



The Future of National Procedural Law in Europe: Harmonisation vs. Judge-made Standards in the Field of Administrative Justice

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1. Introduction¹

In the absence of a general Community competence for the harmonisation of national procedural rules, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the actions intended to enforce the rights which individuals derive from Community law. The EC is thus based upon a decentralised system of enforcement, in which Community law is mainly applied by national authorities and adjudicated upon by national courts according to the rules of national procedural law. However, in order to ensure a minimum degree of uniformity in the enforcement of EC law and to guarantee the ‘*effet utile*’ of Community law, the ECJ has, on numerous occasions, intervened into national procedural rules.² In particular, by using the tools of equivalence and effectiveness, the ECJ has been setting reference points and minimum standards.³ The national rules have to comply with these standards and, in cases in which the national remedies fall below the level of protection which the ECJ deems acceptable, the disapplication powers of national adjudicative authorities is triggered.

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¹ Please note that this paper has been published in the Maastricht Faculty of Law Working Papers Series (number 2008/08).

² In general on the ECJ’s approach to domestic remedies, see R. Craufurd Smith, ‘Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection’ in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford 1999) 287, for an attempt to explain the rationale underlying the ECJ’s case law on domestic remedies; R. Caranta, ‘Judicial Protection against Member States: a New *Ius Commune* Takes Shape’ [1997] *CMLRev* 703; S. Prechal, ‘EC Requirements for an Effective Remedy’ in J. Lonbay and A. Biondi (eds.), *Remedies for Breach of EC Law* (Chichester 1997) 3; B. Hofstätter, *Non-compliance of National Courts – Remedies in European Community Law and Beyond* (The Hague 2005) 9 ff; M. Accetto and S. Zleptnig, ‘The Principle of Effectiveness: Rethinking its Role in Community Law’ [2005] *EPL* 375; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford 2007) 86 ff; J. Delicostopoulos, ‘Towards European Procedural Primacy in National Legal Systems’ [2003] *ELJ* 599; A. Arnall, *The European Union and its Court of Justice* (Oxford 2006) 267 ff; P. Craig, *EU Administrative Law* (Oxford 2006) 789ff.

³ See, for example, Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1990] ECR I-2433; case C-208/90, *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-4269; case C-271/91, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority (Marshall No. 2)* [1993] ECR I-4367.

As a potential consequence of the existence of European standards of protection, a process of convergence may occur, namely a process of change towards an increasing similarity of the legal systems. More strikingly, however, this process of convergence may occur beyond the initial boundaries of 'European situations', and through the voluntary adoption of Community standards by the Member States. This voluntary adoption of Community standards in the legal order of the Member States takes place when the national courts of the Member States apply, on a voluntary basis, the standards set out in the ECJ's case law in purely domestic cases, or when the national Parliaments of the Member States enact new pieces of legislation that comply with such standards. In this way the Member States avoid the creation and maintenance of two different sets of rules and judicial protection for national and Community law matters, and thereby avoid the possibility of reverse discrimination when the Community standards offer a higher level of protection.⁴

Earlier research⁵ has shown, however, that, of five procedural areas analysed⁶ in three legal systems,⁷ an increased similarity, induced by the ECJ's case law, can only be detected in two legal systems with regard to the procedural rules on interim relief. The situation, therefore, still remains that national procedural rules remain different. The cause of these enduring procedural differences has been traced back to the ECJ's attitude, which appears to be tolerant of national differences. In some procedural areas, the ECJ has merely imposed the scrutiny of national courts on the requirements of equivalence and effectiveness.⁸ National courts, therefore, are not required to follow one single model advanced by the ECJ. The consequence of this minimalist intervention by the ECJ is that, in the areas analysed, although all are in compliance with the ECJ's case law, different procedural rules apply. Although the phenomenon was not detected for the procedural areas and the legal systems examined, it should not be overlooked that other reasons for the existence of different procedural rules might also lie in the national courts' ignorance of or disregard for the relevant ECJ's case law,

⁴ As Schwarze points out, 'such a situation not only puts significant strains on the personnel working for the administration who, at least partly, need to apply European and national administrative law simultaneously, but it would also be increasingly difficult to explain such a strict separation to the citizens of the EU who are subject to these separate regimes'. See J. Schwarze, *European Administrative Law* (London 2006), ccii. On this aspect, see M.L. Fernandez Esteban 'National Judges and Community law: The Paradox of the Two Paradigms of Law' [1997] *MJ* 143.

