THE IMPACT OF SECONDARY LEGISLATION ON THE LEGAL SYSTEMS OF MEMBER STATES. JURISPRUDENTIAL ASPECTS AND HARMONIZATION/INTEGRATION OF EUROPEAN PROCEDURAL LAW

O IMPACTO DO DIREITO DERIVADO NOS SISTEMAS JURÍDICOS DOS ESTADOS-MEMBROS. ASPECTOS JURÍDICOS E HARMONIZAÇÃO/INTEGRAÇÃO DO DIREITO PROCESSUAL EUROPEU

Dimitris Liakopoulos

ABSTRACT

The present work seeks to highlight the evident "links" between the aims pursued by the European legislator and the methods used, the intensity of the level of approximation and the aspects of European procedural law harmonized through mutual recognition and the principle of effectiveness. The aim is to carry out a discussion on the state of approximation and harmonization of the procedural rules within the European civil judicial area, but also a conclusive analysis on the perspectives of the evolution of the subject, about an overview of the various modalities and tools used in the harmonization process. The possibility of a transition from a strictly sectoral process harmonization model to a structural one will be assessed, by defining, at Union level, a set of fundamental principles by bringing together and examining a wide jurisprudence both by the Court of Justice of the European Union. To determine not only if this is possible in the current approach of the Treaties, but also if such an evolution is desirable and actually achievable. The methodology is based on the ultimate legislative of the EU law and jurisprudence of the CJEU.

Key words: mutual trust, principle of effectiveness, ECtHR, CJEU, recognition of foreign sentences, European procedural law, harmonization, European integration.

RESUMO

O presente trabalho busca destacar os evidentes "elos" entre os objetivos perseguidos pelo legislador europeu e os métodos utilizados, a intensidade do nível de aproximação e os aspectos do direito processual europeu harmonizados pelo reconhecimento mútuo e pelo princípio da efetividade. O objetivo é realizar uma discussão sobre o estado de aproximação e harmonização das regras processuais no espaço judiciário civil europeu, mas também uma análise conclusiva sobre as perspectivas da evolução do assunto, sobre uma visão geral das várias modalidades e ferramentas utilizado no processo de harmonização. Será avaliada a possibilidade de uma transição de um modelo de harmonização de processos estritamente setorial para um estrutural, definindo, a nível da União, um conjunto de princípios fundamentais, reunindo e examinando uma ampla jurisprudência pelo Tribunal de Justiça da União Europeia . Determinar não apenas se isso é possível na atual abordagem dos Tratados, mas também se tal evolução é desejável e realmente alcançável. A metodologia baseia-se na legislação legislativa final e na jurisprudência do TJUE.

Palavras-chave: *confiança mútua, princípio da eficácia, TEDH, TJUE, reconhecimento de sentenças estrangeiras, direito processual europeu, harmonização, integração europeia.*

INTRODUCTION

The construction of a European civil justice area is one of the most successfully pursued objectives of the European Union in recent decades (GLAS, KROMMENDIJK, 2017, pp. 568ss; HORSPOOL, HUMPHREYS, 2016; LIAKOPOULOS, 2018; HALBERSTRAM, 2015, pp. 114ss; ECKHOUT, 2015, pp. 964ss). The main purpose of such a common space is to provide citizens and businesses with easy and effective access to cross-border justice, also in order to facilitate the complete realization of a barrier-free market by removing legal obstacles to free movement of people, goods and capital.

Especially with regard to the free circulation of foreign judgments, it has been shown that the process of procedural harmonization (LIAKOPOULOS, 2018) has evolved asymmetrically with respect to the principle of mutual recognition (ANDREWS, 2012), in the sense that an ever greater ease of circulation of such decisions has not corresponded an equally profound harmonization of the legal systems of the Member States. More specifically, following the transfer from the Member States to the EU of the jurisdiction relating to the recognition and enforcement of foreign legal measures (LIAKOPOULOS, 2010), the EU legislator has not in parallel developed a set of common provisions to "infuse", to within the legal systems of the Member States, an adequate level of protection of fundamental rights (DOUGLAS-SCOTT, HATZIS, 2017, p. 511ss), but rather preferred to build an area of free movement of decisions based on the principle of mutual trust (FALLON, KRUGER, 2012-2013, pp. 6ss).

In particular, according to the writer the Court of Justice of the European Union (CJEU) is concerned with fundamental rights only as part of that (i.e. EU) order (LIAKOPOULOS, 2018). This means solicitude for international human rights agreements comes with a caveat (LIAKOPOULOS, 2018). The CJEU will show solicitude for international human rights agreements only in so far as these international agreements do not undermine the legal and constitutional architecture of the European Union. This is indeed seems to be the attitude of the CJEU, and it is quite extraordinary. Surely a commitment to human rights is of little value if it cannot apply even in those cases in which the enforcement of a right may undermine the participant state’s constitutional architecture? The issue of prisoners’ votes in the UK has proved controversial, partly because the decision of the European Court of Human Rights (ECtHR) in Hirst v. United Kingdom of 6 October 2005 collides with the UK constitutional principle of Parliamentary sovereignty, given that primary legislation disenfranchises sentenced prisoners in the UK (LIAKOPOULOS, 2015).

It does mean that the principle of trust interpreted through the role of the CJEU and dropped in the context of judicial cooperation, implies a presumption of a quite absolute respect for fundamental rights within the legal system of origin, of the fact that in every State of Union are available remedies capable of rectifying any violations of these rights (LIAKOPOULOS, 2012). Therefore, such a transfer of powers-combined with the latter principle-necessarily postulates that the limitations of sovereignty over the procedures for the control, recognition and enforcement of foreign court documents, and consequently of the judgments of the courts of other Member States, invest also the sphere of protection of fundamental rights (TRIDIMAS, 2013, pp. 368ss).

WHY HARMONIZE? TOWARDS A UNIFORM AND EFFECTIVE APPLICATION OF EUROPEAN UNION LAW.

If it was the jurisprudence of the CJEU, with the twin sentences Rewe (PRECHAL, WIDDERSHOVEN, 2011, pp. 31-32, 38ss)[1] and Comet (CREMONA, 2012)[2] of 1976, to introduce for the first time the limitations to the procedural autonomy of the States (BOBEK, 2011, pp. 306ss) through the principles of equivalence and indeed, this does not necessarily mean that the legislator has refrained from reinforcing the level of effective application of EU law through the establishment of ad hoc legislation.

So much so that Directive 89/665/EEC (FARGRIVE, LICHÉRE, 2011; ARROWSMITH, 2012, pp. 5ss)[3], on the subject of coordination of laws, regulations and administrative provisions relating to the application of appeal procedures on the awarding of public contracts, is one of the very first measures adopted by the Union capable of affect the procedural arrangements of the Member States.

The legislator will be able to carry out directly that balancing act between procedural and substantive rights of the plaintiff, the defendant and the public interests-which is the basis of every procedural law norm-in order to guarantee to EU law not only a minimum level of effectiveness, but the best possible effectiveness. Such an operation is evident within the Directive 2014/104/EC (FORRESTER, 2017, pp. 68ss)[4]-which establishes common procedural rules regarding actions for compensation for violations of competition law (JONES, SURFIN, 2016, pp. 892ss)-especially in those provisions which deal with defining the powers of disclosure of the judge (OLYKKE, 2011, pp. 180ss), extending them or limiting them not so much in correlation to the protection of the rights of the injured, but rather paying attention to the wider picture of the best repression of the violations of the antitrust law. Furthermore, also the "particular" and "subsequent" nature of the protection offered by the principles of effectiveness and equivalence (LECZYKIEWICZ, 2015)-which are reverberated on national laws only after the finding that a given rule is incompatible with EU law, as a rule it takes place in CJEU, and limited to it-can play a decisive role in the choice of the legislator to intervene directly in the harmonization of the procedural rules.

This circumstance requires a level of loyal collaboration between the Union and Member States (VON BOGDANDY, IOANNIDIS, 2014, pp. 64ss; JAKAB, KOCHENOV, 2017) which may be lacking in those cases in which there is a strong interest of the administrative and institutional apparatus to limit the application of the rules of EU law in particular areas, so much so that it leads to behaviors-even specious-whose ultimate goal is to exclude the effective application of EU law in a given field in a conscious and systematic way.

---

[1]CJEU, 38/73, *Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex and Feitelijke Vereniging De Belder* of 11 October 1973, ECLI:EU:C:1973:188, I-01989.

[2]CJEU, C- 45/76, *Comet* of 16 December 1976, ECLI:EU:C:1976:191, I-01043, parr. 5, 13 and 16.

[3]Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33-35.

[4]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1-19.

The European Commission (EC) in its white paper of 1985[5] had to complain about the substantial widespread application of the "Procurement" Directive 71/305/EC[6] and, at the same time, solicit the adoption of measures capable of guaranteeing its effective application. Even in those cases in which the Rewe principles are able to guarantee an adequate level of effectiveness of EU law, simple reasons of uniformity can in any case push the legislator to intervene directly in the definition of the procedural rules. It follows that, with the same minimum protection, the differences between the various legal systems of Member States may give rise to potential distortions of competition (STORME (eds), 1994, pp. 58ss). Always to give two examples related to the public procurement sector and the antitrust rules: a procedural law that imposed high charges for access to appeal procedures against the awarding of public procurement could create a "protectionist" effect of the establishment existing (TRYBUS, 2013, pp. 136ss), discouraging new companies-domestic and foreign-to enter the market of these services. Likewise, a national framework that would instead complicate the success of the compensation actions deriving from violations of the provisions on competition, with particularly restrictive rules regarding the power of the judge to order the companies involved to show certain documents proving the offense, would create an "attractive" effect with respect to all the major economic operators, who would enjoy a higher level of protection in one Member State than in another.

DIRECTIVES 89/665 AND 2007/66 ON APPEAL PROCEDURES CONCERNING THE AWARDING OF PUBLIC CONTRACTS

The objective of the so-called "appeals" directives, which are responsible for coordinating the laws, regulations and administrative provisions relating to the application of appeal procedures concerning the awarding of public contracts, supplies and works, can easily be derived from recitals n. 3, 4 and 6 of the original Directive 89/665/EC (BAUDENBACHER, 2015, pp. 618ss)[7]. They highlight how the legislative activity of the legislator has been motivated, on the one hand to ensure full effectiveness in EU procurement law, providing for "adequate procedures that allow the cancellation of illegitimate decisions and compensation of persons injured by (his) violation" (ARROWSMITH, 2012), on the other hand by the attempt to make the opening of public procurement matters to European competition as much as possible, by establishing effective and rapid remedies, whose absence or inadequacy may deter foreign companies from competing in the State of the contracting authority concerned. The measures have their legal basis in article 114 of the TFEU (ex article 100-A EEC and 95 EC), as legislation concerning the establishment and functioning of the internal market.

Coherently with the typology of implicit competence, they form the Directive and their scope is limited to procurement matters regulated by the provisions of EU law and, in particular, by Directive 2004/18/EC[8]. In its original form, Directive 89/665/EC constituted

[5]COM(1985)-310, Completing the Internal Market, White Paper from the Commission to the European Council, Bruxelles 14 June1985, par. 83.

[6]Council Directive 71/305/EEC of 26 July 1971 on the coordination of procedures for the award of public works contracts published in OJ L 185 of 16.8.1971.

[7]Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33-35.

[8]Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

mostly a set of relatively general obligations on the part of Member States, which referred to a series of requirements to which the review procedures should have complied with in order to guarantee the effectiveness of the Union, through a scrutiny of the decisions taken by the awarding authorities effectively and, in particular, as rapidly as possible. More specifically, the central article of the provision-n. 2-provided that the judicial or administrative authority invested by the appeals against the award procedures had been given appropriate powers in order to take precautionary measures as quickly as possible and to annul or have the unlawful decisions annulled and to grant a compensation for damages to persons injured by the violation.

As for the more properly procedural guideline, the provisions relating to the conduct of the review process were very sparse. Any determination of the effects of the annulment of the illegitimate decisions of the administration was left to national law and no provision was made for the manner in which the appeal was lodged or carried out, nor was any reference to the procedural rights of the parties. Only in the event that the Member States designate, as the authorities responsible for the above procedures, non-judicial bodies, the Directive was going to impose a series of properly procedural guarantees. In particular, there was a requirement to provide written reasons for their decisions, as well as certain guarantees regarding the appointment and termination of their members. They should have been subject to the same conditions as those applicable to the courts and, at least the president, should have had the same legal and professional qualifications as a judge. Furthermore, the proceeding should have been conducted in contradictory and the decisions taken on its outcome assisted by binding legal effects in the same way as those issued by other courts.

It can not be overlooked that such an approximation operation does not distinguish itself from a mere crystallization-in the legislative sense-of a series of elements capable of distinguishing an effective procedure from an inadequate one, such as the possibility of preparing precautionary measures, canceling illegitimate decisions, a conviction for damages. The clear and precise indication of these elements, although on the one hand facilitates the legislator and the administrative authorities of Member States in identifying certain aspects of the procedures in need of special attention, on the other the judicial bodies to identify possible violations of the law of Union-without having to resort to that complex interpretive procedure underlying the principle of effectiveness-little adds to the level of protection of EU law that could have been achieved simply on the basis of the obligations set out in articles 4 (3) and 19 (1) TEU and of the Rewe principles.

It follows that, in the absence of a concrete and loyal cooperation by the Member States in the implementation of such general and principle indications, which reserve to the national legislature any other regulatory burden (CARANTA, EDELSTRAM, TRYBUS, 2013)[9]-which had already been registered in relation to the effective fulfillment of the provisions of Directive 71/305/EC (DE KOINICK, FLAMEY, 2009, pp. 76ss; HEBLY, BRANTS, 2011; BOVIS, 2012, pp. 218ss; WILMAN, 2015, pp. 95ss)[10] and was itself the underlying motivation for the adoption of Directive 89/665/EC-we necessarily find ourselves faced with all the problems that already prevented the abstract obligations contained in the principle of effectiveness and within the aforementioned articles of the Treaties, to guarantee an adequate level of effectiveness to EU law (BAUDENBACHER, 2015).

In particular see the position of the CJEU (procedural integration) in case: C-601713, *Ambisig* of 26 March 2015, ECLI:EU:C.2015:204, published in the electronic Reports of the cases.

[9]CJEU, C-470/99, *Universale-Bau AG* of 12 December 2002, ECLI:EU:C:2002:746, I-11617, par. 71.

[10]See recital n. 1 of Directive 89/665.

In case Universal Bau the CJEU, while acknowledging the fact that Directive 89/665/EC did not provide for any provision specifically relating to the terms concerning the proposition of appeals, it had in fact underlined how the modalities envisaged by national law would not have had to be such to deprive the provisions relating to the procedures for their useful effect (THOMSPON, GORDON, 2017)[11].

In the Santex [12] judgment, however, it was linked to that elusive practice, widespread among the contracting authorities, aimed at speeding up as much as possible the signing of the contract following the (illegitimate) award, with the sole purpose of making the effects irreversible even after annulment of the award (so-called race to signature) (CARANTA, EELSTRAM, TRYBUS, 2013). This benefits from the separation between the award procedure (regulated by public law) and the signing and subsequent execution of the contract (regulated by private law) common to many of the Member States. The latter problem stemmed on the one hand from the fact that article 2 (6) of Directive 89/665/EC (BAUDENBACHER, 2015) reserved for the discretion of the national legislator the determination of the effects that the cancellation of the award decision was to unfold on the contract already concluded, with the consequence that very often the only protection offered to the preterm company was the one, not very interesting (WILLIAMS ELEGBE, 2012, pp. 212ss; BROWNSWORD, MICLITZ, NIGLIA, 2011, pp. 580ss)[13], of the refreshment by equivalent. On the other hand, the fact that article 2(1) of the same Directive, even including among the cancellable decisions also the award decision (WILLIAMS ELEGBE, 2012, pp. 91ss)[14], did not provide for any term[15] between the awarding of the contract and its signature, thus substantially depriving the company damaged by every possibility-including the precautionary one (which could well be quick, but certainly not instantaneous)-to block the process of concluding the contract before it was completed.

Precisely these shortcomings gave rise to the subsequent adoption of Directive 2007/66/EC (SCHEBESTA, 2015, pp. 25ss; ARROWSMITH, TREUMER, 2012, pp. 334ss; SÁNCHEZ GRAELLS, 2015)[16], which went to innovate the previous legislation

---

[11]CJEU, C-327/00, *Santex* of 27 February 2003, ECLI:EU:C:2003:109, I-01877, parr. 48-54-56ss; C-406/08, *Uniplex* of 28 January 2010, ECLI:EU:C:2010:45, I-00817, parr. 37ss.

[12]CJEU, C-327/00, *Santex* of 27 February 2003, op. cit.

[13]CJEU, C-503/04, *European Commission v. Germany* of 18 July 2007, ECLI:EU:C:2007:432, I-06153, par. 33; C-20/01, *European Commission v. Germany* of 10 April 2003, ECLI:EU:C:2003:220, I-03609, par. 39.

