1. Frontiers in civil justice – privatising, digitising and funding justice[1]

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1.1 NEW PATHWAYS AND FRONTIERS IN CIVIL JUSTICE

A well-functioning civil justice system is pivotal for enforcing rights of consumers and businesses, protecting fundamental rights, and facilitating trade and economic growth. Yet, for many decades civil justice systems have been under pressure and criticised for their inability to provide affordable, expedient, and simple procedures for dispute resolution. The turn of the century saw the 'civil justice crisis'[2] and the right to a fair trial as encompassed in Article 6 of the European Convention on Human Rights (ECHR) is among the most violated human rights.[3] Attempts at securing the fundamental right of access to justice have traditionally focused mainly on the key hurdles of costs, complexity and delays of civil procedures. These have resulted in legislative amendments aimed at increasing efficiency, simplifying procedures, and reducing costs. While these continue to be important, successive civil justice reforms in Europe and beyond have only moderately contributed to effectively securing access to justice. In more recent years, justice reforms have taken a more fundamental turn in many European countries. These reforms in civil procedure are in part triggered by the need to more assertively take the right

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[2] Adrian A.S. Zuckerman (ed), *Civil Justice in Crisis* (Oxford University Press 1999).

[3] See e.g., European Court of Human Rights, Annual Report 2020, 164; The European Court of Human Rights, 50 Years of Activity: Some Facts and Figures, 6.

of access to justice seriously, but have also been driven by societal changes, austerity measures following the economic crisis of 2008, and, perhaps most forcefully, by technological advancements. At the same time, at the European Union level, civil justice cooperation has become increasingly important, and policy initiatives and new legislative instruments are shaping civil procedure in Europe.

New pathways in dispute resolution have been paved by the digitisation of justice, the gradual privatisation of justice and emerging alternative dispute resolution (ADR) providers and platforms, and an increase in possibilities for self-representation – often supported by technology. Lastly, in international commercial dispute resolution, where arbitration has become commonplace rather than an alternative route of dispute resolution, the rise of international commercial courts is remarkable. These new pathways, that were discussed in a recent book, have changed the face of civil justice.[4] The present book builds on these pathways and zooms in on the most promising as well as challenging frontiers in advancing civil justice. Three interrelated cross-cutting developments that are central in this book are: the interaction between formal and informal justice; developments in different forms of digitised justice; and the funding and collectivisation of civil justice.

First, the growth of ADR in practice, along with national, European, and global legislative instruments require a renewed reflection on the balance between these various forms of informal justice and the courts. Most notably, at the EU level the consumer ADR Directive and ODR Regulation were adopted and have been in effect as of 2015 and 2016 respectively.[5] Recognising the indisputable importance of both routes of justice, it is essential to scrutinise their relationship, interaction, and the possible directions of communication between them. Second, sweeping technological developments continuously require a reassessment of the efficiency and efficacy of the civil justice system. On the one hand, the increasing amount of social interaction and commerce that takes place in an online environment requires a civil justice system that can respond to the ever-changing nature of the civil dispute landscape. On the other hand, the digitisation of the civil justice system itself has gained new momentum and has become one of the spearheads of civil

[4] X.E. Kramer, A. Biard, J. Hoevenaars and E. Themeli (eds), *Pathways to Civil Justice in Europe* (Springer 2021).

[5] Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63; Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

justice cooperation in EU policy-making. Technological developments and emerging technologically assisted services are increasingly influencing the entire justice chain: starting from e-negotiations, through online dispute resolution (ODR) platforms to fully automatic decision-making by algorithmic judges. Third, pivotal in effectuating access to justice is funding of litigation. The high costs of litigation as well as retrenching governments have resulted in a shift from public to private funding. This is particularly visible in high value and public interest cases, hence the focus in the present work is on the funding of collective redress as a frontrunner mechanism to bring these cases to court. Acknowledging that public funding continues to be essential, the rise of private funding and the balance between these two requires further scrutiny.

This book studies these three frontiers in civil justice both from a European and a national perspective, combining theory with policy and insights from practice. It scrutinises the peculiarities of these seminal areas of change and the interrelation between them. These three frontiers are viewed against the backdrop of the requirements of effective access to justice and the overall goal of establishing a sustainable civil justice system in Europe. Part I is dedicated to the interaction between public and private justice, viewed from a pan-European perspective and zooming in on several European jurisdictions. Part II deals with digitisation of dispute resolution, another key topic in the current civil justice debate, spanning both private justice (e-negotiations, private forms of ODR) and court litigation, and including the rapid development and use of advanced forms of Artificial Intelligence. Part III turns to collective redress – both collective settlements and collective actions – and in particular the funding thereof by means of private funding and common funds. The final chapter views the latter from the Canadian perspective, a frontrunner jurisdiction in many respects, to illustrate what is likely to also become important in Europe.

The present chapter reflects on the development of civil justice in Europe, focusing on current challenges and opportunities, and the three frontiers that are central in this book (1.2). It then turns to discussing the interaction between private and public justice (1.3), digitising public and private justice (1.4), and funding collectivised justice (1.5), on the basis of the chapters included in this book. It concludes with an assessment of how these three key issues will further shape the future of civil procedure in Europe (1.6).