⁵ M. Eliantonio, *Europeanisation of Administrative Justice? The influence of the ECJ's case law in Italy, Germany and England* (Groningen 2008), in particular Chapter 5.

⁶ The rules that have been analysed concern:

- (i) rules concerning the possibility of bringing a claim for the judicial review of an administrative measure;
- (ii) rules setting out time limits within which to challenge the administrative action;
- (iii) rules limiting the powers of national courts to raise *ex officio* grounds of unlawfulness of an administrative measure based upon the violation of EC law;
- (iv) rules setting out the means of evidence available to administrative courts; and
- (v) rules concerning the power of administrative courts to provide interim relief and the types of interim measures that can be granted.

⁷ Namely, Italy, Germany and England.

⁸ On time limits, case C-326/96, *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; case C-78/98, *Shirley Preston and others v. Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201. On evidence rules, case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio S.p.A.* [1983] ECR 3595; case C-228/98, *Kharalambos Dounias v. Ipourgos Ikonomikon (Minister for Economic Affairs)* [2000] ECR I-577. On the powers of national courts to raise *ex officio* points of EC law, joined cases C-430-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; joined cases C-222-225/05, *J. van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233.

or in the fact that the question of the compliance of certain national procedural rules with EC law is not submitted to the ECJ.

The issue which this article endeavours to analyse is whether, for the purposes of ensuring an adequate, complete and effective judicial protection to individuals deriving rights from EC law, and a uniform application of Community law throughout the Union, it would be advisable for the European legislator to enact measures containing the procedural rules that need to be applied by national administrative courts when they are adjudicating upon EC law, or whether the effective enforcement of Community law in national courts can still be safeguarded by the requirements imposed by the ECJ's case law. This question is closely connected to that concerning the existence of a legal basis for the European Community to harmonise national procedural law: in other words, before examining whether a harmonisation of procedural administrative law by the Community legislature is desirable, one needs to first check whether, at present, the enactment of such harmonising measures would be at all possible. This question, in turn, raises doubts as to which legal instrument would be best suited to contain rules for the harmonisation of procedural rules.

2. The Need for Harmonisation of the Rules for the Decentralised Enforcement of Community Law

2.1 The Possibility and Desirability of Harmonised Procedural Rules Applicable to the Judicial Review of Administrative Action

Before investigating the arguments concerning the desirability of a harmonisation of the rules for the decentralised enforcement of Community law, the question of the possible legal bases of the Community action must be addressed. As is well known, pursuant to the principle of conferral, enshrined in Article 5 EC, the Community is only empowered to act within the competences conferred upon it by the Treaty.

With regard to a procedural harmonisation, it must be pointed out that there seems to be no general competence enshrined in the EC Treaty for the Community to act, so that a Community legislative competence may be exercised only within specific sectors, such as agriculture and customs cooperation. The latter area, for example, has undergone a process of codification which resulted in the enactment of the Community Customs Code, the first comprehensive compilation of rules for the entire field of Community customs law.⁹

One could in principle turn to Article 95 EC, the legal basis for harmonisation measures.¹⁰ According to this provision, the Council is entitled to enact legislation for the approximation of national laws, having as its objective the establishment and functioning of the internal market. On this basis, the Public Procurement Remedies Directives were issued.¹¹ However, it

⁹ Council Regulation 2913/92/EEC of 12 October 1992 establishing the Community Customs Code [1992] OJ L 302/1.

¹⁰ See, for example, F. Schoch, 'Die Europäisierung des Verwaltungsprozessrechts' in E. Schmidt-Aßmann, D. Sellner and G. Hirsch (eds.), *Festgabe 50. Jahre Bundesverwaltungsgericht* (Köln 2003) 533; G. Haibach, 'Vorläufiger Rechtsschutz im Spannungsfeld Von Gemeinschaftsrecht und Grundgesetz' [1996] *DÖV* 62.

