

# DEVELOPMENTS OF EUROPEAN CIVIL PROCEDURES

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## disclaimer

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## Plan of treatment

- Legal basis for European civil procedure
- Existing acquis
- Perspectives for future development

## Legal basis

- Article 81
- Introduced in ToA, used since 2005
- Article 81 and 114 TFEU
- Only cross-border litigation, but internal market not obligatory premise
- CJEU case-law on choosing legal basis

# Existing acquis

- 1) Optional instruments
- 2) Horizontal instruments (non sector-specific)
- 3) Vertical instruments (sector-specific)

## Ad 1) Optional instruments

- Increasing role of OIs in EU private law (IP law, company law; but CESL to be withdrawn)
- Optional procedures: ESCP, EOP, EAPO (from 2017) + optional ODR platform (but not procedure)
- Optional titles: EEO, ESC

## Ad 2) Horizontal instruments

- Set minimum standards for a given area of procedural law horizontally (all civil cases)
- Legal Aid Directive
- Mediation Directive
- Collective Redress Recommendation
- Possible future horizontal instrument on minimum standards – EP appointed rapporteur recently for an INI report on that

## Ad 3) Vertical instruments

- They address civil procedure, but on the basis of Article 114 TFEU
- Under CJEU case-law legal, if harmonisation of CP not their main aim
- Consumer Injunctions Directive
- Consumer ADR Directive
- IPR enforcement directive
- Anti-trust Damages Directive (t.b. impl. 2016)



# Towards European Principles of Cross-Border Civil Procedure?

- Storme project (1990-1994)
- Increasing free movement of judgments → increased need for **mutual trust**
- ELI/Unidroit Project
- EP's forthcoming INI report on minimum standards of CP
- Commission request expert study on similar topic

## Harmonising substantive vs. procedural private law

- Legal basis – Article 81 TFEU is a strong and explicit mandate, as opposed to Article 114 TFEU
- Size of normative material – operative substantive private law much more voluminous and complex
- Character of legal norms – rules vs. standards; prevalence of rules in CP
- Scope – only cross-border (Art 81 TFEU) so a procedural dualism – should we be afraid of it?
- Subsidiarity & proportionality in favour

## CP and fundamental rights

- Right of access to justice (claimant's perspective)
- Right of the defence (defendant's perspective)
- Speedy proceedings (both parties' perspective)
- Active court vs. passive court (perspective depends on one's means to hire good lawyer, and varies according to legal culture)
- Substantive truth vs. formal truth (differences according to legal culture)
- Concerns over existing ex parte procedures

## Principles or optional code?

- Principles could be in the form of a directive – but would it make sense to apply it to cross-border cases only?
- An optional code could be chosen by claimant or defendant if case is cross-border
- Model already existing for selected types of claims (ESCP, EOP, EAPO)
- Regulatory competition (national CCP vs. cross-border CCP)
- Will judges and lawyers want to use it? Cf. ESCP...

# Conclusions

- EU enjoys a strong mandate to regulate cross-border civil procedure
- Potential not yet fully unleashed
- 3-track approach – concerns over coherence
- Towards principles of EU civil procedure or maybe even optional code for cross-border litigation
- Such an optional cross-border code more in line with subsidiarity than indistinctly applicable harmonisation of substantive law