1.2 CIVIL JUSTICE IN EUROPE: DEVELOPMENTS AND CHALLENGES

While civil procedural law has traditionally been a topic of domestic law and is closely interwoven with national legal culture and the judicial system, European developments and EU law have become more important over the

past two decades.[6] First, the right of access to justice and a fair trial have been shaped by the ECHR, and in particular the case law of the European Court of Human Rights on Article 6 thereof, as well as the Resolutions of the Council of Europe. In the EU, Article 47 of the Charter on Fundamental Rights, plays an increasingly important role in protecting fundamental procedural rights, and is advanced by the expanding case law of the European Court of Justice.

Third, and most importantly in the present context, a vast number of legislative instruments have been brought about that not only influence national civil procedure, but that have created a self-standing European civil procedural system. Many of these are brought about on the pillar of judicial cooperation in civil matters, introduced in 1999, as laid down in Article 81 of the Treaty on the Functioning of the European Union (TFEU). Increasingly, also Article 114 TFEU serves as a legislative basis for procedural law instruments, which – unlike Article 81 – not only harmonise cross-border civil procedure, but also apply in domestic cases. Three main strands of legislation can be discerned.[7] The first strand consists of the regulations dealing with typical private international law and international litigation issues, including international jurisdiction, the recognition and enforcement of judgments, the cross-border service of documents, and the taking of evidence. The second strand of unification consists of several instruments that have introduced pan-EU civil procedures or that aim at harmonising specific topics of civil procedure in cross-border cases. These include the Regulations on a European Order for Payment Procedure, the European Small Claims Procedure, the European Account Preservation

[6] This is also evident from a range of edited volumes focusing on the Europeanisation of civil procedure in recent years. This includes, among others, B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016); B. Hess and X.E. Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos/Hart Publishing 2017); A. Nylund and H.B. Krans (eds), *European Union and National Civil Procedure* (Intersentia 2016); A. Nylund and M. Strandberg (eds), *Europeanisation of Civil Procedure: Overcoming Follow-Up Fragmentation through Bottom-Up Harmonisation?* (Cambridge University Press 2019); B. Hess and K. Lenaerts (eds), *The Fiftieth Anniversary of the European Law of Civil Procedure* (Nomos 2020); Kramer, et al (n 4).

[7] See X.E. Kramer, 'Strengthening Civil Justice Cooperation: The Quest for Model Rules and Common Minimum Standards of Civil Procedure in Europe' in Marco Antonio Rodrigues and Hermes Zaneti Jr, Coleção Grandes Temas do Novo CPC - v.13 - *Cooperação Internacional* (Editora Juspodivm 2019) 591-607.

Order[8] as well as the Mediation Directive.[9] What these have in common is that their scope of application is limited to cross-border cases.[10] A third category of harmonised EU civil procedural rules are the sector-specific rules dealing with a specific substantive area, most notably consumer law.[11]

The topics central in this book appear in all of these three categories. First, reviewing policy and legislative developments reveals that court litigation, in other words: formal justice, has been at the forefront at least from a legislative perspective. The regulations that fall into the first and second category, encompassing those concerned with international litigation and creating uniform cross-border procedures or procedural rules, are primarily intended for court procedures. Recommendations dating from 1998 and 2001 already acknowledged the importance of out-of-court dispute resolution,[12] but the first legislation was the Mediation Directive, which was brought about in 2008.[13] While this Directive regulates only a few specified topics, including the obligation to ensure quality and confidentiality of mediation and the enforcement of a settlement agreement, it sketched the first contours of regulating both formal and informal justice. It applies to both mediation initiated by parties and to court-ordered mediation, and specifically aims at ensuring a balanced relationship between mediation and judicial proceedings.[14] While the Commission aimed at having an instrument that would apply to both domestic and cross-border cases,[15] the vast majority of Member States were

[8] Regulation (EU) 2015/2421 of 16 December 2015 amending Regulation (EC) 861/2007 establishing a European Small Claims Procedure and Regulation (EC) 1896/2006 creating a European order for payment procedure [2015] OJ L341/1; Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

[9] Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

[10] These legislative instruments based on Art 81 TFEU, limited to matters having cross-border implications. These are generally defined as cases in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized for the dispute, see e.g., Art 3 of the European Order for Payment and Small Claims Regulations.

[11] These are based on Art 114 TFEU.

[12] Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L115, 17 April 1998; Commission Recommendation 2001/310/EC on the principles of out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L109, 19 April 2001.

[13] Directive 2008/52/EC (n 9).

[14] Article 1 Mediation Directive.

[15] Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 22 Oct. 2004, COM(2004)718 final.

against an instrument on domestic cases. At the sectorial level, however, ADR could advance, and consumer ADR became one of the spearheads. In 2013 the Consumer ADR Directive was established, which applies to both cross-border and domestic cases. Its primary aim is to set quality standards for ADR entities by introducing a certification system.[16] This is complemented by the ODR Regulation, which has introduced an EU-wide ODR platform to facilitate the resolution of disputes resulting from online sales and services.[17] Alongside, and sometimes in part resulting from EU legislative instruments, ADR has further developed at the national level. In a couple of Member States and other European countries, forms of mandatory mediation in particular cases are also emerging, including in Italy[18] and in the three jurisdictions covered in this volume, Belgium,[19] England and Wales,[20] and Norway.[21] Importantly, ADR and the interaction between formal and informal justice have also received attention in soft law instruments. Most prominent is the ELI-ENCJ Statement on formal and informal justice which was adopted in 2018.[22] In the 2020 ELI-Unidroit Model European Rules on Civil Procedure, which focus on court procedures, one of the three main overarching rules concerns the obligation of the parties and the role of the court in seeking consensual dispute resolution.[23] Lastly, a reference is made to settlements in the European Parliament Recommendation for a Directive on Minimum standards of civil procedure of 2017.[24] An integrated approach to public and private dispute resolution is, however, still lacking both at the EU and national level.