¹¹ 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 [1989] OJ L 395/33; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the

is at least questionable whether this article could constitute a correct legal basis for the harmonisation of administrative procedural law:¹² the choice of this legal basis would, indeed, need to be justified, namely, one would need to show how the rules on the administration of justice have as their object, among other things, ‘the establishment and functioning of the internal market’, and that the national differences between these rules somehow impair the proper functioning of the internal market.¹³

Since the Treaty of Amsterdam, an explicit base for harmonisation of civil procedural law is to be found in Article 65 of the EC Treaty. This legal basis can be used with regard to civil matters which have cross-border implications and in so far as common rules are necessary for the functioning of the internal market. This rule is organised around two poles. One aspect of this provision concerns the harmonisation of civil procedural law through a series of steps, such as judicial cooperation and the approximation of national legislation in specific matters, such as evidence, conflict of laws and jurisdiction. The second aspect, in contrast, deals with the elimination of the obstacles to the good working of civil proceedings, through the promotion of mutual ‘compatibility’ of the national rules. For both aspects, however, the measures of harmonisation should be enacted only in so far as it is *necessary* for the proper functioning of the internal market. In the context of procedural harmonisation, letter ‘c’ of Article 65 EC is of particular relevance, since it allows measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States. Apart from the reference to the necessity of the measure for the proper functioning of the internal market, a further difficulty with regard to this article lies in its subject-matter. Indeed, this legal basis concerns civil procedural measures, and it would be arguable whether it could be applicable also to administrative procedural law.

The common feature of Article 95 and Article 65 EC is the reference to the functioning of the internal market,¹⁴ the disruption of which would justify procedural harmonisation measures. Thus, in order to decide upon the necessity of EC harmonisation measures in the field of procedural law, one has to estimate the negative effects which judicial remedies, which differ from State to State, create for European integration.¹⁵ In particular, one has to analyse the influence of divergent judicial remedies in the Member States on the internal market of the European Community. If, for example, procedural differences would cause business actors to reduce their business in a certain Member State because of the difficulty that they might encounter in enforcing their EC rights, then one could argue that competition in the European

procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14.

¹² For this argument, with regard to the codification of the rules on administrative decision-making proceedings, see C. Vedder, ‘(Teil)kodifikation der Verwaltungsverfahrensrechts der EG’ [1995/Beiheft] *EuR* 1995, 94; J. Schwarze, ‘The Convergence of the Administrative Laws of the EU Member States’ in F. Snyder (ed.), *The Europeanisation of Law: the Legal Effects of European Integration* (Oxford 2000) 177.

¹³ For these doubts with regard to a European Code of Civil Procedure, see K. Kerameus, ‘Procedural Harmonization in Europe’ [1995] *Am.J.Comp.L.* 409-410.

¹⁴ Incidentally, it should be noted that Article 308 EC, the supplementary legal basis, presents the same reference to the functioning of the internal market. Hence, the same considerations that will be made with regard to Article 95 and 65 EC apply also to Article 308 EC.

¹⁵ A. Schwartz, ‘Enforcement of Private Law: The Missing Link in the Process of European Harmonisation’ [2000] *ERPrivL* 139. On this point, see also, extensively, M. Wolf, ‘Abbau prozessualer Schranken in europäischen Binnenmarkt’ in W. Grunsky, R. Stürner and G. Walter (eds.), *Wege zu einem europäischen Zivilprozeßrecht* (Tübingen 1992) 35 ff; E. Werlauff, *Common European Procedural Law* (Copenhagen 1999) 7ff.

Community might be distorted and harmonising measures might prove necessary.¹⁶ In other words, if one could demonstrate that the direct effect of substantive EC law might be at risk and market competition would not take place on equal terms, unless at least some minimal requirements concerning procedure were upheld in all Member States, then there would be adequate grounds to support the introduction of harmonised remedies in national courts.¹⁷

This argument is based upon the idea that, since there is a firm connection between procedural law and substantive law, the outcome of a case may often be considerably affected by the applicable procedural rules.

