Dickson argues convincingly that the EU warrants, at the very least, the label *legal system* in fundamental jurisprudential terms, notwithstanding the fact that the theoretical autonomy of EU law vis-à-vis the national legal systems is a matter on which minds seriously disagree.⁹ Dickson's detente offers a convenient path through the morass, as does the insight that neither the EU nor its Member States are wholly autonomous, in behavioral terms, since influence flows both ways. The EU legal order, as Wilhelmsson puts it, “lacks roots in a legal culture but at the same time ... is functionally integrated into national legal cultures” (1999: 439). The crucial point, for present purposes, is that both EU and national legal systems lay theoretical claim to autonomy vis-à-vis the other, while simultaneously accepting that they are part of – and thus subject to – the larger *international* legal order.¹⁰ I return to a holistic view of EUstitia in the conclusions to this paper (section 3).

The organization of this paper proceeds as follows. First, some preliminary issues are addressed (section 1), with the aim of facilitating the analysis that follows. Second, section 2 maps each sub-field of the EU's civil justice field, and examines the significance of these developments. In particular, section 2

⁷ I use the terms ‘legal system’ and ‘legal order’ interchangeably when speaking about EU law and Member State law, as most authors do. I reserve the term ‘European legal order’ to refer more broadly to the entire pluralistic legal landscape in Europe, including not only EU and national law, but also the Council of Europe legal regime.

⁸ More precisely, she asks “whether there is an EU legal system distinct from and in addition to the national legal systems of EU Member States, or whether it is better to conceive of EU law merely as an aspect of Member States’ legal systems, or indeed whether we should think of there being but a single EU legal system of which Member States’ ‘national legal systems’ are in some sense sub-systems” (Dickson 2008: 1).

⁹ In EU legal discourse, the term ‘autonomy’ refers to the question of ultimate *authority*.

¹⁰ Curtin & Dekker (2002: 65) explain that the “autonomy of the legal system of the Union concerns the legal systems of the member states and not the international legal order. On the contrary, the international legal order not only provides for the validity of the legal sub-systems, but also co-ordinates the relations between them. ... [The] principle of ... supremacy of Union law over national law does not follow as such from the validity relations between the two systems, because in that respect the systems are equal. The supremacy is based on a priority rule laid down in the overarching legal order.”

provides a set of interpretive frameworks for understanding the implications of the EU's moves to 'domesticate' international procedure and the conflict of laws, and the transformative potential of the EU's efforts vis-à-vis the administration of justice. Section 3 concludes with broader perspectives about the meaning and transformative potential of the developments in the EU's civil justice field.

It bears repeating, on the threshold of surveying the emerging landscape since 1999, that no wholesale harmonization of the law governing civil justice is underway in the EU. Rather, the EU's manifold and (increasingly) intrusive activities in the civil justice field *displace* national activities, but only to some extent.¹¹ In federalist terms, the EU has not completely occupied the civil justice field. Rather, the AFSJ remains, in the EU's own constitutional terminology, a field of "shared competence" per Article 4(2)(j) TFEU, and not an exclusive one.¹² Similarly, EU activities in the AFSJ field largely supplement civil justice initiatives originating in other international and regional fora, but do not displace them entirely, at least not as a matter of law.¹³ These qualifications, while necessary to avoid *overstating* the significance of Europeanized civil justice, simultaneously run the risk of *understating* it. This paper endeavors to navigate between these twin perils.

1. Preliminary Matters

1.1 Conceptual Framework

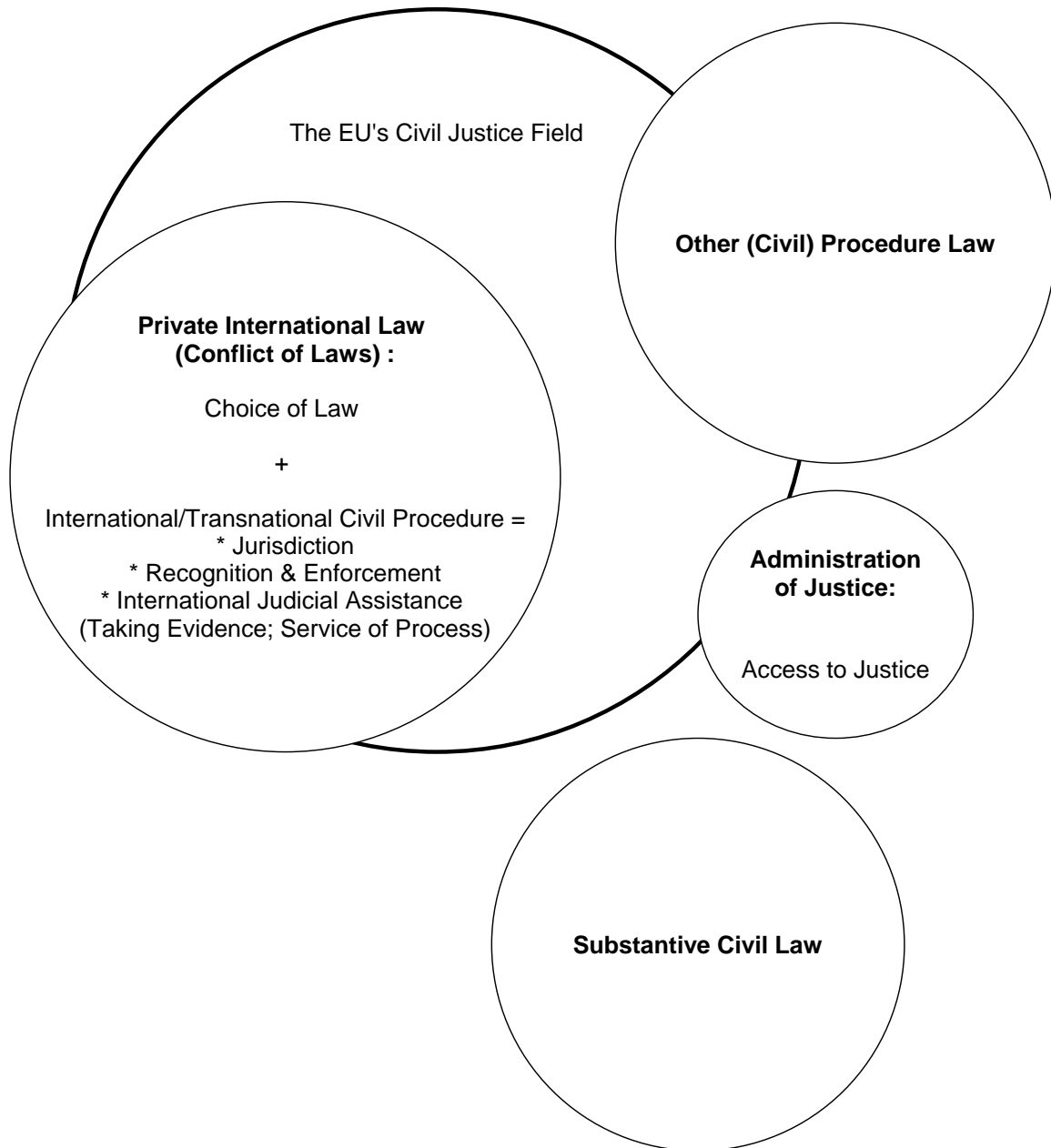
This paper aims to illustrate the expansion as well as the dynamism of the field. I begin by comparing two Venn diagrams, the first of which represents the conceptual categories in the civil justice field as they existed in the 1999 Amsterdam Treaty, and the second, a decade later, under the 2009

¹¹ Figure 1, which can be found in section 1 below, illustrates that the degree of displacement varies from sub-field to sub-field, and even from issue to issue within a given sub-field.

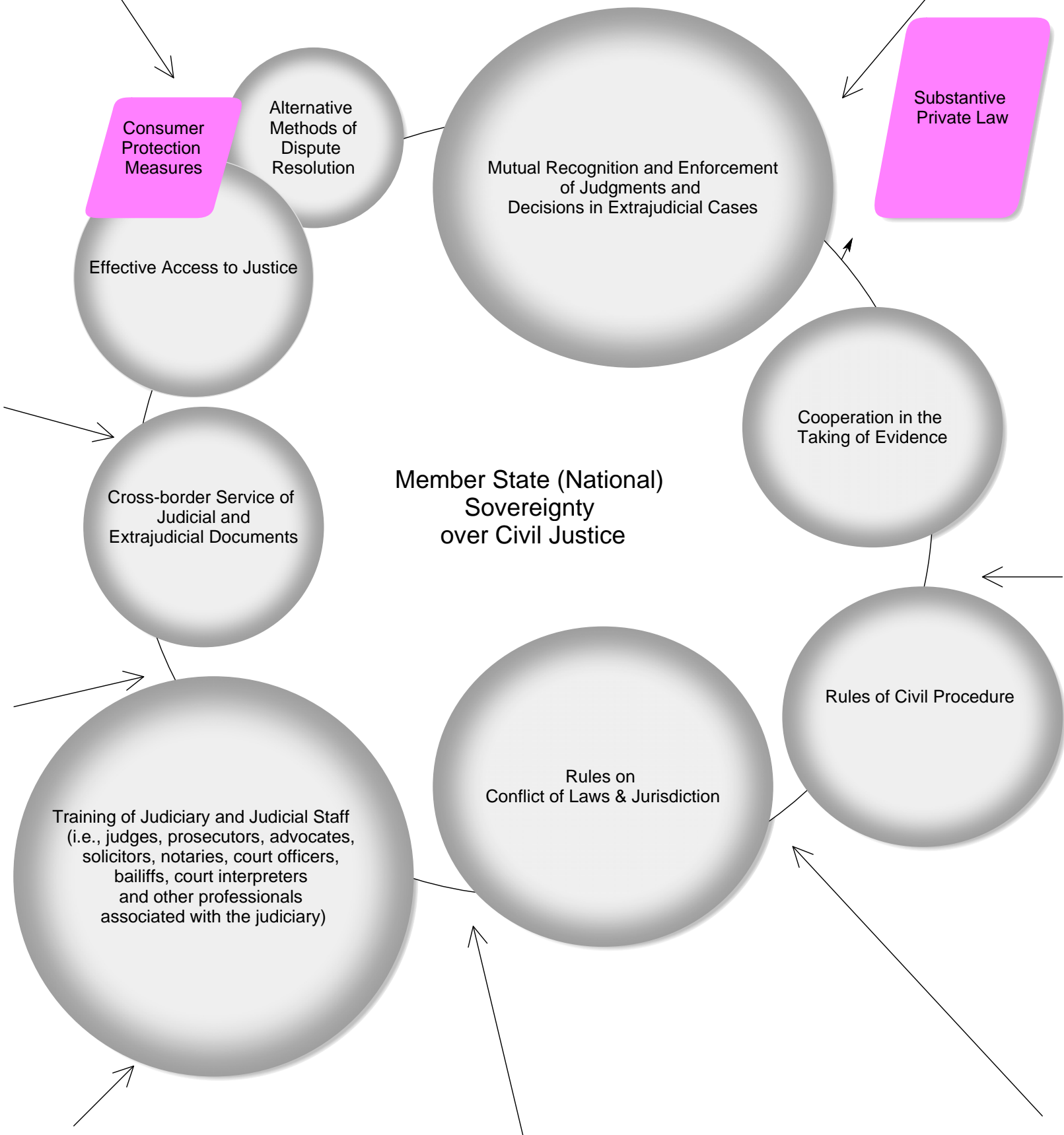
¹² According to Article 2(2) TFEU, "[w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." To put it more plainly, the Member States lose their competence – i.e., their power to take decisions – when the EU regulates, but can regain it if the EU withdraws from a field.

¹³ As a matter of fact, however, the EU measures might turn out to be *more* effective, given the extensive powers of its institutional apparatus, the compelling nature of EU law, and the dynamics of legislation in the civil justice field, but this question is beyond the scope of the present inquiry.

Figure 1: Civil Justice Field in the European Union: "Judicial Cooperation in Civil Matters"



Areas of EU Competence in the Civil Justice Field
as they Impinge on Member State Sovereignty (Lisbon Treaty)
Figure 5.1



Lisbon Treaty.

[INSERT FIGURES 1 AND 2 ABOUT HERE]

Figure 1 depicts the EU's civil justice field under the Amsterdam Treaty. At that incipient stage of its development, "judicial cooperation in civil matters" comprised *private international law* – both its narrow (i.e., conflict of laws) and broad (i.e., international or transnational civil procedure) meanings. It also included a broad general reference to *civil procedure*, along with one dimension of the *administration of justice*, namely access to justice. *Substantive law*, on the other hand – the private law of contract, tort, family law, etc. – was not formally part of the civil justice field at all.

Figure 2 depicts the EU's civil justice under the more recent Lisbon Treaty. This Venn diagram disaggregates the conceptual legal categories, and shows each component of the EU's civil justice field separately. The first thing to notice is the expanded *number* of civil justice sub-fields in which the EU became active between 1999 and 2009. Second, the *size* of each policy sub-field depicted in Figure 2 gives a rough sense of how developed it is, either in terms of the quantity of measures adopted or their comprehensiveness. Finally, Figure 2 suggests the *extent* to which EU measures occupy a given policy sub-field, that is, how deeply the EU has moved into realms previously occupied by the Member States. In this regard, Figure 2 illustrates that the degree of displacement of national by EU law varies from one civil justice sub-field to another.

The terms 'civil justice' and 'EUstitita' as used here include all types of measure listed in Article 81 TFEU, as well as some that are not explicitly mentioned in the Treaty, but are nevertheless formally part of, or at least informally linked to the growth of the AFSJ. These measures are bundled, and subsequently discussed, according to the following schema:

- **Procedural Law**
 - Jurisdiction and Mutual Recognition and Enforcement of Judgments and Decisions in

Extrajudicial Cases (Articles 81(2) (a) &(c))¹⁴

- International Judicial Assistance:
 - Cross-border Service of Judicial and Extrajudicial Documents (Article 81(2)(b) TFEU)
 - Cooperation in the Taking of Evidence (Article 81(2)(d) TFEU)
- Elimination of Obstacles to the Proper Functioning of Civil Proceedings (if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States) (Article 81(2)(f) TFEU)
- **Institutional Measures: The Administration of Justice**
 - Judicial Network & E-Justice
 - Support for the Training of the Judiciary and Judicial Staff (Article 81(2)(h) TFEU)
 - Effective Access to Justice (Article 81(2)(e) TFEU)
 - Alternative Methods of Dispute Settlement (Article 81(2)(g) TFEU)
- **Conflict of Laws**
 - Choice of Law Rules (Article 81(2)(c) TFEU)

1.2 Key Features of the EU Legal Order

Developments in the EU's civil justice field implicate the EU's politico-legal order in a number of ways, which are explored in section 2 of this paper. A quick overview of the organization of the EU's administrative and judicial branches, the role of procedure in the EU construction, and the nature of legal pluralism in the EU will facilitate the discussion below.

The organization of administrative and judicial authority in the EU is predominantly *decentralized*, with the result that most EU law enforcement¹⁵ is carried out by the Member States' own administrative and judicial apparatus (Barents 1992: 64-5). The Commission has noted that EU law "has

¹⁴ I bundle these two sets of issues, even though the TFEU does not, because this reflects how the issues are treated in legislative measures, such as the Brussels I and Brussels II Regulations (see subsection 2.1.1 below).

¹⁵ I use 'enforcement' in the broadest sense, to include application and interpretation of EU law, mindful that the "sharp contrast between direct and indirect enforcement of European law has long been discarded by scholars. Indeed, in many sectors the execution of EU norms occurs through forms of cooperation between national and European administrations" (De Lucia 2012: 43). I avoid the term 'implementation' of EU law, which is best used to denote the transposition of EU directives into Member State law.

traditionally left it up to the Member States to determine how their authorities and courts operate, even though they are heavily involved in the process of applying Community law. There is no European law-enforcement area but rather a juxtaposition of national systems each configured as an autonomous body of civil procedure. Their respective bodies of law are the fruit of their respective historical backgrounds and vary widely in consequence.”¹⁶

In practical terms, this means that Member State courts are EU courts of general jurisdiction (Maher 1994), and that they have, as organs of their respective Member State, the “duty and the power to apply all rules of [Union] law that may be relevant to the cases coming before [them]” (Temple Lang 2007: 1532).¹⁷ National judges are “part of the Community judiciary and might be considered the Community’s *juges de droit commun*,” according to a former Dutch member of the Court of Justice (Kapteyn 1997: 181). National courts are thus the primary judicial arenas in which individuals, companies and others can seek to vindicate rights (or raise defenses) based on EU law.¹⁸ This fact alone suggests, but by no means exhausts the key role of procedural law in the enforcement of EU law.

Procedural rules¹⁹ *constitute* the EU legal order in two fundamental ways. First, the EU’s

¹⁶ Commission Communication on Judgments 1998: Introduction, at ¶ 3. See Biavati 2001: 87; McKendrick 2000.

¹⁷ As Temple Lang explains, the duty of loyal cooperation is the cornerstone of “a large body of case law” from which emerged “several profoundly important constitutional principles of Community law: the duty of national courts to give effective protection to rights given by Community law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with Community law, and the right to judicial review” (2007: 1483; *see also* Temple Lang 1986). That the “duty of cooperation” has been softened somewhat and re-labeled as the “principle of sincere cooperation” is unlikely to detract from its basic nature:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Article 4(3) TEU (ex Article 10 EC Treaty, ex Article 5 EEC Treaty). *See generally* Skouris (2009).

¹⁸ Similarly, individuals and companies may find themselves raising EU law issues in proceedings before national administrative authorities. Direct access to the EU’s own courts is limited, both by case type and by the nature of the party who may bring a direct action to them. In general, only Member States and EU institutions can bring direct actions to the EU courts, though in rare cases, it is also possible for an individual or corporate plaintiff to do so.