Second, digitisation of justice occurs at different speeds in the individual EU Member States. While a couple of Member States are well underway in digitising justice, others are lagging behind. Digitising justice has been a focal point

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[16] See, *inter alia*, A. Biard, 'Monitoring Consumer ADR in the EU: A Critical Perspective', (2018) 2 *European Review of Private Law* 171–96.

[17] See, *inter alia*, E.M. van Gelder, 'The EU Approach to Consumer ODR' (2019) *International Journal of Online Dispute Resolution* 219–26.

[18] E. Silvestri, 'Too much of a good thing: Alternative Dispute Resolution in Italy' (2017) Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 77–90.

[19] S. Voet, 'Formal and Informal Justice in Belgium' (Chapter 3).

[20] M. Ahmed, 'Formulating a more principled approach to ADR within the English civil justice system' (Chapter 4).

[21] A. Nylund, 'Alternative Dispute Resolution, Justice and Accountability in Norwegian Civil Justice' (Chapter 5.)

[22] ELI-ENCJ statement on The Relationship between Formal and Informal Justice: The Courts and Alternative Dispute Resolution, adopted by ELI and ENCJ in 2018.

[23] ELI-Unidroit Model European Rules of Civil Procedure (adopted by ELI and Unidroit in 2020), Rules 9 and 10. Also throughout the Rules, reference is made to ADR and settlements.

[24] European Parliament Recommendation on common minimum standards of civil procedure in the EU, 2015/2084(INL) of 6 June 2017.

of EU justice policy with the primary aim of improving judicial cooperation for over a decade.[25] In the last few years, policy and legislative activities have intensified. While previous editions of the EU Justice Scoreboard included some information on ICT, the 2021 EU Justice Scoreboard contains more elaborate data referencing digitisation as a way to promote efficient and accessible justice systems. More recently, digitisation has gained extra attention as a way of keeping courts functioning during the Covid-19 pandemic.[26] Using different criteria to assess digitisation, including for instance the availability of online information of the court system, the availability of electronic communication tools and digital solutions to initiate proceedings, a certain pattern can be determined.[27] Also, a Member State such as the Netherlands that is technologically highly developed, has a very high internet penetration, and accessible online public information on justice, still experiences difficulties in advancing digitising court communication and court procedures.[28] At the EU level, advancing digitisation has been complicated due to these national differences, the decentralised approach that has been taken requiring national systems to be interoperable, and – also resulting from the principles of subsidiarity and proportionality – a large degree of voluntariness. Being a horizontal matter, references to digital communication and other electronic means can be found in a series of instruments on cross-border litigation and in sectorial instruments. While the earlier versions of the Service and Evidence Regulations enabled digital communication, in 2020 both regulations were revised to

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[25] See e.g., X.E. Kramer, 'Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU' in K. Benyekhlef, J. Bailey, J. Burkell and F. Gélinas (eds), *E-Access to Justice* (Ottawa: University of Ottawa Press 2016) 351–75.

[26] The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 38, 1. The Scoreboard uses nine criteria for evaluating digitisation, including for instance the availability of online information about the judicial system, procedural rule allowing digital technology in courts, the use of digital technology by courts and the availability of electronic communications tools. See 31–37.

[27] For instance, Estonia scores first on a number of criteria, and scores well overall, while among others Cyprus and Greece have lower scores overall.

[28] In 2018, an ambitious programme was largely discontinued due to difficulties, see e.g., X.E. Kramer, E. Themeli and E.M. van Gelder, 'e-Justice in the Netherlands: The Rocky Road to Digitised Justice' in M. Weller and M. Wendland (eds), *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt* (Tübingen: Mohr Siebeck 2018) 209–35. While progress has been made in the last few years, it is still lagging behind in enabling online submissions of claims and communication with the court.

further strengthen and to some extent oblige the use of e-communication.[29] The European Order for Payment and Small Claims Regulations also facilitate and encourage the use of e-communication and (for the latter) videoconferencing, and these procedures have been subject of e-Codex pilots. The launch of the e-Justice portal in 2010 has greatly facilitated access to information, and with regard to ADR, the above-mentioned establishment of the ODR platform in 2016 was an important step in simplifying online access to justice. An overarching framework, however, is still lacking. In 2021, an extensive impact assessment was made for the further digitisation of both civil and criminal justice. On 1 December 2021, the Commission published its proposal for a Regulation on the digitalisation of judicial cooperation and access to justice. This aims at making digital communication equal to other forms of communication, introducing a common approach to the use of modern technologies and the setting up of a decentralised IT system for the exchange of communication between courts and competent authorities and of these entities with natural and legal persons.[30]

Third, funding of justice systems and of litigation in particular is still predominantly a domestic issue in Europe, being interwoven with financing the judicial system as a whole. The costs of litigation are generally high, and this is in part what explains the rise of ADR being a cheaper alternative, and what triggers investments in digitisation of justice. That costs are a sensitive issue in the EU became clear with the revision of the European Small Claims Procedure, where the European Commission attempted to set a maximum court fee for this procedure.[31] This proposal was dismissed by the Member States and considered to be beyond the competence of the EU. Legal aid is at the forefront of securing the right of access to justice and embedded in Article 6 ECHR and – more prominently – in Article 47 EU Charter, as is also clear from the case law. However, this is limited to the obligation to provide some form of legal aid to people who cannot afford the costs of litigation. Apart

[29] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L405/40.