Two examples illustrate this argument. The first concerns time limits: after the expiry of a limitation period provided for by law, the enforcement of the rights of individuals is blocked. This means that different rules on limitation periods and on the powers of the courts to admit late claims may influence the chances of success of a claim in the various Member States. Along the same lines, one can think of an example based upon the rules of evidence: the chances of success of a claim depend, to a large extent, on the judge's conviction regarding the facts of the case. Consequently, national rules concerning the means of evidence that can be admitted in certain judicial proceedings and the powers of the judge to find facts *ex officio* may have decisive consequences for the outcome of the dispute.

In the light of this argument, one could maintain that different procedural rules concerning the enforcement of EC rights before national administrative courts might induce business actors to reduce their business in the Member States where administrative procedural law is restrictive and where it offers them low chances of success in cases in which they need to bring a claim before a court against the national authorities. This, in turn, might lead to a distortion of competition within the EC, which could be remedied by issuing harmonised rules for the decentralised enforcement of Community law by individuals.

The desirability of harmonised procedural rules, for the purposes of ensuring a smooth functioning of the internal market and a uniform application of Community law, has been advocated by some scholars.¹⁸ As has been argued, even where the direct effect and supremacy of EC law are accepted and endorsed by the national courts, the uniformity of Community rules may still be jeopardised by the different procedural rules of the national legal systems.¹⁹ As van Gerven has asserted, 'the need for harmonised legal remedies [...] is inherent in the concept of uniformity: in the absence of (sufficiently) harmonised legal remedies, uniform rights cannot be adequately secured throughout the Community'.²⁰ Others

¹⁶ P. Lindblom, 'Harmony of Legal Spheres' [1997] *ERPrivL* 14; T. Anderson, 'Approximation of Procedural Law in Europe' in M. Storme (ed.), *Procedural Laws in Europe – Towards Harmonisation* (Antwerpen 2003), 63.

¹⁷ In the light of this line of argumentation one could, indeed, conclude that not all procedural rules are as such a potential hindrance for the proper functioning of the internal market: in other words, in order for procedural differences to be regarded as an obstacle for the internal market, they must be of such nature that, because of them, market actors tend to engage in less trade in a certain Member State, so that the free movement rights might be impaired. M. Wolf, 'Abbau prozessualer Schranken in europäischem Binnenmarkt' 39-40.

¹⁸ For a different perspective, see M. Dougan, *National Remedies before the European Court of Justice – Issues of Harmonisation and Differentiation* (Oxford 2004), who essentially argues that the view according to which one of the main aims of the Treaty is to promote uniformity does not take into account the recent phenomenon of 'regulatory differentiation' occurring in the European legal order.

¹⁹ M.P. Chiti, 'Towards a unified judicial protection in Europe?' [1997] *ERPL* 555.

²⁰ W. van Gerven, 'Bridging the Gap between Community and National Laws: towards a Principle of Homogeneity in the Field of Legal Remedies?' [1995] *CMLRev* 690.

have asserted that the lack of uniform enforcement of Community law may lead to a disturbance of the competition conditions between the Community undertakings and distort the operation of the free movement of goods and persons. Community harmonised measures of enforcement could, therefore, secure a level playing-field for undertakings. Furthermore, from the perspective of individuals, the absence of uniform procedural rules may endanger the equal treatment of citizens – which is the very foundation of the Community itself.²¹

It is interesting to note that the necessity of harmonised procedural rules for the purposes of ensuring a proper functioning of the internal market has been brought forward by the Storme Commission in the context of civil procedural law.²² The Commission considered why an approximation of civil procedural law would be at all necessary in the European Community and found the reason in the need to ensure the proper functioning of the common market. In particular, the Storme Commission argued that international businesses require an effective and transparent system of procedural law²³ and citizens an equal and fair access to justice,²⁴ and that these results could only be achieved if a harmonised system of procedural rules was set up. Secondly, the Commission argued that, under (former) Articles 3(h), 5, 100 and 100a (currently Articles 3(h), 10, 94 and 95, respectively) of the EC Treaty, the authority would exist to proceed to an approximation of procedural law in the Member States of the Community because of the very need to avoid the distortion of competition discussed above.²⁵