¹⁹ The legal systems of both the EU and its various Member States generate procedural rules that interact in the context of civil litigation.

‘reference for a preliminary ruling’ procedure is the pre-eminent²⁰ characteristic of the EU legal order, in the context of litigation involving EU norms. This procedure links national courts with the EU’s Court of Justice in a judicial dialogue that drives the evolution of the EU legal order, insofar it *empowers* national tribunals – and under certain circumstances *obliges* them – to refer questions about the validity or interpretation of EU law that arise in cases pending before them to the Court of Justice in Luxembourg for an authoritative ruling, as a means to ensure legal uniformity across the EU.²¹ This procedural mechanism is so central to the EU legal order that the Court of Justice relied on it to justify the revolutionary 1962 ruling (in *van Gend en Loos*) holding that provisions of the EEC Treaty – unlike traditional international law – created rights that could be enforced by private parties in legal proceedings before a national tribunal.²² The Court reasoned [*inter alia*] that the mere *existence* of the preliminary reference procedure implies the existence of a supranational right that is capable of being invoked before a national court.

The second way in which procedural law constitutes the EU legal order is the ‘division of labor’

²⁰ Until recently, it was also unique to the EU. However, Hong Kong’s post-handover constitution contains a provision modeled on the EU’s preliminary reference procedure (Chan 2013).

²¹ Article 267 TFEU (ex 177 EEC Treaty). *See, e.g.*, Barents 1992; Broberg 2009; Lenz 1994; Stone Sweet 2000; Weiler 1987, 1991, 1994. It is not always obvious when “a decision on the question is necessary” to enable the Member State court or tribunal to give judgment in the case before it, and controversies have arisen. The TFEU allows Member State courts some discretion, but insists that the “court or tribunal shall bring the matter before the Court [of Justice]” when “any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” (Article 267 TFEU). However, the Court of Justice provided some guidelines in *CILFIT*, case 283/81, where it stated that: “a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with the obligation to bring the matter before the Court of Justice, unless it has established that [a] the question raised is irrelevant or [b] that the Community provision in question has already been interpreted by the Court or [c] that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.”(¶ 21). Still, controversies occasionally arise. More recent case law has established that a Member State can be held liable to an injured party in damages for wrongful acts of its judiciary, including failure to comply with Article 267 TFEU. *Köbler*, case C-224/01, ¶ 36.

²² To be sure, this is not the only peg that the Court hung its hat on. However, the key language in that decision leaves no doubt about the implications of this procedural rule: “In addition the task assigned to the Court of Justice under Article 177 [EEC Treaty, now Article 267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.” *van Gend en Loos*, case 26/62. This doctrine has come to be known as the doctrine of ‘direct effect’.

between EU and national law in cases involving EU norms²³ that are litigated in Member State tribunals.²⁴ Traditionally, EU law was said to govern *substantive* EU legal issues,²⁵ such as whether a rule of EU primary law (i.e., treaty) or secondary law (e.g., legislation) has been violated, whereas national courts were ‘autonomous’ when it came to providing the *procedures* and *remedies* for enforcing those rights and duties derived from EU law.²⁶ As noted earlier, this traditional ‘doctrine of national procedural autonomy’ has gradually eroded under pressure from the Court of Justice. However, the tension between the EU and its Member States across the substance-procedure frontier remains a key battleground “for the protection of rights, the effectiveness of [EU] law and the search for justice” (Douglas-Scott 2002: 312). This tension is unlikely to diminish in the future, given that the EU plays an increasingly important role in establishing procedures and other civil justice rules that will affect not only EU claims and defenses, but those arising under Member State law as well. Member States retain a shrinking, but nonetheless viable governance claim over the conduct of civil proceedings in their courts and other tribunals.

A third major characteristic of the EU legal order is legal pluralism.²⁷ From an anthropological

²³ EU law can be used as a sword and as a shield. In other words, in appropriate cases, a party can base a claim on a rule of EU law, or can invoke a rule of EU law as a defense to a claim made by another party to a lawsuit. For example, a private party can challenge a national health and safety regulation, on the basis that it violates the EU treaty rules guaranteeing free movement of goods or services. Conversely, a private party who has been charged with violation of a national criminal law can raise as a defense that its conduct was compelled by a rule of EU law.

²⁴ For simplicity’s sake, the discussion here focuses on judicial rather than administrative proceedings, but some of what is asserted about courts is also true of administrative tribunals. There is a large body of literature on administrative law and policy in the EU. See, e.g., De Lucia 2014; Hofmann, Rowe & Türk 2011.

²⁵ By the same token, claims based on national law are governed by the applicable *substantive* national law, whether that of the forum Member State or of some other country. However, the pervasive effect of EU law is so strong that Member State tribunals are obliged to interpret national law in a manner that renders it consistent with EU law, pursuant to the ‘indirect effect’ doctrine and the ‘doctrine of consistent interpretation’. See, e.g., Schütze 2011.

²⁶ In general, a national court applies its *own* rules of jurisdiction, procedure, and choice of law to a dispute that comes before it, but may apply the *substantive* rules of another state (in a federal system like the United States) or country to decide the issues that arise in that case. A court “will under no circumstances adjudicate cases according to foreign civil procedure rules” (van Rhee & Verkerk 2006: 120-21). The peculiar function of choice of law rules is to instruct a court which body (or bodies) of substantive law govern the issue(s) arising in a particular case. Within federal legal orders, such as the United States, choice of law rules govern the ‘horizontal’ relations among equal sovereign states, whereas the question whether a principle of federal law displaces a state law is a ‘vertical’ question having a constitutional nature.

²⁷ Consideration of the voluminous and contested literature on legal and normative pluralism in the EU is beyond the scope of this paper. See, e.g., Avbelj (2006); Barber (2006); Besson (2009); Borowski (2011); Douglas-Scott (2012); Huomo-Kettunen (2013); MacCormick (1999a); Maduro (2007); Shaw (1999); Tuori & Sankari (2010). For an analysis of legal

perspective, most modern states consist of “parallel and often contradictory regulations ... based on different types of legitimation: international law, state law, religious law, customary law and forms of self-regulation.”²⁸ Like these states, the EU is characterized by “coexisting normative orders that challenge state-led law making” (Chowdhury & Wessel 2012: 348).²⁹ However, the EU is peculiar in two respects. First, the anthropologists’ list of legal sources must be supplemented by the addition of binding *supranational* sources, such as EU secondary law and case law. And second, like other federal arrangements, the EU legal order lays claim to a quasi-constitutional normative primacy, or supremacy over the laws of its constituent Member States.³⁰ These peculiarities aside, the EU can be seen as part of a long line of overlapping, interacting, and occasionally conflicting normative orders in Europe that can be traced back over millennia. Tension exists in the EU between legal diversity and legal unity – such as in the field of private law – and debates are heated between proponents of greater convergence or systemic coherence, on the one hand, and those who are willing to tolerate fragmentation in order to preserve legal diversity, on the other.³¹ Some EU civil justice measures, as explained further below, are mechanisms for managing this complex legal pluralism.

pluralism in the European *private law* sphere, see Michaels (2013).

²⁸ Research Programme of the Project Group Legal Pluralism (2000-2012), *Max Planck Institute for Social Anthropology*, available at <http://www.eth.mpg.de/cms/en/research/d3/pglp/>. To the anthropologists who coined the term, ‘legal pluralism’ implies the co-existence of two or more legal systems in a particular geographical space or social field, commonly as a result of religion, migration, conquest or colonialism (Merry 1988: 869-70). “Classic legal pluralism” thus involves “analysis of the intersections of indigenous and European law” (*id.* at 872). Since the late 1970s, however, the term has been increasingly applied outside this traditional context, and used as a tool for analyzing contemporary advanced industrial countries, including debates over the nature of the EU legal order (e.g., Barber 2006; Letto-Vanamo 2013a; McCormick 1999; Smits 2012; Walker 2002), and globalization more generally (e.g., Berman 2007; Snyder 2010; Teubner 1997). In regard to this contemporary usage, Merry (1988: 869) argues that “given a sufficiently broad definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past.”

²⁹ Chowdhury and Wessel (2012: 349) note that legal pluralism, such as seen in the EU, encompasses not only a “multiplicity of norms functioning in the absence of a meta-norm,” but also a set of “complex overlapping institutional norm production authorities.” See generally Stephenson (2013) (reviewing 20 years of scholarship on multilevel governance in the EU and other settings).

³⁰ In this respect, EU law operates in a manner similar to federal law, with the caveat that the EU’s authority is derived from treaty sources rather than from a national constitution. The EU’s theoretical autonomy is contested by Member State claims that the EU’s authority ultimately depends on their acquiescence or agreement.

³¹ These debates, which are crucial to understanding the significance of Europeanizing the conflict of laws, are explored in subsection 2.3 below.

1.2 A Micro-Level View of the Topography of the EU's "Genuine European Area of Justice" (European Judicial Area)

The EU's accomplishments in the fifteen years since the Amsterdam Treaty entered into force in 1999 have dramatically altered the legal landscape. EU action began, but did not end with articulating the overarching goals and logics driving the civil justice field, namely, access to justice, mutual recognition, and greater convergence in civil law (Tampere Milestones 1999). Once the Amsterdam Treaty entered into force in 1999, civil justice issues – which for generations had been the province of Member State diplomats and their legal experts – landed in the laps of (at first) a small handful of EU bureaucrats. After some initial difficulties marshaling the expertise needed to handle the new tasks assigned to them, the EU institutions rose to the challenge posed by their new responsibilities in the field of civil justice, and proposed a wide array of measures, of which many were subsequently adopted. By now, the EU “has adopted an impressive *acquis* covering a number of issues connected to the everyday lives of citizens and companies,” and is currently “the most advanced system of mutual recognition, civil and administrative cooperation and unified choice of law in the world” (European Policy Centre 2013: 6).

My aims in this section are two-fold. First, I provide a micro-level view of EU *stitia* measures that have been considered or adopted since communitarization of the field pursuant to the Amsterdam Treaty. My analysis focuses on major themes, rather than on describing in detail the content of the potentially bewildering array of civil justice measures. Figure 3 provides an overview of the legislative landscape in the civil justice field since communitarization in 1999. It would be unwise at this time to predict that the expansive growth of the field will continue unabated, particularly in view of the “new start” proclaimed by the incoming Juncker Commission at the end of 2014, which aims to make a “political priority of lightening the regulatory load,” and has announced its intention to apply the “principle of political discontinuity” and “clear the decks” of backlogged legislative proposals that are not integral to the new Commission’s priorities (Juncker Commission Work Program for 2015: 3-4). Civil justice is not evident among the ten priorities articulated by the Commission, nor are civil justice measures among the newly announced initiatives (Annex I). However, the fact that the Commission’s ‘hit list’ of legislative proposals to be withdrawn (Annex II) includes *no* civil justice measures suggests that the Commission is not particularly concerned about curbing its legislative activity in this field. That the civil justice policy field does not have a target pinned to its back comes as no surprise, given that the Commission’s twin

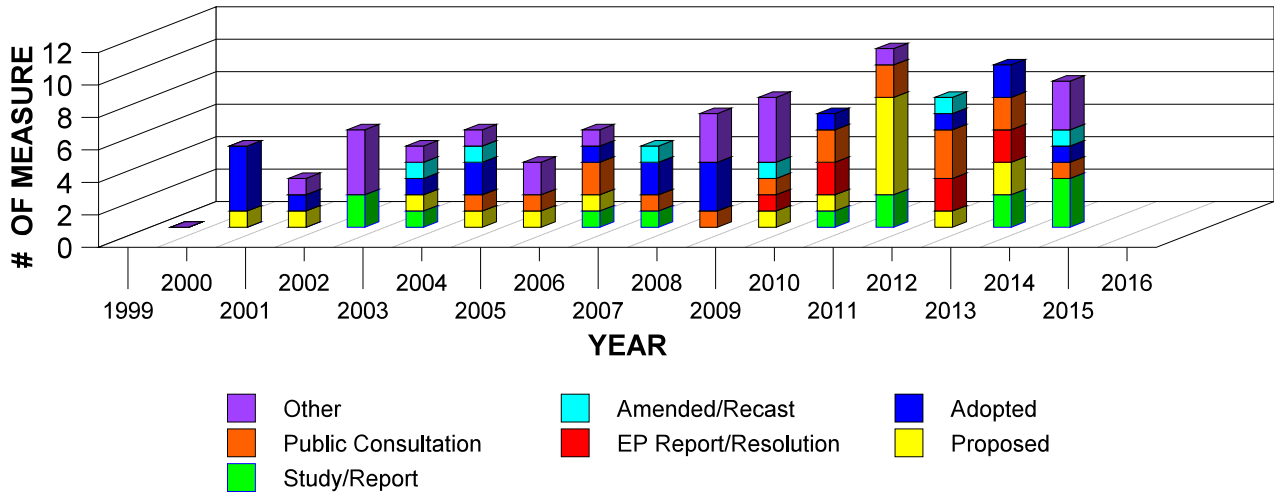
aims – addressing citizens’ needs and seeking to cut red tape and remove regulatory burdens on business – are in alignment with the civil justice agenda.³²

Second, this section assesses the actual and potential significance of the changes that have been introduced in the EU’s civil justice field. In this respect, my contribution does not provide a comprehensive analysis of the law in action, but rather explores the broader implications of replacing national with EU governance of civil justice issues. These developments should not be ignored because they are ‘merely procedural’. They matter in particular to European integration, but also to transnational governance more generally.

³² See Hartnell (2015a).

Figure 3

EUstitia - Legislation 1999-2015



2.1 Procedural Law and the Politics of Procedure

The EU has already taken a wide range of measures in regard to the “arcane”³³ matter of procedural law. The Amsterdam Treaty directed the EU’s attention from the outset toward multiple facets of procedural law: (a) recognition and enforcement of decisions, (b) rules of jurisdiction, and (c) rules of civil procedure (EC Treaty art. 65), all of which have become the subject of legislative measures, as detailed below. Indeed, the first three legislative measures that the EU adopted in the newly communitarized civil justice field were all addressed to traditional ‘infrastructural’ problems of ‘international’ procedure. While these issues remain on the agenda, recent developments target a more particular set of internal market concerns that affect the interests of citizens and business. The political dynamics in this sub-field are driven by the EU’s push to implement the ‘mutual recognition’ principle in the civil justice field, and the resulting pressure to establish minimum procedural guarantees.

³³ Commission Communication on Judgments (1998:¶ 6) (rules of “procedure are already substantially arcane in the purely national context they [sic] are even more so in the cross-border context”).

2.1.1 *Jurisdiction and Beyond: Extending ‘Mutual Recognition’ into the Civil Justice Arena*

The EU’s new civil justice legislative program began with “improving and simplifying ... the recognition and enforcement of decisions in civil and commercial cases” (EC Treaty art. 65(a))³⁴ and “promoting the compatibility of the rules ... of jurisdiction” (EC Treaty art. 65(b)).³⁵ However, the procedural sub-field is animated by aspirations that reach far beyond the infrastructural goal of making the existing mechanisms for coordinating Member State legal systems more efficient. Rather, the AFSJ harnesses procedure’s systemic coordination function to the overarching goals of establishing the “principle of mutual recognition” as the “cornerstone of judicial co-operation in both civil and criminal matters,” and [thereby] facilitating “the judicial protection of individual rights” (Tampere Milestones, ¶VI. 33). The EU’s movement towards these goals has progressed in stages, and across a broad front encompassing civil and commercial relations, from the intimate arena of family life, to an array of measures aimed at facilitating debt collection throughout the EU.

These developments provide an apt starting point for this survey of the EU’s emerging civil justice landscape, for five reasons. First, this procedural category nicely illustrates the hybrid form that EU law is taking, as it merges ‘domestic’ civil procedure with ‘international’ procedure, and reconceptualizes itself as ‘cross-border’ within the EU’s increasingly federal legal framework.³⁶ Second, the EU’s legislative efforts in the civil justice field are most comprehensive and advanced today in connection with precisely these measures. Third, they illustrate the emerging holistic effect of incremental changes in the civil justice field. Fourth, these developments unleash a dynamic that appears to be pushing further developments in the civil justice field. And fifth, the mutual recognition paradigm offers a vivid illustration of the institutional dynamics that have characterized the civil justice field post-communitarization. This last point requires further elaboration.

³⁴ The current formulation calls upon the EU to “adopt measures ... aimed at *ensuring*: (a) the *mutual* recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases” (TFEU art. 81(2)(a), emphasis added).

³⁵ This formulation has not changed, except that Article 81(2) TFEU now calls upon the EU institutions to *ensure* achievement of the stated goal, rather than just to “promote compatibility of the rules”.

³⁶ To state this proposition differently, EUstitia erases the boundaries between domestic procedural law and the field traditionally known as ‘private international law’. According to Cadet (2014: 6), the “traditional lines” are being challenged “due to a rising osmosis between the internal and the external dimensions, the domestic and the international levels.”

The first major post-Tampere policy statement that emerged from Brussels was the Draft Mutual Recognition Program (Figure 4),³⁷ which aimed to realize Tampere’s stated goal of extending the mutual recognition principle into the administration of justice (Tampere Milestones 1999: ¶ 33). Although this Program was, formally speaking, a ‘draft’ that never gained legal force,³⁸ it became the lodestar that guided the first generation of civil justice legislation, and continues to orient action in the civil justice field today. As Figure 4 illustrates, the Mutual Recognition Program embodies an ambitious vision for implementing the principle of mutual recognition in four areas corresponding to the core of private law governing human relations,³⁹ and lays out an exceedingly complex, multi-stage approach to achieving various ‘degrees’ of mutual recognition in each area.⁴⁰ The breadth and depth of the Program was startling in its time, and attests to the far-reaching vision of the legal experts already on task within the EU bureaucracy during the early years after communitarization.