[30] Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM(2021) 759 final. This proposal was put forward while this manuscript was in the final stages of editing and is not discussed in the various chapters.

[31] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure and Council Regulation (EC) 1896/2006 of the European Parliament, and of the Council of 12 December 2006 creating a European order for payment procedure, COM(2013) 794 final, Art 2.

from the Legal Aid Directive, which aims to guarantee the same standards for cross-border litigation in the EU,[32] there is little regulation so far.[33] Meanwhile, in several Member States different forms of private funding of litigation have been developed, including legal aid insurance and more recently third-party litigation funding by commercial funders. It is primarily the rise of collective redress in Europe that is the gamechanger for the funding of litigation. This in part takes place at the national level but the issue of funding a collective redress has meanwhile also reached the EU level. Collective redress has been one of the most debated topics in the EU for more than ten years. This is due to a great diversity among Member States in the regulation of collective redress, and in about half of the Member States appropriate mechanisms are still lacking. In 2013, a non-binding Recommendation on Collective Redress was put forward.[34] Due to the need for effective enforcement of consumer law and mass damages – as recently in the Volkswagen diesel emissions scandal – a sectorial approach was taken as the more feasible one. This resulted in the adoption of the Representative Actions Directive for consumers (RAD) in November 2020 which will be effective as of 25 June 2023.[35] This Directive includes a few provisions on funding. It only allows non-profit designated Qualified Entities to bring a claim,[36] but as is clear from Article 10, funding by a commercial party is possible as far as allowed under national law and provided that it is secured there is no conflict of interest. Article 12 implements the loser pays rule with certain restrictions for consumers. In addition, according to Article 20, Member States are required to take measures to ensure funding for collective redress. Interesting in this regard is the possibility of 'cy pres distribution' in Article 9(7), according to which Member States can use unclaimed proceeds to feed into legal aid or a fund.[37] Interestingly, following a study of the European

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[32] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2002] OJ L26/41.

[33] The European Parliament Recommendation of 2017 (n 24) also included a few provisions on costs and funding, requiring proportionality of court fees, laying down the loser pays principle and securing legal aid (Arts 13–15 proposed directive).

[34] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201.

[35] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

[36] Art 4(3)(c) RAD.

[37] I.N. Tzankova and X.E. Kramer, From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands**,** in Alan Uzelac and Stefaan Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 97–130 at 124, 125.

Parliament Research Service,[38] the European Parliament Committee published a Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation.[39] While it remains to be seen how the RAD will be implemented and whether the Commission will take up the European Parliament recommendations, these are promising first steps towards regulating funding of civil justice, and collective redress in particular.

1.3 BALANCING AND CONNECTING PRIVATE AND PUBLIC JUSTICE

Privatised justice is a vital part of today's civil justice systems. As discussed in Section 1.2 above, there are different forms of informal justice by private providers and in the context of court proceedings by way of court-ordered or court-annexed mediation, or more informal attempts of settlement. A challenge created by the growth of ADR and in particular more recent forms of ODR is how to secure the quality of dispute resolution. In the EU, the ADR Directive was an important step in regulating the quality requirements. Recognising the indisputable importance of both public courts and private routes to dispute settlement, it has become crucial to address the interaction between these. The contributions in Part I of this book address the development of public and private justice in the EU alongside emerging forms of mandatory ADR and judicial oversight or other forms of accountability. After reflecting on consumer ADR in the EU, drawing on examples from specific jurisdictions (Belgium, England & Wales, and Norway) Part I dissects this first of the three frontiers of current civil justice development.

In Chapter 2, **Betül Kas** traces the development of consumer ADR in the EU and highlights the potential that lies in an investigation of the interactions between informal and formal justice for the future development of an effective framework for the resolution of consumer disputes in the EU. It is highlighted how the Court of Justice of the European Union has played a key role in giving impetus to the EU's efforts of promoting the availability of high-quality ADR in the EU and in legitimising the Member States' experimentation with mandatory pre-trial ADR in order to further the effective administration of

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[38] J. Saulnier, K. Müller and I. Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment' [2021] European Parliament Research Service. See on this study X.E. Kramer and I. Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165–81 at 174–75.

[39] European Parliament, Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), 17 June 2021.

justice.[40] However, the Court's favourable position towards ADR has not yet led to a broader European-level discussion about the proper relationship between ADR and the courts. So far, the EU framework requires the Member States to set up ADR entities that are standing next to the courts, giving rise to a 'multi-option system', which leaves the question of whether a dispute is resolved by ADR or court primarily to the parties' choice. While the ELI-ENCJ Statement on formal and informal justice provides a useful starting point to envisage the role of the judge in encouraging the 'responsible' use of ADR processes, the question how ADR processes could contribute towards upholding the fundamental role of the courts remains unaddressed. The development of a synergetic relationship between the courts and ADR by the EU still constitutes an untapped potential.