Other arguments supporting the harmonisation of the rules for administrative justice are connected to the need for more transparency and legal certainty. In particular, it has been considered that the ECJ's case law on domestic remedies necessarily entails an *ad hoc* approach, which could be detrimental for the judicial protection of the rights of the individuals.²⁶ From the point of view of transparency and legal certainty, the benefits of harmonised procedural rules may be appreciated especially from the perspective of economic policy and competition. In particular, it can be argued that those participating in the economic life of the Community would profit, especially from an economic point of view, from a clear and transparent situation in which they would be able to enforce their claims against public authorities all over Europe pursuant to the same procedural rules.²⁷

²¹ J. Schwarze, 'Deutscher Landesbericht' in J. Schwarze (ed.), *Administrative Law under European influence: on the convergence of the administrative law of the EU member states* (London 1996) 221. On the need for procedural unification in order to ensure that the operation of the unified substantive rules not be hampered, see K. Kerameus, 'Procedural Implications of Civil Law Unification' in A. Hartkamp, M. Hesselink and E. Hondius (eds.), *Towards a European Civil Code* (The Hague 2004) 121. Although not related to administrative procedural law, for the business actors' perspective on procedural harmonisation, see F. Vincke, 'Les entreprises Européennes ont besoin de rapprochement' in M. Storme (ed.), *Procedural Laws in Europe – Towards Harmonisation* (Antwerpen 2003) 15.

²² The Storme Commission is an unofficial body of academic experts from (at the time) every Member State which, with the financial support of the European Commission, investigated the possibilities of drafting a 'European Judicial Code of Civil Procedure'. The document prepared by the Storme Commission can still prove a useful reference for the discussion on the harmonisation of the rules applicable before national administrative courts. See M. Storme, *Approximation of Judiciary Law in the European Union* (Dordrecht 1994).

²³ M. Storme, *Approximation of Judiciary Law in the European Union* 45.

²⁴ M. Storme, *Approximation of Judiciary Law in the European Union* 44.

²⁵ M. Storme, *Approximation of Judiciary Law in the European Union* 58-59.

²⁶ T. Heukels and J. Tib, 'Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence' in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (London 1998) 128.

²⁷ J. Normand, 'Le Rapprochement des Procédures Civiles dans l'Union Européenne' [1998] *ERPrivL* 388.

Additionally, codified rules for the enforcement of Community law in national courts may be perceived as being more 'legitimate' than the principles developed on a case-by-case basis by the European Court of Justice. On the one hand, the ECJ has, so far, been playing what could arguably be considered to be the role of 'motor of the European integration process'. On the other, however, it cannot be denied that the development of standards of protection which the national courts need to respect could be seen as an encroachment by the judiciary upon a function which should belong to the Community legislative power.

Furthermore, even if one accepted 'the creative role' of the ECJ in ensuring that minimum remedial standards are set, it cannot be overlooked that the ECJ's intervention can only be of a case-by-case nature. As has been pointed out, such an approach is dependent on the capacity of the litigants to obtain access to the national courts and on the willingness of the latter to cooperate.²⁸ In addition, one should not underestimate the inevitable influence of the factual circumstances upon the principles enunciated by the ECJ,²⁹ and the fact that the ECJ's analysis is necessarily limited to the procedural rules called into question by the national courts. This often implies that remedial rules that fall below the European standards of protection in a certain legal system may well be acceptable if examined in the context of another legal system which provides for mechanisms that compensate the 'shortcomings' of the rules in question.

Moreover, a legislative measure would, in principle, be an improvement vis-à-vis the process of setting minimum standards carried out so far by the ECJ, because the thresholds established by the ECJ have to be applied by the judges in the Member States, and this application may vary according to the judges' knowledge of, and sensitivity to, European issues.³⁰ Furthermore, Community institutions have no way of controlling the application of these standards in a systematic way.³¹ In contrast, with harmonising measures, there would be clear rules stemming from the indications contained in the measure, which would make the commitment of national authorities more direct and incisive.³²

There are, however, several arguments against the harmonisation of procedural rules at European level. In particular, it has been argued that harmonising measures would entail the risk of a rigid and inflexible system, and would, therefore, contradict the evolutionary character of Community law.³³ Furthermore, one could argue that the aim of ensuring a uniform and effective application of Community law might be in conflict with legitimate national interests, such as the need to protect fairness and efficiency in the administration of justice. For example, a harmonised measure contained a provision to the effect that arguments based upon Community law may be raised by claimants at any point during the proceedings

²⁸ C. Boch, *UK courts and EC law* (PhD Thesis defended at the University of Amsterdam 2004) 24.