[14]CJEU, C-81/98, *Alcatel* of 28 October 1999, ECLI:EU:C:1999:534, I-07671, parr. 29ss. The CJEU stated that: "(...) Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract (...) is in all cases open to review under a procedure whereby unsuccessful tenderers may have that decision set aside if the relevant conditions are met (...)".

[15]CJEU, C-212/02, *European Commission v. Austria* of 24 June 2003, ECLI:EU:C:2004:386, not published, parr. 13-21-23. The CJEU clarified that review should be made possible by allowing for a reasonable period between the award decision and the conclusion of the contract. In effect it introduced a standstill period. Such a standstill period has now been inserted into the Remedies Directives by Directive 2007/66. This was deemed necessary because the Member States gave effect to the ECJ's ruling in different ways, while some adopted no or insufficient measures.

[16]Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31-46. European Commission Final Study Executive Summary, Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, MARKT/2013/072/C, written by Europe Economics and Milieu, 2015, p. 9ss. See also for the same Directive: Commission Staff Working Document, Evaluation of the Modifications Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC Concerning the European Framework for Remedies in the Area of Public Procurement/REFIT Evaluation, COM(2017) 28 final, Brussels, 24.1.2017.

through the introduction of common provisions aimed at clearly defining: when a contract should necessarily be considered without effects to following an annulment decision, which alternative sanctions may apply where the consequence of unlawfulness does not lead to the deprivation of the effects of the contract[17], a minimum period allowing an effective recourse between the award decision of a contract and the conclusion of the related contract[18], a minimum period of limitation or forfeiture of appeals against the awarding procedures[19].

The "surgical" character of the changes made, is evident. And indeed, limiting ourselves solely to the assessment of the harmonization potential of the provision, the measures implemented by the 2007 Directive merely re-demonstrate the eminently functional nature that the procedural rule has, in this case, with respect to the full realization of substantive competence[20].

This has been achieved by making sure that the companies that consider themselves injured can first of all access the appeal procedures (hence the attention to the discipline of the terms), secondly that the outcome of this procedure can be linked to legal consequences in able to guarantee the effectiveness of EU law through proportionate and dissuasive sanctions (hence the involvement of the sanctions and ineffectiveness of the contract) (CARANTA, EELSTRAM, TRYBUS, 2013).

Thus the involvement in the harmonization of the procedural legislation is relevant only in cases where the regulation of Member States proves insufficient to achieve the objectives of effectiveness pursued by the legislator and, even in these cases, is limited to those indications strictly necessary to achieve these objectives. The most illustrious injured[21] by such an approach, which goes so far as to ignore all the other aspects of the

[17] Article 2 of the Directive provides that alternative sanctions must be effective, proportionate and dissuasive. The types of penalties provided for therein are: the imposition of pecuniary fines on the contracting authority or the reduction of the duration of the contract.

[18] Specifically, Article 2 bis, par. 2 provides that: "The conclusion of a contract following the award decision of a contract governed by Directive 2004/18/EC cannot take place before the expiration of a period of at least ten calendar days starting from the day following the date on which the award decision was sent to the tenderers and candidates concerned, whether the shipment was by fax or by electronic means, or if the shipment was made by other means of communication before the expiration of a period of at least fifteen calendar days from the day following the date on which the contract award decision was delivered to the tenderers and tenderers concerned, or at least ten calendar days from the day following the date of receipt of the award decision (...)".

[19] Article 2c of the Directive lays down minimum terms of at least ten calendar days from the day following the date on which the contracting authority's decision was sent to the tenderer, whether the shipment was by fax or by electronic means, or , at least fifteen calendar days from the day following the date on which the contracting authority's decision was sent to the tenderer or candidate, or at least ten calendar days from the day following the date of receipt of the decision of the administration contracting authority, where the shipment has taken place using other means of communication.

[20] Article 2d of the Directive provides, inter alia, for Member States to ensure that a contract is deemed to be ineffective if the contracting authority has awarded a contract without prior publication of the notice in the Official Journal of the European Union without this being allowed pursuant to Directive 2004/18/CE; in the event of a breach of the standstill terms, if this violation has deprived the claimant of the possibility of availing itself of remedies before the conclusion of the contract and when that violation is added to an infringement of Directive 2004/18/EC capable of influencing the applicant's opportunity to obtain the contract; in the cases referred to in the second subparagraph of Article 2b (c) of this Directive where Member States have provided for the derogation from the suspensive term for contracts based on a framework agreement and a dynamic purchasing system under Directive 2004/18/EC.

[21] The aspect concerning the protection of fundamental rights connected to the notion of due process is ignored here. If the guarantee for effective judicial protection is certainly a general principle of EU law-as well as a right enshrined in Article 6 ECHR and 47 of the Charter that the EU must protect-this does not mean that it has the power to approximate procedural legislation with the sole aim of guaranteeing a (better)

procedure not directly connected with the effectiveness of substantive legislation-leaving them to the full discretion of Member States-is certainly that of the uniform application of the Union law. An element that is of some importance within the economic sectors and, therefore, could justify a joint action. In this regard, it is worth noting that the issue of possible competitive distortions resulting from a different level of accessibility of redress procedures in the field of procurement was presented in the case of Orizzonte Salute (MICKLITZ, 2014; MENDES, VENZKE, 2018)[22], in particular in relation to the amount of court costs due for the submission of appeals pursuant to Directive 89/665/EC (BAUDENBACHER, 2015).

DIRECTIVE 2004/48/EC ON THE RESPECT OF INTELLECTUAL PROPERTY RIGHTS AND DIRECTIVE 2014/104/EC WHICH REGULATES THE ACTIONS FOR COMPENSATION FOR DAMAGES FOR VIOLATIONS OF THE PROVISIONS OF COMPETITION LAW.

The purpose of ensuring the full effectiveness of EU law has also led to the adoption of two further acts aimed at approximating the procedural rules of Member States. This refers, in particular, to Directive 2004/48/EC (BONADIO, 2008, pp. 320ss; ARAUJO, 2013, pp. 455ss), on the respect of intellectual property rights, and to Directive 2014/104/EC on the approximation of certain rules that regulate actions for compensation for damages due to violations of the provisions competition law. The two measures share with the Directives: 89/665/EC and 2007/66/EC (HEBLY (ed.), 2011) the intent to guarantee the effective application of the substantive law of the Union through an intervention on the procedural modalities that regulate the procedural actions put to protection, respectively, of the work of ingenuity and of free competition. In particular, the CJEU determined in Fastweb [23] that the Remedies Directive is designed to strengthen already existing arrangements for ensuring the effective application of the EU rules on the award of public contracts. The CJEU could not find any conflict between the Remedies Directive and the right to an effective remedy. Conversely, as regards the interplay between the right to an effective remedy and the Remedies Directive, it can be added that the EC has noted that the Remedies Directive is fully in line with the objective of article 47 CFREU.

However, they contain a very different philosophy of intervention compared to the aforementioned "appeals" directives. The latter, in fact, are characterized by a "defensive" approach to procedural law, in the sense that they affect only the limits in which this is necessary to avert the substantial paralysis of the substantive rules, caused by the application of national procedural rules particularly restrictive practices or "elusive" practices implemented by the administrative authorities of the Member States. The effect on procedural law is therefore achieved by "defusing" improper uses of the broad autonomy that the Member States enjoy in procedural matters, aimed at limiting-indirectly

level of respect for fundamental rights. Indeed, if the Charter and the Treaties postulate an obligation for Member States to respect the right to a fair trial, they will have to independently take all appropriate measures to fulfill this obligation. A competence of the Union in this sense could arise only if the determination of a set of minimum standards for the protection of procedural rights became absolutely necessary for the achievement of the objectives that justify the two types of procedural competence that we have identified (implementation substantial competence or completion of the European area of freedom, security and justice).

[22]CJEU, C-61/14, *Orizzonte Salute* of 6 October 2015, ECLI:EU:C:2015:655, published in the electronic Reports of the cases.

[23]CJEU, C-19/13, *Ministero dell'Interno v. Fastweb SpA* of 11 September 2014, ECLI:EU:C:2014:2194, published in the electronic reports of the cases.

and through the procedural means-the effects of Union in areas where they maintain significant economic or political interests, which do not necessarily coincide with those of the Union. In essence, this is the same approach that underlies the principle of effectiveness (BERRY, HOMEWOOD, BOGUSZ, 2013), but in the present case, it was preferred to crystallize in a series of clearer and more precise provisions, considering the particular circumstances of the case. There is, in fact, a notable difference between the lack of effectiveness of EU law caused by one -even if guilty-inertia of the legislator, which fails to update its legal system in order to guarantee adequate protection of the rights conferred by the law of Union, and that deriving, instead, from a series of "malicious" behaviors by the institutional and administrative authorities of the Member States, which consciously try to hinder or circumvent the provisions of EU law. In the first case, the only abstract obligations deriving from articles 4 (3) and 19 (1) of the Treaties may prove sufficient to temporarily resolve the situation pending legislative intervention, but in the second, the conscious "resistance" of the Member States may require more incisive actions, which can also be substantiated in a more or less extensive subtraction of procedural competence through an ad hoc legislative act.

With regard to the first of the two measures in question, the objective of Directive 2004/48/EC (known as IPRED) (LARSOON, 2011; SAVIN, 2013, pp. 95ss) is to "ensure a high, equivalent and homogeneous level of protection of intellectual property in the internal market" with the aim-in addition to ensuring the effectiveness of the acquis communautaire in the field of intellectual property-to encourage innovation and investment within the internal market, ensuring effective and rapid remedies for the repression of infringements, and to curb the distortions of competition caused by existing disparities at national level regarding instruments aimed at ensuring compliance with these rights. The regulatory framework that adopts the harmonization methodology for minimum standards, is made up of a whole series of provisions of principle which, while identifying a minimum level of protection of the prevailing position-in this case that of the holders of intellectual property rights-do not impose, however, a fixed, precise and predetermined balance between opposing interests. The legislator is concerned, in fact, of safeguarding those rights which are relevant for achieving the objectives of the Union, leaving to the Member States the choice on whether to adopt even more stringent measures regarding their protection. Coherently, article 2 of the Directive states that the rules contained in it do not affect national or current national instruments, provided that these are more favorable to the rights holders. The question for Directive 2014/104/EC may vary where the implementation of particular purposes requires, not only the protection of a particular legal position, but a precise level of reconciliation between different conflicting interests. As regards the individual provisions, after a general reference to the principles of effectiveness and equivalence, the Directive examines a whole series of procedural institutions with the aim of facilitating the holder of intellectual property rights in the their judicial protection.

More specifically, common minimum standards are set for the retrieval of the evidence [24] , injunctive and precautionary measures [25] , as well as for the corrective/sanctioning measures following the decision on the merit[26]. The action of the legislator focuses on bringing together, as far as possible, all those areas in which the discrepancy between the various national laws could damage the common market and the effectiveness of Union law. Indeed, if a Member State provided for less stringent measures, or more complex protection proceedings, it would create, on the one hand, an obstacle to free competition-since "legitimate traders would tend to avoid that Member State because of the market share occupied by pirated or counterfeit products and the difficulty of maintaining competition in such a disrupted market"[27]-on the other hand, an obstacle to the full effectiveness of the measures taken by the Union to protect intellectual property rights not only on its territory, but also on that of all other Member States. If we take into account the principle of free circulation of goods and services, the phenomenon of piracy and counterfeiting could exploit the inequalities of risk with regard to the sanctioning regime in the matter of intellectual property to place its production chain within one of the Member States members with the milder regime, and then spread their illegal products throughout the single market. Moreover, the location of the center of illicit activities in a particular country would alter, among other things, the flow of trade since an activity, albeit illegitimate, requires raw materials and generates however induced, "benefiting" a single State to the detriment legal activities operating throughout the Union.

Furthermore, the legislator is also responsible for ensuring a certain level of uniformity in terms of accessibility of procedures for the holders' rights, article 14 of the Directive constitutes, in fact, one of the few examples-if not the only one -provisions to contain the amount of court fees[28] (which must be "reasonable and proportionate") outside the legislation adopted pursuant to art. 81 and 82 TFEU (EDWARD, LANE, 2013;

---

[24]Articles 6, 7 and 8 shall in particular provide that the judicial authority may order evidence of evidence in the possession of the counterpart including bank, financial or commercial documentation (article 6), to have rapid and effective provisional measures for to safeguard evidence that could otherwise be concealed or destroyed (article 7), may order that information on the origin and networks of distribution of goods or provision of services infringing an intellectual property right are provided by the author of the violation and any other person who: "a) has been found in possession of goods that are the object of a violation of a right, on a commercial scale; b) has been surprised to use services that are the object of a violation of a right, on a commercial scale; c) has been surprised to provide on a commercial scale services used in activities of violation of a right; d) has been indicated by the subjects referred to in letters a), b) or c) as a person involved in the production, manufacture or distribution of such products or in the provision of such services "(article 8).

[25]Under Article 9, Member States shall ensure that the competent judicial authorities may, at the request of the claimant, issue an interlocutory injunction against the alleged infringer in order to prevent any imminent infringement of an intellectual property right, and the seizure or delivery of products suspected of jeopardizing an intellectual property right in order to prevent them from entering or circulating in commercial circuits.

[26]As regards the measures subsequent to the decision on the merits, the directive provides that the competent judicial authority may: order, upon the request of the plaintiff, the appropriate corrective measures relating to the products resulting from the infringement such as withdrawal from commercial circuits, the definitive exclusion from circuits or their destruction (article 10); issue an injunction against the infringer to prohibit the continuation of the violation (article 11); order the author of the violation, knowingly implicated-or with reasonable reasons to be aware-in an activity of violation to compensate the right holder for damages appropriate to the actual prejudice suffered by this right because of the violation (article 13).

[27]COM (2003)-46 "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights".

[28]Article 14 of the Directive provides that: "Member States shall ensure that reasonable and proportionate court costs, as well as any other charges borne by the winning party, are normally borne by the losing party, unless compliance with the principle of equity does not allow it".

NOWAK, 2011; CHALMERS, DAVIES, MONTI, 2014; TILLOTSON, FOSTER, 2013). Similar, but with a more complex reading, it is instead the second legislation in question. As well as the appeals directives and the IPRED Directive, also Directive 2014/104/EC aims to ensure the effectiveness of EU law through the protection of the right of action of individuals, ensuring effective means for the purpose of asserting-in judicial or administrative seat-the rights conferred by EU law. Likewise, as well as the IPRED Directive, it pursues the achievement of an adequate degree of uniformity in the procedural modalities aimed at regulating damages actions for violation of the antitrust provisions, eliminating those discrepancies between the various disciplines capable of creating competitive distortions within the common market. As is known (ANDREANGELI, 2008, pp. 229ss), the function of the private as an "attorney general" of EU law constitutes a cornerstone of the system of the EU legal order, since it not only guarantees the horizontal effectiveness of the rules and principles advanced by the Union legislation, but it also contributes significantly to vertical compliance, i.e. by Member States, of secondary legislation. It is true that very often the effectiveness of EU law coincides with a better protection of the individual who claims, in the trial, the rights conferred on him by the EU law. In this regard, as far as the competition sector is concerned, the CJEU in Courage case (THORSON, 2016, pp. 266ss; MICKLITZ, WECHSLER, 2016, pp. 138ss)[29] has stressed the importance of the role of private enforcer carried out by the citizen or by the company that go to bring a judicial action aimed at requesting compensation for the damage caused by a contract, or a behavior, that goes to restrict or distort the game of competition. Indeed, this possibility reinforces the operational character of the competition rules in such a way as to discourage illegitimate agreements, which are often carefully concealed.

Nevertheless, it must be borne in mind that the Directive in question arises in an area of utmost importance within the legal system of the Union, where the regulatory and sanctioning function is not exclusively at the apical level of the legislator or the judiciary authority, but is rather distributed in a multilevel system of administrative governance composed on one side by the EC-within the scope of its executive powers pursuant to art. 101 and 102 TFEU (OPPERMANN, CLASSEN, NETTESHEIM, 2016; SCHÜTZE, TRIDIMAS, Oxford, 2018; BARNARD, PEERS, 2017, pp. 788ss), on the other hand, by the various national competition authorities[30]. These institutions act as public enforcers of the antitrust law, in order to ensure compliance even in those cases where individuals do not have the means, or the interest, to assert their violation in court. There is therefore a parallel and consecutive system[31] for the application of competition law by the EC, the guaranteeing authorities and the national courts (the latter managed by private individuals) which may, in some cases, cause conflicts and tensions (WRIGHT, 2016, pp. 15ss) between the various institutions, both during the course of their investigative activity,

[29] CJEU, C-453/99, *Courage* of 20 September 2001, ECLI:EC:C:2001:465, I-06297, par. 27; C-295/04, *Manfredi* of 13 July 2006, ECLI:EU:C:2006:461, I-06618, par. 60; C-557/12, *Kone* of 5 June 2014, ECLI:EU:C:2014:1317, published in the electronic Reports of the cases, par. 21.

[30] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25, concerning the application of the competition rules set out in Articles 81 and 82 of the Treaty, published in OJ L 1 of 4.1.2003, establishes a system of parallel competences on the basis of which the Commission and the competition authorities of the Member States may apply Article 101 and 102 TFEU.