2.1.1.1 *Jurisdiction and Regimes for the Recognition and Enforcement of Civil and Commercial Judgments: Brussels I*

The Amsterdam Treaty made it possible to substitute binding EU legislation for the treaty that had formerly governed the affected issues – namely, court jurisdiction in civil and commercial matters, along with the recognition and enforcement of the resulting judgments – among Member States. That treaty – the 1968 Brussels Convention – was already in the process of being reviewed and amended when the Amsterdam Treaty came into force and upset the apple cart in mid-1999 (Commission Communication on Judgments 1998). After a failed effort to fast-track adoption of the new law (Proposal to Adopt Brussels Convention 1998), the Commission initiated a process that revised the pre-existing

³⁷ The Mutual Recognition Program (2001) was put forward by the Commission and approved by the Council in November 2000.

³⁸ No final version was published, and subsequent Commission documents cite the November 2000 draft, which was published in the Official Journal in 2001, as authoritative.

³⁹ Namely: civil and commercial judgments in contract, tort, commercial law, etc.; family law; property relationships after the dissolution of marriage or the separation of unmarried couples; and wills and successions. Mutual Recognition Program 2001, Proposals A-D.

⁴⁰ Mutual Recognition Program (2001): ¶¶ II.B.1-3. The Program states that “[p]rogress should be made in stages, without any precise deadlines ...,” and that a “stage is begun when the previous one has ended.” *Id.* at Part III.

Areas	Brussels I	Brussels II and family situations arising through relationships other than marriage	Rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple	Wills and succession	Ancillary measures
Measures	First stage: European enforcement order for uncontested claims Small claims Abolition of exequatur for maintenance claims	First stage: Abolition of exequatur for judgments on rights of access Instrument on family situations arising through relationships other than marriage (separate instrument or revision of Brussels II) Extension of the scope of any instrument(s) adopted to judgments modifying the conditions under which parental responsibility is exercised, as fixed in judgments made at the time of the divorce or separation	First stage: Drafting of one or more instruments on mutual recognition with regard to rights in property arising out of a matrimonial relationship and the property consequences of the separation of unmarried couples: adoption of the Brussels II machinery	First stage: Drafting of an instrument on mutual recognition with regard to wills and succession: adoption of the Brussels II machinery	Instrument on the taking of evidence Establishment of the European Judicial Network on civil and commercial matters Minimum standards of civil procedure Harmonisation of rules on, or minimum standards for, the service of judicial documents Measures to facilitate the enforcement of judgments, including those allowing identification of a debtor's assets Measures for easier access to justice Measures for easier provision of information to the public Measures relating to harmonisation of conflict-of-law rules
	Second stage: Revision of the Brussels I Regulation: — incorporation of previous developments — extension of abolition of exequatur — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement, protective measures, including the attachment of bank accounts)	Second stage: For every previously adopted instrument: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	Second stage: Revision of the instrument(s) drawn up at the first stage: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	Second stage: Revision of the instrument(s) drawn up at the first stage: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	
	Third stage: Abolition of exequatur for all the areas covered by the Brussels I Regulation	Third stage: Abolition of exequatur for the areas covered by the Brussels II Regulation and for family situations arising through relationships other than marriage	Third stage: Abolition of exequatur for the areas covered by the instrument(s) drawn up	Third stage: Abolition of exequatur for the areas covered by the instrument drawn up	

treaty and ‘reformatted’ it as EU legislation in 2000, which resulted in the so-called Brussels I Regulation (2000) (Beaumont 2002). The switch from multilateral treaty to EU legislation as a mode of governance streamlines the decision-making process, insofar as qualified majority (rather than unanimous) voting rules apply under the EU’s ‘ordinary legislative procedure’. Despite this major innovation, the civil justice policy field remains a complex one.

This complexity has numerous sources. Indeed, the civil justice field is characterized by “differentiated integration” (Adler-Nissen 2009: 63), which results from two separate causes. First, three Member States – Denmark, Ireland and the United Kingdom – secured permanent derogations in regard to the asylum, immigration and civil justice provisions of the Treaty of Amsterdam, which has resulted in uneven coverage and occasionally perplexing efforts to bridge the resulting legal gaps.⁴¹ Second, one sensitive arena of civil justice policy-making – family law – remains subject to unanimity requirements, which makes it particularly difficult to reach agreement on common rules. Finally, the switch from multilateral treaty-making to EU legislative procedure does not render the *issues* at stake any simpler or less controversial, as the lengthy process of replacing the 2000 version of the Brussels I Regulation attests.⁴²

While both the 2000 and 2012 (Recast) versions of the Brussels I Regulation regulate the same package of issues – jurisdiction and judgments – the reformed legislation embodies significant “structural and conceptual changes” (Baumgartner 2014: 188, 191-93) that exemplify some of the larger trends underway. The ‘Brussels system’ provides the core “matrix” of EU procedural law (Brussels I Recast

⁴¹ “Whereas the British and Irish managed to secure a ‘have the cake and eat it approach’ with the possibility of option out and then back into AFSJ matters, the Danes have been more drastic in – what seems at first sight – saying no to the entire project” (Herlin-Karnell 2013: 97). Adler-Nissen (2009: 64) explains that “the UK and Ireland have an opt-in arrangement while Denmark has a full opt-out.” Thus, for example, the Brussels I Regulation of 2000 bound all Member States (including Ireland and the United Kingdom, which had elected to participate in that particular piece of legislation), but did not bind Denmark, which continued to be governed by the pre-existing Brussels Convention. To bridge that gap, Denmark and the EC concluded a *treaty* in 2005 in which Denmark agreed to apply the provisions of the Brussels I Regulation (Denmark-EC Agreement on Brussels I Regulation). The terms of that treaty were later extended to apply the provisions of the Brussels I Regulation Recast to Denmark as well (Denmark-EC Agreement on Brussels I Regulation Recast). In October 2014, the Danish Prime Minister announced that Denmark would hold a referendum on EU matters in 2015, which is expected to address the possibility that Denmark might opt in to some, if not all AFSJ matters.

⁴² In 2009, the Commission commenced a process that led to lengthy public consultation and substantial amendment of that law (Commission Report on Brussels I Regulation). The Brussels I Recast Regulation was adopted in December 2012, and entered into force in January 2015.

Regulation Proposal 2010: 3), from which position it bridges both the past and future of EUstitia. In terms of future orientation, the Brussels I Recast Regulation (2012) exemplifies the growing trend to view the EU's civil justice arena holistically, and to encourage coherence by defining a "hermeneutic circle" (Garcimartín Alférez 2008: I-62) of EU measures that must be interpreted in a manner that is consistent with other core legislation in the field.

More backward-looking, on the other hand, is the continuing tendency to dovetail with the national legal orders and seek only partial harmonization of an issue area, leaving many crucial issues to be covered by the domestic laws of the Member States. For example, Brussels I contains an obligatory list of jurisdictional rules that must be applied in certain cases,⁴³ but these rules only partially displace the Member State's own jurisdictional rules, which apply otherwise. The Commission's Brussels I Recast Regulation Proposal (2010) would have abolished the subsidiary role of Member State rules of jurisdiction, and displaced them entirely by uniform EU rules, but this radical proposal was rejected. Another significant linkage to the past is the continuing preservation of the Member States' 'public policy defense' to enforcement of a judgement from the court of another Member State, which is a residual bastion of national sovereignty. Here, too, the Commission's 2010 proposal would have gone all the way and eliminated this defense, in order to facilitate the movement (i.e., enforcement) of court judgments throughout the EU. But once again, the Member States were not prepared to guarantee automatic enforcement, and refused to relinquish their ability to block enforcement of judgments in cases *they deemed* appropriate.⁴⁴

Commentators on the recently concluded Brussels I Recast Regulation (2012) process largely agree that the Commission's efforts to "further integration by treating judgments from other member-state courts more like domestic judgments and less like foreign ones" (Baumgartner 2014: 193) were anticlimactic, after the fierce debates surrounding the Commission's radical 2010 proposals. The changes

⁴³ The crucial scope condition for application of the Brussels I Regulation (as well as the Brussels I Recast Regulation) is the fact that the defendant in a given lawsuit has its domicile in a Member State of the EU. And yet, the definition of 'domicile' was left up to the varying national legal orders.

⁴⁴ In addition to retaining the public policy defence, Member States can *inter alia* refuse to enforce a judgment when the defendant did not have adequate opportunity to defend itself in the proceedings that resulted in the judgment, due to lack of proper notice (Brussels I Recast Regulation 2012: arts. 41(2) & 45). This exception points to the importance of service of documents, which is discussed below in sub-section 2.1.3.

actually introduced by the Brussels I Recast Regulation are “modest, compared to the Commission’s original political intentions” (Domej 2014: 550). The EU “legislator chose incremental change” instead of a “great leap forward” (id.). However, the Brussels I Recast Regulation did achieve one of the major innovations that had been proposed, namely abolition of the traditional *exequatur* (i.e., declaration of enforceability) requirement,⁴⁵ which is examined in greater detail in sub-section 2.1.1.3 below.

While the Brussels I regime is generally considered to be a successful example of regional regulation of civil justice, it has a number of limitations beyond those already noted above. First, the scope of the Brussels I Regulation (and the Recast) is limited to garden-variety civil and commercial matters, thus many common types of cross-border cases are not covered, including those related to family relationships, wills and succession (i.e., the administration of decedents’ estates), and bankruptcy. And second, the traditional ‘Brussels package’ – consisting of rules of jurisdiction plus rules relating to the recognition and enforcement of judgments – is narrow and fails to address other issues that also inevitably arise in connection with particular types of civil litigation. The EU has gradually addressed these limitations, as the following sub-sections show.

2.1.1.2 Measures Affecting Family Life: Brussels II bis and Beyond

Among the first pieces of procedural legislation adopted after the Amsterdam Treaty entered into force in May 1999 was the Brussels II Regulation (2000), which extended and adapted the Brussels I system into the arena of family law,⁴⁶ and provided a framework for cases involving “matrimonial matters” and “parental responsibility”, such as dissolution of marital ties, visiting rights, and a few other

⁴⁵ The Brussels I Recast Regulation abolishes the formal requirement of a declaration of enforceability, but this does not constitute automatic recognition of the judgment from one Member State in another Member State, since the decision can still be reviewed by the court in the Member State that has been asked to recognize and enforce it.

⁴⁶ Civil justice legislation in the family law field is according to the EU’s “special legislative procedure” which requires unanimous voting (TFEU art. 81(3)). The Council could, however, unanimously decide to apply the “ordinary legislative procedure” to some areas of family law having cross-border implications, by invoking the so-called *passerelle* clause. The Commission’s *Assises* Discussion Paper on Civil Justice (2013: 4) urges the Member States to consider making more “effective use of the *passerelle* or a more frequent recourse to enhanced cooperation” in order to speed progress on family law.

child welfare issues.⁴⁷ In order to better serve the needs of “international families”,⁴⁸ the Commission reviewed the operation of the Regulation (Brussels II bis Report 2014), and conducted a public consultation, as a prelude to revising (‘recasting’) the Regulation.⁴⁹

One of the many family law topics that falls outside the scope of the Brussels II bis Regulation – which provides the ‘master’ regulatory framework for family law – is *maintenance*, i.e., the obligation to provide financial support that arises “from a family relationship, parentage, marriage or affinity” (Maintenance Regulation 2008: art. 1(1)). The Maintenance Regulation adopted by the EU in 2008 provides a good example of how the EU is trying to overcome two major limitations (noted above) of the traditional ‘Brussels system’. First, it extends the scope of issues covered by creating a special set of rules to govern a particular legal problem. And second, the Maintenance Regulation provides a holistic package of rules to govern this problem, by combining the standard ‘Brussels’ package – jurisdiction and judgments – with uniform conflict-of-law rules that guide the court that has jurisdiction over the case to determine which country’s laws it should apply to decide the case.⁵⁰

The EU has also turned its attention to property rights in the family law context. With regard to the *living*, proposals are pending that would extend the basic Brussels II bis framework, but in the form of the Maintenance Regulation’s extended ‘package’ (i.e., common rules on jurisdiction + judgments + conflict-of-laws) to property rights affecting two types of “international couples”:⁵¹ married couples (Matrimonial Property Proposal 2011) and registered partners (Registered Partnership Proposal 2011). These regulations purport to leave the underlying institutions of marriages and partnerships unaffected, insofar as they continue to be defined by the national laws of the Member States. The European Parliament considered each Proposal in late 2013 and proposed amendments, which the Council

⁴⁷ The rather hastily adopted Brussels II Regulation was replaced in 2003 by the Brussels II bis Regulation.

⁴⁸ The Commission estimates that of the “approximately 122 million marriages in the Union, around 16 million (13%) have a cross-border dimension” (Brussels II bis Report 2014: 4).

⁴⁹ Results from the public consultation are available at <https://ec.europa.eu/eusurvey/publication/BXLIIA>.

⁵⁰ The conflict of laws are examined in greater detail in sub-section 2.3 below.

⁵¹ See Communication of Property Rights for International Couples (2011). This communication revamped the approach that was set forth in the earlier Green Paper on Conflicts in Matrimonial Property Regimes (2006).

considered in December 2014. No agreement has been reached as yet, but is expected in 2015.

With regard to the *dead*, the fact that some 12.3 million Europeans currently live in an EU country that is *not* their home country results in nearly a half a million cross-border inheritance cases every year (Deville 2014). The Succession Regulation (2012), or ‘Brussels IV’, is an innovative piece of legislation that takes the ‘extended package’ seen in the 2008 Maintenance Regulation one step further. It not only provides common rules for jurisdiction, recognition and enforcement of judgments, and conflict of laws on wills and successions (i.e., decedents’ estates), but also creates a ‘European Certificate of Succession’. The certificate is a standard form that is can be used by heirs, legatees, executors and administrators to prove their legal status and exercise their rights, such as those pertaining to property, in other Member States, without added formality.

While not limited to family situations, the EU has also adopted a Civil Protection Measures Regulation (2013). This Regulation implements the mutual recognition principle in regard to civil protection measures taken in one Member State to protect a person’s physical or psychological integrity, such as a restraining order.

Finally, a proposal to cut bureaucratic red tape is under consideration, which aims to promote “the free movement of citizens and businesses” by implementing mutual recognition in regard to official government documents (Documents and Civil Status Green Paper 2010). The Movement of Documents Proposal (2013) aims to simplify the often complex, time-consuming and costly formalities required to authenticate documents, particularly those required to prove status. In regard to *individuals*, the Proposal would simplify administrative formalities related to cross-border acceptance of public documents, such as those relating to birth, death, name, marriage or registered partnership, parenthood, adoption, nationality or residence. In regard to *businesses*, the Proposal would cover documents related to the legal status and representation of companies. The proposed Regulation would also cover real estate documents and intellectual property rights, which would benefit individuals as well as businesses.

2.1.1.3 Mutual Recognition 2.0: Abolishing Exequatur

From the very beginning, the Commission had its sights set on ways to simplify the complex procedures involved in recognizing and enforcing judgments rendered by the court of one Member State

in another Member State.⁵² These procedures involved “intermediate steps” entailing approval of the judgment by the court in the Member State asked to enforce the judgment, which resulted in delays and imposed additional costs (Tampere Milestones 1999: ¶34). Already in 1999, the European Council laid out a detailed road map for incremental movement towards this goal – while simultaneously “respecting the fundamental legal principles of Member States” – and asked the Commission to prepare a detailed program for implementing the principle of mutual recognition in regard to judgments (Tampere Milestones 1999: ¶¶ 34 & 37). The designated means to this end were not limited to elimination of intermediate proceedings,⁵³ but also included eliminating grounds for refusal of enforcement,⁵⁴ and “setting of minimum standards on specific aspects of civil procedural law” where appropriate (*id.*). The elimination of “intermediate steps” is indeed radical, considering that the Commission Communication on Judgments (1998: 6) considered that “full abolition ... is inconceivable, if only because of the wide procedural divergences between Member States as regards enforcement” (see Kramer 2011: 634-5).

The Commission hastened to present its Mutual Recognition Program (2001) (Annex D), which gives a sense of how gold has been spun from the straw of “judicial cooperation in civil matters” within a short time frame. The Mutual Recognition Program neatly embodies the twin tendencies to ‘deepen’ and to ‘widen’ European integration in a given domain. It proposes to ‘deepen’ integration by incrementally stripping away the Member States’ ability to raise barriers to judgments issued by courts in other Member States, and to ‘widen’ integration by spreading horizontally through a policy domain. It bears

⁵² Recognition means giving *res judicata* effect to the issues that were litigated in the Member State that rendered the judgment. (*Res judicata* means that the matter has already been judged.) This effect is automatic (e.g. under Article 36(1) of the Brussels I Recast Regulation), subject to a few exceptions (enumerated in Article 45). Enforcement of a judgment of a foreign court, on the other hand, traditionally requires an extra step, consisting of obtaining a declaration of enforceability (*exequatur*) in civil law jurisdictions or registering the foreign judgment in common law jurisdictions. According to Baumgartner (2014: 191-2), this procedure is “usually granted as a matter of course,” but there appeal and challenge are possible. As a matter of fact, this happens only in 1% to 5% of cases (*id.*).

⁵³ The Tampere Milestones designated a number of specific types of claims as to which these simplifications should be introduced, namely small consumer or commercial claims, and certain judgments in the field of family litigation pertaining to maintenance claims and visiting rights. Tampere Milestones 1999: ¶ 34.

⁵⁴ The grounds for refusing recognition or enforcement are the same, and include: (1) violation of public policy (ordre public) of the Member State that is being asked to give effect to the foreign judgment, and (2) defective service of documents on the defendant in cases where the judgment was rendered in default of appearance by the defendant (i.e., where there was some ‘due process’ defect in the proceedings that led to the judgment, such that the defendant was not able to mount a defense). Brussels I Recast Regulation, arts. 45 & 46.

repeating here that the EU had no – and outside the narrow confines of the civil justice arena, still has no – legislative competence over family law,⁵⁵ property rights for married or unmarried couples, or wills and successions.