Over the last years, Belgium has seen several procedural reforms. In every reform there was a (large or minor) focus on different forms of informal justice: consumer ADR, conciliation, judicial and extra-judicial mediation, and collaborative mediation. Over the years, new dispute resolution avenues have come to the fore. Today, all these forms belong to the alternative dispute resolution options within the Belgian dispute resolution landscape. There is a consensus that in some circumstances they are a better, quicker, and cheaper alternative than judicial adjudication. However, it remains a difficult relationship to disentangle. In that sense, critical questions remain. Should some of these forms of informal justice be made mandatory before going to court? What about the 'quality' of the non-judicial deciders and solvers? Does an informal justice process offer the same procedural guarantees as a formal justice process? How can/should the outcomes of informal justice processes be enforced? How to design appropriate forms of interaction, interconnection, and integration between formal and informal justice processes? In Chapter 3, **Stefaan Voet** assesses these questions from a Belgian perspective. In light of the fading division between public and private enforcement, a plea is made for an integrated dispute resolution framework in which all options are connected in order to avoid enforcement gaps.

Although successive English civil justice reforms have embraced ADR as an important aspect of the civil justice process, the issue of whether the courts possess the power to compel non-consenting litigating parties to engage with ADR has been a controversial one. The orthodox judicial approach has been to dismiss the notion of compulsory ADR on the grounds that it would unduly

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[40] Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA* EU:C:2010:146; Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa* EU:C:2017:457.

restrict the constitutional rights of the parties to access the courts. In the English civil justice system however, a divergent judicial approach has emerged which, although officially rejecting compulsory ADR, impliedly compels the parties to engage with ADR through the threat of cost sanctions. Consequently, the evolving ADR jurisprudence has been inconsistent, contradictory, and confusing. In Chapter 4, **Masood Ahmed** critically considers English judicial approaches to compulsory ADR and argues, considering current digitisation reforms, including the introduction of the Online Civil Money Claims and recent landmark decisions of the Court of Appeal, that it is time for the courts to reject the orthodox approach to compulsory ADR and to fully embrace their case management powers in making ADR orders. Ultimately, Ahmed argues, this will allow the senior courts to develop a consistent and coherent message for the courts, litigants, and the legal profession.

Proponents of ADR praise its qualitative and quantitative advantages for being a flexible, cost-efficient, and swift process that promises party self-determination and mutually agreeable, sound outcomes. In practice, many ADR processes do not match the rhetoric and fail to provide a genuine alternative process. Regulation is often inadequate since it fails to recognise ADR as a range of processes (many of which are dominated by quasi-adjudicative practices) and it does not consider that many disputants are unable to make informed decisions regarding the procedure and outcome. In Chapter 5, **Anna Nylund** identifies the palpable gap that exists between ADR theory and practice and argues that the development of a theory of ADR that is better aligned with ADR as an integral part of the justice system could serve to improve the quality and accessibility of dispute resolution. By exploring key factors underpinning the gap between ADR theory and practice and through explicating concepts of justice in ADR, she addresses the accountability gap in ADR, and puts forth suggestions for mechanisms of accountability. After formulating parameters for justice and accountability she applies them to the three most-used processes in Norway and evaluates their ability to provide just outcomes and processes and render the ADR system accountable. She discusses how the formal justice system could enhance the quality and appeal of out-of-court dispute resolution by addressing ADR processes as they are practiced.

1.4 DIGITISING PRIVATE AND PUBLIC JUSTICE: NEW TECHNOLOGIES, ARTIFICIAL INTELLIGENCE, AND ONLINE PLATFORMS

The use of digital technologies has seen a rapid rise in both the private and public justice field, and at present is perhaps the most important topic at the EU level, as also highlighted in Section 1.2 above. Part II of this book is dedicated to new technologies, Artificial Intelligence (AI) and emerging online plat-

forms. There is no doubt that these digital technologies reduce costs, improve communication both in cross-border and domestic cases and simplify access to justice. Many law firms, courts, and public institutions offer better and faster services thanks to them. And even though we cannot say that technology has solved access to justice problems, such as complex procedures, long adjudication time, and high costs, we can say that it has changed our life. Now more than ever online trade is very common, online platforms are growing in number and types, and social media is ubiquitous. Sadly, this has led to new access to justice problems for online consumers, and platform and social media users. Finding redress for a small online purchase, for example, can be quite challenging considering the costs and lengthy procedures involved. It is even harder for platform or social media users to find legal support or protect their rights. In Europe this situation is more challenging in cross-border situations where physical distance, language barriers, legal uncertainties, and the possibility to enforce rights across borders create even more hurdles.