[31] COM (2004)-101/53 "Communication from the Commission on cooperation between the Commission and the jurisdictions of the EU Member States for the application of Articles 81 and 82 of the EC Treaty", published in G.U. n. C 101 of 27/04/2004.

and following the adoption of decision-making measures which, based on the same facts, however, arrive at different or logically incompatible conclusions.

One thinks, for example, of the Lucchini case (BRIZA, 2008, pp. 40ss)[32], in which there was a contrast between the assessment of the EC on the illegitimacy of state aid and the decision of the Italian judicial authority. Or to the situation in which the private party tries to obtain, through the order of the judge, confidential documents contained in the files of the various guarantors in order to use them as evidence of the anti-competitive agreement, compromising the effectiveness of all those programs aimed at to encourage the practice of the so-called whistleblowing [33] between companies. The need for coordination between public and private enforcement in the field of competition has therefore set itself as an imperative for the purpose of avoiding a "war" with opposing and incompatible measures, which would have rendered a very poor service to the effectiveness of the Union law, creating a confused system and, above all, uncertain in its application (CAUFFMAN, 2011, pp. 182ss; WILS, 2009, pp. 3ss; KOMNINOS, 2006, pp. 5ss).

On the administrative side, an adequate level of synergy has been achieved through the establishment of a network of public competition authorities [34], aimed at ensuring the consistent and uniform application of articles 101 and 102 TFEU. As for the judicial plan, on the other hand, such a solution seemed impracticable, both for the plethora of judges who may be called upon to apply European competition rules, and because the creation of a "hierarchical" style coordination structure, with top of the General Directorate of EC in matters of competition, it would have been reconciled with the guarantees of independence and impartiality that are linked to the figure of the judge. The burden of guaranteeing an adequate level of consistency to the system has therefore fallen on the legislator who, with article 16 of Regulation 1/2003 (VANDENBORRE, 2013, pp. 508ss; MARQUIS, CISOTTA (ed by), 2015)[35], codified the obligation for the judicial

---

[32]CJEU, C-119/05, *Lucchini* of 18 July 2007, ECLI:EU:C:2007:434, I-06199.

[33]Literally, whistleblower, the term whistleblower is usually used to define any person, physical or legal, which brings to the attention of the authority a situation considered inappropriate and illegitimate within a particular organization. The protection of the cd. antitrust whistleblower, through a reduction or complete immunity from sanctions, is common practice in order to facilitate the repression of anti-competitive agreements and agreements, often disguised and difficult to identify and prove. As far as EU law is concerned, the penalty discounts (leniency legislation) for whistleblowers are governed by Commission Communications COM (1996)-207/4 "Commission Communication on the non-imposition or reduction of fines in cases of between companies", published in the Official Journal C 207 of 18.7.1996; COM (2002) -45/3 "Communication from the Commission on the immunity from fines and reduction of fines in cartel cases", published in G.U. n. C 045 of 19/02/2002; COM (2006) -298-17 and COM (2015) -256-1 "Communication from the Commission on the immunity from fines or reduction of their amount in cartel cases between companies" and ss. amendments, published in OJ C 298 of 8.12.2006 and OJ C 256 of 5.8.2015.

[34]See, Recital n. 16 of Regulation 1/2003, as well as COM (2004) -101/43 "Communication from the Commission on cooperation within the network of competition authorities", published in G.U. n. C 101 of 27/04/2004.

[35]In case C-17/10, *Toshiba* of 14 February 2012 (ECLI:EU:C:2012:552, published in the electronic Reports of the cases), both Advocate General Kokott and CJEU have stated, inter alia, that Article 11(6) of Regulation 1/2003 contains a rule of procedure such that the national competition authorities are automatically deprived of their competences to apply article 101 or 102 TFEU as soon as the EC initiates proceedings for the adoption of a decision under the Regulation 1/2003. This does not definitively preclude further proceedings in the application of national competition law. In the case C-360/09, *Pfleiderer v. Bundeskartellamt* of 14 June 2011, (ECLI:EU:C:2011:389, published in the electronic Reports of the cases) the CJEU interpreted artt. 11 and 12 of Regulation 1/2003 in the context of national proceedings concerning access to the file of a proceeding on the imposition of a fine (including the leniency procedure documents) which was sought in order to prepare a civil action for damages in front of a German court. The CJEU stated that such access

authorities of the Member States-already enucleated in the Masterfoods case[36]-not to make decisions relating to agreements, decisions or practices pursuant to art. 101 and 102 TFEU in conflict with those already adopted by the EC in relation to the same arrangements (LENAERTS, MASELIS, GUTMAN, 2014, pp. 133ss; WIERZBOWSKI, GUBRYNOWICZ, 2015; TÜRK, 2010; WOODS, WATSON, 2017, pp. 37ss; CLÊMENT-WILZ, 2019).

However, all matters relating to the powers of disclosure of the judge, even against the guaranteeing authorities, as well as the value, within the judicial proceedings brought by private individuals following an alleged breach of the law, remained excluded from the clarification intervention of Regulation 1/2003 (WOUTER, 2013)[37] of competition law, decisions on the merits of the same authorities. Which brings us to the examination of the Directive 2014/104/EC which, with a work that demonstrates greater maturity of the legislator in exercising the procedural competence, not only tries to guarantee a better level of effectiveness of the law of Union[38] through the strengthening of the procedural position of the private-with the preparation of common rules on the legitimation to act[39], access to the tests, terms of prescription of the action[40] and quantification of the damage[41]-but, at the same time, performs that work of coordination between public and private enforcement. In order to avoid a logical conflict between the decisions for damages[42] taken by the judicial authorities and the assessment decisions issued by the national guarantors, article 9 of the Directive provides that a final decision[43] of an authority of the same Member State of the judge of the appeal-which establishes an infringement

might be granted to: "(...) a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages" but onthe basis of national law, with due consideration for the "interests protected by European Union law". This last judgment is of particular interest for the problem analyzed in this article, as it clearly allows the EU Member States to retain their procedural provisions when applying Regulation 1/2003, even if it implies a different level of protection of the undertakings concerned. In the same spirit we notice also the case: C-536/11, *Donau Chemie and others* of 6 June 2013, (ECLI:EU:C:2013:366, published in the electronic Reports of the cases).

[36]CJEU, C-344/98, *Masterfoods* of 14 December 2000, ECL:EU:C:2000:687, I-11369, par. 48, 52.

[37]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

[38]These rules derive, inter alia, from the activity carried out by the Commission through the previous white and green books: V. COM (2008) -165, White Paper on damages actions for infringement of EU antitrust rules, Brussels 2 April 2008 and COM (2005) -672, Green Paper-Actions for damages for violation of EU antitrust rules, Brussels 19 December 2005.

[39]Article 3 of the Directive provides that "Member States shall ensure that any natural or legal person who has suffered damage caused by an infringement of competition law can seek and obtain full compensation for that damage".

[40]Article 10 of the Directive provides that the limitation period applicable to actions for compensation for damage is at least five years and does not start to run before the infringement of competition law has ceased and before the plaintiff becomes aware or one can reasonably presume that he is aware of: the conduct and the fact that such conduct constitutes an infringement of competition law; the fact that the violation of competition law caused him harm; the identity of the author of the violation.

[41]Article 17 provides, inter alia that the national courts be ensured, in the relevant procedures, the power to estimate the amount of the damage if it is established that the plaintiff has suffered it, but it is practically impossible or excessively difficult to quantify with accuracy of the entity based on the available evidence.

[42]Furthermore, it should be noted that in some Member States the scope of the judgment is not limited to the sole assessment of the right claimed in the case (in this case, compensation for damages) but also extends to all the necessary logical antecedents underlying of the decision (therefore, possibly also to the existence of the violation of the antitrust law).

[43]By definitive decision of an authority is understood, of course, not only that directly issued by the authority in the first instance, but also that of the judicial authority in charge of the appeal, which confirms the contested decision.

of the competition law-is able to establish before the courts of the same State irrefutable proof of the violation for the purposes of the action for the compensation of the damage.

This assessment effect is, on the other hand, reduced in the event that the decision was taken by the authority of a different Member State with respect to that of the judicial authority invested in the claim, it will be up to the legislation of the latter to determine (WRIGHT, 2013, pp. 23ss)[44] the effects of the decision of the authority, but making sure that at least the value of prima facie evidence is recognized and may, if appropriate, be assessed together with other evidence adduced by the parties.

As for the relationship between the powers of disclosure of the judge and the need for confidentiality of the files of the authorities, connected to the protection of the previously mentioned whistleblowers, the legislator dictates, in articles 5, 6 and 7 of the Directive, detailed procedural rules that attempt, to achieve a balance[45] between the need for effectiveness of the leniency programs and the right of individuals to compensation for damages. In fact, it is envisaged that the national courts must be guaranteed the power to order the presentation of adequately specified and detailed documentation and evidence, limiting themselves to what is proportionate to the interests of all the parties involved (article 5). Where, however, such evidence is included in the file of a competition authority, three different categories of documents are identified, on the basis of the level of protection guaranteed to them, which enjoy further protection with respect to the general requirements referred to above. The statements linked to a leniency program and the settlement proposals fall within the black list, and therefore can never be obtained[46]. Instead of a temporary protection (gray list), all the information processed for the purposes of the infringement procedure will be processed until the end of the investigation by the authority[47].

---

[44]The probative value of the decision of the guarantor authority in the proceedings for compensation for damage is extremely varied among the different Member States, in some it is only one of the many evidence of appreciation by the judge, in others it is considered as a circumstance particularly persuasive and relevant to the decision, in others still form a presumption of (non) violation of the antitrust rules, which must then be defeated by the party against whom it is placed.

[45]That the question needed careful balancing, since both aspects therein opposed contribute, each in its own way, to the effectiveness of Union law in the field of competition had been well highlighted by the Court of Justice in Pfleiderer, where it was to underline the need to "balance between the interests justifying the communication of (only) information spontaneously provided by the applicant for favorable treatment and those aimed at protecting the information" as well as, in the absence of common provisions, "to the courts of Member States, on the basis of their national law, determine the conditions under which such access must be authorized or denied, balancing the interests protected by Union law". In Donau Chemie, moreover, the Court always excluded the possibility of a balancing completely in favor of the leniency programmes, since, although it was "certainly true that such balancing (should be) carried out under national law, this right can not be structured in such a way as to completely exclude the possibility, for national courts, to carry out this balancing on a case by case basis "of that," a national rule which leaves "the parties to the proceedings which have violated Article 101 TFEU to prevent those allegedly damaged by the breach of this provision from having access to the documents in question, without taking into account the fact that such access could to represent the only possibility offered to such subjects to obtain the necessary evidence in order to base their claim for compensation, is likely to make excessively difficult the exercise of the right to compensation recognized to such subjects by the law of the Union", so violating the principle of effectiveness, See, CJEU, C-360/09, *Pfleiderer* of 14 June 2011, ECLI:EU:C:2011:389, I-05161, parr. 30-32; C-356/11, *Donau Chemie* of 6 June 2013, ECLI:EU:C:2013:70, not published, parr. 35-39.

[46]Article 6 (8) provides, however, that where Article 6 (6) applies only to certain parts of the required evidence, the remaining parts are disclosed according to the category in which they fall. For example, if some information included in the gray list is contained in blacklist documents.

[47]The gray list referred to in Article 6 (5) includes information produced by natural or legal persons specifically for the purposes of a proceeding by a competition authority; the information that the competition

Any other document in the file (white list), on the other hand, may be freely exhibited, provided that the requirements for the specificity of the request referred to in article 5 are met, as well as the residency[48] referred to in article 6 (10). It should be noted that these provisions, in the parts in which they balance the injured party's right to obtain the performance of the tests with the protection of the effectiveness and effectiveness of the leniency programmes, which is mandatory, in the sense that the Member State does not it may alter the equilibrium (DUNNE, 2015, pp. 582ss) identified therein between the two opposing interests, guaranteeing to one a higher level of protection at the expense of the other. And indeed, if such a possibility were granted, the coordination objectives pursued by the legislator would be logically frustrated. With a view to ensuring full cooperation between the judicial authorities and the competition authorities-in order to ensure the best possible level of effectiveness for Union law-the legislator has provided for the possibility for the judge to request assistance from the authority with regard to the quantitative determination of the damage (article 17 (3)) and the faculty for the competition authority to officially present to the court, where it deems it appropriate, its own assessments of the proportionality of requests for disclosure of documents contained in the investigation files (article 6 (11).)

THE DIRECTIVES ON EQUAL TREATMENT AND THE PROTECTION OF THE WEAK (PROCEDURAL) PART

It is not uncommon, therefore, that the legislator-by means of real choices of procedural politics-may decide to change the balances of the procedural rule in favor of one party, rather than the other, in those cases in which he considers that the particular nature of the dispute puts one of the two in a situation of unjustified disadvantage. The link between procedural harmonization and the protection of persons is much closer, since the effectiveness of EU law coincides with the recognition of a high level of guarantee to subjective rights often of a top position in the EU legal order. Such situations tend to occur, usually, in two specific areas in which the Union has substantial competence, among others extensively exercised: that of equal treatment and that of consumer protection.

The work of harmonization focused on the definition of minimum standards in terms of burden of proof, legitimacy to act, access to justice and adequate deterrent scope of the sanctioning system. These provisions are placed, in no particular order, within the various provisions that the Union has issued, over the years, in its fight against discrimination under articles 19-153 and 157 of the TFEU. We refer, in particular, to articles 8 and 9 of Directive 2000/43/EC[49], 9 and 10 of Directive 2000/78/EC[50], 8 and 9 of Directive

authority has drawn up and communicated to the parties in the course of its proceedings and the settlement proposals that have been withdrawn.

[48]The principle of residuality is well highlighted by Article 6 (10), which states that "the national court (may ask) a competition authority to disclose the evidence contained in the latter's file only if no part or no third party is reasonably able to provide such proof".

[49]Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin published in OJ L 180 of 19.7.2000.

[50]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published in OJ L 303, 2.12.2000.

2004/113/EC[51] and 17, 18 and 19 of Directive 2006/54/EC[52]. The scope of the legislator's intervention is, in fact, among the various substantially homogeneous instruments, considering that they apply to different variations of the same problem which, therefore, have the same protection requirements.

The discriminatory nature of treatment often arises only after a scrutiny of the author's motivations while, in the external reality, it hides behind apparently neutral behavior. Of this, it is not at all easy for the discriminated to prove in court that a particular difference in treatment has been put in place on the basis of sex, race, religion or other protected characteristics, and this precisely because of the difficulty in finding evidence capable of demonstrating this animus discriminating against the immaterial nature, which largely fall within the exclusive availability of the defendant[53]. Because of such probative complexity, and of the imbalance that derives from it, the legislator has therefore intervened on the procedural law in order to alter the distribution of the burden of proof and restore equality of arms[54].

With regard to the application practice, in the Brunnhofer case[55], as regards possible discrimination in the workplace, the CJEU stated that the applicant had the sole obligation to attach to its application factual elements capable of making it presume the existence of a difference in treatment on the sole basis of a protected characteristic-in the case of sex-such as the perception of a pay lower than that of his colleague, combined with the performance of a job of equal importance[56]. That done, it would have been the defendant's duty to refute the presumption of discriminatory treatment, demonstrating in turn that this was based on objective and justifiable reasons[57]. It should be noted, in any case, that the rule only postulates a different distribution of the burden of proof, and not a complete inversion of it. Indeed, the plaintiff will still have to produce sufficient elements to make the supposed disparity of treatment seem likely prima facie. Only once this has been credited will the charge, for the defendant, replace the appropriate justification.

There is, therefore, however an initial probative activity on the part of the appellant, albeit remodulated and rebalanced according to the particularity of the dispute. Alongside this redistribution of the burden of proof, a further provision arises, whose rationale always refers to a certain position of weakness of the discriminated. This refers, in particular, to the possibility, provided for by all the aforementioned directives, to assist the person who considers himself injured by the discriminatory behavior of associations or organizations (for the protection of human rights or trade union rights) who have a legitimate interest in enforcing the principle of equal treatment, granting him the right to take action both on

[51]Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment for men and women with regard to access to goods and services and their provision published in OJ L 373, 21.12.2004.

[52]Directive 2006/54 / EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), published in OJ L 204 of 26.7.2006.

[53]CJEU, C-381/99, *Brunnhofer* of 26 June 2001, ECLI:EU:C:2001:358, I-04961, par. 53-55.

[54]See, the articles 9 of Directive 2000/43/EC, 10 of Directive 2000/78/EC, 9 of Directive 2004/113/EC and 19 of Directive 2006/54/EC, which provide that "Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure whereas, where persons who consider themselves injured by the failure to apply them in respect of the principle of equal treatment expose, before a court or another competent authority, facts from which it can be presumed that there has been direct or indirect discrimination, it incumbent on the defendant to prove that there was no violation of the principle of equal treatment".

[55]CJEU, C-381/99, *Brunnhofer* of 26 June 2001, op. cit., par. 44.