And so it has rapidly come to pass. The first step towards abolishing interim procedures – *exequatur* or registration – was the creation of the European Enforcement Order (EEO) for Uncontested Claims (2004) (‘EEO Regulation’). The creation of the EEO, which is a “passport” for enforcement of a civil or commercial judgment in other Member States, is “one of the most important steps” taken in the civil justice arena (Biavati 2009: 75-7).⁵⁶ It has a dual nature: first, it creates an entirely new procedure at EU-level that parties can use as an alternative to procedures that exist under national law, and second, it takes bold steps toward implementing the ‘mutual recognition’ principle. As to the latter, the EEO Regulation specifies minimum procedural standards that must be met by the court in the Member State that renders the judgment (European Enforcement Order for Uncontested Claims 2004: art. 12-17), if the EEO certificate (“passport”) is to issue.⁵⁷ A judgment that satisfies these requirements “shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement” (art. 20(1)).⁵⁸

The constellation of measures found in the EEO Regulation – that is, the combination of an entirely new EU-level procedure and a certificate (or “passport”) that is issued by the rendering court if the EU’s minimum procedural requirements have been satisfied – has been replicated in a number of later measures addressed to particular types of case. First, the European Order for Payment Regulation (2006) extends this legislative approach to uncontested pecuniary claims. Second, the Small Claims Regulation

⁵⁵ However, family reunification issues have been addressed, in connection with free movement of workers

⁵⁶ “A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.” European Enforcement Order Procedure 2004: art. 5.

⁵⁷ In this context, it is important to note that these minimum standards do not oblige the Member States to adapt their procedural rules to the minimum standards established by EU law, but rather that meeting these standards is the prerequisite to obtaining the EEO certificate (see Kramer 2011: 634-5).

⁵⁸ While some grounds for refusing enforcement remain, they are much more limited than the reasons noted above. Specifically, they do not include defenses based on the public policy (order public) of the enforcing Member State. European Order for Enforcement Procedure 2004: art. 21.

(2007) extends it to claims below € 2,000. And third, the Maintenance Regulation (2008) extends it into the family law field. (Each of these measures is discussed further below.) In contrast, the Brussels I Recast Regulation (2012) discussed above does not create a new procedure as such, though it does abolish *exequatur* for civil and commercial claims that fall within its scope.

Two points bear mention in closing. First, the creation of new EU-level procedures for certain types of cases, such as the ones described above, serves dual aims. The Regulations adopted by the EU not only aim to enhance the enforceability of judgments, and thereby implement the ‘mutual recognition’ principle in the civil justice arena, but also serve to increase access to justice on the part of individual and business claimants alike. Second, while the abolition of *exequatur* is significant, the heated rhetoric surrounding it should be taken with a grain of salt. At least in some cases, it “sounds like a bolder move than it really is” (Baumgartner 2014: 193). In connection with the Brussels I Recast Regulation (2012), discussed above, the Member States retain significant defenses to automatic enforcement of judgments from courts of other Member States, even absent the “intermediate step” of the *exequatur* or registration procedure.

2.1.2 *Measures Related to Debt Enforcement*

2.1.2.1 *Insolvency Proceedings*

The backbone of the EU’s efforts to provide an adequate legal framework for cross-border insolvencies, which affect nearly 50,000 companies a year (Commission Insolvency Memo 2014), is the Insolvency Regulation (2000), which was one of the first to be adopted after the Amsterdam Treaty came into force in 1999. This Regulation, which applies to individuals as well as businesses, applies whenever a debtor has assets or creditors in more than one Member State. The nature of the Insolvency Regulation is fundamentally different from the narrow and extended mutual recognition regimes discussed above. The Insolvency establishes a coordinated procedure among Member States, in which a main procedure is opened where the debtor’s activities are centered, and secondary proceedings in all other Member States where the debtor has assets. The Regulation provides rules for coordinating these proceedings, as well as conflict of laws rules. As such, it constitutes a step towards cross-border case management.

After a decade in force, the Commission commenced a review process, which resulted in the

Proposal to Amend Insolvency Regulation (2012). This Proposal would modernize the Regulation by shifting emphasis away from liquidation, and making it easier to restructure a business in a cross-border context. The goal is to “facilitate a fresh start” by establishing a “ ‘rescue and recovery’ culture for viable businesses” (Commission Insolvency Memo 2014). The EU Justice Ministers reached agreement on the amended text in December 2014, but final votes from the Council and Parliament are pending during the first half of 2015 (Insolvency Press Release 2014).

Meanwhile, the Commission has seized the moment and presented an additional innovative proposal aimed at implementing a “new approach to business failure and insolvency” (Commission Communication on Insolvency 2012). The Communication highlights differences between national insolvency laws that “may hamper the hamper the establishment of an efficient internal market,” and calls for a creating a “level playing field in these areas” in order to establish greater business confidence, improve access to credit, and encourage investment (Commission Recommendation on Business Failure and Insolvency 2014: preamble, ¶ 8). In view of the fact that several Member States are in the process of reviewing their national insolvency laws, the Commission followed up with a Recommendation that encourages Member States to reduce “divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties” as a way to establish “coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market” (id. at ¶¶ 10-11). The (non-binding) Recommendation establishes minimum standards on preventative restructuring frameworks and the discharge of debts of bankrupt entrepreneurs (id. at art. I.3), which it “invites” the Member States to implement (id. at art. V.34).

While the fate of the Commission’s Recommendation remains open, it is worth noting that this call for voluntary harmonization appears to be in line with emerging developments on the ground. Cadiet (2014:14) has identified a form of spontaneous procedural convergence that results from the activities of the legal staff involved in transnational insolvency procedures – notably law firms, administrators and liquidators – who have created protocols (standard contracts) for coordinating national procedures. These protocols have “been sanctioned by the relevant courts,” and go beyond the “duty to cooperate and communicate information” that the Insolvency Regulation prescribes.

2.1.2.2 *Other Measures to Facilitate Debt Collection*

The EU has undertaken two additional measures aimed at facilitating debt collection. The Transparency of Debtors' Assets Green Paper (2006) is a soft-law measure, by which the Commission recommends that Member States implement a variety of measures that would enable creditors to obtain prompt access to information about debtors' assets. More dramatic is the Account Preservation Order Regulation (2014), which creates a new uniform European procedure that allows for the prompt preservation of funds held in debtors' bank accounts. Once an EAPO has been issued in one Member State, the debtor may not transfer or withdraw funds from its bank accounts in other Member States. While the debtor can challenge the EAPO, it is generally easier for a creditor to obtain such an order than for a debtor to challenge one. As with other innovative EU procedures in the civil justice arena, the European Account Preservation Order (EAPO) Regulation creates a EU procedure that is an *alternative* to the procedures available under Member State law, and does not displace them.

2.1.3 *International Judicial Assistance: Service of Process & Taking Evidence in Cross-Border Litigation*

The EU moved quickly after the Amsterdam Treaty came into force in 1999 to adopt new regulations on two significant arenas of international judicial cooperation (or 'assistance' as it has traditionally been known): service (or transmission) of documents and taking evidence in cross-border litigation. Both Regulations overlap with international treaties that bound some (but not all) of the EU's then-Member States: the Hague Service of Documents Convention (1965)⁵⁹ and the Hague Evidence Convention (1970).⁶⁰ Service of documents and taking of evidence were among the earliest priorities flagged by the EU as "aspects of procedural law on which common minimum standards are ... necessary" (Tampere Milestones 1999: ¶ 37; Mutual Recognition Program 2001). These technical procedures, which differ significantly among Member States, are key to ensuring that the essential requirements of 'due

⁵⁹ The Hague Service of Documents Convention (1965) bound fourteen of the EU's then-Member States.

⁶⁰ The Hague Evidence Convention (1965) bound eleven of the EU's then-Member States. Unlike the Service and Brussels I and II Regulations, however, the Evidence Regulation was based on a German initiative, rather than on an earlier convention that had been prepared under EU auspices. Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, 2000 O.J. (C 314/1)

process⁶¹ – among them, the opportunity to defend oneself in court (‘rights of defense’) – are observed in cross-border litigation. Indeed, the Commission has observed that the fate of the ‘mutual recognition’ principle in the civil justice arena depends on “mutual trust in the legal procedures of other Member States,” which presupposes that the “parties’ procedural rights are protected” (*Assises* Discussion Paper on Civil Justice 2013: 2-3).

The Service of Documents Regulation (2000) was rather quickly overhauled by the Service of Documents Recast Regulation (2007). However, cross-border transmission of court documents, particularly at the commencement of judicial proceedings, remains a dynamic and controversial topic. The need to ensure minimum due process standards across the EU gains urgency as the movement of judgments is further liberalized, such as by the abolition of *exequatur*. The Commission issued a report in 2013 which assesses experience under the 2007 Recast Regulation, and opens a debate on future reforms (Commission’s Report on Service of Documents Regulation 2013). The 2013 Report notes that the “increasing judicial integration” within the EU has exposed the “limits of the current text” and the more urgent need for “minimum standards” (id. at 16).⁶²

For its part, the EU’s Evidence Regulation (2001) is less controversial. The Commission issued a report in 2007 assessing the state of play, noting that it was generally satisfactory, if underused (Report on Evidence Regulation 2007). The Commission’s Report urges Member States to disseminate information about the available procedures and encourage their use, along with the greater use of modern communications technology, in particular videoconferencing, which is being integrated into the EU’s e-Justice portal (id. at 7). The European Parliament responded by adopting the EP Evidence Resolution (2009), which is part- scathing attack on the Commission for dropping the ball in the civil justice arena,⁶³

⁶¹ Biavati (2009: 9) refers, in a related but different EU context, to the need to ensure the “correct application of the great principles of the due process of law,” which are part of EU law by virtue of being “recognized by art. 6 of the [European Convention on Human Rights] and art. 47 of the [EU’s Charter of Fundamental Rights].”

⁶² Caadiet (2014: 16) explains that “the service of documents is a crucial element whose good functioning supposes a fair cooperation between courts and parties. The current state of play is not satisfactory due to divergences between Member States on important issues such as the circumstances under which documents are to be served, by whom such service should or could take place, which documents may be served and so on.”

⁶³ The main reason for the 2009 spanking was the Commission’s late report assessing the Hague Program (2004), which was a prerequisite to the adoption of the Stockholm Program (2009).

and part-ringing endorsement of the Commission's proposals to improve the taking of evidence in cross-border litigation. The Commission dutifully responded by enumerating its good intentions (Commission Follow-up to EP 2009).

2.1.4 *Others ...*

The variety of procedural measures surveyed above does not exhaust the EU's agenda in the procedural field. The Amsterdam Treaty called for "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States (EC Treaty art. 65(c)).⁶⁴ The European Council in Tampere identified a number of types of legislation that might be adopted (beyond the specific types of measure already discussed), such as provisional measures and time limits (Tampere Milestones 1999: ¶ I.11.38). One such measure under consideration arises in the context of road traffic accidents, where the time period for filing claims for compensation differs across Member States. In this context, the Commission has announced its intention to harmonize the rules on limitations periods "so that victims do not risk losing their right to compensation for procedural reasons" (Communication on Victims' Rights 2011: 2). The Commission initiated a consultation on this issue in 2012, but no proposed legislation has been forthcoming.

The paucity of current examples notwithstanding, the residual category of civil procedure is amorphous and open-ended in nature, thus it is not unreasonable to suppose that EU developments in this arena are still in their infancy.

2.1.5 *Conclusions*

The EU's move into the area of procedural law has significant effects on the European legal order, even beyond the specifics already discussed. It is not enough to state that these developments cut deeply into residual Member State sovereignty, and do so in legal fields that are most fundamental to the integrity of the national legal order. EUstitia measures undermine precisely those traditional techniques used by states to vindicate their fundamental interests in the administration of justice. Member States

⁶⁴ The text has been slightly amended; it now calls for "the elimination of obstacles to the *proper* functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States" (TFEU art. 81(2)(f), emphasis added).

retain some, but ever-shrinking power to invoke national policy preferences in lieu of European ones.

This section offers four further perspectives on the broader political implications of these developments.

First, the EU's embrace of the mutual recognition paradigm in regard to judgments has triggered a crisis of trust throughout the EU. For example, imagine a German court that is asked to enforce a judgment for damages against a German company rendered by a court in one of the Member States that the Commission has targeted for judicial corruption. The tenor of the EU's civil justice regime is to compel 'full credit' of that judgment in a setting where 'faith' in the integrity of the court that rendered the judgment is lacking. This crisis of faith is driving EU efforts to achieve further harmonization of procedural law. As the Commission says, one way to reinforce mutual trust is "through procedural law integration" (*Assises Discussion Paper on Civil Justice 2013: 2-3*) of the sort seen in the EEO Regulation of 2004 and its progeny. This pressure simultaneously entails efforts to raise the bar, EU-wide, in order to ensure that "parties' procedural rights are protected" (*id.*). Schröder (2014) argues that there should be a "(larger) core of harmonized European procedural law" in the future, "some sort of common ground (*Leitbild*) amongst the Member States in procedural issues," against which "national procedural laws can be measured. Once such common ground is sufficiently established, national procedural laws can be measured against this standard, and the more a national law or rule departs from the common ground, the more it is put under pressure for justification." As Schröder's argument suggests, the trend is toward further erosion of national legal orders, despite the EU's professed desire to protect national legal culture.

Second, these developments are part of the ongoing "seachange" in Europe towards the privatization of enforcement (Tulibacka 2009: 1530; see also Kelemen 2011).⁶⁵ The abolition of "interim steps" for the enforcement of judgments, for example, "expresses the trend already observed in the privatization of the coordination between State justice systems," where "public *ex ante* control" by the enforcing court by means of the *exequatur* or registration procedure "disappears to the benefit of an *ex post* control initiated by parties" (Cadiéc 2014: 9). While this trend has been led by the Court of Justice, it has found an amiable counterpart in the Commission's efforts to ensure that the different components

⁶⁵ Tulibacka argues that private enforcement "now has the potential of truly complementing public enforcement." of EU law (2009: 1531).

of the European legal order mesh smoothly.

Third, these developments matter, because litigation matters beyond the resolution of particular legal disputes. As argued in sub-section 5.4.3 below, developments in the civil justice arena are related to broader concerns about the legitimacy of EU governance. Moreover, by increasing the efficiency of available procedures and promoting access to justice, EU civil justice developments have the potential to make existing substantive rights more potent, as U.S. experience suggests.⁶⁶ Finally, while EU competence in the civil justice arena is formally limited to matters of procedure, the administration of justice, and the conflict of laws, it would be foolish not to expect these developments to have far-reaching impact on the content of *substantive* EU law as well. There is enormous potential for the Court of Justice to spin *substantive* ‘gold’ when interpreting *procedural* EU legislation. As Lenaerts & Stapper (2014) demonstrate, it is not always possible for the Court to stay on the procedural side of the line, given the overarching command to interpret EU law – including the legislative measures surveyed here – so as to achieve the larger (teleological) goals of European integration. The Court has a long-standing propensity to interpret terms found in EU legislation “autonomously” and give them a particular meaning within the context of the EU legal order, which does not always leave room for the particularities of national law (*id.* at 254).⁶⁷

Fourth, the developments in the EU’s civil justice field constitute major steps towards legal federalization. The effect of implementing the mutual recognition principle in regard to judgments is a good example of how civil justice measures ‘domesticate’ or internalize something that was previously ‘foreign’ or the subject of international relations. Or, as Cadiee (2014: 9) puts it, foreign judgments inside the EU “are less and less foreign and more and more domestic because of the abolition of *exequatur*,” they are “somehow naturalized” (Cadiee 2014: 9).

How far the EU will go along the civil justice is a matter of great debate, and is sure to occupy legal specialists for years to come. One author asserts that the “logical endpoint of this development is

⁶⁶ This is not unprecedented. In the United States, for example, tort law was transformed by the spread of procedural innovations, such as class actions and lawyer-driven pre-trial discovery, which were introduced by the Federal Rules of Civil Procedure, and later imitated by the states. Similarly, laxer rules of standing to sue and the availability of civil injunctions fostered use of courts for institutional reform litigation and other efforts to change public policy via litigation.

⁶⁷ “[Der Gerichtshof strebt] grüensätzlich eine unionsrechtlich autonome Auslegung [an], die für nationale Besonderheiten nicht immer Raum lässt...”

likely to be the displacement of all member-state law applicable to transnational cases, no matter what the type of proceeding” (Baumgartner 2014: 193). Another author, by contrast, takes a more cautious view, and argues that the sky is not the limit for developments in EU procedural law (Domej 2014: 548: “[D]ie Bäume des europäischen Zivilprozessrechts [wachsen] nicht in den Himmel”).

2.2 Institutional Measures affecting the Administration of Justice: Fostering Access to Justice and European Legal Culture

The EU’s activities in the civil justice field include multiple measures addressed to institutional dimensions of the rule of law. These developments are consistent with broader calls for justice reformers to accord “as much priority” to the “institutional vehicles for the effectuating of the rule of law” – given their “critical role” – as “the rules themselves” (Chodosh 2005: 65). Already at an early stage, the EU’s Economic and Social Committee urged the Commission to place greater emphasis on standardizing “legal institutions” when building the AFSJ (ESC Opinion on European Judicial Area 2001, ¶ 1.4.13). This section surveys key EU measures in the field, before turning to an examination of their importance.

Given the immediate context from which plans to build a “genuine European area of justice” emerged – namely, the elite cooperation that emerged in the 1990s under the EU’s Third Pillar⁶⁸ – it is no surprise that cooperation remains a key strategy in the civil justice field, nor that some of the measures aimed at institutionalizing civil justice in the EU relate specifically to legal professionals, among them judges and lawyers. However, the EU’s civil justice strategy attends to the perceived needs of the consumers of civil justice as well, and emphasizes the need for measures that enhance access to justice.