²⁹ M. Dougan, *National Remedies before the European Court of Justice – Issues of Harmonisation and Differentiation* 392. The author concludes his book by stating that 'indeed, one might ultimately feel pressed towards the conclusion that remedial harmonisation [...] is a task to which the Court is inherently unsuited'.

³⁰ In addition, one could add on the basis of the *Köbler* ruling, only in very exceptional circumstances could the national courts' disregard of EC law give rise to State liability. Case C-224/01, *Gerhard Köbler v. Austrian Republic* [2003] ECR I-10239.

³¹ Apart from the limited option of pursuing the infringement through Article 226 EC procedure.

³² M. P. Chiti, 'Towards a unified judicial protection in Europe?' 560.

³³ J. Schwarze, 'The Convergence of the Administrative Laws of the EU Member States' 177, who further analyses the possible content of a codification with regard to the rules on administrative decision-making proceedings. For this objection in civil procedure harmonisation, see P. Lindblom, 'Harmony of Legal Spheres' 25-26, who points out that harmonisation might 'not become a road to new reforms but an enemy to continuous development'. See also T. Anderson, 'Approximation of Procedural Law in Europe' 65.

before administrative courts, might increase the likelihood of EC law being effectively enforced throughout the Community. However, it might also endanger the fair administration of justice by granting the parties who rely upon Community law a procedural advantage over those whose rights are rooted solely in national law.³⁴

From this perspective, one could also maintain that a uniform set of rules for the enforcement of Community rights in national courts would create awkward problems of double standards of protection, which would give the national courts a hard time in trying to manage and maintain the integrity of the system. The difficulties connected to the existence of a double standard of protection could be perceived in an acute form and could potentially lead to unmanageable situations in cases in which it is impossible to sever the parts of the claim that are based upon EC law from those that are rooted in national law.³⁵

Another argument against the creation of Community-wide remedial rules is based upon the fact that such norms may be perceived as an extraneous body which might not fit with the legal traditions of the Member States.³⁶ This argument is based upon the assumption that legal systems are built through habits, customs and practices which dictate how law is going to be interpreted,³⁷ and that public law especially 'has particularly deep roots inside a cultural and political framework'.³⁸ Closely connected to this argument is the perception that the possibility of achieving a common procedural administrative law in Europe is doubtful because the political conditions are missing. In particular, it can be argued that the legal systems are based on very different conceptions: in some countries there is no code, and there is no desire to have one; moreover, in some countries, there is no difference in the procedural rules between civil and administrative claims.³⁹ These fundamental differences could make it extremely hard to agree, at European level, upon common rules which all national

³⁴ M. Dougan, *National Remedies before the Court of Justice – Issues of Harmonisation and Differentiation* 106.

³⁵ A less intrusive solution could be a more piece-meal approach, hence the harmonisation of only certain rules or procedural areas. However, this solution would overlook the fact that, within a national system of judicial review, the rules are interdependent, and an attempt to sever certain parts of procedural law might also lead to unmanageable situations.

³⁶ It is interesting to note that these objections have been brought forward also with regard to harmonised rules in the area of civil procedural law. See, for example P. Lindblom, 'Harmony of Legal Spheres' 27; P. Biavati, 'Is Flexibility a Way to the Harmonization of Civil Procedural Law in Europe?' in F. Carpi and M. Lupoi (eds.), *Essays on transnational and comparative civil procedure* (Torino 2001) 91. In particular, it has been argued that 'given the diversity of customs, languages and law, the attempt to draft a civil procedure code binding on all of the European Union's Member States may be unrealistic'. F. Jünger, 'Some Comments on European Procedural Harmonization' [1997] *Am.J.Comp.L.* 933.