Digital technologies, however, can help improve this situation by offering alternatives to court litigation, by improving communication between citizens and institutions, and by providing better access to information. As **Erlis Themeli** explains in Chapter 6, the EU has approved a series of action plans with the goal of supporting the adoption of digital technologies in the field of justice within its borders. The action plans emphasise the importance of digital technologies both for public institutions and for citizens. In particular, they aim at improving the communication between institutions and their constituents, and at dematerialising cross-border judicial proceedings. Themeli argues that the Action Plans should be viewed in conjunction with other activities of the EU, such as legislative reform and the general promotion of digitisation. The EU Justice Scoreboard is one of the examples of how the EU tries to promote the adoption of digital technologies in the justice field. At the same time some cross-border civil justice regulations, among others the European Small Claims Procedure and the European Order for Payment Procedure, have been amended to include digital communications more prominently. Themeli adds, as part of the digitisation of justice, the legislative work on AI for which the EU has approved an Ethics Guideline for Trustworthy AI and has prepared a Regulation on AI. The importance of AI cannot be understated and as the next chapter illustrates the challenges it brings are many.

In Chapter 7, **Nicholas Kyriakides, Anna Plevri and Yomna Zentani** argue that the use of AI has the potential to improve access to justice to an even greater degree by encouraging cost savings large enough to reverse the corrosive effect that the lack of access has had on the rule of law and public confidence. They build upon findings made by Adrian Zuckerman to delve into the possible benefits and risks associated with utilising AI to facilitate broad access to justice. Using Zuckerman's work as a launchpad, this chapter

seeks to encourage further critical debate on AI's role in court adjudication and to elucidate its possible impact on key stakeholders such as the public and potential litigants. The key issue at stake is the legitimacy of the justice system as a whole; were AI to systemically penetrate it, the system would become unrecognisable. Therefore, potential consequences of such a transformation must be carefully considered. Should the transition into AI-led adjudications lead to the loss of perceived legitimacy, this may have profound undesirable consequences on the rule of law, and, therefore, undermine efforts to provide quality access to justice to citizens throughout the EU.

Recently, AI is increasingly used in consumer online dispute resolution (cODR) to diagnose problems, predict outcomes, influence negotiations, limit bias, reduce unrealistic settlement points, and facilitate the resolution of disputes by the removal of human interventions. As such, cODR is becoming increasingly automated. The use of AI based techniques in cODR creates opportunities for consumers and the justice system in general, especially by the increasing speed and costs, but also raises concerns in terms of fair trial rights and due process standards. Within this context, **Martin Ebers** presents a critical evaluation of AI systems in cODR, dealing especially with the extent to which AI systems can meet or violate due process standards and whether there is a need to regulate the role of AI in cODR, in Chapter 8.

Negotiations take up a significant portion of interactions, and many disputes find their resolution in mutual agreements between parties. Within the ODR and AI context, e-negotiation is a process that uses negotiation support systems, including computers or other forms of electronic communications, to enable parties to reach an agreement. In Chapter 9, **Marco Giacalone and Seyedeh Sejeden Salehl** explore the concept of e-negotiation and its existing applications for resolving disputes in the EU. The authors point to the fact that in Europe, despite prominent examples from the United States, Canada, and Australia, the topic of e-negotiation has thus far received rather limited discussion. Assessing several widely used e-negotiation systems, and discussing their strengths and weaknesses, they identify the great potential of e-negotiation, and its application through the EU ODR Platform in particular, in ameliorating many of the existing barriers in citizens' access to justice.

Concerns about access to justice have found a new dimension in today's data-driven economy and online social media platforms, which enable an ever-growing range of interactions between individual users. Unavoidably, these interactions give rise to disputes: social media behaviour can, for instance, result in claims for copyright infringement, unfair commercial practices, or privacy violations. Yet, these claims are rarely adjudicated by public courts; most of these disputes are resolved internally by the platforms, through techniques known as 'content moderation'. In Chapter 10, **Catalina Goanta and Pietro Ortolani** unpack content moderation and show how, behind this

label, platforms operate as veritable online civil courts. As such, they explore the platforms' failure to ensure adequate access to justice through content moderation. The authors comparatively analyse the reporting systems of four social media platforms (Facebook, Twitch, TikTok and Twitter) and propose a hierarchy of 'actionable' content, as well as the underlying procedural rights of users to file complaints. Additionally, the authors explore the responsibility of social media platforms as adjudicators, to determine what role traditional principles of dispute resolution (such as independence and impartiality) play in their private spheres. Finally, they propose a normative framework for private access to justice in the context of harms arising out of social media content.

The publication and dissemination of unlawful online content and the lack of effective remedies to stop it has proven to be a persistent problem. In Chapter 11, **Naomi Appelman, Joanna van Duin et al.** report on the findings of empirical research, commissioned by the Dutch government, on the possible need for procedural innovation in the Netherlands to quickly take down online content that causes personal harm – i.e., a wide variety of Article 8 ECHR claims that impact people's private life. The results of this interdisciplinary study, combining law and communication science perspectives, show that, even though a significant minority of the Dutch population has personal experience with harmful content, the available means of recourse are often not utilised. This appears to be partly due to a lack of knowledge, as well as the length, complexity, and costs of a legal procedure. Other obstacles concern the specialised nature of the problem and the difficulty for injured parties to find the appropriate actor to address. There is also tension between the need for routes that are fast, accessible, and scalable, and the need to ensure procedural safeguards and the protection of fundamental rights – in particular the right to freedom of expression. Appelman and van Duin suggest ways to improve remedies for the removal of unlawful online content and propose a roadmap that provides injured parties with a step-by-step plan or escalation model, according to e.g., the different types of content at issue and the actors involved.