2.2.1 *Creation of Judicial Network*

Initially, the EU’s institutional strategy focused on establishing a *horizontal* network among a wide array of judicial actors in the Member States.⁶⁹ The European Judicial Network in Civil and

⁶⁸ In fact, professional legal networks – particularly those involving judicial cooperation – have always been a key element in European integration (Vauchez 2001: 10), and can be easily traced back much further. Although Vauchez focuses on the criminal side of the judicial profession, he also offers valuable insights for the study of the civil and commercial side of the professions.

⁶⁹ The aim here is not to provide a comprehensive overview of the types of networks currently active in the EU, but merely to note those that have been created within the EU itself. In particular, the growing number of networks that have been set up by judicial actors themselves are beyond the scope of this paper. See further de Claes & de Visser (2012: 106-12); Dallara

Commercial Matters (EJN-Civil) was created in 2001,⁷⁰ and extends an innovation from the criminal to the civil justice field.⁷¹ The EJN-Civil, which describes itself as flexible and non-bureaucratic, regularly brings together some or all of more than 500 designated “national contact points”⁷² to “exchange information and experience” with each other, as well as with the Commission, which serves as the EJN’s secretariat. One key reform introduced in 2010 was to open up this network to (designated) professional associations representing legal practitioners in the Member States (Simões de Almeida, João Paulo 2009). Meetings devoted to general or special topics have been held since 2002, and members have ongoing access to one another via a closed virtual community (CIRCA).

The EJN provides a platform for discussing a wide range of topics, including but not limited to the “practical and legal problems encountered by the Member States in the course of judicial cooperation” (EJN Decision 2001: art. 10). Dallara & Amato (2012: 2) argue that “what circulates” among members of the emergent judicial networks in Europe includes “opinions, best practices and reports related to shared values and elements of rhetoric, judicial procedural standards and models of professional excellence, ... [and] crucial aspects of the judicial system organization and functioning such as the judge status and role or the guarantees of judicial independence” (Dallara & Amato 2012: 2).

The EJN-Civil is designed to serve two distinctly articulated, but ultimately intertwined goals: first, to improve judicial cooperation by networking the authorities of the Member States in a uniform manner throughout the EU (EJN Decision 2001: art. 3(1)(a)), and second, to simplify the life of Europe’s citizens by giving them easier access to justice in a Member State other than their own (id., preamble, ¶9). More concretely, the EJN-Civil aims to remove practical barriers that arise in the context of cross-

(2012: 21-25); Magrassi (2011).

⁷⁰ After an evaluation process (see EJN Evaluation) 2005), the EJN-Civil was and modified in 2009 (Decision Amending EJN).

⁷¹ The European Judicial Network for criminal matters was created by Joint Action 98/428 JHA of 29 June 1998, pursuant to the Council’s 28 April 1997 Action Plan to Combat Organised Crime.

⁷² As of 2013, the ENJ-Civil consisted of 503 members, among them 113 “contact points” designated by Member States, the central authorities designated for coordination functions by relevant EU, national, or international law instruments; liaison magistrates responsible for cooperation in civil and commercial matters; and any other judicial or administrative authorities responsible for judicial cooperation designated by a Member State. European Judicial Network (2014). Denmark does not participate in the EJN-Civil.

border cases, as a means of improving the implementation of relevant EU laws and international treaties, and making life easier for everyone involved.⁷³ The EJM-Civil also aims to facilitate cross-border civil justice by disseminating information to the public as well as to the legal community.⁷⁴ Yet these are clearly not the only goals that the EJM aims, or is likely to serve.

Frequent meetings of Member State and Commission officials, occurring within the framework of the EJM-Civil, will establish personal relationships among participants, which in turn tend to “increase mutual trust,” which is the *sine qua non* of the EU’s mutual recognition system (de Claes & de Visser 2012: 108; see also Weller 2015). Cooperation and mutual trust, in other words, are “closely and dialectically connected” (Cadiet 2014: 15). Moreover, these networks serve as fora for deliberation between courts from different orders “under conditions of mutual respect and open conversation,” and thus prepare the ground in which a “pluralist conception” of the European legal order might flourish (de Claes & de Visser 2012: 113). These “horizontal techniques of direct coordination between” a growing number of “protagonists of the judicial system” in connection with their “procedural duties governing dispute resolution” constitute a “new dimension” of the European project, and manifest the “rise of a more general cooperative model of dispute resolution” (Cadiet 2014: 4). Judicial networks – including the EJM-Civil – thus contribute toward the development of a European judicial culture, and provide the “necessary infrastructure for a functioning multilevel legal order,” a place where the “inevitably fragmented transnational community” might be overcome (Benvenuti 2014: 5). As such, judicial networks have two dimensions: an “ascending dimension,” which refers to their impact on the

⁷³ Thus, according to de Claes & de Visser (2012: 111), participating in networks “is not so much a matter of choice but of necessity to make sure judges are still able to get the job done properly in a changing environment. The internationalized nature of litigation makes knowledge about other legal systems a prerequisite to being able to dispense justice in an individual case. These considerations take on an extra dimension within the EU, with its quest to establish a truly internal market and the ever-expanding reach of EU rules. Judges dealing with commercial law, administrative law, consumer law and increasingly also civil and criminal law need to cooperate with out-of-state counterparts simply to make principles such as mutual recognition work.”

⁷⁴ In 2003, the EJM-Civil established a multi-lingual Internet site for European citizens – the ‘European Judicial Atlas’ – which aimed to provide user-friendly access to information about virtually every aspect of the Member States’ legal systems, along with pertinent multilingual forms (EJM Decision 2003: arts. 10(1)(b) & 15(3)(a)-(g)). The European Judicial Atlas is currently available at http://ec.europa.eu/justice_home/judicialatlascivil/, but is being migrated to a new, consolidated EU e-Justice Portal – the EU’s “electronic one-stop-shop in the area of justice” – available at <https://e-justice.europa.eu/>. The E-Justice Portal aims to achieve greater synergies by bringing together all the resources available to citizens, businesses, legal professionals and judges (Simões de Almeida, João Paulo 2009). See generally de Claes & de Visser 2012: 107 & 110 (re: the use of information and sophisticated IT facilities).

development of European legal norms, and a “descending dimension,” which refers their effect of Europeanizing the national judicial cultures (Benvenuti 2014: 5, 14-15).

These effects of judicial networking are furthered by parallel efforts that involve training judges, lawyers, and other members of the legal staff.

2.2.2 *Judicial & Other Training*

The booming efforts to provide coordinated EU-level training for judges and other members of the legal staff is related, but parallel to the development of judicial networks noted above. Training was overlooked in the Treaty of Amsterdam and Tampere, and has only recently come into its own as a field of EU endeavor. The first impetus came from Member States themselves, who established the European Judicial Training Network (EJTN) outside formal EU structures in 2000.⁷⁵ The French Government simultaneously asked the Council of the EU to take a decision establishing a European judicial training network (French Judicial Training Network Initiative 2001). No such Council action was immediately forthcoming, but still the EJTN commenced operations, and currently “represents the interests of over 160,000 European judges, prosecutors and judicial trainers across Europe” (EJTN Website).

While the goal of taking on professional training received general support,⁷⁶ the Council proceeded cautiously. The First Council Conclusions on Judicial Training expressed broad support for the EJTN, but declined to adopt a binding act that would establish a “more permanent structure for judicial training at the European level.” The Second Council Conclusions on Judicial Training (2008) went further, however, and stated that Member States “should adhere” to the EU guidelines “when organising training for judges, prosecutors and judicial staff (such as assistants, law-clerks and

⁷⁵ The Member State authorities responsible for judicial training adopted a Charter in Bordeaux in October 2000. The Bordeaux meeting involved criminal law judges and prosecutors, but the EJTN that has emerged includes civil law judges as well. Thus, the EJTN does not institutionally separate civil from criminal law judges, as the European Judicial Networks do. Further information about the EJTN is available at <http://www.ejtn.eu>.

⁷⁶ For example, the Laeken European Council called for “a European network to encourage the training of magistrates to be set up swiftly; this will help develop trust between those involved in judicial cooperation” in December 2001 (Laeken Presidency Conclusions); and the 2004 Hague Program called upon the EU to provide financial support for the EJTN. Financial support was indeed provided, albeit on an ad hoc basis, until 2007, when the EU established an operating budget for the EJTN. For its part, the Commission prepared the 2002 Working Paper on Judicial Training and the 2006 Commission Communication on Judicial Training. Judicial Training was also mentioned on occasion in specific pieces of civil justice legislation, such as the Brussels II bis Regulation (2003) on matrimonial matters and parental responsibility.

registrars), without prejudice to judicial independence or different judicial organisations in the European Union.” One reason for delay in bringing training into the EU’s bailiwick was the failure of the Constitutional Treaty, which included provisions establishing judicial training in civil and criminal matters as a base of EU competence.⁷⁷ As it happened, the EU did not gain formal competence over “training of the judiciary and judicial staff” until the Lisbon Treaty entered into force at the end of 2009 (TFEU art. 81(2)(h)). Since then, the topic of judicial training has received a great deal of attention from EU institutions, notably the European Parliament,⁷⁸ the Commission,⁷⁹ and the Council.⁸⁰ After more than a decade, ideas that remained marginalized as reaching too deeply into sensitive national prerogatives have been fully endorsed, and the EU’s institutional apparatus is geared up to push this agenda forward.

A second reason for the delay in bringing professional training in from the cold is the boldness of the idea, or at least the rhetoric that has accompanied these proposals from the beginning, in conjunction with the overall sensitivity of the interests at stake (e.g., judicial independence). Both the 2000 French Judicial Training Network Initiative⁸¹ and the 2001 EJTN Bordeaux Charter articulate visions of the European legal order that were radical in their time. Uncontroversial was the assertion that “mutual understanding and trust” are key to promoting judicial cooperation, indeed, the “sine qua non for the success of the European judicial area” (French Judicial Training Network Initiative 2000: preamble, paras. 2-3). More chilling to some at the time, was the claim that European judicial training would not only contribute to the effectiveness of current laws and facilitate the implementation of new measures,

⁷⁷ In its Communication on Judicial Training (2006: 2), the Commission boldly asserted that the “adoption of the Amsterdam Treaty with its reference to the new objective of creating an ‘area of freedom, security and justice’ means that judicial training is a new task for the Union.”

⁷⁸ See First EP Resolution on Judicial Training (2010); Second EP Resolution on Judicial Training (2012).

⁷⁹ See Commission Report on Judicial Training (2011); Commission Proposal on Judicial Training (2011). A pattern of annual reports by the Commission has recently emerged. See, e.g., Third Report on Judicial Training (2014).

⁸⁰ See Council Conclusions on European Judicial Training (2011).

⁸¹ In concrete terms, the French Judicial Training Network (2000) calls for launching a network of training establishments for Member State judiciaries, in order to “foster consistency and efficiency in the training activities carried out by the members of the judiciary of the Member States.” Among the joint activities that should take place within the framework of the EJTN are: language training, the organization of training programs and exchanges involving members of the profession, the dissemination of good practices, and the training of trainers.

but also help to “create a *genuine European judicial culture* (id. at ¶ 3(1), emphasis added).⁸² For its part, the Charter takes this vision a step further by noting that “the organisation of regular training for members of the judiciary” establishes the basis from which “a *common European judicial culture and identity* can progressively emerge” (EJTN Bordeaux Charter 2001: preamble, ¶ 6, emphasis added). Thus the EJTN, like the EJC-Civil, is premised on the belief that professional contacts and the formation of personal relationships will contribute to the erosion of cultural and other differences among members of the judiciary, and foster the emergence of a new European identity. These notions have become commonplace today, and training will help forge a strong link between mutual trust and the constitution of a European legal culture which “rests on a sense of belonging to a single area shared by practitioners of justice in the Member States” (Commission Communication on Judicial Training 2006: 3).⁸³

While initially aimed at judges (as well, in the criminal sphere, at prosecutors who are in some countries members of the judiciary), the training mandate has expanded. The first extension was to legal practitioners,⁸⁴ with the aim of fostering mutual knowledge of legal and judicial systems, as a way to facilitate cooperation in the area of civil law between Member States. Measures affecting legal professionals remained controversial, however, as indicated by cautious language in various EU measures. For example, the Commission Communication on Judicial Training (2006: 4) declared that the EU “has no grounds for interfering in the organisation of national training systems, which reflect the Member States’ legal and judicial traditions,” while simultaneously noting that “strengthening mutual confidence entails developing training sufficiently and devoting sufficient resources to it.” Similarly, the Council Resolution on Judicial Training (2008: para. 18, p. 2) noted that it is

⁸² According to one contemporaneous interviewee, some Member States were concerned about the French proposal to establish an elaborate governance structure for the EJTN, and for this reason moved quickly to designate the ERA (Academy of European Law) in Trier (Germany) as the de facto secretariat for the EJTN.

⁸³ More recently, the Justice Program for 2014-2020 (2013) proclaims that judicial training is “central to building mutual trust and improves cooperation between judicial authorities and practitioners in the various Member States,” and that it “should be seen as an essential element in promoting a genuine European judicial culture” (preamble, para. 5).

⁸⁴ In fact, the Council adopted the first Grotius-Civil program providing incentives and exchanges for legal practitioners in 1996, under the Third Pillar arrangements prior to the Amsterdam Treaty. Joint Action 96/636/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners (‘Grotius’), 1996 O.J. (L 287/3) (covering the period 1996-2000), which was later extended for an additional period. The program provided funding for training, exchange and work-experience programs, for the organization of meetings, studies and research, and for the distribution of information.

essential that other legal professions, such as lawyers, receive adequate training in the field of European law. However, in the majority of Member States these professions are themselves responsible for organising their training. It seems therefore appropriate not to include them in the scope of this resolution. This should however not preclude that national authorities and the European Union support, also financially, the training of these other legal professions in the field of European law, it being understood that the independence of these legal professions should not be jeopardized.

The reluctance of the early years has been largely overcome, as noted earlier, and the scope of EU training activities now extends to “judiciary and judicial staff” (TFEU art. 81(2)(h)), which has been defined to include “judges, prosecutors and court officers, as well as other legal practitioners associated with the judiciary, such as lawyers, notaries, bailiffs, probation officers, mediators and court interpreters” (Justice Program for 2014-2020, preamble, para. 4). Moreover, judicial training can also involve “different actors, such as Member States' legal, judicial and administrative authorities, academic institutions, national bodies responsible for judicial training, European-level training organisations or networks, or networks of court coordinators of Union law,” as well as other bodies “pursuing a general European interest in the field of training of the judiciary” (Justice Program for 2014-2020, preamble, para. 6).

2.2.3 *Access to Justice: Legal Aid and Beyond*

Access to justice has come to be regarded as the overarching goal of the EU’s civil justice program. It has long enjoyed the status of a fundamental right under the European Convention on Human Rights⁸⁵ and, since 2009, under the EU’s own justiciable Charter of Fundamental Rights. Although it was not explicitly mentioned in the Amsterdam Treaty, “better access to justice” was quickly placed high on the EU’s civil justice agenda (Tampere Milestones 1999: section V). A decade later, in the Lisbon Treaty, access to justice was exalted as *the* overarching goal of the justice component of the AFSJ, the

⁸⁵ The European Court of Human Rights ruled in *Airie v. Ireland* (1979) that the right to a fair trial guaranteed by article 6 of the European Convention on Human Rights requires that governments provide legal aid to the poor in civil cases (Keleman 2011: 65).

end to which other means should lead.⁸⁶ “The Union shall *facilitate access to justice, in particular* through the principle of mutual recognition of judicial and extrajudicial decisions in civil matter” (TFEU art. 67(4), emphasis added). In the civil justice arena, the TFEU provides – also since the end of 2009 – that civil justice measures shall include “*effective access to justice*” (TFEU art. 81(2)(e), emphasis added),⁸⁷ which implies “quality throughout the whole justice chain” (2014 Justice Scoreboard: 16). Access to justice must thus be understood abstractly, as a dimension of the rule of law.

However, access to justice must also be understood concretely, as a set of procedural measures that affect the opportunity to pursue claims in a judicial fora. The nature of measures designed to improve access to justice in the EU is diverse, and the concept itself has expanded over time. Still, the vision spelled out at the 1999 Tampere summit was already very detailed, and includes measures aimed at making the justice arena more transparent,⁸⁸ at simplifying the paperwork involved in cross-border litigation,⁸⁹ at establishing procedures to facilitate cross-border litigation, promote extra-judicial dispute resolution, and ensure adequate legal aid,⁹⁰ and even at creating private rights of action, such as

⁸⁶ According to the Commission, access to justice “is an essential right, one of the founding principles of European democracies enshrined in the constitutional traditions common to all European Union Member States” (DG-Justice Website, http://ec.europa.eu/justice/effective-justice/index_en.htm).

⁸⁷ The term ‘effective justice’ came to have a particular meaning under Commissioner Reding. It connotes the Commission’s growing interest in the *quality of justice* in each Member State, and the bench-marking process that has emerged. “Shortcomings in the national justice systems are ... not only a problem for a particular Member State, but can affect the functioning of the Single Market itself and, more generally, the whole EU legal system which is based on mutual trust” (DG-Justice Website, http://ec.europa.eu/justice/effective-justice/index_en.htm). See, e.g., the 2013 and 2014 Justice Scoreboards.

⁸⁸ Tampere Milestones (1999: ¶ 29): “In order to facilitate access to justice the European Council invites the Commission, in co-operation with other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate ‘user guides’ on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.” The Judicial Atlas and e-Justice websites were discussed above in connection with the European Judicial Network. The European Day of Justice, an annual event established in 2003, also serves these aims (Hartnell 2002: 104-5).