³⁷ See P. Legrand, 'Public Law, Europeanisation and Convergence: Can Comparatists Contribute?' in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law* (London 2002) 230. According to the author, 'for instance, in enacting a *loi* for the reasons they do and in the way they do, as a product of what they think, with the desires and the ambitions they have, in enacting a particular *loi* (and not others), the French are not just doing that: they are also doing something typically French and are thus alluding to a modality of legal experience that is intrinsically theirs'. For these arguments, see also G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' in F. Snyder (ed.), *The Europeanisation of the Law: the Legal Effects of European Integration* (London 2000) 243.

³⁸ C. Harlow, 'Voices of Difference in a Plural Community' in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law* (London 2002) 208.

³⁹ Noted by M.P. Chiti, 'Towards a unified judicial protection in Europe?' 562. This position is shared by C. Harlow, 'European Administrative Law and the Global Challenge' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford 1998) 275-276. For civil procedural harmonisation, this argument is put forward by P. Lindblom, 'Harmony of Legal Spheres' 25.

administrative courts would be bound to adhere to.⁴⁰ This point can also be found in Jurgen Schwarze's well-known publication, in which the national experts taking part in the research project were asked whether they thought that a codification of administrative rules concerning the indirect enforcement of Community law would be possible. All the participants discussed the advantages and disadvantages of codifying administrative procedural law and the question of whether and to what extent the Community is authorised to codify such rules. With regard to these issues, most of the experts have emphasised the great differences still existing between the administrative legal systems of the Member States: as Schwarze points out in his final assessment of the reports, 'the *rapporteurs* are obviously concerned that a general codification could be achieved only by reducing the requirements to the level of a common denominator, in which case it would prove as a barrier rather than an asset for an effective and uniform enforcement of Community law'.⁴¹

2.2 The Choice of the Legal Instrument

Even admitting that a legal basis for the Community intervention in this area may be found, and that legislative measures containing the rules for the decentralised enforcement of Community law would be desirable, the question still arises as to which legal instrument would be most adequate. In this respect, a directive would seem to be the most suitable instrument. Indeed, the latter, pursuant to Article 249 EC, binds Member States to a complete and immediate implementation, while leaving them free to choose the method and form in which to achieve the prescribed result.⁴² Furthermore, a directive can be considered as having direct effect under certain circumstances in lack of implementation, and the incorrect or non-implementation may give rise to State liability.

A directive was deemed to be the best instrument to achieve procedural harmonisation also by the Storme Commission. In particular, from among the hard law instruments, the Commission discussed the options of proposing a convention or a directive. However, the convention was regarded as not providing a sufficient degree of flexibility (in the sense of not enabling the national authorities to fit the remedies adopted into the framework of the internal regulatory system).⁴³ Consequently, the Commission opted for proposing a directive, in the light of its capacity to leave the Member States with the choice of the form and method in which to reach the result to be achieved.

⁴⁰ In addition, one could also argue that an agreement on such rules could only be reached on such general and abstract terms that it is at least doubtful whether EC rights would then be more effectively protected in national courts.

⁴¹ J. Schwarze, 'The Europeanization of National Administrative Law' in J. Schwarze (ed.), *Administrative law under European influence: on the convergence of the administrative laws of the EU member states* (London 1996) 832.

⁴² From this perspective, a directive is to be preferred to a regulation, since the latter would impose uniform conditions to the Member States, thereby leaving them less room to adapt the European legislation to the national standards.

⁴³ M. Storme (ed.), *Approximation of Judiciary Law in the European Union* 60.

A different solution can be seen in the possible adoption of a soft law instrument, such as the code of good administrative practice envisaged by Jowell and Birkinshaw in their report.⁴⁴ This solution would have the advantage of creating a more flexible and less invasive system, based upon voluntary compliance by the single Member States. Although it is doubtful whether it would immediately achieve the objective of a more effective judicial protection for the rights of individuals and a more predictable and transparent system,⁴⁵ the adoption of a soft law instrument in the field of procedural law might, at least, contribute to trigger a debate on the harmonisation of remedial law in Europe and on the creation of a common European frame of reference. This might, in turn, help the Member States to feel more involved in the harmonisation process, and ultimately induce them to implement the soft law instrument in their own legal systems.