[56]CJEU, C-381/99, *Brunnhofer* of 26 June 2001, op cit., par. 48.

[57]CJEU, C-381/99, *Brunnhofer* of 26 June 2001, op. cit., par. 50.

behalf of the discriminated person (with his consent) and to assist him in the process of procedural action[58].

In the case of the weak position of one of the parties to the process we refer specifically to those common rules which require the Member States to guarantee to the discriminated the possibility of access to a judicial remedy, as well as to grant the courts competent for the examination of appeals the right to impose effective, proportionate and dissuasive sanctions in case of violation[59]. The latter constitute a return to the classic use of procedural law aimed solely at avoiding the substantial paralysis of the substantive norm due to the inadequacy of the procedural system. They therefore enjoy limited power of harmonization. In the Seguridad case (GILIKER, 2017, pp. 224ss)[60] it has been highlighted that article 25 of Directive 2006/54/EC concerning the obligation for Member States to provide for effective and dissuasive sanctions-cannot have the effect of introducing the orders of these States forms of sanction previously unknown in them, such as punitive damages. This obligation must therefore be expressed, within the limits of the principle of effectiveness, by means of the methodologies present in this order.

The reasoning by which the CJEU moves is strongly similar to the one carried out by the legislator on equal treatment. Indeed, it is based on the assumption that the effective protection of the consumer can only be ensured where the right of national courts to detect ex officio the illegality of the contractual clauses[61] is guaranteed. This, it is argued, by virtue of the procedural and contractual inferiority of the consumer that must be counterbalanced with exceptional procedural law (CHENEVIERE, 2010, pp. 352ss; DE VRIES, IORIATTI, GUARDA, 2018)[62], which is substantiated by the recognition of the judge of powers, and subsequently obligations (GULLFER, VOGENAUER, 2014, pp. 125ss; DEVENNEY, KENNY, KENNY, 2013)[63], of motu proprio intervention[64]. It is clear that both the protection of the consumer's court and the obligation of the judge, within the limits of the principle of effectiveness[65], to assert the invalidity of the unfair terms on the

---

[58]In particular, it is possible for Member States to recognize "associations, organizations and other legal entities which, in accordance with the criteria established by their respective national laws, have a legitimate interest in ensuring that the provisions of this Directive are complied with, the right to , in judicial or administrative proceedings, on behalf of or in support of the person who considers himself injured and with his consent, a procedure aimed at fulfilling the obligations arising from this Directive".

[59]See, in this regard, the articles 15 of Directive 2000/43/EC, 17 of Directive 2000/78/EC, 14 of Directive 2004/113/EC and 25 of Directive 2006/54/EC.

[60]CJEU, C-407/14, *Seguridad* of 17 December 2015, ECLI:EU:C:2015:831, published in the electronic Reports of the cases.

[61]CJEU, C-240/98-244/98, *Océano* of 27 June 2000, ECLI:EU:C:2000:346, I-04941, par. 25-26; C-168/05, *Mostaza Claro* of 26 October 2006, ECLI:EU:C:2006:675, I-10421, par. 27.

[62] CJEU, C-240/98-244/98, *Océano,* op. cit., par. 27; C-169/14, *Morcillo* of 17 July 2014, ECLI:EU:C:2014:2099, I-10421, par. 22.

[63]CJEU, C-473/00, *Cofidis* of 21 November 2002, ECLI:EU:C:2002:705, I-10875, par. 34; C-243/08, *Pannon* of 4 June 2009, ECLI:EU:C:2009:350, I-04713, par. 32; C-40/08, *Asturcom* of 6 October 2009, ECLI:EU:C:2009:615, I-09579, par. 53.

[64]Which are not necessarily related only to the official relief of the abusiveness of the clause but may, for example, result in a suspension of the enforcement procedure, according to the sentence Morcillo, op. cit., parr. 45ss.

[65]It should be noted, in fact, that although in Pannon it has been shown that there is an obligation, and not the mere faculty, for the judge to raise ex officio the illegality of the clause in order to guarantee the effectiveness of the directives concerning consumer protection, "in any case, compliance with the principle of effectiveness cannot (...) come to the point of demanding that a national court should not only compensate for a procedural omission of a consumer who is unaware of his rights (...) but also to make up for it. in full to the complete passivity of the consumer concerned". See, C-40/08, *Asturcom* of 6 October 2009, op. cit., par. 47.

grounds of office constitute a rebalancing of the general procedural law dissimilar to that put into place in the aforementioned directives, with the only difference being that it was carried out in the jurisprudential seat. Leaving aside the specific examination of these obligations, and the copious jurisprudence that characterizes them (REICH, 2009, pp. 318ss), what we want to highlight here is the fact that the CJEU's aquis in the matter of consumer procedural protection constitutes an excellent example of indirect harmonization by means of the Rewe principles. In this case, this type of indirect almost legislative harmonization is realized, whose characteristic is to provoke a mechanical application by the national jurisdictions of the principles enucleated by the CJEU, even in the face of a different national legislation. In this way, they integrate with such depth, such precision, such constancy in the laws of the individual Member States, so much so as to put into effect an almost-substitutive effect of the incompatible national rule, neither more nor less effective than horizontal harmonization of legislative form.

DIRECTIVE 2009/22/EC ON INJUNCTIONS FOR THE PROTECTION OF CONSUMERS' INTERESTS (OUTLINE)

The creation of almost the entire European procedural law of the consumer took place at a jurisprudential level; the legislator, however, intervened in the matter with some regulatory provisions with a procedural nature, albeit with a limited scope. We refer to the Directive n. 2009/22/EC (HESS, BERGSTRÖM, STORKRUBB (eds), 2016; CORTÉS, 2016; IOANNIDOU, 2015; DUROVIC, 2016, pp. 156ss; LODDER, MURRAY, 2017)[66] on injunctions for the protection of consumers' interests.

This Directive was adopted on the basis of the competence pursuant to art. 114 TFEU (SHUIBHNE, GORMLEY (ed by), 2012, pp. 176ss; ARNULL, BARNARD, DOUGAN, SPAVENTA (ed by), 2011, pp. 7ss) which is instrumental to the full realization of the internal market. What we are pursuing is therefore a more similar objective to the Directives 2004/48 and 2014/104/EC, which aims at strengthening and completing the internal market-also through the procedural means-rather than that of the directives relating to equal treatment, the rationale of which is focused solely on the protection of the rights of the discriminated person. This statement seems to be confirmed by the tenor of the recital n. 5 of the provision, which specifically refers to the protection of competition and the removal of barriers in the common market. It is not surprising, therefore, that the harmonization work was relatively contained and examined only the procedural aspects strictly necessary to achieve this aim without going to touch elements of the proceeding concerning fundamental procedural rights. More specifically, the Directive outlines some common rules aimed at ensuring, in the various Member States, adequate mechanisms to put an end-promptly-to violations that harm the collective interests of consumers[67]. Article 2 in particular provides the obligation for States to designate jurisdictional or administrative bodies competent to decide on actions brought by consumer protection

[66]Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests published in OJ L 110 of 1.5.2009.

[67]These violations are indicated in Annex I to the Directive. In particular, they relate to failure to comply with Union acts concerning: contracts negotiated away from business premises; consumer credit; television activities; travel, holidays and all-inclusive circuits; unfair terms in contracts with consumers; contracts negotiated at a distance; sale and guarantees of consumer goods; electronic commerce in the internal market; medicines for human use; distance marketing of financial services to consumers; unfair commercial practices between businesses and consumers; timeshare contracts, contracts relating to long-term holiday products and resale and foreign exchange contracts.

associations, or by public guarantee authorities-where provided by the national laws-identified by article 3.

Always the same article 2, according to a scheme that is familiar to us within the framework of those measures aimed at protecting the effectiveness of EU law, ensures that the authorities in charge have the concrete ability to put an end to the violation, this through the power to order-if necessary with an urgent procedure-the termination or the prohibition of any violation, as well as to arrange suitable measures in order to eliminate the lasting effects of the violation, together with adequate sanctions in order to obtain the correct and concrete execution of decisions[68]. Alongside these two provisions, article 4[69], is perhaps the most innovative element of the provision.

This rule-in order to repress violations of the rights of consumers whose effects, due to the same characteristics of the internal market, go beyond the boundaries of individual Member States-allows any body legitimized under article 3- regardless of whether it is based or less in the State of origin of the violation-to appeal to the jurisdictional bodies of the latter, where the interests it protects are adversely affected by improper conduct.

Therefore, there is an extension of the legitimacy to act of the various organizations even outside the State in which they are based. The rationale of such a provision can be found in the legislator's desire to guarantee protection of consumer rights for the most diffuse and uniform (even for competitive reasons) that even in those cases in which the Member State in which the author resides of the violation, and the State in which the effects of the violation reverberate instead do not coincide. It is evident that the content of the harmonization of the act is very low, if not with regard to the mere existence of the remedy and the exceptional extension of the legitimacy to act on the part of the organizations ex art. 3 even before the courts of different Member States compared to the one in which they are established. The whole procedure, as in the case of the "appeals" directives, remains firmly in the defining space of the individual Member States.

SUBSTITUTIVE HARMONIZATION AND PARALLEL HARMONIZATION

The legislator therefore went on to affect the legal systems of the Member States through two main ways. The first, which we have already defined for "standards" or "objectives", acts, through the instrument of the Directive, through the definition of a set of standards to which internal procedural rules must comply, in order to guarantee a certain level of protection to the individual (minimum, equivalent or uniform), capable of

[68]Article 2 provides that the designated authority should be empowered to: order, with due care and, as the case may be, by an urgent procedure, the cessation or interdiction of any violation; order measures such as publication of the decision, in whole or in part, in a form deemed appropriate and / or publication of an amending declaration in order to eliminate the continuing effects of the violation; in so far as the legal system of the Member State concerned permits it, order the losing party to pay to the public treasury or another beneficiary designated or envisaged by national legislation in the event of failure to execute the decision within the time limit set by the courts or by the administrative authorities, an amount determined for each day of delay or any other amount provided for by national legislation, in order to guarantee enforcement of the decisions".

[69]In particular, it states: "Each Member State shall take the necessary measures to ensure that, in the case of a breach of their territory, any legitimate entity of another Member State, if the interests which it protects are adversely affected by that breach, refer to the court or administrative authority referred to in Article 2 after submitting the list referred to in paragraph 3 of this Article. The courts or administrative authorities recognize that the institutions appearing on this list are entitled to act, without prejudice to their right to assess whether, in the present case, the action brought is justified".

ensuring-in turn-a particular degree of effectiveness of Union law or a better achievement of objectives, through the means of procedure, pursued by the Treaties. These standards will be characterized by a growing degree of precision depending on the intensity of the required harmonization in order to achieve the desired effect, up to the so-called maximum harmonization where the provisions included in the Directive are not aimed only at achieving a "minimum" standard, but rather a "common" standard. The second, instead, implemented through the instrument of the Regulation, takes concrete form through the direct definition of the procedural rules, and in this way harmonizes, in addition to the effects of the procedures, the procedures themselves, eliminating any possible discrepancy between the procedural rules, the which necessarily derives from that margin of discretionality of form and means, typical of the Directive, which distinguishes the harmonization by standards. These modalities can be applied in turn under two different forms. The first, most common, is the substitute one. In this case the principle, or the rule, enunciated by the norm of the Union succeed to those of domestic law, substituting them. So the approximation or harmonization of national procedural laws will occur in the strict sense, giving rise to a different discipline than the previous one, influenced-more or less pervasively-by the impact of EU law, which it will apply in place of the first. The effects of such a harmonization work are therefore mandatory and unavoidable for the cases falling within its scope. Now it is easy to understand how the impact on national laws is considerable. Through such measures, not only is it created a corpus of common principles or procedural rules of a European character, but it also realizes the substitution of these principles or norms to the national ones, replacing in fact the previous balancing of interests-place in being by the internal legislator-that made by Union law. Given the delicacy of the subjects dealt with, the convergence in the institutional setting in relation to the adoption of a rule or a principle which reflect, in a more or less adequate way, the key concepts of all the different legal traditions of the Member States is not always smoother. This may give rise to the adoption of acts that put in place a fragmented harmonization of the subject, or rather the failure of the legislative process due to the lack of agreement between the parties. In order to facilitate the process of building a unitary procedural law, reducing the frictions between different national legal traditions and uniformity requirements advanced by EU law, the legislator has therefore experimented with a second method of harmonization, which not necessarily it affects the procedural arrangements of the Member States through the substitution of the norm of national law, but rather through the integration-within them-of common European procedures, alternative and optional with respect to internal ones.

THE ADVANTAGES OF SUCH A METHODOLOGY ARE MANIFOLD…

The principles of subsidiarity and proportionality will be respected a priori in consideration of the non-substitutive effects of the Union legislation, which does not in any way restrict the jurisdiction of the States. On the one hand, there is a much broader capacity of the regulatory act in being able to directly and completely regulate the procedure-without necessarily having to limit to those parts that are strictly necessary in order to achieve the objective that is set on the other hand, a greater freedom of the legislature to dictate norms that are the result, rather than a compromise between the different legal traditions of the Member States, of a European conception of procedural law, which has its roots in the general principles of the Union and in the notion of just

process advanced by the articles 6 of the European Convention of Human Rights (ECHR) and art. 47 CFREU (GILLIAUX, 2012; PICHERAL, 2012; SILVEIRA, CANOTILHO, 2013, pp. 537ss; CIMAMONTI, TRANCHANT, CHÉROT, TREMEAVU, 2013, pp. 920ss; KERIKMÄE, 2014, pp. 80ss; SAFFIAN, DÜSTERHAU, 2014, pp. 3ss; LEBRUN, 2016, pp. 433ss; MAK, 2012). The non-substitutive effect of these measures will also reduce the political resistance on the part of the States, which will not be forced to modify or repeal the cardinal institutes of their system following the entry into force of a legislative act Union.

On the contrary, as regards the more harmonized effects of this particular parallel approach, they will depend on (FAUVARQUE-COSSON, BEHAR-TOUCHAIS (ed by), 2012, pp. 35ss) the level of diffusion of the instrument between economic operators and legal professionals, since the Member States already provide for a national procedure that regulates the same category of disputes regulated by the optional instruments, as well as by the possible decision of individual countries to adopt the procedure laid down in them as a standard in relation to that particular type of dispute, thus giving voluntary place to that effect of taking over from the Union legislation to the national one, which characterizes substitutive harmonization.

With the exception of this last case, the optional instruments put in place a type of "parallel" harmonization which-in case of success-is able to supplant the individual national regulations in an indirect way, simply making them obsolete. Indeed, where the vast majority of economic operators, convinced of the goodness, effectiveness and cost-effectiveness of the alternative procedure, decided to rely on it for the resolution of disputes in its scope, the degree of effective harmonization it would be no more, no less, the one reached by means of substitutive harmonization.

Likewise, if the Member State does not provide procedures similar to the alternative procedure, this would be done only in name but not in fact, becoming, in essence, the only procedure to be used in that particular area. Finally, even outside such borderline cases, the effects of this particular harmonization in the broad sense are not negligible.

In addition to the positive economic effects due to the introduction of certain and inexpensive common procedures, the optional instruments contribute to the construction of a true and proper European procedural aquis, which in the future can become the basis for a broader procedural harmonization. Indeed, also the jurisprudence-both national and of the Union -which was formed and formed later on the interpretation of the institutions and the procedural concepts expressed in the aforementioned regulations, which constitute to all intents and purposes elements and notions of European Union contributes to enriching and specifying such an aquis.

The measure of the success of parallel harmonization in the various Member States is indirectly proportional to the degree of efficiency of the national law procedure. Indeed, the more it will be slow, expensive or complicated compared to the alternative, the latter will be attractive to citizens, or will induce the legislator to act on the internal discipline, adapting it to the standards of the Union.

Otherwise, where internal procedures have a degree of efficiency equal to or greater than the alternative ones, the impact of parallel harmonization will be somewhat reduced. It therefore acts with more force the greater the gap between the standard offered by domestic law and the one guaranteed by alternative procedures, thus "leveling" the discrepancies between the means available to a citizen of a Member State rather than another, in concert with the national legislation, without necessarily replacing it, nor preventing it from implementing a different or more favorable regime for individuals.

Furthermore, a special form of parallel harmonization is constituted by the adoption of non-binding measures, such as the Recommendation, whose purpose is to urge the Member States to put in place measures-also of a procedural nature-aimed at achieving specific objectives meeting the common interest. In particular, the Recommendation of the EC of 11 June 2013[70] on the establishment of common principles for collective redress mechanisms in relation to violations of rights conferred by Union rules (collective redress) (BIARD, 2018, pp. 191ss) is well known. Although the harmonizing scope of these acts is particularly small (VERNADAKI, 2013, pp. 308ss), given their soft-law nature, they must not be considered to have any effect. Indeed, as clarified in the Grimaldi case[71] the Recommendations can not be considered, due to the lack of binding, without legal consequences, so much so that the national courts are still "required to take them into consideration (...) for the resolution of the disputes submitted to their judgment, in particular when they help in the interpretation of national rules adopted to ensure their implementation, or are aimed at completing binding Community rules (...)"[72].