⁸⁹ Tampere Milestones (1999: ¶ 31): “Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union.”

⁹⁰ Tampere Milestones (1999: ¶ 30): “The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.”

compensation for victims of crime.⁹¹

The wide array of measures envisioned in Tampere have been largely achieved, at least ‘on the books’. The EU has adopted hard-law measures that aim to simplify, expedite and reduce the costs of debt collection cases involving uncontested pecuniary claims (European Order for Payment Regulation 2006)⁹² and claims below €2,000 (Small Claims Regulation 2007). These unique EU procedures offer alternatives to procedures otherwise available in the national courts. Other EU legislation establishes minimum common rules throughout the EU, such as the Legal Aid Directive (2003),⁹³ the Compensation to Crime Victims Directive (2004), and the Mediation Directive (2008). The EU’s most recent wave of access-to-justice legislation focuses specifically on the dispute-resolution needs of consumers, and establishes an EU-level system for online dispute resolution (Consumer ODR Regulation 2013), as well as minimum standards for alternative dispute resolution across the EU (Consumer ADR Directive 2013). These latest developments illustrate the growing convergence between civil justice and consumer protection policies in the EU.⁹⁴

Last but not least, the volatile issue of collective redress has entered the civil justice policy

⁹¹ Tampere Milestones (1999: ¶32): “... minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims’ access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.”

⁹² The European Order for Payment is based on the principle of mutual recognition, thus an order secured from a national court in one Member State circulates and can be enforced freely throughout the entire EU. Under the new e-CODEX pilot project (<http://www.e-codex.eu/pilots/european-order-for-payment.html>), all necessary filings can be made via a secure electronic forum that links all national filing systems.

⁹³ The EU, like the European Court of Human Rights before it, has “pressed ... member states to strengthen their legal aid systems,” but at the same time has increasingly promoted the goal of “encouraging private forms of litigation finance” (Kelemen 2011: 64). For an analysis of the shortcomings of the Legal Aid Directive, see Kelemen (id. at 65-66) (“Ultimately, ... the EU’s effort to strengthen national legal aid systems is likely to prove one of its least significant access-to-justice initiatives. ... The heyday of legal aid is past.”).

⁹⁴ Although both 2013 measures were adopted as ‘internal market’ rather than as ‘civil justice’ measures, in terms of their treaty basis, they were prepared under the spreading wings of DG-Justice. For a critical analysis of the new legislation and potential unintended consequences, see Ross (2014).

arena.⁹⁵ After an enormous amount of preparatory work,⁹⁶ the Commission issued its Recommendation on Collective Redress - Injunctive and Compensatory Mechanisms in 2013.⁹⁷ The Recommendation is a soft law measure, in which the Commission calls upon the Member States to engage in voluntary harmonization of a series of collective procedures and remedies, in lieu of mandatory harmonization. Hodges is skeptical that the Recommendation is indeed the “long-awaited breakthrough in obtaining collective redress by consumers, and hence in affecting behaviour by business,” and whether it is likely to succeed in “expanding key goals” or in “preventing abuse” (2014: 67-8). For its part, DG-Justice website contains the unassuming statement that the Commission “will continue further works on an EU framework on collective redress, following up the full range of previous Commission work on collective redress.” This issue is likely to remain on the EU’s agenda for a generation to come.

2.2.4 *Conclusions*

The networking, training, and access to justice measures summarized above provide a startling picture of the EU’s civil justice landscape that is gradually coming into focus. The Europeanization of the administration of justice is a many-headed hydra. At the most basic level, it comprises a set of mundane techniques for coping with the EU’s decentralized legal order. As such, these measures embody, but also surpass the initial aims of making it easier for people in Europe to vindicate their rights throughout the EU. The push to foster European legal culture and identity, which is the sub-text that runs through many of these developments, has potential effects that extend beyond the stated goal of improving enforcement of EU law. Viewed holistically, these developments have far-reaching implications for the “conceptualization of the European legal order as a composite legal order” (de Claes

⁹⁵ For the “convoluted” institutional history of EU (and in particular, Commission) efforts to address collective redress issues, see Hodges (2014). This is an issue that affects not only specific fields of EU law, such as consumer protection, competition, data protection, financial services, environmental, and other types of protective regulation, but also the enforcement and effectiveness of EU law more generally.

⁹⁶ See especially Public Consultation on Collective Redress (2011); EP Resolution on Collective Redress (2012). The British Institute of International and Comparative Law (BIICL) has gathered many of the vast resources on its website, *available at* <http://www.collectiveredress.org/collective-redress/eu>.

⁹⁷ The Recommendation was bundled with the Commission’s Collective Redress Communication (2013), as well as with its Proposed Competition Law Damages Directive (2013).

& de Visser 2012 : 101). Innovative efforts to build networks, strengthen interpersonal relations among legal professionals, and foster European legal culture have both the aim and the potential to transform the European system of civil justice into a more comprehensive, coherent and effective whole.

The transformative potential of these developments is greater than the sum of its (technocratic) parts. To understand this potential, we must consider what Benvenuti (2014: 5, 14-15) calls “descending” and “ascending” dimensions, that is, how they affect the national judicial/legal cultures, on the one hand, and how they affect the development of European legal norms and legal order, on the other. With regard to the former, these developments create opportunities and pressures toward convergence, or spontaneous harmonization from below. With regard to the latter, they open up channels for (further) judicialization of politics in the EU. These dimensions are dynamically interrelated.

Descending Dimension: By fostering European judicial networks and training for a wide array of national legal elites, the EU’s civil justice project not only moves the EU towards an increasingly unified system for the administration of justice, but also lays the foundation for generating profound changes in the normative order itself.⁹⁸ The emphasis on fostering European legal culture and on (re)socializing an ever larger universe of national legal elites sets the stage for spontaneous harmonization from below, and supports the emergence of a common law of Europe (*ius commune*). These institutional developments have the potential to “fundamentally change” the traditional role of judges and parties in civil proceedings, insofar as they “significantly encroach upon the court structure or affect structural concerns within the national court systems” Storskrubb (2008: 231-2, 238-9), and thereby to smooth the rough edges of cultural difference (Hartnell 2002: 131). Member State legal elites operating under increasingly aligned procedural as well as substantive rules, and in an increasingly explicit European legal culture, may be further co-opted to the task of European integration. More concretely, judges and lawyers may become more prone to consider European common law as a source of legal norms, and to develop pan-European (in lieu of local) notions of public policy (e.g., van Houtte 2002; Škerl 2011; see also Hess &

⁹⁸ Similar effects can also occur in regard to procedural law. Van Rhee & Verkerk (2006: 124-6) have demonstrated that the fundamental right to “fair trial” found in article 6 of the European Convention on Human Rights has had a “harmonising effect on the systems of civil procedure in Europe” by influencing the development of fundamental principles of justice.

Pfeiffer 2011).⁹⁹ That these developments can affect how judges fulfill their tasks is exemplified by a Nordic example. When fulfilling their role as ‘juges de droit commun’ (judges of EU common law), judges must only apply European law, but often also decide whether it is compatible with provisions of national law. Pauliine Koskelo, who has served as President of the Finnish Supreme Court since 2006, has argued that courts are “often ill-prepared for this task,” due to their “national perspective and the quantity of [EU] law provisions. In lieu of top-down harmonization, she “proposed ‘judicial cooperation with recourse to case law across borders’ as a potential remedy, pointing out that *this had been practiced by the Nordic countries for some time and had automatically led to an increasing legal convergence between them*” (quoted in Salomon 2007, emphasis added). Thus, spontaneous harmonization can result from ‘sharing’ case law in the regional setting.¹⁰⁰ In such ways, the EU’s civil justice project has the potential to erode the legal terrain of the Member States, and generate fresh soil in which a common European legal order might flourish. By transforming Member State courts into European common ground,¹⁰¹ EUstitia may help the *ius commune* and European fundamental rights to take root.

Ascending Dimension: Some of the EU’s civil justice innovations – in particular, those related to access to justice – establish conditions that aim, and have the potential to foster litigation, and thereby to encourage further litigation-driven integration (or judicialization). By structuring the judicial (and administrative) arenas in which parties can claim their rights (and assert defenses) under EU law, procedural and remedial rules can create significant incentives or barriers to litigation in Member States courts. The measures aimed at improving access to justice (including but not limited to legal aid for the resource-poor) will allow a wider range of litigants to mobilize their rights under EU law. Since the arena

⁹⁹ The emergence of European notions of public policy is particularly crucial in the civil justice arena, since ‘public policy’ has historically served as the ‘national exception’ or loophole that enabled local courts to uphold national interests over those of other states, or of the international legal system more generally.

¹⁰⁰ At the same conference, then Vice-President of the European Parliament Diana Wallis was asked “whether the differences between Europe’s legal traditions constituted a limit to European legal integration” (Salomon 2007). She replied, “We all come from different backgrounds. I come from a Common Law legal tradition in which I was educated and practiced as a lawyer and I am proud of that. That does not mean, however, that I feel this tradition is threatened by Europe. Europe provides a vehicle to celebrate the difference between our legal cultures and *use them to assist one another*” (id., emphasis added). Diana Wallis served as Member of the European Parliament from 1999 until 2012, and was elected President of the European Law Institute (ELI) in 2013.

¹⁰¹ I am indebted to Sjef van Erp for this notion.

of civil justice is a public forum where values as well as norms are in play, enhanced access to civil justice may deepen integration by bringing a greater diversity of values into play.

There is an historical nexus between litigation and European integration. The EU's civil justice project enhances the capacity of Member State courts to participate in generating European governance through the process of judicialization. Private dispute resolution enables social and economic actors to play a role in the development of European norms, and thus to participate (albeit indirectly) in European governance. Integration emerges from the dynamic process of judicialization, which links the micro-level strategic behavior of individual actors to the development of the macro-level normative structure (Stone Sweet 2004). In the words of Schepel and Blankenburg (2001: 13), the "people's Europe" is constructed through law. Civil litigation in Member State courts provides an opportunity for citizens to interact with the European legal order, as well as for people and organizations to play an active role in developing Community law and policy. As European society becomes increasingly juridified, "judges will be called upon more and more to uphold not just the law, but moral standards, legitimate expectations, fairness" (Schepel & Blankenburg 2001: 9). Through this process, the social interaction in Member State courts will both reflect and affect the identity of European citizens and firms, which new institutional theory predicts will feed back into the political process.¹⁰² In this sense, EUstitia aims at nothing less than transforming the judicial arenas where European citizens' claims are resolved, and where European identity and citizenship can be constructed. The EU's civil justice agenda thus extends the insights of the early neo-institutional analysts, who showed how transnational business activity drove European integration by means of traders' demand for rules. The Europeanization of civil justice takes this to the next level, by considering the needs and demands of ordinary citizens and drawing them into this institutional setting. (Whether it will succeed is another matter.) In this view, Member State courts can be seen as spaces in which social, economic, and political forces interact, both in the pursuit of private

¹⁰² The argument based on new institutional analysis is developed in section 3.2 below. Briefly, it is built on Stone Sweet's 2000 and 2004 examinations of the dynamic relationship between the micro-level of actors (or agents) and the macro-level of rules (or structures). Once European rules have been fixed in a given domain, they "generate a self-sustaining dynamic, that leads to the gradual deepening of integration in that sector" through a feedback process. The evolving rule structures henceforth shape actors' expectations and guide their behavior in the affected domains. Thus, new (or newly interpreted) rules establish the context for subsequent interactions, and thereby influence how actors define their interests, as well as how they perceive their options and the mechanisms available for dispute resolution. In this way, transnational activity and the European legal system are seen as "developing along mutually reinforcing paths." (Fligstein & Stone Sweet 2001).

justice, and in the process of developing rules that can govern other social spaces.

2.3 The Transformation of the Conflict of Laws

Private international law (PIL), in the narrow sense, or the conflict of laws, constitute mechanisms for managing horizontal legal relations among EU Member States.¹⁰³ The modest language of the Amsterdam Treaty (which remained unchanged), which calls upon the EU to “promote the compatibility of the rules applicable in the Member States concerning the conflict of laws ...” (TFEU art. 81(2)(c)), belies the nature of the legislation that has been adopted, which comes close to making a clean sweep and displacing relevant national laws.

2.3.1 *Survey of EU Measures Adopted*

As was the case in regard to rules on jurisdiction and on judgments in civil and commercial cases,¹⁰⁴ EU Member States started down the road towards forging common choice of law rules long before the Amsterdam Treaty transferred competence over these issues from Member States to Brussels. Some Member States agreed on common choice of law rules for *contract* under the 1980 Rome Convention on the Law Applicable to Contracts. Modernizing this treaty was designated as a “priority action” in the Vienna Action Plan (1998), but the 1999 Tampere summit did not pick up this suggestion, or otherwise make conflict of laws a priority.¹⁰⁵ However, the Hague Program (2004) noted the importance of achieving agreement on rules to govern contractual as well as non-contractual disputes, and called for adoption of measures that were already under discussion at the time. The Stockholm Program (2009: ¶ 3.3.2) called upon the Commission to “continue the work on common conflict-of-law rules, where necessary,” and requested specific attention to the question whether “common rules determining the law applicable to matters of company law, rules on insolvency for banks and transfer of claims could be devised” (id. ¶3,4,2). The issue got no special mention in the Strategic AFSJ Guidelines

¹⁰³ Rules of this nature play a similar coordination role among sovereign states in the context of international relations and in some federal states (e.g., the United States)

¹⁰⁴ Brussels Convention (1968).

¹⁰⁵ For an insider’s perspective, see Wilderspin (2008).

for 2015-2020.

Despite the rather low degree of policy focus or rhetoric, large steps have been taken, and continue to be discussed, to unify conflict of laws rules in Europe. Yet despite the anodyne appearance, the EU's efforts to displace national laws have triggered some of the biggest controversies in the civil justice arena. The following examples provide some evidence for Meeusen's claim (2004: 79) that private international law "is no bleak, neutral and coordinating subdiscipline regulating international flows of trade and persons, but a bundle of norms which materialize national ... policies."

The unification of choice of law rules for contractual matters provides a neat illustration. After lengthy discussions, the pre-existing Rome Convention (1980) was modernized and converted into EU legislation, in the form of the Rome I Regulation (2008).¹⁰⁶ What may appear a technocratic matter of routine, was anything but, and triggered an explosive academic debate in France. A professor from the University of Paris (Sorbonne) penned an open letter to the President of France, which was published in a leading French law journal, and signed by 40 other prominent professors (Letter to President of France - Heuzé). The gist of the letter was to attack the institutions of the EU – in particular the Commission and the European Court of Justice – for *abuse of power* of such magnitude as to violate the fundamental principles of democracy and rule of law. These authors characterized the Rome I Regulation as an offensive intrigue by the Commission that aimed to foist the 'country-of-origin' principle on the Member States.¹⁰⁷ This principle was already a hot-button issue at the time, owing to its association with the Bolkenstein Directive on services, which triggered fears of a regulatory 'race to the bottom' and social dumping.¹⁰⁸ In the context of contract law, a similar (if less overtly political) tension arises between party

¹⁰⁶ See Rome I Green Paper; Kuipers (2009); Wilderspin (2008).

¹⁰⁷ "Ce texte constitue la dernière en date, et la plus radicale, des offensives menées par la Commission en faveur de la loi du pays d'origine." Letter to President of France – Heuzé (2006).

¹⁰⁸ The 'country of origin' principle was already in some disrepute at the time owing to its association with the so-called Bolkenstein Directive, which tried (unsuccessfully) to implement the 'country of origin' principle in connection with creating a single market in services. The concern at the time was that implementation of the 'country of origin' principle would speed up deregulation and undermine protective legislation in some Member States to protect worker's rights. Moreover, it was criticized as pitting workers in different parts of the EU against one another (i.e., the problem of 'social dumping' and the 'Polish plumber'). The Bolkenstein Directive was so unpopular in France that many believe it is one reason why the French rejected the Constitutional Treaty. The services directive ultimately passed in 2006, but only after the 'country of origin' provisions were removed.

autonomy, on the one hand, and the power of Member States to limit party autonomy by adopting protective regulation that ‘trumps’ the parties’ choice of law, on the other.¹⁰⁹ Within a month, another 77 French law professors had responded vociferously to Professor Heuzé’s “dramatic, apocalyptic and totally disproportionate” letter (Letter to President of France – Response 2007), which prompted yet another lengthy letter from Professor Heuzé, not to mention a larger debate about whether French legal academia was in crisis (Ciaudo 2007). The final result is a mixed bag – some, but not all of the Commission’s far-reaching proposed changes were accepted, others not.¹¹⁰ Plenty of controversies arose, including many linked to the nature, if any, of the limits to be imposed on party autonomy,¹¹¹ including specific “overriding” (or “mandatory”) provisions of national law which parties may not avoid by ‘contracting around’ them. The Rome I Regulation appears to limit the effect of such national laws, thus giving national sovereignty another ‘trim’ (if not exactly a ‘haircut’).¹¹² At the end of the day, the Rome I Regulation has been criticized as both a “big step forward” and a missed opportunity (Garcimartín Alférez (2008: I-79).

Second up, after contract, was the challenge to achieve common conflict-of-law rules for non-

¹⁰⁹ Debates were not uncommon over this issue under the Rome Convention as well, in the guise of debates over ‘mandatory’ provisions of national law and under what circumstances parties could avoid them by choosing the law to govern their contract. See, e.g., Magnus & Mankowski (2003).

¹¹⁰ The Rome I Regulation has universal application, which is to say it provides rules that bind Member State courts in all contract cases, and its effects are not restricted to intra-EU cross-border cases. See Wilderspin (2008: 262-3). This strong displacement of national law, in the context of a debate over whether the EU exceeded the competence provided by (then) article 65 EC Treaty (now TFEU art. 81) is another reason behind the heated controversy that erupted in French academic circles. Wilderspin, who works on civil justice issues at DG Justice, has publicly stated his view on whether the Rome I Convention is *ultra vires*: “The fact that the rules will be applied by a court in [an EU] Member State may of itself represent a sufficient link with the internal market ...” (Wilderspin 2008: 263).