3. Conclusion

In the light of the considerations made above, one can conclude that the choice between procedural harmonisation by way of a legislative instrument and a process of setting minimum standards of protection by way of judge-made law is mainly one between rigidity and flexibility. The choice for harmonisation would entail a more rigid system, in that all Member States would be obliged to adhere to the same procedural standards (for example, the European legislator would provide for a specific time limit within which individuals should bring their claims before national administrative courts when they are trying to enforce their EC rights). The current situation, instead, provides for a rather flexible system, in that Member States are free to create and maintain potentially divergent remedial provisions, as long as these provisions do not fall below the European standards (for example, the ECJ accepts that all national time limits are acceptable so long as they are reasonable, and they comply with the principles of equivalence and effectiveness).

In conclusion, it is submitted that the rights of individuals against the actions of the public authorities can be effectively protected even in the presence of different procedural conditions, as long as the control by the ECJ is carried out in such a way that an effective judicial protection is ensured, and national courts adequately comply with the ECJ's case law. This compliance is confirmed by earlier research which has shown that where the ECJ does take a clear stand in its case law, the national courts generally fulfil their role adequately as 'Community courts' in ensuring protection of EC rights.⁴⁶

⁴⁴ J. Jowell and P. Birkinshaw, 'English Report' in J. Schwarze (ed.), *Administrative law under European influence: on the convergence of the administrative laws of the EU member states* (London 1996) 331. Such a soft law instrument is envisaged by Stürner as one of the possibilities for the development of a European Code of Civil Procedure. R. Stürner, 'Das Europäische Zivilprozessrecht – Einheit oder Vielfalt?' in W. Grunsky, R. Stürner and G. Walter (eds.), *Wege zu einem europäischen Zivilprozeßrecht* (Tübingen 1992) 4. One could also seek inspiration from the European Principles of Contract Law and the American Restatements of the Law, both soft law instruments containing rules that can be voluntarily adopted by the concerned parties, or the Recommendations adopted by the Committee of Ministers of the Council of Europe. See, for example, Recommendation Rec(2004)20, *The Judicial Review of Administrative Acts* (Strasbourg 2005).

⁴⁵ The Working Group of the Storme Commission, for example, considered a recommendation unsuitable for procedural law harmonisation because of its non-binding force.

⁴⁶ M. Eliantonio, *Europeanisation of Administrative Justice? The influence of the ECJ's case law in Italy, Germany and England*. Here it is concluded that in none of the areas that have been investigated, can one detect, on the part of the national courts, a manifest disregard of the European jurisprudence (at 294-295).

However, one must not overlook the fact that preliminary rulings can only be issued by the ECJ if a national court questions the legitimacy of a national rule. This means that, in some procedural areas, the ECJ's case law may not have had (and may not get) the chance to set 'European standards' of protection. Furthermore, it cannot be excluded that national courts might be unaware of relevant ECJ's rulings, or might erroneously consider the ECJ's case law as not applicable to the cases upon which they adjudicate, thereby depriving individuals of an effective judicial protection.

Therefore, even though, in the current state of the development of the Community legal order, there does not seem to be a compelling need for uniform rules *per se*, leaving to the ECJ the task of ensuring that EC law is adequately enforced before national administrative courts might also be problematical, and sometimes even ineffective and inefficient. In fact, from a merely European perspective, one could argue that only remedial harmonising measures can truly guarantee a uniform application of Community law.

The only obstacle to such measures seems, at present, to be the lack of a legal basis: while Article 65 EC should be excluded because its scope is limited to civil proceedings, one could, in principle, envisage such measures to be based upon Article 95 EC. However, there is no evidence to imply that the procedural rules applicable before administrative courts do actually induce business actors to choose one Member State over another in the light of the more favourable remedial provisions. Thus, in order to resort to Article 95 EC, further research should be carried out with regard to whether and to what extent, the differences in the domestic procedural rules applied by the administrative courts impair the proper functioning of the internal market.

Cite as: Mariolina Eliantonio, *The Future of National Procedural Law in Europe: Harmonisation vs. Judge-made Standards in the Field of Administrative Justice*, vol. 13.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (September 2009), <<http://www.ejcl.org/133/art133-4.pdf>>.