Furthermore, the effects of substantial harmonization of the Recommendations should not be underestimated, to the extent that they are instrumental in soliciting regulatory action by Member States. Although the pressure exerted by the latter on the internal legislator is much lower than that resulting from the need to remedy a possible situation of "reverse discrimination"-created for example by the preparation at European level of a procedure more beneficial than the similar one of national law (ie the international private law or the procedure for a modest entity)-the practice has shown how these acts possess an appreciable capacity to channel and bring back the national regulatory activity corresponding probably to a desire for reform already matured at the level purely internal-on convergent tracks, thus leading to a type of harmonization that we could define "at the source" (HESS, 2016, pp. 13 and 14; BUX, 2017).

THE IMPACT OF EUROPEAN UNION LAW ON PROCEDURAL MATTERS AND ITS RELATIONSHIP WITH THE HARMONIZATION OF PROCEDURAL LAW. THE IMPACT OF UNION LAW ON PROCEDURAL MATTERS AND ITS RELATIONSHIP WITH THE HARMONIZATION OF PROCEDURAL LAW

Procedural harmonization, understood as the approximation of the procedural rules of the individual Member States, constitutes an "indirect" effect of such an impact. It is mostly realized as a consequence of the second methodology of integration, since it is mainly through the definition of a series of common provisions or procedural standards that the States must apply, or adopt, within their own legal system that is realized-and this regardless of the rationale underlying the legislative intervention-an approximation of the procedural rules.

However, this should not lead to the error of considering European procedural law-understood as the whole of the provisions or common standards, of normative or jurisprudential origin, determined by the law of the European Union in procedural matters-which has as an objective main harmonization of the legal systems of the Member States. It is true that it necessarily has as its object the definition of shared rules or rules of

[70]Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms of an injunctive and compensatory nature in Member States concerning infringements of rights conferred by Union rules, published in OJ L 201 of 26.7.2013.
[71]CJEU, C-322/88, *Grimaldi* of 13 December 1989, ECLI:EU:C:1989:646, I-04407, par. 18.
[72]CJEU, C-322/88, *Grimaldi* of 13 December 1989, op. cit.

procedure, nevertheless this operation does not express-at least not directly-a desire to regulate the processing of individuals in a uniform way, but rather constitutes one of the means through which is pursued a different and separate objective, which has been identified in the effectiveness of the substantive law or in the better realization of certain ends.

While, in fact, procedural law, understood as a general area of law, aims to fully regulate the law of the process-that is, that set of legal rules governing the performance of the latter-the "European procedural law" acts on the procedural law only in order to protect the underlying substantive law position conferred by EU law, so much so that it often limits itself to guaranteeing a generic right to the trial, or to the actual remedy, by failing to regulate it in detail. And, it must be pointed out, it could not be otherwise, considering the same functional argument on which both the recognition of the procedural competence of the Union is strictly linked to the full realization of a different substantial competence-and the juridical limitation of the procedural autonomy of the Member States through the principles of equivalence and effectiveness.

Such a functional link between the legislative/jurisprudential action of the Union in procedural matters and the achievement of a better degree of effectiveness of Union law-that is, the functioning or establishment of the internal market -must in any case significantly affect the amplitude of the harmonizing effects of which such an action is, albeit in a mediated manner, a carrier.

Immediate consequence is the fact that we will have, or will have, the harmonization of the procedural rules only in those situations in which the impact on internal procedural law is instrumental to the attainment of the aforementioned objectives and-even in these cases-only within the limits in which this is strictly necessary. Not by chance, regardless of the type of legislation adopted and the method of harmonization chosen or substitutive or parallel-each of the documents examined is in any case characterized by a strictly "special" or ad hoc approximation work. The latter, which is equally coherent under two different forms, is able to restrict, precisely, the impact of the work of harmonization to the sectors, and to the aspects, in which it is functional to the achievement of the objectives to be discussed.

Not even provisions with a high degree of procedural harmonization-such as optional instruments-that are aimed at disciplining a particular aspect of the process, such as legal aid, jurisdiction, international connection or litigation, can be said to be transversal immune to such an instrumental link. On the contrary, the attention paid in such acts to some particular institutes of the process reinforces, if anything, the idea that the legislator is much more interested in the effectiveness of the European Union law and the better functioning of the internal market than a general uniformity of the procedural treatment. reserved for the parties. Jurisdiction, connection and lis pendens, for example, are procedural issues closely related to the establishment of the dispute and the consequent protection of their substantive rights in court: they do not influence the position or the procedural rights of the party in the process, but rather they relate directly to the ability of the individual to determine with certainty the competent judge and let him know of a particular controversy, thus facilitating the commercial and economic relationships of a transnational nature.

Likewise, the procedural harmonization deriving from the Regulations establishing the European injunctive decree (DUROVIC, 2016, pp. 106ss; HAZELHORST, 2017, pp. 438ss; RAUSCHER, 2017, pp. 686ss; EICHEL, 2014; BOBEK, 2015, pp. 234ss;

GRUBER, 2016, pp. 153ss; JELINEK, ZANGL, 2017; HOBE, 2017)[73], the procedure for small-scale disputes[74] and the European order for the seizure of bank accounts (PEREÑA VICENTE, DELGADO MARTIN, HERAS HERNÁNDEZ, 2015, pp. 632ss; MARINO, 2017, pp. 266ss)[75], arises-albeit particularly profound when compared to that of others measures-always as instrumental to needs of an economic nature. So much so that it focuses on the construction of a "common" procedural "framework" that is common-but generic-based on the perspective of simplification, of rapidity, of the economic nature of the procedure. One thinks, for example, of the rules relating to the development of the process: they provide the written form, except for exceptions, they request an investigation phase as quickly as possible, limit the mandatory legal representation, circumscribe the possibility for the judge to unduly dilute the duration of the procedure. Instead, the particular discipline of the process is neglected, ie that which would be necessary to obtain a true degree of uniformity in the treatment of the parties, for which reference is made -by means of general clauses (LAZIĆ, STUIJ, 2018)[76]-to national law.

Even effectively harmonized aspects which at first sight might appear to be unrelated to the criteria of the economy and speed of the procedure-such as those relating to the protection of the right to be heard-do not actually constitute the necessary "counterpart" for the abolition of procedures of exequatur and the restriction of the grounds for refusing recognition and enforcement. So that even a procedural law that would seem to be in place to raise the level of protection of the party's rights in the process-is indirectly serving unavoidably economic purposes. Basically, there is no guarantee in terms of the right to be heard in order to materialize and instil in the legal systems of the Member States a higher standard of protection of fundamental procedural rights, but it is done in order to pursue a particular objective-the abolition of exequatur and of the obstacles to the free circulation of judicial measures, in fact-from the eminently economic nature. The "compensatory" view of procedural harmonization in point of fundamental rights-which balancing the progressive abolition of intermediate control procedures for the recognition

[73]Regulation (EC) No 1896/2006-creating a European order for payment procedure. See from the ECJ the next cases: Walter Vapenik v. Josef Thurner C-508/12 of 5 December 2013; Imtech Marine Belgium NV v. Hellenic Radio SA C-300/14 of 17 December 2015, which the CJEU has declared that: "(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the European enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)". The CJEU in case C-511/14, *Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd* of 16 June 2016, ECLI:EU:C:2016: 448, published in the electronic reports of the cases, the CJEU has stated that: "(...) the default judgment was to be counted among the executive title that were to be certified as a European enforcement order, even if it could not, in fact, to be certified as a European enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (…)". Especially in the case of the European injunction it is noted by the CJEU, and through its case law in a "systematic" and "teleological" perspective the guarantee of the certainty of the title (especially in the case of public acts and judicial transactions in accordance with the Wirkungserstreckung principle) whenever there is in fact no objection to the credit and does not derive the right of the credit assessment. This is why the equivalence in the European judicial area of jurisdiction is based on fundamental human rights considerations, shared and based on compatible procedural rules or supplemented by the minimum standards of protection provided by the same Regulation.

[74]Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

[75]Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59-92.

[76]For example, the general clauses referring to the national procedure present in many Regulations, for example see the art. 47 (2) of the Regulation 1215/2012 or the art. 46 (1) of the Regulation 655/2014.

and execution of foreign judgments and provisions-emerges with some clarity in each of the optional instruments, which offer nothing more than an extremely partial protection of the right to a fair trial, limiting itself to essential rules that ensure that the defendant becomes aware of the procedure against him in time to present his defenses, or may remedy certain violations of the procedure provided for in the Regulations themselves.

In assessing the scope of the procedural harmonization action of which the European procedural law is the actor, as well as delineating scenarios for its further development, its inevitably functional nature cannot be ignored. That said, for example, the ambitious project of a real European procedural law code (STORME (ed by), 1994)[77] which completely regulates the process of proceeding before each of the Courts or Courts of the Member States appears at least to be utopian. And this not only for the obvious problems of competence but also, and above all, for the excessively divergent nature of the different procedural traditions of the Member States, which are, inter alia, expressly referred to in art. 67 (1) TFEU. Such a project would require, in fact, a "traumatic" intervention on the legal systems of the Member States in order to pursue an objective-the high or perfect uniformity of the procedural treatment-which is not specific to the Union's action in procedural matters. Or better-more precisely-the interference of EU law in such a sensitive area as the procedural material would be disproportionate to the effective benefits of EU law, or better achievement of its substantive objectives, whose research informs, in my opinion, the action of the legislator in procedural matters in all its parts. Even a high degree of uniformity of procedural processing-even if limited to particular areas-can be imposed by EU law where this is necessary in order to eliminate, for example, competitive distortions that could undermine the smooth functioning of the internal market. However, such a harmonization action must always maintain its functional link (KERAMEUS, 1995, pp. 409ss)[78] with the objectives at issue, not being able to deviate from it in order to pursue its further objectives, such as better protection of fundamental rights, or exceed what is strictly necessary-this also in accordance with the principle of proportionality-for their achievement.

Such an instrumental constraint causes many difficulties to extend the regulatory action beyond the functional "boundaries" referred to here and, in particular, to offer protection-through the approximation of national procedural rules-not so much to those substantive rights underlying the process, but rather to those rights of a strictly procedural nature-sanctioned by article 6 ECHR and from art. 47 CFREU-which the parties must enjoy so that the process is not only effective, but also right. Furthermore, it should be noted that the caution of the legislator in affecting the procedural matter also emerges in relation to issues or procedural areas that have a close link with the functioning of the internal market-for example, the executive phase or the regime of judicial costs-which therefore could well be subject to harmonization by the Union. Indeed, it was preferred to keep the procedural autonomy of the Member States intact, being satisfied with the guarantees of effectiveness guaranteed by the general principles of effectiveness and equivalence, most likely because it was considered that the benefit at the point of operation of the internal market cost was not the latter, the latter constituted by the compression of the autonomy of the States. Much in the future development of the matter

[77]As well as that imagined by the c.d. "Storme Commission", which constituted an external working group funded by the European Commission during the 1990s, which had the task of evaluating the feasibility and drafting a draft "European civil procedure code".

[78]And indeed, doubts about the possibility of using the "derivative" competence referred to in articles. 114 e and 115 TFUE. in order to justify the enactment of a general provision, such as a draft European civil procedure code, they were immediately expressed following the draft produced by the Storme Commission.

will depend on the will of the Member States, which, however, do not seem intent on giving a particular acceleration to the process of harmonizing procedural rules, as demonstrated, for example: the stalling of the Green Paper on minimum standards procedural[79], the failure to draw up a draft framework legislation in the same area, the somewhat limited innovations in European injunction proceedings and small claims by Regulation 2015/2421 (FLETCHER, HERLIN-KERNELL, MATERA, 2016; BARNARD, PEERS, 2017, pp. 586ss; KACZOROWSKA-IRELAND, 2016; MARTUCCI, 2017; POIARES MADURO, WIND, 2017, pp. 321ss; SCHÜTZE, 2015, pp. 382ss. USHERWOOD, PINDER, 2018; RAUSCHER, 2017, pp. 686ss; EICHEL, 2014, BOBEK, 2015, pp. 234ss; GRUBER, 2016, pp. 153ss; JELINEK, ZANGL, 2017)[80] (reduced, among other things, to original EC proposal which provided for a wider interpretation of the requirement of transnationality of the dispute), the limited use of the possibilities opened by the reform of the Lisbon Treaty on the harmonization and approximation of cross-border procedural rules. Especially in relation to this last point it seems to the writer that, simply, the requirement of functionality with the proper functioning of the internal market "downgraded" from the necessary novel to a mere element of preferential has been simply translated, subsumed, under the respect of the principle of subsidiarity. Thus, regardless of the wording of the Treaty provision (article 81 TFEU), the intervention always arises as appropriate-necessary-only in those cases, in fact, where it offers appreciable results in terms of effectiveness of EU law or better achievement of particular objectives of an economic nature.

Among other things, the wording of article 19 (1) TEU does not help to overcome such a restrictive interpretation, although it makes it obligatory for Member States to establish "the legal remedies necessary to ensure effective judicial protection in the areas governed by Union law" it seems to them to reserve this jurisdiction (HOWELLS, TWIGG-FLESNER, WILHELMSSON, 2017)[81] in an ordinary way, subjecting each exceptional common intervention to a rigid demonstration of proportionality and of the necessity of the action.

If, therefore, resistance is encountered in carrying out this work of harmonization in those sectors of the procedural material in which this functional/instrumental link is particularly strong, the even more marked difficulties that must be faced in attempting to "hijack" this are evident action of rapprochement towards other shores, of no less importance, but characterized by a substantial detachment from reasons of an economic or mercantile nature. Which, among all, the protection of fundamental procedural rights. And indeed, it is inevitable to register a substantial discrepancy between the declarations of intent of the European institutions on the protection of fundamental rights in civil proceedings and the concrete results of the regulatory action. Personally, I do not consider that the wording of the provisions of the Treaties on which the competence in procedural matters of the Union is based is sufficiently clear and precise that it is possible, particularly to the Council, to revalue the nature of the Union's legislative action in proceedings freeing it from the close instrumental link with the effectiveness of EU law and the functioning of the internal market-and extending its horizons towards a function of concretising and

[79] Green Paper from the Commission-Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM/2003/0075 final.

[80] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015, p. 1-13.

[81] CJEU, C-472/11, *Banif Plus Bank Zrt* of 21 February 2013, ECLI:EU:C:2013:88, publised in the electronic Reports of the cases, par. 29; C-240/09, *Lesoochranárske Zoskupenie (LZ I)* of 8 March 2011, ECLI:EU:C:2011:125, I-01255, par. 47; joined cases, C-439/14 and C-488/14, *Star Storage* of 15 September 2016, ECLI:EU:C:2016:688, published in the electronic Reports of the cases, par. 46.

strengthening not only the individual's substantive rights, but also of its fundamental procedural rights.

In speciem, the Resolution of European Parliament of 25 October 2016[82] on the subject of guarantee, at the level of the Union, of fundamental rights and the subsequent study (BÁRD, CARRERA, GUILD, KOCHENOV (eds), 2016) highlight the opportunity for joint action to protect and concretise the fundamental rights guaranteed by CFREU. And indeed, notwithstanding the fact that the Union has no jurisdiction over fundamental rights, during the examination of the various documents, it was nevertheless clear to see, in the Directive 2003/08/EC[83] and in the optional instruments, some provisions- relating to access to justice or to the protection of the right to be heard-apparently without a functional link with the internal market. The adoption of these rules only on the surface demonstrates an intent to strengthen the protection of fundamental rights in the main, but hides in reality a "compensatory" operation of the limitations imposed by EU law to the capacity of individual Member States to restrict the free circulation of foreign judicial measures on the basis of their non-compliance with fundamental procedural rights. More precisely, the EU legislator has been forced to establish a minimum protection of fundamental rights as a counterpart to the abolition of the intermediate exequatur procedures and the restriction of the grounds for refusal to recognition and enforcement, which are strongly instrumental to a better functioning of the internal market through the free circulation of foreign measures and judgments. Nonetheless, it is inevitable that the effect of strengthening fundamental rights through the definition of common rules on access to justice, or the protection of the right to be heard, takes place independently of any rationale underlying the adoption of these rules. In fact, the work of "building" the mutual trust necessary to achieve a largely economic purpose-just as the best circulation of judgments-is nevertheless a bearer of undoubted benefits even in terms of protection and strengthening of the fundamental procedural rights of the citizen.

In doing so, we will try to demonstrate how the search for ever greater freedom of circulation of foreign measures and judgments can also convey a deeper work of procedural harmonization-especially in the point of protection of fundamental rights in court-allowing a substantial "circumventing" the problems of competence highlighted above.

CONCLUDING REMARKS AND PERSPECTIVES. TOWARDS A HARMONIZATION AND INTEGRATION OF EUROPEAN PROCEDURAL LAW

The harmonization and approximation action in procedural matters has derived its driving force from the need for Union law to affect the procedural autonomy of Member States, in order to ensure both the effectiveness of Union law, both the achievement-a through the procedural means-of the objectives set by the Treaties. From the examination of the pronouncements which recall the principles of equivalence and effectiveness, as well as of the legislative acts concerning this area, the instrumental character of the principles or, respectively, of the common rules contained therein concerning the need to ensure the useful effect of substantive law provisions, namely the completion or better functioning of the internal market.