1.5 FUNDING CIVIL JUSTICE AND COLLECTIVE REDRESS

One of the most persistent barriers in access to justice remains the costs associated with litigation. As discussed in Parts I and II, this is also one of the reasons why private forms of justice and online dispute resolution have gained importance, while also digitalisation of court litigation reduces costs. A special category of litigation that is of particular importance for access to justice due to economies of scale is that of collective redress. Mass damage, complex and public interest cases, are generally not suitable for ADR mechanisms and benefit only to a limited extent from digitisation of procedures. It is in this area

specifically that costs and funding have been discussed mostly in recent years, as was addressed in Section 1.2. Part III of this book focuses on the funding of litigation and of collective redress in particular. The contributions explore the opportunities and drawbacks of three funding routes: collective actions by or via public funding entities, semi-public consumer organisations and private entrepreneurial entities. The chapters address these focusing on three distinct jurisdictions, The Netherlands, Germany and Canada (Quebec). The first is one of the frontrunners in the EU both as regards collective redress and funding, while also in Germany an important collective redress mechanism is in place and has been the centre of the Volkswagen diesel scandal litigation. Canada, and Quebec in particular, has a well-developed system of collective actions and settlements and the financing through public funds can serve as an example for Europe.

As was mentioned above (Section 1.2), the Netherlands is one of the frontrunners in collective redress, and in the last decade entrepreneurial parties have started to diversify the Dutch mass litigation landscape. This is in part incentivised by the potential large earnings that such litigation provides. In Chapter 12, **Ilja Tillema** discusses several Dutch cases in which entrepreneurial parties have been involved, focusing on the pros and cons of their involvement, and the ways in which the legislator and courts have addressed this development so far. By juxtaposing the possible benefits of entrepreneurial parties – such as the facilitation of access to justice, increased competition, increased quality of claims, (e)quality of representation and the alignment of interest – with the 'dark side' of the coin – fostering a claim culture, inefficient competition, adverse selection, abusive behaviour and conflicts of interest – Tillema provides lessons learned from the Dutch cases and sketches an idea of what to expect in the future of mass litigation and entrepreneurial parties. So far, entrepreneurial lawyering seems not to have resulted in excessive litigation. Dutch developments cannot be detached from European developments. Both legislation and case law demonstrate that a move towards a stricter approach in the Netherlands is beginning to take shape. Dutch courts will continue to face challenges in the assessment of the business model of representative organisations, and that the political debate on entrepreneurial parties will continue. She concludes that to maintain an effective and trustworthy collective action system, it is essential to combine transparency and accountability with the sustainability of entrepreneurial parties and describes this as a balancing act.

Astrid Stadler delves into recent German case law on litigation funding issues in Chapter 13. Two Federal High Court decisions of 2018 explicitly forbid consumer associations to use the services of a commercial third-party funder for actions skimming-off illegally gained profit in consumer cases. Another highly topical issue is the funding of mass claims based on the assignment model which plays an important role in cartel damage litigation and in

the VW Dieselgate case. Legaltech companies and Special Purpose Vehicles (SPVs) offer debt collection free of charge and risk, but charge success fees. Despite a quite liberal decision of the Federal High Court in 2019, lower courts clearly tend to declare assignments to legaltech platforms like 'myRight' or SPVs void, due to an alleged violation of the German Act on Legal Services – a set of rules which de facto provides a monopoly for lawyers. The conflict is rooted in an obvious mismatch and the lack of a level playing field: whereas contingency fees are not allowed for lawyers under German law, there is no equivalent ban for SPVs and legal tech platforms. Finally, Stadler reflects critically on the German VW Dieselgate settlement in spring 2020 and how German law has inadvertently imported typical US class actions conflicts of interests. She concludes that in the long term, there is a definite need for a legislative framework on third-party funding, but also for the establishment of a fund for representative actions under the Representative Actions Directive.

In Chapter 14, **Catherine Piché** focuses on the public forms of financing class litigation and argues that financing class actions publicly through assistance by entities such as the Canadian province of Quebec's *Fonds d'aide aux recours collectifs* (the assistance fund for class action lawsuits; the Fonds) is the most appropriate and effective way to finance class action litigation, whenever available. She explains how the Fonds entity is not only effective as a class litigation funding mechanism but also as a mandatory independent oversight body beneficial to the class action system and the industry as a whole, that it should be recognised as such and serve as a model for reform of other legal systems. She argues that for the objectives and public policy purposes of class actions to be fulfilled, successful cases must be used to help finance unsuccessful ones. Assistance must be provided to legitimate and promising cases from entities with proper motivations: that is, to provide a way to fund this kind of litigation, to provide true access to justice. Because the Fonds' right to compensation applies to all class actions in Quebec, every class action case initiated in the province – whether it is funded or not – helps finance the next one. Furthermore, the Fonds' motive to assist class plaintiffs in a neutral manner helps provide access to worthwhile cases. As such, the very structure and functioning of Quebec's public class action assistance fund immunises it from potential conflicts of interest and the risk of agency cost in representative actions.