¹¹¹ Special protective regimes exist for contracts involving consumers, carriage of goods, employment, and insurance, and the Rome I Regulation contains special rules for them. See Wilderspin (2008: 267-71).

¹¹² Thus, article 9(1) of the Rome I Regulation defines “overriding mandatory provisions” as those “regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.” While this definition appears rather broad to the naked eye, it constrains national sovereignty in three ways, when contrasted to the traditional notion that each nation had sole authority to define its own policy priorities. First, the term “crucial” sets a high bar. Second, nailing down a definition that is limited to “public interests” – which connotes “ordo-political rules” (*Eingriffsnormen*) per Garcimartín Alférez (2008: I-77) – may “cast doubt upon the fate of such rules enacted to preserve private interests, for example those of weaker parties such as consumers or workers” (Wilderspin 2008: 272). Third, the existence of a definition in EU legislation renders it justiciable by the Court of Justice, and thus no longer up to Member States to define their national interests and how to achieve them. However, the justiciability of overriding provisions of national law was already established by the Court of Justice in *Arblade* (1999), which established that the Court may examine whether such national rules impede the free movement of goods or services.

contractual cases, such as those involving liability in tort/delict or unjust enrichment.¹¹³ Unlike contract, European nations had not previously succeeded in reaching agreement on common conflict-of-law rules of this nature, despite numerous attempts.¹¹⁴ Tort law, which “serves the dual purposes of compensation and deterrence,” is particularly controversial, since it “implicates twin state interests in loss allocation and conduct regulation” (Kaminsky 2010: 83). Despite the difficulties, the EU Member States reached agreement on common conflict-of-laws rules in 2007. The general approach adopted is that the law of the place where harm/injury occurs shall govern, rather than the law of the place of the conduct giving rise to that harm. As such, the EU scheme is one in which the “compensation function ... dominates,” rather than an approach oriented towards punishing fault-based conduct (Rome II Proposal 2003: 7).¹¹⁵ The Rome II Regulation, like the Rome I Regulation, has universal application. Unlike the Rome I Regulation, however, Rome II does not constrain Member State ability to invoke overriding or mandatory provisions of national law (art. 16), nor does it force a Member State court to apply the law of another country where doing so would be “manifestly incompatible with the public policy (ordre public) of the forum” (art. 26). As such, the Rome II Regulation tolerates a higher degree of Member State diversity than does the Rome I Regulation.

The third arena in which the EU has sought to reach agreement on common conflict-of-laws rules is family law, starting with the law applicable to divorce and legal separation (Rome III Proposal 2006). The diversity of Member State positions on this controversial topic,¹¹⁶ combined with the need for

¹¹³ Among the many issues that fall under the category ‘tort/delict’ are product liability, liability for environmental damage, unfair competition, infringement of intellectual property rights, and industrial accidents. Rome II Regulation (2007: chapter 2). Injuries to the right of privacy or personality are excluded from the scope of the Rome II Regulation (art. I(2)(g)), but this issue is to be studied by the Commission with a view to future inclusion (art. 30(2)).

¹¹⁴ The Europe never produced a comprehensive treaty instrument on choice of law for noncontractual obligations. The Hague Conference abandoned its effort in 1967, concluding that the “extreme diversity of tort law and the range of conflict-of-laws approaches” prevented agreement at that time. Similarly, the EC made a first attempt as early as 1967, but abandoned the effort in 1978. Kaminsky (2010: 63-64). See generally Nadelmann (1976); Symeonides (2008).

¹¹⁵ For a critical analysis of the Rome II Regulation, see Symeonides (2008) (arguing that Rome II is a missed opportunity, insofar as it fails to bring EU standards into alignment with modern laws adopted by numerous EU Member States, notably Belgium, England, Germany, and the Netherlands).

¹¹⁶ Substantive law differs widely among Member States, ranging from ban on divorce (Malta, at that time) to countries where no actual grounds for divorce are required (e.g., Finland and Sweden) (Fiorini 2008b: 179). One author argued that this legislation “would have had probably the greatest transformation on English family law for a century” (Hodson 2008: 177).

unanimity to legislate on civil justice matters in the area of family law (TFEU art. 81(3)), quickly led to the failure of this legislative proposal in 2008.¹¹⁷ However, a subset of Member States were not to be deterred, and forged ahead to agree on common rules, making the first-ever use of the EU's 'enhanced cooperation' procedure, which allows a minimum of nine Member States to "make use of" EU institutions when it has become clear that "the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole its institutions" (TEU art. 20). Ten Member States elected to go forward,¹¹⁸ and the Council adopted the Rome III Regulation Implementing Enhanced Cooperation in 2010.¹¹⁹ Among its many innovations, the Rome III Regulation unifies the rules to be applied by courts to determine what law shall govern divorce and legal separation, and introduces party autonomy into divorce law (Carruthers 2012; Kruger 2012; Torga 2012).

Further efforts to unify conflict-of-laws rules in the family law area have been undertaken, some with greater success than in regard to divorce. Notably, the EU adopted the Maintenance Regulation in 2008, which applies to obligations to pay maintenance (i.e., financial support) "arising from a family relationship, parentage, marriage or affinity" (art. 1(1)). Currently, proposals are pending that would establish common conflict-of-laws rules pertaining to property rights for international couples:¹²⁰ the Matrimonial Property Proposal (2001) and the Registered Partnership Proposal (2011). These regulations leave the underlying institutions of marriages and partnerships to be defined by the national laws of the Member States. The European Parliament considered each Proposal in late 2013 and proposed amendments, which were considered by the Council in December 2014. No agreement has been reached as yet. However, the EU has agreed on conflict-of-law rules to govern successions (i.e., succession to the estate of a deceased person) and wills has been concluded (Succession Regulation 2012), which some

¹¹⁷ The Rome III Regulation was opposed by Ireland, Sweden, the UK, among others (Hodson 2010a). For a critical analysis, see Fiorini (2008b).

¹¹⁸ Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia. Rome III - Proposal for Enhanced Cooperation (2010). See generally Hodson (2010b).

¹¹⁹ Fourteen countries initially elected to participate in the Rome III Regulation: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Lithuania joined in 2012.

¹²⁰ Communication of Property Rights for International Couples (2011). The original proposal on property rights was the Green Paper on Conflicts in Matrimonial Property Regimes (2006).

call 'Rome IV'.

Finally, a number of other conflict-of-laws measures are waiting in the wings. At this stage, the Stockholm Program's call for conflict-of-laws rules to govern companies has not been designated a priority in the AFSJ Strategic Guidelines for 2014-2020,, to the dismay of some (e.g., Wagner 2014a). Meanwhile, academic (as well as parliamentary) interest has turned of late to questions relating to consolidation and codification, such as whether there is a need for a 'Rome 0' Regulation (e.g., Wagner 2014b) or a 'Brussels 0' Regulation, that would bring together the general principles that cut across the various conflict-of-laws measures on the books, or for a Private International Law Code (e.g., Kramer 2012b).

2.3.2 *Conclusions*

This section offers broader perspectives on the significance of the EU's displacement of national conflict-of-laws rules in most core areas of private law. As the brief survey of adopted measures suggests, the conflict of laws "inevitably" involves a "conflict of values" (Kaminsky 2010: 70). These EU measures constitute "dramatic [steps] in the federalization" of the European legal order (Symeonides 2008: 174-5). The unification of large portions of conflict-of-laws rules governing contract, non-contractual obligations, divorce, maintenance, and successions displaces a great deal of national law. The keys to understanding the significance of this displacement are the historical role of conflict of laws, and their relationship to the tension between diversity and uniformity of *substantive* law. The conflict of laws arises from legal diversity in a community of states.

Conflict of laws problems arise with increasing frequency, "by virtue of the unprecedented mobility of our times ...; in this era of 'globalization' ..., the effects of broken promises, defective goods, traffic accidents and marital squabbles are no longer confined to the territory of one particular state or nation" (Juenger 1999: 1). Absent uniform law, issues that arise in border-crossing transactions must be governed by the domestic laws of one or another state. Such laws are "are usually made with domestic exigencies in mind" and may or may not be appropriate for governing inter-state/inter-national legal

relationships (Juenger 1999: 2-3).¹²¹ Given diversity, there is no certainty which law will ultimately govern a relationship, or that the outcome of a case will be the same, wherever it happens to be brought. This uncertainty leads to unpredictability, which makes it difficult for parties to know what their rights are, and imposes additional costs on the process of ascertaining their rights. Conflict-of-laws rules are a way to “reduce the risk that the outcome of an adjudication can depend merely on the forum in which it is adjudicated” (Hazard 1998: 495). But they are more than just a means toward eradicating “the evil of forum shopping” by achieving “decisional harmony” (Juenger 1999: 6-7).¹²²

Yet conflict-of-laws rules are not solely concerned with the needs of private parties; they serve public ends as well, and in that respect serve a core function in the “law of international coexistence” (de Boer 2010: 11). They are a tool for allocating regulatory power among different legal orders, or “managing regulatory arbitrage” (Riles 2014) or, more concretely, about deciding which country’s law will have its say in the context of a particular case. In international cases, it boils down to the decision by the court (or arbitral tribunal) before which a case is pending whether to apply its own law, or the law of another country to the issues in that case.¹²³ The judge’s (or arbitrator’s) power to make this decision is particularly sensitive in a world where a high degree of tension exists between economic liberalism and socially-minded regulation (Hatzimihail 2006: 16). As such, conflict-of-laws rules are “essential in a social system constituted from more than one political regime” (Hazard 1998: 496).

Centralization of this allocative function via unification of conflict-of-laws rules is a step that makes the EU more federal than the United States, there “state-by-state choice-of-law rules” result in a

¹²¹ Indeed, the “basic problem with traditional private international law is that it relies on domestic rules to resolve problems that are international in nature” (Juenger 1999: 21).

¹²² This is the core of Savigny’s 1849 idea that each legal relationship has a seat and by linking it to that one seat by means of connecting factor, it would be possible to assure “a uniform result irrespective of where a dispute is litigated” (Juenger 1999: 7). “To attain the goal of ‘decisional harmony’ would require each and every state to adopt identical choice-of-law rules, which was indeed what Savigny had optimistically predicted” (id. at 8).

¹²³ Natural and legal persons who act “in the shadow of the law” must make some prediction about whether they believe that a given law will ever be applied to them, before they decided whether or not to adapt their conduct to it. At the end of the day, however, it is up to a judge (or arbitrator) to decide whether to apply a particular law to a case, or whether the parties’ effort to choose the law that they want to be governed by should be respected.

“chaotic and decentralized system” (O’Hara & Ribstein 2008 & 2009).¹²⁴ Unified conflict-of-laws rules not only remove the authority to establish the criteria for making these regulatory allocations, but also limit (more or less) the ability of Member States to prefer at least some of their own national policies over the policies of other states whose laws may be deemed the governing law under the Rome I, II, III and IV Regulations. Conflict-of-law rules have traditionally served as one of the main vehicles by which national/local public policy concerns could be vindicated in the context of cross-border litigation. In practical terms, these rules are the lynchpin of legal sovereignty among states, since they allow the courts of each country to determine when to assert itself vis-à-vis another sovereign in the context of litigation, and when to yield. By ‘domesticating’ (or federalizing) one of the key tools of Member State sovereignty under international law, the EU has tinkered with historically sacrosanct rules that define and maintain boundaries between different legal systems. As such, the EU’s move into the conflict of laws field constitutes a real constraint on national sovereignty.

Europeanization of conflict of laws is also significant because of the relationship of these rules to the tension between diversity and uniformity of *substantive* private law.¹²⁵ Conflict-of-laws rules play a key role in the debates between proponents of greater legal convergence or systemic coherence,¹²⁶ on the

¹²⁴ O’Hara and Ribstein (2008, 2009) argue in regard to the conflict of laws that the decentralized federalism found in the United States offers advantages over the centralized system that has emerged in the EU, since the U.S. has sparked a type of law market that helps constrain inefficient state regulatory efforts.

¹²⁵ Here I mean private law in the traditional sense used in Civil Law countries, and am not referring primarily to “economic law” (Buxbaum 2009), although the categories do overlap, particularly in the EU context. The original EEC Treaty did not foresee a single body of European private law to govern fundamental matters such as contract, tort, property, or family law. It did, however, expressly contemplate some harmonization in the field of company law, and included a general provision that allowed for “approximation” (harmonization) of laws, where doing so would “directly affect the establishment or functioning of the common market.” The process of harmonizing company law began already in the 1960s (Grundmann 2004; Stein 1972). This general harmonization tool was too unwieldy to eliminate all obstacles to the free movement of goods, persons, services and capital, as became apparent by the mid-1980s. The Commission’s 1985 White Paper drew attention to the “costs of non-Europe” (Cecchini Report 1998). It was followed in short order by the first major revision of the founding treaties – the 1986 Single European Act (SEA) – which jump-started the stagnated European integration process, and spurred a push to complete the internal market before the end of 1992. Harmonization of private law was at most a minor theme in the debates leading to this tectonic shift, though one can find contemporaneous references that characterize the existence of divergent legal rules as a barrier to trade. In this view, the “legal differences and the uncertainty amongst traders” constitute costs of non-Europe (Basedow 1998: 28), and an “Internal Market sooner or later needs for its proper functioning unified or at least harmonized rules of private law” (Drobnig 1996: 20). See also Buxbaum (2009: 63) (“[M]uch national law ... must move up one step”).

¹²⁶ See, e.g., Kötz (1998).

one hand, and those who are willing to tolerate fragmentation in order to preserve legal diversity,¹²⁷ on the other. The more legal convergence, the less need for such rules, and vice versa. The fact that the EU has largely federalized choice of law rules might be seen to imply a commitment to private law diversity or pluralism,¹²⁸ insofar as conflict of laws provides a rough substitute for uniform substantive laws.¹²⁹ This view is consistent with recent EU policy statements about the need to respect the diversity of national legal systems and cultures. The crucial point is that there is a *nexus* between the EU's halting movement towards harmonization of substantive private law, on the one hand, and the rapid evolution of the private international law dimension of the EU's civil justice agenda, on the other.

3. Conclusions

Viewed as a whole (Hartnell 2015a), the rhetoric of 'judicial cooperation in civil matters' reveals that civil justice is expected to play a key role in transcending the EU's humble origins as a mere market and constructing an "ever closer union" (Preamble, TFEU). The lofty rhetoric and ambitious proposals suggest that EUstitia is more than the sum of its many parts. It remains to be seen whether, and if so to what extent the 2014 backlash – in the form of the European Council's Strategic AFSJ Guidelines for 2015-2020 – affects the hitherto widening spire of developments in the civil justice field. While no legal scholar "could underestimate the importance" of the EU's burgeoning civil justice field (Biavati 2001: 92), their implications have, until very recently, gone largely unnoticed outside the legal field.¹³⁰ From the earliest days after communitarization by the Amsterdam Treaty, 'judicial cooperation in civil matters'

¹²⁷ Hay, Lando & Rotunda (1985: 161) argued a generation ago that "integration does not require uniformization. Variation in the laws of the different jurisdictions is not only inevitable but to some extent also desirable." Harlow (2002: 340) provides a more recent and impassioned "counter-argument for diversity and legal pluralism within the EU."

¹²⁸ Vanessa Mak has just come out with an interesting paper along these lines, but it is a perennial discussion in EU legal circles.

¹²⁹ In some cases, the EU takes the process one step further. For example, the EU's e-commerce directive's use of the country-of-origin principle "replaces far-reaching substantive harmonization as well as the detailed elaboration of choice-of-law rules" (Meeusen 2004: 85).

¹³⁰ For early explorations of the significance of these developments, *see* Basedow (2000); Remien (2001); Hartnell (2002: 117-38); and Heß (2002). For more recent explorations, *see* Storskrubb (2008); Tulibacka (2009); Kelemen (2011); Kramer (2012a); Van Den Eeckhout (2013); Vernadaki (2013). With the exception of Kelemen, all authors cited are legal scholars.

has been framed as a “fundamental stage in the creation of a European judicial area” (Vienna Action Plan 1998: ¶ I.16), which in turn has been linked to overarching political as well as pragmatic goals.

3.1 *EUstitia as a Mode of Governance*

EUstitia stakes out a “new political field” for Europeanization, which not only empowers EU institutions, but also imposes on them a duty to realize the European judicial area as a “new step in the integration process.” (Heß 2002: 4-5). Many of the steps that have been taken (or proposed) thus far to create the “genuine area of justice” in the field of civil law are of a highly technical nature, and address themselves to concrete procedural problems arising from the diversity of the Member State legal systems that are bound together into the Union. However, EU action in the field is increasingly directed towards institutional aspects of the administration of justice itself, as well as towards normative convergence of both substantive and procedural law, and hence have potentially far-reaching consequences.