[82]European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254 (INL).
[83]Commission Directive 2003/76/EC of 11 August 2003 amending Council Directive 70/220/EEC relating to measures to be taken against air pollution by emissions from motor vehicles, OJ L 206, 15.8.2003, p. 29-30.

The effectiveness of national legal remedies safeguarding the legal positions guaranteed by EU law is an essential requirement for the Union legal order to be able to concretely produce its effects in the company it is called upon to regulate. This is due to the dualistic dispositional/executive approach of the constitutional system of the Union-which entrusts the protection of subjective positions defined by EU law to the only procedural guarantee instruments prepared by each national system-with the risk that, in the absence of the provision of effective judicial remedies by domestic law, the common rule is in fact devoid of legal consequences, with obvious detrimental effects on the achievement of the objectives it pursues.

This close link between the effectiveness of substantive EU law and procedural law has allowed the attraction of procedural matter within the competence of the Union and the scrutiny of the CJEU. This link of interdependence between the effectiveness of the moment of national judicial protection and the effectiveness of EU substantive law-that is the completion, the correct or better functioning of the internal market-has legitimized jurisprudential and normative intervention in the procedural matter, it has deeply shaped and modeled both the methodology and the scope. Both the strictly sectoral approach to the regulation of procedural-confined matter in the context of cross-border disputes, or in even more specific fields, such as procurement, competition, consumer protection-as well as the limited consideration given to harmonization and approximation of aspects of the process related not so much to its effectiveness, but rather to its correspondence to the principles of the "fair trial", reflects the idea that the interference of Union law within the procedural autonomy of the Member States is admissible (ex-art 114 TFEU)-really appropriate (pursuant to article 81 TFEU) (MARTUCCI, 2017; POIARES MADURO, WIND, 2017, pp. 322ss; SCHÜTZE, 2015, pp. 382; USHERWOOD, PINDER, 2018)-only in those cases where the intervention on the procedural law is strictly preliminary to a better effectiveness of EU law, or a better realization of the objectives that it poses (SCHÜTZE, 2015, pp. 382; USHERWOOD, PINDER, 2018).

The attitude of the legislator in affecting procedural matter has undergone an evolution over the years, expanding itself from a philosophy of intervention that is merely "defensive" to the effectiveness of the EU norm, to a more "proactive" one. Alongside acts such as the "appeals" directives, issued to prevent the improper use of the wide autonomy of which the Member States enjoy in the procedural matter, further regulations have been issued, as in the case of the Directive IPRED (LARSOON, 2011; SAVIN, 2013, pp. 95ss)[84] and of Directive 2014/104/EC (FORESTER, 2017, pp. 68ss)[85] concerning compensation actions for violation of the antitrust rules, the only procedure harmonization implemented was that directly functional to achieving this objective. Very little attention is reserved in the legislation to the procedural rights of the parties involved. Similarly, even in the field of civil judicial cooperation, very few measures were taken to raise the level of protection of procedural rights within the Union by setting common minimum guarantee standards. This refers, in particular, to the aforementioned rules on free legal aid in cross-border disputes established by Directive 2003/08/EC, as well as to the special procedures outlined by the so-called optional instruments.

No reference, except as indicated in the recitals, is made in relation to fundamental rights, as well as due process. The protection is therefore in fact limited only to certain

[84]Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 2.6.2004, p. 16-25.

[85]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, p. 1-19.

aspects of the fair trial, in particular the right to be informed of the existence of a judicial procedure against it, in order to be able to present its defenses in good time. The legislation in question does not guarantee that an extremely partial protection of the right to due process. There is no reference, for example, to the aspects relating to the presence of a third and impartial judge, to a public hearing, to the parity of the parties or to the right to a reasoned judgment. The procedural guarantees laid down therein-simplification rules of the procedure apart-constitute nothing more than the mere counterpart of the defendant's loss of a "full" possibility of opposition to the recognition and enforcement of the provision issued, or certificate, in accordance with the aforementioned Regulations. They hardly express a general intention of the legislator to strengthen the level of procedural protection of the parties. Even in these cases, therefore, the only harmonization provided was that instrumental to the realization of the internal market, albeit through better access to justice (RIPOLL SERVENT, TRAUNER, 2017), better circulation of foreign measures, or the establishment of faster, faster and inexpensive procedures.

The aim of modern procedural law is not only to ensure that the process is "effective" or "efficient" but also, and above all, that this is "just", and therefore respects those fundamental procedural rights, such as the contradictory, defense, equality of arms, the impartiality of the judge, publicity of the hearing etc. sanctioned by both the ECHR, the CFREU, and the national constitutions themselves.

In this context, procedural harmonization has been purely ancillary to the functioning of the internal market: it has emerged as a "by-product" of the impact of EU law on national legal systems in order to guarantee the achievement of the objectives set by the Treaties, without any claim to directly standardize the judicial protection guaranteed to individuals, or define minimum standards for the protection of fundamental procedural rights. In essence, the harmonization action focused solely on the capacity of the process of "giving that" (WEID, 2014, pp. 438ss; RODGER, 2013, pp. 104ss; PETER, 2015, pp. 58ss; REINDL, 2015 (1); PEYER, 2015 (1))[86] and that the holder of the subjective situation of EU law would have had the right to receive in the absence of the crisis of cooperation, omitting-however-all that part of legislation related to the fair and just performance of the latter, remitted to the individual national laws. According to our opinion the Directive presents the specific rules as regards some novel questions for the extent of harm, which relates to violations of anti-trust legislation. A most prominent example is the question whether the liability of the cartel members should extend to the harm caused by the inflated pricing of non-cartel members as a reaction to the distortion of competition in the market due to the cartel (known as “umbrella effects” or “umbrella pricing”)[87]. The more pronounced effect of the Directive is probably the coordination of private and public enforcement of competition rules. The specific rules relating to the restriction of access to documents which have been submitted to the competition authorities under leniency applications, confirm the importance which continues to be attributed at European level on the public enforcement of competition law, and in particular on the unveiling of cartels

[86]Weid indicates that Art. 2 para 1 of the Directive (at least) does not contain restrictions for making respective claim.

[87]CJEU, C-557/12, *Kone AG* of 5 June 2014, ECLI:EU:C:2014:1317, published in the electronic Reports of the cases, par. 34 ("(...) consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied (...)").

through leniency programs, at least where these are successful. In this respect, it will be interesting to see how they will be applied, most notably in view of partially contradicting decisions of the CJEU.

On the illusory certainty of an already full and adequate protection of fundamental rights within the area of freedom, security and justice (FLETCHER, HERLIN-ARNELL, MATERA, 2016), there is an attempt to build a system of free circulation of foreign measures increasingly based on trust and mutual recognition. Except in the case of the recast of the Brussels I Regulation-before the inevitable finding that a system without common minimum standards for the protection of fundamental rights cannot be able to concretely base the trust necessary for the application of a full faith and credit clause postulating a free circulation of the foreign provision without any possibility of re-examination, not even with regard to the respect of these rights in the State of origin (GROUSSOT, 2012).

Even more concern is raised by the fact that one can take for granted the respect of fundamental rights by a State on the sole basis that it is a member of the Union. While the conventional system can only offer protection for equivalent-together with any enforcement, judicial or legislative enforcement effects, which the individual Member States deem to attribute to the ECtHR ruling-the exercise of the Union's powers in point protection of fundamental rights-with the consequent provision of minimum standards of guarantee-is able to offer, by means of those mechanisms such as the direct effect and the non-application of the incompatible national rule, a specific form of protection. Protection, the latter, which implies a higher standard of protection, even only for the mere application of the principle of primacy.

In my opinion, therefore, given that the two different guarantee schemes have contained-and offer protection- which is not perfectly comparable, the proper fulfillment of the obligations set out in articles 2 and 6 TEU could not be disregarded, where the Union enjoys its own competence, from the adoption of common minimum standards to safeguard fundamental rights on the sole basis that the same rights are also protected by the ECHR. This is because, by exercising the Union's regulatory competence, better and more effective protection could be guaranteed to them. This is especially true in connection with the construction of a system of free circulation of foreign judgments based on the principle of trust and mutual recognition, respect for fundamental rights can not be presumed by the fact that all Member States are also part of the ECHR. Indeed, in this case the question assumes the same tautological character as a presumption of respect for fundamental rights based solely on participation in the Union, in accordance with article 2 TEU (WIERZBOWSKI, GUBRYNOWICZ, 2015. TÜRK, 2010. WOODS, WATSON, 2017, pp. 37ss; BARNARD, PEERS, 2017, pp. 788ss).

In particular, the balancing act between the right to effective judicial protection and other opposing interests- which, as we have seen, presupposes a rich series of political evaluations-should be placed primarily on a legislative level. Only later, if the assessment of the European legislator is flawed by unreasonableness, or is disproportionate, the question could pass to the examination of the judicial power. However, legislation which is "systematic" and not strictly sectoral in the matter of fundamental procedural rights would constitute a useful benchmark for the CJEU in those cases in which it must balance their protection in the specific case- that is to assess the compatibility of a legislative act with the same-attenuating the "political" character of these decisions and calming any criticism in relation to the excessive "activism" of the courts of Luxembourg.

The legislative action on harmonization and procedural approximation did not follow that transition between economic Europe and the Europe of rights that the Treaty of Lisbon

wanted to give to every aspect of the Union, but rather remained firmly anchored to that functional link between the procedural impact and the functioning of the internal market which has characterized the early stages. And indeed, there is a marked gap between the declarations of intent of the European institutions on the protection of fundamental rights in the EU Justice Agenda for 2020[88]-and the effective action of the Union in this area.

If one were to identify one of the most needy aspects of development and evolution within the harmonization work, this is certainly relative to the protection of fundamental rights in civil proceedings. Action in this sense appears to be extremely urgent, as also highlighted by the recent resolution of the European Parliament of 25 October 2016 concerning the establishment of a safeguard mechanism at the level of the Union of fundamental rights[89]. And this not only to guarantee individuals a better level of protection for their rights, especially in connection with the free circulation of foreign measures-does not detract from the latter (GÁSPÁR-SZILÁGY, 2016, pp. 198ss; BOVEND' EERDT, 2016, pp. 112ss; GUIRESSE, 2016; NIBLOCK, 2016, pp. 250ss.; VERVAELE, 2015, pp. 123ss; SYBESMA-KNOL, 2014; FOSTER, 2014, pp. 51ss; MANSELL, 2011, pp. 133ss; TINSLEY, 2013, pp. 461ss; WOODS, WATSON, 2017, pp. 39ss; BACHMAIER, 2015, pp. 505ss; SMITH, 2013, pp. 82ss; SWOBODA, 2015, pp. 361ss; BROBERG, FENGER, 2016, pp. 602ss)[90].

---

[88]COM(2014)-144, The EU Justice Agenda for 2020: strengthening trust, mobility and growth in the Union, Brussels 11 March 2014.

[89]Only the harmonization and approximation of national laws by means of common provisions which, inter alia, ensure respect for fundamental procedural and non-procedural rights could allow the concrete removal of the necessary scrutiny by the national court of the execution, and consequently the reasons for refusal, without necessarily sacrificing the prerogatives of individuals. It is true that, at a precise and timely reading of the Povse and Bosphorus rulings, a presumption of absolute equivalent protection, and consequently the realization of a full European full faith and credit clause, would always be incompatible with compliance with the Convention. However, it is also clear from the rulings of the European Court that the element of primary importance is that of guaranteeing concrete protection of the fundamental rights guaranteed by the Convention. The presence of a normative corpus of EU law capable of infusing and realizing within the legal systems of the Member States a minimum, common and uniform standard for the protection of fundamental procedural rights-also modeled taking due account of the decisions of the Courts of Strasbourg and Luxembourg-would greatly reduce both the possibility of a conflict between the legal systems of the Union and the individual Member States with the provisions of the Convention, and possible conflicts between the jurisprudence of the two Courts. Furthermore, one would thus reconcile the pursuit of the "justice" component of the SLSG.-understood as a better realization of the right to effective judicial protection, with consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market-with a concrete realization, and not presumed, of the "freedom" component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed. Such a course of action was undertaken, for example, in relation to criminal law, starting with the Council resolution of 30 November 2009, which established a roadmap for strengthening

[90] CJEU, joined cases C-404/15 and C-659/15, *P. Aranyosi and R. Căldăraru* of 5 April 2016, ECLI:EU:C:2016:198, published in the electronic Reports of the cases. In particular the attitude of the Luxembourg courts in relation to the interpretation of the principle of mutual recognition and mutual trust in civil procedural matters is intended to align with the "warnings" enucleated by the European Court in Avotinš. The reasons behind the less rigorous interpretation of this principle in the aforementioned ruling-based on the derivation of a new mandatory reason for non-execution of a European arrest warrant, where such execution exposes the person concerned to the actual risk of suffering treatment inhuman or degrading-they cannot in fact move perfectly within the civil procedural matter, considering the ontological difference of the fundamental rights at stake. The CJEU has gone further on the mutual recognition and has been based on another interpretative way stating that the art. 3 of the ECHR and 4 of the CFREU must be interpreted: "(...) in a convergence between (...)". In particular the Advocate General Yves Bot ha dichiarato relativamente che: "(...) In the AG's search for balance he considers first whether Article 1(3) (...) constitutes a ground for non-execution of an arrest warrant. He rejects such a notion for the following three reasons. First off, interpreting Article 1(3) as a non-execution ground would run counter to the phrasing of that Article,

Furthermore, it would be necessary to reconcile the pursuit of the "justice" component of the Freedom and Security Security Area-intended as a better realization of the right to effective judicial protection, with a consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market-with a concrete and not presumed realization of the "freedom" component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed. Such a course of action was undertaken, for example, in relation to criminal law from the Council Resolution of 30 November 2009 (VERMEULEN, FLAMME, 2012, pp. 89ss; JIMENO-BULNES, 2010; VAN PUYENBROECK, VERMEULEN, 2011, pp. 1019ss)[91] which established a roadmap for strengthening the procedural rights of suspects or defendants in criminal proceedings, from which they a whole series of transversal measures originated-including the 2016/343/EC [92] and 2016/800/EC (SCHÜTZE, TRIDIMAS, 2018; BARNARD, PEERS, 2017, pp. 788ss)[93]-aimed at strengthening mutual trust between the judicial systems of the Member States by means of procedural harmonization.

Unfortunately, in the field of civil matters the legislator does not seem to have made use of the possibilities offered by the new approach of the Lisbon Treaty[94], especially as regards the cross-border judicial cooperation sector, where the immanent requirement for the functioning of the market the interior has been dequalified from a necessary to merely preferential element. Once this requirement had been removed, it would have been relatively simple to justify a cross-cutting procedural harmonization action, aimed at

---

which due to its place and wording does not express a non-execution ground, but rather the principle of mutual trust. Secondly, such a notion would not be in agreement with the EU legislator's intent to create a system of surrender with exhaustively enumerated non-recognition grounds, whereby, in addition to the grounds (...) only in the exceptional circumstances described in Recitals (10) and (13) surrender can be suspended or removal, expulsion or extradition can be prohibited. Last, a ground of non-recognition in Article 1(3) would severely damage mutual trust between judicial authorities on which the Framework Decision is based and would, as a result, make the principle of mutual recognition meaningless (...)". We are also talking about another principle-value of the Union, that of proportionality as a balancing of interests and the widening of the discretionary sphere of the internal judge, and the circumstances in speciem. Criminal cooperation does not seem to be comparable with the similar ground and dates back to the experience of the single market, in terms of decisive jurisprudential protagonism. Let us not forget that criminal cooperation has been based on the definition of common minimum standards for delineating spaces and limits of cooperation between judicial and police authorities in the areas selected by the Member States and by the Union legislator. Of course we can speak of a positive and normative unification for years in the criminal sector and especially after the Treaty of Lisbon the merit belongs to the principle of mutual recognition of judicial decisions which continues to guarantee a median solution to integration that is summarized in the protection of rights fundamental rights, the inalienable rights of individuals and a continuous progress dictated by the Member States towards an increasingly active and proactive contribution, a harbinger of innovations and achievements with the main objective among others the continuous accelerated integration but within a harmonious development and development of all the individual interest and not the state one.

[91]Council Resolution of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in riminal rpcoeedings, OJ C 295.4.12.2009, pp. 1-3.

[92] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of the of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11.

[93]Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1-20.

[94]The reason for such a difference in treatment could be raised. Even in this case, the most likely appears the ontological difference between the "very personal" values at stake in the criminal sphere-among which, of course, personal freedom stands out-and those that can be traced back to civil matters. Nevertheless, such a reasoning does not fully satisfy. Indeed, within civil matters are not only rights from exclusively economic but also social nature, such as that of family life.

defining a series of common rules to protect fundamental procedural rights, albeit limited to cross-border disputes.