1.6 CONCLUDING REMARKS: THE ROAD AHEAD

Civil justice and the concept of access to justice are changing. Traditional approaches have focused primarily on increasing access to courts, securing that legal aid is available for those without sufficient means, simplifying procedural rules and increasing efficiency to meet the requirement that judgment

is given within reasonable time. While these continue to be essential, the legal landscape is changing along with society and technological developments. There is a need for different forms of dispute resolution, technology has become a vital element in both private and court justice, and mass damages – for instance in consumer, cartel, and environmental cases – require appropriate collective redress mechanisms with funding that goes beyond legal aid to individuals by the government. In terms of regulatory attention, we have reached the next stage in EU civil justice. While the 2008 financial crisis and Brexit seemed to have slowed down developments,[41] it now seems to be at full speed in a more encompassing and integrated civil justice system. This chapter described the three main frontiers in the development of such an integrated system capable of addressing current access to justice issues.

ADR mechanisms have so far been developing as a separate track, while mediation and settlements within the court system have largely been voluntary and – in many countries – often incidental. The inherent limitations of the court system, limited legal aid and the ad hoc establishment of private ADR and ODR entities and platforms call for a more integrated approach. A step in the right direction at the EU level is the ADR Directive laying down quality requirements. In 2022, the ADR Directive and ODR Regulation will be evaluated, and it is expected that this will lead to further improvements, also in the monitoring of these quality requirements and in the operation of the ODR platform. Both for ensuring quality standards and for potential litigants to find their way, it is important that formal and informal justice become more integrated. An example in the EU, though be it a small step, is that the User Guide and Practice Guide on the European Small Claims Procedure after its revision in 2019, also refer to the possibility of ADR and to the operation of the ODR platform.[42] Similarly, the ODR platform should refer to this procedure as an option in case ADR fails. Apart from these references by way of signposting, a more advanced system of integrating formal and informal justice is needed, as is also suggested by Kas and Voet in the present book, and following up on the ELI-ENCJ Statement mentioned above.[43] One of the means is making mediation more compulsory and guided, which, as Ahmed discusses in relation to England and Wales, can also be part of the court's case management system. A more inter-connected system of formal and informal justice, along with what Nylund in assessing developments in Norway refers to as semi-formal justice, also requires a clear organisational framework and

[41] Kramer et al (n 4) 16–17.

[42] A Guide for Users to the European Small Claims Procedure and Practice Guide for the Application of the European Small Claims Procedure, available on the e-Justice Portal (the first author of this chapter was involved in revising these guides in 2019).

[43] Section 1.2; n 21.

accountability of ADR processes. The expansion of ADR and the expectation that these different forms of informal justice along with the need to administer cases in courts, calls for a more fundamental rethinking of an integrated justice system, both at the national and the EU level.

Another layer to the civil justice system, and one that is also important for cross-fertilisation and connection to private dispute resolution and court adjudication is technology. Technology develops fast and often follows trends in society, such as the importance of social media. Private dispute resolution entities seem to be more flexible in responding to these than public courts. Online service providers and sellers like eBay are at the forefront of technology development and have created their own forms of dispute resolution, as Goanta and Ortolani and Ebers discuss in the present book. This requires a strong commitment of legislators and the developers to uphold high-quality standards and to protect fundamental rights, including that of fair trial and privacy. The benefits of digital technology are also evident in courts, and the Covid-19 pandemic has showed the importance of a resilient judicial system and digital communication. The above-mentioned Commission proposal put forward on 1 December 2021, is an important step towards a more horizonal and encompassing approach to digital communication and justice and alignment between Member States.[44] Most developments are expected in further advancing the use of AI in dispute resolution, as is illustrated in several chapters of the present book. Also in this regard, private dispute resolution platforms have made big steps. The use in courts differs greatly per country, but also there it is clear that AI is very promising as it can compile arguments and read files faster than humans and it can already be used to resolve non-complex cases. It would not be surprising if a robot judge will replace a human judge for some types of cases in public courts in the near future. However, more structurally replacing human judges with robots involves social, political, and human aspects that will need further deliberation. Ultimately, the legal community will need to face this challenge and consider the risks it poses to procedural rights and the right to a fair trial, but also the benefits that AI will bring.

For the protection of consumer rights in particular, not only an integrated system of public and private dispute resolution and digitised justice is important, but also advancing collective redress and the funding thereof. It is also in the area of collective redress where public and private, or formal and informal justice go hand in hand in the form of collective actions and settlements. Collective redress is at the same time an area where private and (semi) public interests come together as by definition it affects large groups of individuals. The establishment of the Representative Action Directive is a huge step in

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[44] Section 1.2; n 29.

regulating collective redress and its regulatory and factual implementation in the next years creates an opportunity to bring Member States on board that do not yet have suitable mechanisms to collectively deal with cases that cannot be resolved individually. Collective redress, however, cannot exist and grow without funding, and traditional legal aid by the government cannot provide this. This also explains the rise of entrepreneurial parties, as Tillema discusses in the present book, and in the same vein Stadler rightfully argues that third-party funding is inevitable. But as for private dispute resolution, public regulation is required, and entrepreneurial lawyering will not take care of every case that needs legal address. The example Piché illustrates for public funds in Quebec can serve as an example of how such funds strike a balance between different interests in furthering access to justice.

The key issues and examples addressed in the different chapters of this book will continue to shape the future of civil justice development and underscore the complexity of present-day civil justice challenges, while at the same time pointing to opportunities available for addressing them. Taken together, the three identified frontiers in the development of a civil justice system capable of dealing with current and emerging issues of access underscore the need for a comprehensive and integrated approach.