Yet even if EUstitia consisted only of technocratic rules aimed at making the wheels of justice turn more smoothly, it would be a mistake to overlook them. The apparent “distinctions between constitutional, public, and private law are only matters of degree” (Shapiro 1964: 34-5). Technocratic tinkering in procedural fields can influence outcomes in particular cases, alter the sheer availability of justice within the EU, and spur the development of substantive EU law.¹³¹ Like other “shifts in organization and jurisdiction,” these procedural changes “are never simply technical,” but are “almost

¹³¹ As an aside, two basic pathways for spinning the ‘gold’ of substantive law from the ‘straw’ of technical procedural rules of the sort that make up much of EUstitia come to mind. First, when interpreting EU civil justice legislation, such as rules relating to mutual recognition or choice of law concepts, a court called upon to demarcate the scope of an EU regulation might offer a *definition* of a private law concept, such as one arising in the context of family law. The EU legislator has taken pains to erect a barrier between procedural rules and more basic questions of civil (i.e., private) law, but it is a difficult boundary to maintain, and it is easy to imagine that a Member State court or the EU’s Court of Justice might cross the line into substance. See, e.g., Brand (2014: 371), who analyzes the overlap or confluence between private international law rules in the EU and substantive law. Second, cases arising under civil justice legislation could trigger fundamental questions about *supplementary or unwritten sources of EU law*, which refers to the growing – and bottomless – body of fundamental rights and other general principles of EU law. While the formal relationship between the CJEU and the European Court of Human Rights in Strasbourg (ECtHR) remains uncertain, pending the EU’s accession to the Council of Europe (and its European Convention on Human Rights), it is difficult to imagine that the EU Court would relinquish the opportunity to develop its own body of jurisprudence relating to fundamental rights and general principles as they relate *inter alia* to civil justice. See *generally* Lenaerts & Gutman (2004: 7), who observe that “the ‘hard core’ of European ‘federal common law’ ... appears ... particularly within the fields of European private law: judicial lawmaking stemming from various areas of Community law in which the Court of Justice is confronted with adjudicating a dispute at the heart of which is a term, a concept or a rule derived from a provision of the Treaties ... or of a Community measure ... for which the Community legislator *has not* yet been given competence under the Treaties.”

invariably vehicles for policy change” insofar as they imply a “shift in who gets what,” which is the “basic question of politics” (Shapiro 1964: 37). The “distinction between process and substance is notoriously slippery” (Brest 1981), particularly in the EU (e.g., Lenaerts & Gutman 2004; Brand 2014).

By entering the civil justice field, the EU has given rise to a new hybrid legal form in the context of transnational governance. EUstitia ‘domesticates’ at the regional level rules that formerly had the character of ‘national’ rules governing ‘international’ relations among sovereign states. As Heß (2002: 5) puts it, the EU is creating a “European Transnational Procedural Law” that constitutes a “distinct ... new procedural type between national and international civil procedure law.” In this regard, the EU appears to be ‘more federal’ than the United States, where many of the issues being Europeanized remain a matter of state prerogative under the U.S. Constitution.

Lastly, developments surrounding EUstitia reveal a growing awareness in Europe that litigation is a complex form of governance (Shapiro & Stone Sweet 2002b: 294).¹³² The Commission’s influential Governance White Paper (2001) does not explicitly treat litigation as a mode of governance, but it does cross-reference themes that have become part and parcel of the rhetoric surrounding civil justice. For example, the Governance White Paper calls upon “national lawyers and courts” to become “more familiar with [EU] law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation” (id. at 25). Like the Governance White Paper, which was a tool-kit designed to narrow the EU’s legitimacy gap (Höreth 2001), the EU’s civil justice project is not limited to the perennial concern with ensuring adequate enforcement of EU law, but has also been yoked to the enormous tasks of enhancing the legitimacy of EU governance, and putting meat on the bare bones of EU citizenship, which the 1992 Maastricht Treaty grafted onto the corpus of European legal heritage.

From today’s standpoint, it is clear that the EU views civil justice as a vital dimension of European governance and citizenship, and a key strategy for addressing its contemporary governance challenges. However, these lofty conceptions were largely absent from the process that led to the Europeanization of the civil justice field in the 1990s (Hartnell 2015c)

¹³² By ‘governance’ I mean the “authority to make, interpret, and enforce rules in a given social setting” (Stone Sweet Fligstein & Sandholtz 2001: 7).

3.2 *EUstitia as a Channel toward further Judicialization of European Politics*

There is an historical nexus between litigation and European integration (Cichowski 2001; Stone Sweet 2000 & 2004). Member State courts have played a vital role in creating and maintaining the EU's legal order (Alter 1996 & 2001; de Búrca & Weiler 2001; Burley & Mattli 1993; Stone Sweet 2004; Weiler 1991 & 1994). Yet attention to the themes of constitutionalization and judicial dialogue, on the one hand, and to efforts to improve enforcement of EU law, on the other, does not exhaust the role of dispute resolution in European integration, in general, or of the Member State courts, in particular. The study of judicial politics in Europe therefore cannot be limited to understanding the role of Member State courts as enforcers of EU law, or interlocutors for the Court of Justice. Indeed, lower courts are not inherently 'less political'; indeed, they "collectively make a great deal more law than the [highest constitutional court, and some of them] make considerably more policy in particular areas than do the courts above them" (Shapiro 1964: 34). Recent scholarship extends the study of judicial politics by attending to the growing role of lawyers, courts and litigation in regulatory and administrative processes across Europe (Kelemen 2011: 5; see also Kagan 2007).

The EU's civil justice project conceptualizes Member State courts as key drivers of integration, and aims to strengthen their capacity to participate in European governance through the process of judicialization. Unlike early neo-functional accounts of European integration, which emphasized the role of Brussels and new supranational institutions as the locus of transnational governance (Haas 1958), 'new' institutional theory broadens our range of vision to take in virtually all arenas where actors interact and produce collective governance. This perspective draws attention to European arenas where "firms, governments, and organizations comprised of citizens from European societies construct new local orders," and shuns studying political processes in "isolation from the larger social and economic processes in which they are embedded" (Fligstein 2000: 26-28). Member State courts are such 'glocal' arenas where transnational governance is generated from the interaction of social, economic, and political forces interact in the pursuit of private justice.¹³³ The judicialization dynamic links the micro-

¹³³ Vauchez (2007b) argues that "legal and judicial areas" are more than the "mere surface of the heavy social processes that shape European integration," and insists that they are "actually one of the essential spaces where the government of Europe is being produced." As such, the European legal field occupies a critical position in a EU polity deprived of a State organizing in a perennial way the mediation between social interests."

level strategic behavior of individual actors to the development of the macro-level normative structure (Stone Sweet 2000: 196), or what Gerstenberg (2002: 191) calls “an increasingly common chain of precedent.” EUstitia is thus consistent with the polyarchical vision, in which the judiciary is seen “not ... standing in an aloof place in the political order, ... opposed to society, but rather as part of a continuum on which other governance arrangements are also placed” (id. at 184).

3.3 *EUstitia as a Lynchpin of Legitimacy in the EU*

The EU’s “genuine area of justice,” according to an early formulation, aims to ensure to “each European citizen security for themselves and their property and the respect of individual freedoms and fundamental rights” (Avignon Declaration 1998).¹³⁴ The invocation of positive integration goals such as these, together with the explicit incorporation of private citizens into the governance narrative surrounding the emerging civil justice field, reveal that EUstitia is envisioned as part of a strategy for alleviating the EU’s problematic legitimacy.

The legitimacy of EU governance was not much of an issue in the era of “tacit consent”, when integration was seen as an affair of elites who could rely on a docile public to support their decisions uncritically (Harlow 2002: 343). That era passed with the 1980s, and yielded to a chronic “condition of ‘forced reflection’ about the justification for political authority” (Beetham & Lord 1998: 124; see also Obradovic 1996; Scharpf 1999; Lindseth 1999 & 2001). The EU is “not a constitutionally constructed polity,” but has been “assembled piecemeal” over the course of more than half a century, upon the substrate of preexisting liberal democratic states (Hooghe & Marks 2001: 40). For this reason, democratic representation is lodged first and foremost in the Member States. This “disconnect from direct democracy is to a large extent hardwired into systems of supranational governance” (Grabbe & Lehne 2015: 5). However, representative democracy does exist at the EU level, and has grown stronger in recent decades. The European legislative process involves a modest measure of direct representation of EU citizens, via the European Parliament, and a substantial measure of indirect representation in the

¹³⁴ The Avignon Declaration (1998) was issued at the conclusion of a seminar on the criminal judiciary, held in Avignon during a French Presidency. It is not an official EU document, but is frequently quoted by EU institutions, including the EP and the Justice and Home Affairs Council.

Council of the EU,¹³⁵ via the ministers of elected Member State governments who populate the Council.¹³⁶ Still, the EU's own weak representative dimension has prompted persistent calls for more democratic accountability (e.g., Grabbe & Lehne 2015).¹³⁷

One major early response to the crisis of legitimacy was the Commission's Governance White Paper (2001: 8), which called for reforming "how the EU uses the powers given by its citizens." The White Paper aimed to overcome "disenchantment" by rendering policy-making "more inclusive and accountable," and by "connecting the EU more closely to its citizens" (id.). Its participatory vision of democracy envisioned an increasing role for civil society (Harlow 2002: 5; Armstrong 2002).¹³⁸ From this perspective, "everyone, or at least potentially everyone, is ... seen as a participant" in the governance process (Shapiro 2001: 369). The White Paper itself emphasizes regulatory processes as sites of new governance, and pays little heed to the role of courts, beyond their traditional role as implementers of Community law. Rather, it is EUstitia – the "genuine area of justice" – that connects concerns about citizenship and legitimacy to the judicial context.

Although not explicitly recognized as part of the EU's governance overhaul, EUstitia is equally dedicated to the goals of connecting Europe with its citizens, and getting "more people and organizations involved in shaping and delivering EU policy" (Governance White Paper 2001: 3). It aims to make the benefits of European integration "more tangible to the populations of the member states" (Bellamy & Warleigh 2001: 3), and thus to build legitimacy by rendering EU citizenship ever more relevant. By increasing access to justice and enhancing the capacity of Member State courts to participate in the development of European norms, the EU's civil justice project smooths one avenue by which social and economic actors can participate in European governance. Civil litigation in Member State courts provides

¹³⁵ The Commission has referred to the phenomenon of indirect representation as the EU's "double democratic mandate." Governance White Paper (2001: 8).

¹³⁶ Most recently, the Lisbon Treaty (2009) – sometimes called the "Treaty of Parliaments" – defined an enhanced role for *national* parliaments in the EU legislative process, and created new safeguards to ensure that the subsidiarity doctrine is observed (Article 12 TEU; Protocols 1 & 2, Lisbon Treaty).

¹³⁷ Grabbe & Lehne (2015: 1) call the EU's "dwindling democratic legitimacy ... an acute political challenge" and observe that support for the EU is dwindling even in countries where support was previously strong.

¹³⁸ This has been embodied in Article 10 TEU, and is spelled out in Article 11 TEU, which was added by the Lisbon Treaty in 2009.

a forum close to home where citizens can invoke their rights, interact with the European legal order, and play an active (albeit indirect) role in developing EU law and policy. Indeed, in their 2015 assessment of democratic legitimacy in the EU, Grabbe and Lehne (2015:1-2) argue that one key strategy for rebuilding trust with citizens is for the EU to “[p]rovide more ways for citizens to have their grievances addressed at the EU level. The protection of individuals’ rights at the EU level has become much stronger in recent years, but the public is largely unaware of these efforts and sees rights as mainly applying to minorities. The EU should widen access to justice and ensure more consistent protection of fundamental rights—and better explain these opportunities to citizens.”

Participation – whether in litigation, or in regulatory or political processes – can generate a sense of belonging and authorship, and thus has an “identity-forging constructivist dimension” (Gerstenberg 2002: at 183).¹³⁹ Litigation – even if adversary – is a social process that has the potential to shape the identity of European citizens and firms, and feeds into the political process by pushing normative development (Fligstein 2000: 37-40; Stone Sweet 2000). EUstitia contributes to the development of European “society by establishing bases for interaction and access points for influencing policy” (Stone Sweet & Sandholtz 1998: 11). In contrast to the neo-functional view of European integration, which linked integration to a transfer of actors’ “loyalties, expectations and political activities” from nation-states to EU institutions (Haas 1958: 16), EUstitia imagines the possibility – however far-fetched – of boot-strapping loyalty to the EU political order from interactions in national courts. Grabbe and Lehne (2015: 5) argue that trust could be (re)built through “incremental changes, however small” that “enhance the benefits of European integration as experienced by ordinary people” and respond to citizens’ needs.¹⁴⁰

The EU’s emerging “genuine European area of justice” aims to be a system “based on the principles of transparency and democratic control” (Tampere Milestones 1999: ¶ I.8), where “people can approach courts and authorities in any Member State as easily as in their own” (id. at ¶ I.3.5). The

¹³⁹ “European identity is never far from the institutionalized forms taken by the EU, since “[i]nstitution and identity are in constant historical reciprocal determination” (Burgess 2002: 480).

¹⁴⁰ “Politicians and institutions should become more emotionally intelligent about how they engage citizens – not just by showing that they sympathize, but by making incremental changes, however small, that enhance the benefits of European integration as experienced by ordinary people. If voters truly felt that politicians took them seriously, their confidence in the system would rise. They need to feel their voice is heard on issues they care about and to see personal and individual benefits from European integration.” Grabbe & Lehne (2015: 5).

Tampere Milestones (1999) clearly envision civil justice as a public good that bears upon the legitimacy of EU governance. While far less likely to command headlines than the other components of the AFSJ, civil justice is the day-to-day business of law, and constitutes a core feature of the lives of ordinary citizens, interest groups, and commercial enterprises in democratic society.¹⁴¹ EUstitia's bottom-up approach has the potential to affect virtually all civil litigation in Member State courts.¹⁴² This expands the reach of EU law, given that many more cases make their way to local courts of first instance, than end up before the EU's own courts or the Member State's constitutional or other high courts. Moreover, by implicating areas of private law that were previously relatively untouched by EU law – such as torts, contracts, family law, property, succession, and civil rights – EUstitia is on course to engage a much larger population than those persons who have been affected by movement towards Eurolegalism in other regulatory arenas (Kelemen 2011). The scope of civil justice is broad enough to touch everyone, at least potentially; EUstitia's impact is not limited to the traditional 'beneficiaries' of EU law, namely economic actors and persons who exercise their free movement rights to live, work, or study in another Member State.

Drawing litigants into the process of articulating norms in Member State courts goes hand-in-hand with giving citizens a greater personal rights-based stake in Europe. In this sense, the EU's civil justice project offers a set of predominately procedural means towards some profoundly substantive ends. It is a dual strategy that aims, first, to build loyalty to the increasingly proceduralized Europeanized legal order (Black 2000, 2001), and second, to "gradually 'bootstrap' [the EU] to legitimacy" by generating an increasingly common chain of precedent (Gerstenberg 2002: 191).¹⁴³ Normative convergence can be expected over time to affect the interests of more people, and in more profound ways: first, because civil justice implicates an increasingly broad swathe of private law that intimately affects peoples' lives; and second, because "judges will be called upon more and more to uphold not just the law, but moral

¹⁴¹ Criminal justice is part of the AFSJ, but it remained an intergovernmental (i.e., 'Third Pillar') field, and hence largely in the hands of the Member States, until the Lisbon Treaty entered into force at the end of 2009.

¹⁴² In fact, EUstitia's reach is even broader, since it also encompasses measures aimed at encouraging the use of 'alternative dispute resolution' (ADR) mechanisms as a substitute for civil litigation, especially by consumers.

¹⁴³ This twin strategy is not historically unique to the EU. See Hartnell (2015b), which traces the governance techniques of legal pluralism, civil procedure and the administration of justice in European history back to the Roman Empire.

standards, legitimate expectations, fairness” as European society becomes increasingly juridified (Schepel & Blankenburg 2001: 10).¹⁴⁴ This is especially likely since 2009, when the Lisbon Treaty incorporated the Charter of Fundamental Rights into the EU’s treaty structure, and accorded that extensive catalog of rights the status of justiciable primary EU law.¹⁴⁵ If the “people’s Europe” is being constructed through law, as Schepel and Blankenburg have argued (*id.* at 9), then EUstitia aims at nothing less than transforming the judicial arenas where European citizens’ claims are resolved, and thereby to render EU citizenship relevant, by making the benefits of European integration “more tangible to the populations of the member states” (Bellamy & Warleigh 2001: 3).

EUstitia is not only the bedrock upon which the internal market is established, but also a key strategy for legitimating European governance through enhanced emphasis on European citizenship, rights, and justice. Whether this strategy succeeds, is an entirely different question, and one that calls for sustained empirical study. The apparent severance of citizenship and justice in the course of the 2014 reorganization by the incoming Juncker Commission raises the question of the future institutional commitment to citizenship. Yet at the same time, justice itself appears to have gained status as a meta-narrative of European integration in academic circles (e.g., Douglas-Scott 2013 & 2013), along with the topic of civil justice itself (e.g., Andrews 2013). Moreover, the creation of a ‘super-Commissioner’ (Timmermans) for ‘Better Regulation, Inter-Institutional Relations, Rule of Law and Charter of Fundamental Rights’ whose role includes guiding the work of both DG Justice and DG Migration and Home Affairs (to which citizenship issues have been transferred) can hardly be read as a demotion of justice issues, but rather appears an institutional embodiment of their overarching nature.

¹⁴⁴ This is all the more true since 2009, when the Lisbon Treaty incorporated the Charter of Fundamental Rights into the EU’s treaty structure, and accorded that extensive catalog of rights the status of primary EU law. The key constitutional battleground for years to come will be the question of when the Charter applies. Article 51(1) of the Charter defines its scope in this way: “The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union ... and *to the Member States only when they are implementing Union law.* ...” (emphasis added). For an authoritative early analysis, *see* Rosas (2012). For a compelling analysis of case law, *see* van Bockel & Wattel (2013). The Court of Justice has spoken most recently on the issue in the *Siragusa* case (decided March 2014).

¹⁴⁵ The key constitutional battleground for years to come will be the question of when the Charter applies. Article 51(1) of the Charter defines its scope in this way: “The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union ... and *to the Member States only when they are implementing Union law.* ...” (emphasis added). For an authoritative early analysis, *see* Rosas (2012). For a compelling analysis of case law, *see* van Bockel & Wattel (2013). The Court of Justice has spoken most recently on the issue in the *Siragusa* case (decided March 2014).

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