The possibility of interpreting article 114 TFEU, individually or jointly with article 81 TFEU (TÜRK, 2010; WOODS, WATSON, 2017; BARNARD, PEERS, 2017), should not be excluded a priori, as the legitimacy of the adoption of a directive aimed at defining a set of minimum standards or common principles in civil procedural in order to facilitate the free circulation of judgments through the strengthening of mutual trust between the judicial systems of the Member States-and thereby facilitate the functioning and complete establishment of the common market. Furthermore, a possible recourse to the instrument of enhanced cooperation should not be excluded.

Likewise, a more structured approximation action could, in part, already be done by means of the optional instruments, in the area of cross-border disputes. This also by setting up genuine special courts[95] of the Union competent to resolve-following their procedural rules-disputes in cross-border civil and commercial matters, or in areas where the Union's harmonization action is already substantial, such as consumer protection, copyright, industrial patents[96], public procurement, competition (HESS, 2016). That is, in the event that the necessary political agreement could not be reached, defining special procedures applicable to such disputes, while maintaining them in the executive state of the individual national judicial authorities. In this case, the competence could easily be inferred both directly pursuant to art. 81 TFEU (for cross-border disputes) that indirectly pursuant to art. 114 and 115 TFEU (for further subjects) (KACZOROWSKA-IRELAND, 2016; MARTUCCI, 2017). The proposal made by the European Parliament in the aforementioned declaration of 25 October 2016 to make article 2 TEU and CFREU itself a valid legal for the adoption of legislative measures to protect fundamental rights.

The evolution of civil procedural harmonization within the Union seems to have followed a merely "extensive /inclusive" rather than "qualitative" path, since the new provisions, while expanding the spectrum of regulated subjects, have not attempted to reach a degree of legislative approximation, in procedural matter, significantly higher-that is more "systematic" or "structural"-respect to that already obtained in other fields with pre-Lisbon measures. Indeed, in some cases the level of harmonization has even dropped.

Currently there are no official EC proposals or legislative acts worthy of note, despite the issue of great interest in doctrine, especially as a result of the activation of the project ELI-UNIDROIT (WALLIS, 2014, pp. 174ss; PICKER, SEIDMAN, 2011, pp. 43ss; HESS, BERGSTRÖM, STORKRUBB (eds.), 2016. KRAMER, 2013; VERNADAKI, 2013, pp. 299ss; TARUFFO, 2012, pp. 208ss; KRAMER, 2014, pp. 219ss)[97], since 2013, which aims to develop a series of common principles in the transnational civil procedural matter (LIAKOPOULOS, 2010; BUX, 2017). According to our opinion the ALI/Unidroit Principles are a considerable achievement in its breadth, eloquence, and conciseness the practical influence of the ALI/Unidroit seems, however, rather limited. This is probably due to the subject matter. Procedural law, and in particular court litigation, is up to the present day

[95]It must not be forgotten, in fact, that the dispute before the Court of Justice and the Court of First Instance is governed by its own procedural regulations. However, the recent decline, by Regulation (EU) no. 2015/2422 of 16 December 2015, of the only specialized court pursuant to art. 257 TFUE. seems to exclude the will to proceed towards the creation of a series of ad hoc European judges.

[96]On the model, for example, the Unified Patent Court, which owns a very detailed procedural regulation, which regulates in detail every aspect of the process before it, including any extremely important accessory aspects for effective access to justice, such as legal aid and exemption from court fees.

[97] See the ultimate study LXXVIA-Transnational civil procedure. Formulation of regional rules. ELI-UNIDROIT-Transnational principles of civil procedure of 14 September 2018.

closely interwoven with legal traditions and cultures, and is largely local in nature. Harmonisation and legal transplants are limited. In addition, outside the scope of arbitral proceedings and unlike substantive contract rules, parties enjoy little or no freedom to select their own rules of civil procedure.

On the institutional level, however, the working document drawn up by the European Parliament's justice Commission on the introduction of common minimum rules of civil procedure in the European Union[98], as well as the subsequent draft report containing recommendations to the EC to prepare a formal proposal for a Directive to the pursuant to article 225 TFEU[99]. In particular, Annex I to the aforementioned report-which already contains a preliminary legislative draft-appears to accommodate many of the positions expressed in this paper, including, in particular, the need to strengthen mutual trust between Member States through the protection of fundamental right to a fair and harmonized process at common level[100].

Of course, such a position is understandable, especially considering the doubts in relation to the existence of a generalized Union competence in procedural matters and the possibility-apparently excluded from the case law Lück[101] and Germany v. European Parliament and Council (GUTMAN, 2014, pp. 295ss)[102]-to interpret article 114 TFEU as a legitimate structural intervention tout court on the legal systems of the Member States. Of course there are doubts about the limitation of particular actions or procedures harmonized only to cross-border disputes, an option which I consider to be irrelevant with the idea of a European judicial area based on common access to justice and equal treatment of citizens of different Member states. Of such problems, especially at the point of possible inequality of treatment between internal and cross-border actions, it seems to take note to widen the notion of "transnational controversy" as far as possible, including cases where-although the parties are domiciled in the same Member State of the court seised-the place of performance of the contract, in which the harmful event occurs or the enforcement of the judicial decision is situated in a different Member State, or the matter at issue falls within the scope of Union law.

However, this solution, although appreciable, does not convince in terms of practical feasibility. Indeed, it has already been pointed out that the Member States are inclined towards a strict interpretation of the requirement of cross-border implications referred to in article 81 TFEU, the latter recently reconfirmed with the approval of Regulation 2015/2421-of modification of the European procedure for small claims and the order for payment procedure-in which the Commission's proposal to widen the scope of the aforementioned proceedings was rejected through an almost similar extensive interpretation of the concept of a dispute border. Excluding exceptional revisions of the positions of the Council-possibly also following the exit of the United Kingdom from the Union-the scope of application of the draft of Directive therefore runs the risk of being brought back into the narrowest riverbed as per Regulations 1896/2006 (PEERS, 2016,

[98]Working document on the introduction of common minimum standards of civil procedure in the European Union of 21 December 2015, Commission of Justice, P.E. 572.853.

[99]Draft report giving recommendations to the Commission on common minimum standards of civil procedure in the European Union of 10 February 2017, Commission of Justice, P.E. 593.974. see also: Opinion 23/2018 on Commission proposals on European Production and Preservation Orders for electronic evidence in criminal matters (Art. 70.1.b) adopted on 26 September 2018.

[100]DEF points and L and following, pages 9 and 11 of the document.

[101]CJEU, C-34/67, *Lück v. Hauptzollamt Köln* of 4 April 1968, ECLI:EU:C:1968, I-00359.

[102]CJEU, C-376/89, *Federal Republic of Germany v. European Parliament and Council* of 5 October 2000, ECLI:EU:C:2000:544, I-08419.

pp. 380ss)[103] and 861/2007[104]. and 861/20072. Moreover, particular perplexity arises from the extensive clause aimed at considering cross-border any dispute that falls within the scope of Union law, if only because of the considerable difficulties in application and interpretation that it entails, which are configured as neither more nor less difficult with respect to those relating to the scope of the restrictive clause in article 51 CFREU.

It would have been perhaps politically simpler-in order to guarantee a generalized scope of application to the provision-to try to promote an extensive interpretation of article 114 TFEU capable of legitimizing a minimum harmonization intervention in terms of protection of rights fundamental procedural law in the whole civil and commercial matter, rather than a notion of a dispute with cross-border implications so broad that it essentially clears article 81 TFEU (HARTKAMP, SIBURGH, DEVROE, 2017, pp. 282ss)-which already provides for the possibility to intervene directly on the procedural arrangements of the Member States, albeit limitedly, in fact, to the transnational dispute-from every one of its borders. The latter option, which will hardly be accepted by the Member States willingly, if not for the implications present, but to avoid the creation of a precedent that could be inconvenient in the future[105].

In conclusion, the slowness of the institutions in profiting the openings of the Lisbon Treaty, also with the aim of guaranteeing better protection of fundamental procedural rights, is partly disheartening, but probably also a child of the delicate moment of turbulence-or open crisis-that Union has lived in these last years. The harmonization of national procedural systems-now becoming a necessary element for a further development of the free circulation of foreign judgments and provisions (and therefore for the completion of the common market)-could ultimately benefit from the strong political will that is usually formed in relation to issues related to the functioning of the internal market, to reinforce the protection of fundamental procedural rights and reduce differences in judicial treatment in the different Member States. In this way, that balancing operation would take place between the different components that for too long has been postponed in favor of "security", or "justice", to the partial detriment of strengthening the protection of the fundamental rights of European citizens.

REFERENCES

ANDREANGELI, A., From complainant to "private attorney general": The modernisation of EU competition enforcement and private antitrust action before national courts, in M. DOUGAN, S. CURRIE (ed.), **Fifty years of the EU treaties: looking back, thinking forward,** Hart Publishing, Oxford & Oregon, Portland, 2008, pp. 229ss.

ANDREWS, N., Fundamental principles of civil procedure: Order out of chaos, in X.E. KRAMER, C.H. VAN RHEE (eds.), **Civil litigation in a globalising world,** T.M.C. Asser Press, The Hague, 2012

[103]As we can see form the next cases from the CJEU: C-21/17, *Catlin Europe SE* of 6 September 2018, ECLI:EU:C:2018:675; C-245/14, *Thomas Cook Belgium* of 22 October 2015, ECLI:EU:C:2015:715, all of them published in the electronic Reports of the cases.

[104]See from the CJEU: C-516/18, *Sun Express Deutschland* of 22 August 2018, ECLI:EU:C:2018:730, published in the electronic Reports of the cases.; C-422/18 PPU, *FR* of 27 September 2018, ECLI:EU:C:2018:784, not yet published.

[105]Therefore, it is not mere coordination arrangements between the different courts, or obligations of mutual recognition in relation to notifications made in a different Member State with respect to that of the course seised.

ARAUJO, B.M., Intellectual property and the EU's deep trade agenda, in **Journal of International Economic Law,** 16 (3) 2013, pp. 455ss.
ARNULL, A., BARNARD, C., DOUGAN, M., SPAVENTA E., (a cura di), **A constitutional order of States. Essays in European Union law in honour of Alan Dashwood**, Oxford University Press, Oxford, 2011, pp. 7ss.
ARROWSMITH, S., The purpose of the European Union procurement directives. Ends, means and the implications for national regulatory space for comemrcial and horizontal procurement policies, in **Cambridge Yearbook of European Legal Studies,** 4, 2012, pp. 5ss.
ARROWSMITH, S., TREUMER, S., **Competitive dialogue on European Union procurement,** Cambridge University Press, Cambridge, 2012, pp. 334ss.
BACHMAIER, L., Mutual recognition instruments and the role of the CJEU: The grounds for non-execution, in **New Journal of European Criminal Law,** 5 (4), 2015, pp. 505ss.
BÁRD, V.P., CARRERA, S., GUILD, E., KOCHENOV D., (eds), **An EU mechanism on democracy, the rule of law and fundamental rights-Annex II- Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights,** P.E. 579.328, (Study of European Parliament, April 2016).
BARNARD, C., PEERS, S., **European Union law,** Oxford University Press, Oxford, 2017, pp. 586ss.
BAUDENBACHER, C., **The handbook of EEA law**, ed. Springer, Berlin, 2015, pp. 618ss.
BERRY, E., HOMEWOOD, M.Y., BOGUSZ, B., **Complete European Union law. Texts, cases and materials**, Oxford University Press, Oxford, 2013.
BIARD, A., **Collective redress in the EU: A rainbow behind the clouds?,** in ERA Forum, 19 (2), 2018, pp. 191ss.
BOBEK, M., **Central european judges under the european influence. The transformative power of the EU revisited**, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 234ss.
BOBEK, M., Why there is no principle of "procedural autonomy" of the Member States, in B. DE WITTE, H. MICKLITZ (eds.), The European Court of Justice and autonomy of the Member States, Intersentia, Oxford, 2011, pp. 306ss.
BONADIO, E., Remedies and sanctions for the infringement of IPR under EC law, in **European Intellectual Property Review**, 30 2008, pp. 320ss.
BOVEND' EERDT, K., The joined cases Aranyosi and Căldăraru: a new limit to the mutual trust presumption in the Area of Freedom, Security and Justice?, in **Utrecht Journal of International and European Law**, 32, 2016, pp. 112ss.
BOVIS, C., **European Union public procurement law**, Edward Elgar Publishers, Cheltenham, 2012, pp. 218ss.
BRIZA, P., Lucchini S.p.A.-Is there anything left of the res judicata principle?, in **Civil Justice Quarterly**, 27 (1), 2008, pp. 40ss.
BROBERG, M.P., FENGER, N., Preliminary references to the Court of Justice of the European Union and the right to a fair trial under article 6 ECHR, in **European Law Review**, 23 (4), 2016, pp. 602ss
BROWNSWORD, R., MICLITZ, H.W., NIGLIA, L., The foundations of european private law, Hart Publishing, Oxford & Oregon, Portland, 2011, pp. 580ss.
BUX, U., **The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law,** P.E. 556.972, (Study of European Parliament, 2017).

CARANTA, R. EDELSTRAM, G., TRYBUS, M., **European Union public contract law: Public procurement and beyond,** ed. Bruylant, Bruxelles, 2013.
CAUFFMAN, C., The interaction of leniency programmes and actions for damages, in **Competition Law Review**, 34, 2011, pp. 182ss.
CHALMERS, D., DAVIES, G., MONTI, G., **European Union law,** Cambridge University Press, Cambridge, 2014.
CHENEVIERE, C., Arrêts Pannon et Asturcom: Le caractère abusif des clauses attributives de compétence dans la lignée de la jurisprudence Oceano, in **Revue Européenne de Droit de la Consommation,** 37, 2010, pp. 352ss.
CIMAMONTI, S., TRANCHANT, K., CHÉROT, J.Y., TREMEAVU, Y., **Le droit entre autonomie et ouverture. Mièlanges en l'honneur de Jean-Louis Bergel,** ed. Larcier, Bruxelles, 2013, pp. 920ss.
CLÊMENT-WILZ, L., **Le rôle politique de la Cour de justice de l'Union europèenne**, ed. Larcier, Bruxelles, 2019.
CORTÉS, P., **The new regulatory framework for consumer dispute resolution,** Oxford University Press, Oxford, 2016.
CREMONA, M., **Compliance and the enforcement of European Union law,** Oxford University Press, Oxford, 2012.
DE KOINICK, C., FLAMEY, P., **European public procurement law: The european public procurement. Part I-Remedies,** Kluwer Law International, The Hague, 2009, pp. 76ss.
DE VRIES, S., IORIATTI, E., GUARDA, P., **European Union citizen's economic rights in action: Re-thinking legal and factual barriers in the internal market,** Edward Elgar Publishers, Cheltenham, 2018.
DEVENNEY, J., KENNY, M.B., KENNY, M., **The transofrmation of european private law. Harmonisation, consolidation, codification or chaos?,** Cambridge University Press, Cambridge, 2013
DOUGLAS-SCOTT, S., HATZIS, N., **Research handbook on European Union law and human rights,** Edward Elgar Publishers, Cheltenham, 2017, p. 511ss.
DUNNE, N., Courage and compromise: the directive on antitrust damages, in **European Law Review**, 22 (4), 2015, pp. 582ss.
DUROVIC, M., **European law on unfair commercial practices and contract law,** Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 106ss.
ECKHOUT, P.E., Opinion 2/13 on european union accession to the ECHR and judicial dialogue. Autonomy or autarky, in **Fordham International Law Journal,** 38 (4), 2015, pp. 964ss
EDWARD, D.A.O., LANE, R., **Edward and Lane on European Union law,** Edward Elgar Publishers, Cheltenham, 2013.
EICHEL, F., Keine rügelose Einlassung in Europäischen Mahverfahren, in **Revue de Droit Privè de L'Union Europèenne,** 2014.
FALLON, M., KRUGER, T., The spatial scope of the EU's rules on jurisdiction and enforcement of judgments: From bilateral modus to unilateral universality?, in **Yearbook of Private International Law**, 2012-2013, pp. 6ss.
FARGRIVE, D., LICHÉRE, F., **Public procurement law. Damages as an effective remedy,** Hart Publishing, Oxford & Oregon, Portland, 2011.
FAUVARQUE-COSSON, V.B., BEHAR-TOUCHAIS M., (a cura di), **Implementation of optional instruments within European civil law**, P.E. 462.465, (Study of European Parliament 2012), pp. 35ss.

FLETCHER, M., HERLIN-ARNELL, E., MATERA, E., **The European Union as an area of freedom, security and justice,** ed. Routledge, London & New York, 2016.
FORRESTER, I.S., The role of the CJEU in interpreting Directive 2014/104/EU on antitrust damages actions, in **ERA Forum**, 18 (1), 2017, pp. 68ss
FOSTER, N., **European Union law directions**, Oxford University Press, Oxford, 2014, pp. 51ss.
GÁSPÁR-SZILÁGY, S., Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a european arrest warrant, in **European Journal of Crime, Criminal Law and Criminal Justice, 24 (1), 2016**, pp. 198ss.
GILIKER, P., **Research handbook of European Union tort law,** Edward Elgar Publishers, Cheltenham, 2017, pp. 224ss.
GILLIAUX, P., **Droit(s) europèenne(s) à un procès equitable**, ed. Bruylant, Bruxeles, 2012.
GLAS, L., KROMMENDIJK, G., From opinion 2/13 to Avoţinš: Recent developments on the relationship between the Luxembourg and Strasbourg Courts, in **Human Rights Law Review,** 17 (2), 2017, pp. 568ss.
GROUSSOT, X., Constitutional dialogues, pluralism and conflicting identities, in M. AVBELJ, J. KOMAREK (eds.) **Constitutional pluralism in the European Union and beyond**, Hart Publishing, Oxford, Oregon, Portland, 2012.
GRUBER, P., Die Nichtgerklärung eines europäischen Zahlungsbbefehls, in **Zeitschrift für das Privatrecht der Europäischen Union,** 13 (1), 2016, pp. 153ss.
GUIRESSE, M., Confiance mutuelle et mandat d'arrêt européen: Evolution ou inflexion de la Cour de justice?, in GDR-ELSJ, 12 avril 2016.
GULLFER, S., VOGENAUER, S., **English and european perspectives on contract and commercial law. Essays in honour of Hugh Beale,** Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 125ss.
GUTMAN, K., **The constitutional foundations of european contract law. A comparative analysis,** Oxford University Press, Oxford, 2014, pp. 295ss.
HALBERSTRAM, D., "It's the autonomy, stupid!". A modest defense of opinion 2/13 on EU accession to the ECHR, and the way forward, (2015) in **German Law Journal,** 16, 2015, pp. 114ss.
HARTKAMP, A., SIBURGH, C., DEVROE, W., **Cases, materials and text on European Union law and private law**, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.
HAZELHORST, M., **Free movement of civil judgments in the European Union and the right of fair trial,** T.M.C. Asser Press, The Hague, 2017, pp. 438ss.
HEBLY J.M., (ed.) **European public procurement law: Legislative history of the Public Procurement Remedies Directive 2007/66/EC,** Kluwer Law International, Alphen aan den Rijn, 2011.
HEBLY, J.M., BRANTS, J., **European public procurement: legislative history of the "remedies" of directives 89/665/EEC and 92/13/EEC**, Wolters Kluwer, Aalphen aan den Rijn, 2011.
HESS, B., BERGSTRÖM, M., STORKRUBB E., (eds), **EU civil justice: Current issues and future outlook**, Hart Publishing, Oxford & Oregon, Portland, 2016.
HESS, B., **Harmonized Rules and Minimum Standards in the European Law of Civil Procedure,** P.E. 556.971, (Study of European Parliament, 2016), p. 13 and 14.
HESS, B., **Harmonized Rules and Minimum Standards in the European Law of Civil Procedure,** P.E. 556.971, (Study of European Parlimanent, 2016), pp. 13ss.
HOBE, S., **Europarecht,** Academia Juris-Vahlen Verlag, 2017.

HORSPOOL, M., HUMPHREYS, M., **European Union law,** Oxford University Press, Oxford, 2012, pp. 552ss.
HOWELLS, G., TWIGG-FLESNER, C., WILHELMSSON, T., **Rethinking European Union consumer law**, ed. Routledge, London & New York, 2017.
IOANNIDOU, M., **Consumer involvement in private European Union competition law enforcement,** Oxford University Press, Oxford, 2015.
JAKAB, A., KOCHENOV, D., **The enforcement of EU laws and values. Ensuring member States compliance**, Oxford University Press, Oxford, 2017.
JELINEK, W., ZANGL, S., **Insolvenzordung,** Manz Verlag, Wien, 2017.
JIMENO-BULNES, M., Towards common standards on rights of suspected and accused persons in criminal proceedings in the EU?, **CEPS policy paper,** 2010. I-.
JONES, A., SURFIN, B., **European Union competition law: Text, cases and materials,** Oxford University Press, Oxford, 2016, pp. 892ss.
KACZOROWSKA-IRELAND, A., **European Union Law,** Routledge, London & New York, 2016.
KERAMEUS, K., Procedural harmonization in Europe, in **American Journal of Comparative Law,** 43 (4), 1995, pp. 409ss.
KERIKMÄE, T., **Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights,** ed. Springer, Berlin/Heidelberg, 2014, pp. 80ss.
KOMNINOS, A., Public and private antitrust enforcement in Europe: Complement? Overlap?, in **Competition Law Review,** 29, 2006, pp. 5ss
KRAMER, X.E., Procedure matters: Construction and deconstructivism in european civil procedure, in **Erasmus Law Lectures**, 33, 2013.
KRAMER, X.E., The structure of civil proceedings and why it matters: Exploratory observations on future ELI-UNIDROIT european rules of civil procedure, in **Uniform Law Review**, 19 (2), 2014, pp. 219ss.
LARSOON, S., **Metaphors and norms. Understanding copyright law in a digital society**, ed. Lund University, 2011.
LAZIĆ, V., STUIJ, S., **Internatonal dispute resolution: Selelected issues in international litigation and arbitration,** T.M.C. Asser Press, The Hague, 2018.
LEBRUN, G., De l'utilitè de l'article 47 de la Charte des droits fondamentaux de l'union europèenne, in **Revue Trimestrielle des Droits de l'Homme,** 106, 2016, pp. 433ss.
LECZYKIEWICZ, D., Effectiveness of EU law before national courts: direct effect, effective judicial protection, and state liability, in D. CHALMERS, A. ARNULL, **The oxford handbook of European Union law,** Oxford University Press, Oxford, 2015.
LENAERTS, K., MASELIS, I., GUTMAN, K., **European Union procedural law,** Oxford University Press, Oxford, 2014, pp. 133ss.
LIAKOPOULOS, D., Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile, in **Juris Gradibus**-working paper, 20.
LIAKOPOULOS, D., European integration and its relation with the jurisprudence of European Court of Human Rights and private international law of European Union, in **Homa Publica.Revista Internacional de Direitos Humanos e Impresa**, 2 (2), 2018.
LIAKOPOULOS, D., First considerations and discussion of the proposed reform of litigation competences of the Court of Justice of the European Union, in **International and European Union Legal Matters**-working paper series, 2018.
LIAKOPOULOS, D., La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux, in **International and European Union Legal Matters**-working paper series, 2012.

LIAKOPOULOS, D., Protection of human rights between European Court of Human Rights and Court of European Union, in **International and European Union Legal Matters,** 2015
LIAKOPOULOS, D., Recognition and enforcement of foreign sentences in European Union context: The italian and german private international law cases, in **International and European Union Legal Matters**-working paper series, 2010
LIAKOPOULOS, D., The influence of EU law on national civil procedural law: Towards the adoption of common minimum standards?-La influencia de la legislaciòn de la UE en el derecho procesal civil nacional: ¿hacia la adopciòn de normas minimas comunes?, in **Revista General de Derecho Europeo**, 46, 2018
LIAKOPOULOS, D., **The regulation of transnational mergers in international and european law,** Brill Academic publications and Martinus Nijhoff Publishers, The Hague, 2010.
LODDER, A.R., MURRAY, A.D., **European Union regulation of e-commerce. A commentary,** Edward Elgar Publishers, Cheltenham, 2017.
MAK, C., Rights and remedies: Article 47 EUCFR and effective judicial protection in european private law matters, in **Amsterdam Law School Research Paper No. 2012-88**. Centre for the Study of European Contract Law Working Paper Series No. 2012-11.
MANSELL, D., The european arrest warrant: The role of Judges when human rights are at risk, in **New Journal of European Criminal Law,** 2 (1), 2011, pp. 133ss.
MARINO, S., Strengthening the european civil judicial cooperation: The patrimonial effects of family relationship, in **Cuadernos de Derecho Transancional,** 9, 2017, pp. 266ss.
MARQUIS, M., CISOTTA R., (a cura di), **Litigation and arbitration in EU competition law**, Edward Elgar Publishing, Cheltenham, 2015.
MARTUCCI, F., **Droit de l'Union europèenne**, LGDG, Paris, 2017.
MENDES, J., VENZKE, I., **Allocating auhtority. Who should do what in european and international law?**, Hart Publishing, Oxford & Oregon, Portland, 2018.
MICKLITZ, H., **Constitutionalization of european private law**, Oxford University Press, Oxford, 2014.
MICKLITZ, H.W., WECHSLER, A., **The transformation of enforcement: European economic law in a global perspective,** Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 138ss.
NIBLOCK, R., Mutual recognition, mutual trust?: Detention conditions and deferring an EAW, in **New Journal of European Criminal Law,** 24 (2) 2016, pp. 250ss.
NOWAK, C., **Europarecht nach Lissabon,** ed. Nomos, Baden-Baden, 2011.
OLYKKE, G.S., How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?, in **Public Procurement Law Review,** 20, 2011, pp. 180ss
OPPERMANN, T., CLASSEN, C.D., NETTESHEIM, M., **Europarecht,** C.H. Beck, München, 2016.
PEERS, S., **European Union justice and home affairs law,** Oxford University Press, Oxford, 2016, pp. 380ss
PEREÑA VICENTE, M., DELGADO MARTIN, P., HERAS HERNÁNDEZ, M., **Nuevas orientaciones de derecho civil en Europa,** ed. Thomson Reuters-Aranzadi, Madrid, 2015, pp. 632ss.
PETER, S., Access to competition authorities files in private antitrust litigation, in **Journal of Antitrust Enforcement,** 3 (1), 2015, pp. 58ss.
PEYER, S., The antitrust damages directive-Too little, too late, competition policy, in **International/Antitrust Chronicle,** January 2015 (1).

PICHERAL, C., **Le droit à un procès èquitable au sens du droit de l'Union europèenne,** ed. Anthemis/Nemesis/Limal, Bruxelles, 2012.
PICKER, C.B., SEIDMAN, H., **The dynamism of civil procedure. Global trends and developments,** ed. Springer, Berlin, 2011, pp. 43ss.
POIARES MADURO, M., WIND, M., **The transformation of Europe: Twenty-five years on,** Cambridge University Press, Cambridge, 2017, pp. 321ss.
PRECHAL, S., WIDDERSHOVEN, R., Redefining the relationship between "Rewe-effectiveness" and effective judicial protection, in **Review of European Administrative Law,** 6 (1), 2011, pp. 31-32, 38ss.
RAUSCHER, T., **Internationales Privatrecht mit internationalem Verfahrensrecht**, C.H. Beck, München, 2017, pp. 686ss.
REICH, N., Legal protection of individual and collective consumer interests, in H.W. MICKLITZ, N. REICH, P. ROTT, **Understandig EU consumer law**, ed. Intersentia, Antwerp, Oxford & Portland, 2009, pp. 318ss.
REINDL, A.P., The 2014 Directive on private enforcement-Looking back and Looking Forward, in **Competition Policy International/Antitrust Chronicle,** January 2015 (1).
RIPOLL SERVENT, A., TRAUNER, F., **The Routledge handbook of justice and home affairs research,** Hart Publishing, Oxford & Oregon, Portland, 2017.
RODGER, B.J., Why not court? A study on follow-on action in the UK, in **Journal of Antitrust Enforcement,** 1 (1), 2013, pp. 104ss.
SAFFIAN, M., DÜSTERHAU, D., A Union of effective judicial protection: Addressing a multi-level challenge through the lens of article 47 CFREU, in **Yearbook of European Law,** 33 (1), 2014, pp. 3ss.
SÁNCHEZ GRAELLS, A., **Public procurement and the european union competition rules,** Hart Publishing, Oxford & Oregon, Portland, 2015.
SAVIN, A., **European Union internet law**, Edward Elgar Publishers, Cheltenham, 2013, pp. 95ss.
SCHEBESTA, H., **Damages in European Union public procurement law**, ed. Springer, Berlin, 2015, pp. 25ss.
SCHÜTZE, R., **European Union law,** Cambridge University Press, Cambridge, 2015, pp. 382.
SCHÜTZE, R., TRIDIMAS, T., **Oxford principles of European Union Law**, Oxford University Press, Oxford, 2018.
SHUIBHNE, N.N., GORMLEY L.W., (a cura di), **From single market to Economic Union. Essays in memory of John A. Usher,** Oxford University Press, Oxford, 2012, pp. 176ss.
SILVEIRA, M., CANOTILHO, A., **Carta dos direitos fundamentais da União Europeia**, ed. Almedina, Coimbra, 2013, pp. 537ss.
SMITH, E., Running before we can walk? Mutual recognition at the expense of fair trials in Europe's Area of Freedom, Justice and Security, in **New Journal of European Criminal Law**, 3 (1), 2013, pp. 82ss.
STORME M., (eds), **Approximation of judiciary law in the European Union,** Kluwer Law, The Hague, 1994, pp. 58ss
SWOBODA, S., The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters: A small note on a fundamental misunderstanding, in **Zeitschrift für Internationale Strafrechtsdogmatik,** 10, 2015, pp. 361ss.
SYBESMA-KNOL, N., The european system for the promotion and protection of human rights, in **Georgia Journal of International & Comparative Law,** 20, 2014.

TARUFFO, M., Harmonisation in a Global Context: The ALI/Unidroit Principles, in X.E. KRAMER, C.H. VAN RHEE, **Civil litigation in a globalising world,** T.M.C. Asser Press/Springer, The Hague, Heidelberg, 2012, pp. 208ss.
THOMSPON, B., GORDON, M., **Cases and materials on constitutional & administrative law,** Oxford University Press, Oxford, 2017.
THORSON, B., **Individual rights in European Union law**, ed. Springer, Berlin, 2016, pp. 266ss.
TILLOTSON, J., FOSTER, N., **Text, cases and materials on European Union law,** Gavedish Publishing, New York, 2013.
TINSLEY, A., Protecting criminal defence rights through EU Law: Opportunities and challenges, in **New Journal of European Criminal Law,** 3 (3), 2013, pp. 461ss.
TRIDIMAS, T., Bifurcated justice: The dual character of judicial protection in EU law, in A. ROSAS, E. LEVITS, Y. BOT, **The Court of Justice and the construction of Europe: Analyses and perspectives on sixty years of case-law**, ed. Springer, The Hague, 2013, pp. 368ss.
TRYBUS, M., The hidden Remedies Directive: Review and remedies under the EU defence and security procurement Directive, (2013) 22 in Public Procurement Law Review, 22, 2013, pp. 136ss.
TÜRK, A.H., **Judicial review in European Union law,** Edward Elgar Publishers, Cheltenham, 2010.
USHERWOOD, J., PINDER, S., **The European Union. A very short introduction,** Oxford University Press, Oxford, 2018.
VAN PUYENBROECK, G., VERMEULEN, J., Towards minimum procedural guarantees for the defence in criminal proceedings in the European Union, in **International & Comparative Law Quarterly**, 60 (4), 2011, pp. 1019ss.
VANDENBORRE, I., European Union competition law procedural isues, in **Journal of European Competition Law & Practice,** 4 (6), 2013, pp. 508ss.
VERMEULEN, G., FLAMME, J., **Defence rights. International and european developments**, ed. Maklu, The Hague, Bruxelles, US, 2012, pp. 89ss.
VERNADAKI, Z., Civil procedure harmonization in the EU: Unravelling the policy considerations, in **Journal of Contemporary European Research**, 9 (2), 2013, pp. 299ss.
VERVAELE, A.E., Mutual legal assistance in criminal matters to control (transnational) criminality, in N. BOISTER, R.J. CURRIE (a cura di), **Handbook of transnational criminal law**, ed. Routledge, London & New York, 2015, pp. 123ss.
VON BOGDANDY, A., IOANNIDIS, M., Systemic definiciency in the rule of law: What is this, what has been done, whtat can de done, in **Common Market Law Review**, 51, 2014, pp. 64ss.
WALLIS, D., Introductory remarks on the ELI-NIDROIT project, in **Uniform Law Review**, 19 (2), 2014, pp. 174ss.
WEID, C.F., The Directive on actions for antitrust damages after passing the European Parliament, in **European Competition Law Review,** 35 (4), 2014, pp. 438ss
WIERZBOWSKI, M., GUBRYNOWICZ, A., **International investment law for the 21st century,** Oxford University Press, Oxford, 2015.
WILLIAMS ELEGBE, S., **Fighting corruption in public procurement: A comparative analysis of disqualification or debarment measures,** Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 212ss.
WILMAN, F., **Private enforcement of European Union law before national Courts. The European Union legislative framework**, Edward Elgar Publishers, 2015, pp. 95ss.

WILS, W.P.J., Should private antitrust enforcement be encouraged in Europe?, in **World Competition,** 26, 2003, pp. 474ss.
WOODS, L., WATSON, P., **Steiner & Woods European Union law,** Oxford University Press, Oxford, 2017, pp. 37ss
WOUTER, P.J.W., Ten years of Regulation 1/2003-A retrospective, in **Journal of European Competition Law and Practice,** 4, 2013
WRIGHT, V.K., The ambit of judicial competence after the EU Antitrust Directive, in **Legal Issues of Economic Integration,** 43, 2016, pp. 15ss.