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ENSURING THE EFFICIENCY OF CIVIL PROCEEDINGS: CURRENT EUROPEAN TRENDS

ЗАБЕЗПЕЧЕННЯ ЕФЕКТИВНОСТІ ЦИВІЛЬНОГО ПРОЦЕСУ: СУЧАСНІ ЄВРОПЕЙСЬКІ ТЕНДЕНЦІЇ

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Recently two important documents were released confirming that ensuring efficiency of civil proceedings is among the trends in Europe. These are the draft Directive on Common Minimum Standards of Civil Procedure in the European Union (2017) and the Model European Rules of Civil Procedure (published in 2021). Both documents pay great attention to the provisions ensuring the efficiency of civil proceedings. This article among first aims to provide a comparative analysis of the instruments of ensuring the efficiency of proceedings they suggest, in particular, on the cooperation and proportionality principles, the reasoning of court decisions and case management. Our analysis showed many similarities between those documents in the relevant sphere, for instance, both acts confirm the recent trends of attributing case management and the duty of cooperation to instruments of efficiency of proceedings. Also, they both provide a similar standard for the reasoning of court decisions. At the same time, while the Draft Directive provides a separate section for procedural efficiency, similar provisions could be identified in the different parts of the Model European Rules. Also, the Draft Directive pays major attention to the court's duties regarding efficiency and the Model European Rules share such duties between the court and parties to the dispute. The study showed that Ukrainian civil procedure has a low level of alignment with the instruments of ensuring the efficiency of proceedings proposed by the Draft Directive and the Model European Rules. This, in particular, relates to rules on case management as an important instrument for ensuring procedural efficiency. Considering the path towards full membership in the European Union, Ukraine should take a close look at and consider those legal documents.

Key words: European civil procedure, efficiency of civil proceedings, European standards of procedure, Ukrainian civil procedure, access to court, fair trial.

Нещодавно було підготовлено два важливих документи, які підтверджують, що забезпечення ефективності цивільного процесу є одним із трендів у Європі. Це проєкт Директиви про спільні мінімальні стандарти цивільного процесу в Європейському Союзі (2017 рік) та Модельні Європейські правила цивільного процесу (опубліковані у 2021 році). Обидва документи приділяють значну увагу положенням, що забезпечують ефективність цивільного судочинства. Ця стаття однією з перших має на меті здійснити порівняльний аналіз пропонованих ними інструментів забезпечення ефективності процесу, зокрема щодо принципів співпраці й пропорційності, вмотивованості судових рішень та менеджменту справ. Наш аналіз показав, що між цими документами є багато спільного у відповідній сфері, наприклад, обидва підтверджують останні тенденції щодо віднесення менеджменту справ та обов'язку співпраці до інструментів забезпечення ефективності процесу. Також обидва документи передбачають схожий стандарт вмотивованості судових рішень. Водночас, хоча Проєкт Директиви передбачає окремий розділ, присвячений процесуальній ефективності, подібні положення можна лише ідентифікувати в різних частинах Модельних Європейських правил. Крім того, Проєкт Директиви приділяє значну увагу саме обов'язкам суду щодо забезпечення ефективності, а Модельні Європейські правила розподіляють такі обов'язки між судом та сторонами. Дослідження виявило, що український цивільний процес має низький рівень узгодженості з інструментами забезпечення ефективності процесу, запропонованими Проєктом Директиви та Модельними Європейськими правилами. Це, зокрема, стосується правил менеджменту справами як важливого інструменту забезпечення процесуальної ефективності. З огляду на шлях до повноправного членства в Європейському Союзі, Україна повинна уважно вивчити та врахувати ці правові документи.

Ключові слова: Європейський цивільний процес, ефективність цивільного процесу, Європейські стандарти судочинства, цивільний процес України, доступ до суду, справедливий суд.

1. Introduction. Modern life requires efficiency in everyday activities. Such a trend applies to the law sphere as well. In particular, this relates to procedural rules where there is high demand from both legal professionals and ordinary people in speedy, swift and cost-effective litigation. This is even more demanding with civil courts, which generally resolve most cases among other courts and thus overloaded, which is a particular case in Ukraine. To illustrate, in 2023, the first instance Ukrainian courts resolved 1 084 382 civil cases [1].

Recently two important documents were released confirming that ensuring efficiency of civil proceedings is among the trends in Europe. These are the draft Directive on Common Minimum Standards of Civil Procedure in the European Union (2017) (hereinafter the "Draft Directive") and the ELI/UNIDROIT Model European rules of civil procedure (published in 2021) (hereinafter the "Model European Rules"). Those documents summarise decades of research and debates on the common/model rules of civil procedure in the European Union in particular and within the European countries in general. Both documents pay great attention to the provisions ensuring the efficiency of the civil procedure.

Due to the recent proposal of these documents and their volumes, few scholars are trying to provide their comparative analysis. Thus, this study is among first to provide such comparative research but in a particular sphere focusing on identifying and analysis of the efficiency of proceedings instruments. Do both documents suggest similar or different approaches in this regard? What provisions seem more substantiated and practically wise? The aim of this study is also to touch base on how the Ukrainian civil procedure correlates with the relevant proposed provisions.

2. Results and discussion section

2.1. Draft Directive approach to ensuring efficiency of proceedings

2.1.1. General overview of the Draft Directive

To begin with, the EU civil procedure lacks a unified binding act defining common principles and procedures in the relevant sphere. Usually, such a role in national procedures is played by the civil procedural code. The discussion between supporters and opponents of the idea of the adoption of such a binding act has been going on for many years and is not yet completed. At the same time, in 2017, the European Parliament proposed to adopt an act defining for the first time common minimum standards of civil procedure in the European Union at the level of a binding act. That is why the proposed Draft Directive has become, as I. Izarova fairly emphasizes, among "remarkable events" [2, p. 60] and marks decades of debates to introduce a unified legal act within the sphere of the European Union civil procedure.

Notably, it is more than 30 years have passed since the first idea of the possibility of harmonization of the civil procedure within the European Union was suggested. The histor-

ical background shows that "[t]raditionally, the EU was not considered to have competence in the field of procedural law, and the Member States were considered to have autonomy over national civil procedure" [3, p. 12].

The development of the national and European Union legislative systems affected the high level of interplay between them. This affected the civil procedure as well. However, as shown by E. Storskrubb, this interplay was "fragmented and disparate" [3, p. 12]. According to M. Tulibacka, M. Sanz, and R. Blomeyer, "[o]ne of the most significant obstacles to the development of any new procedural measure by the EU, especially one of a potentially horizontal, fundamental nature, is the limited constitutional mandate to regulate civil procedures. ... Another significant obstacle is the very nature of civil procedure, and the differences in national civil procedure principles, rules, practices and cultures" [4, p. 54].

Meanwhile, opposing this argument, other scholars (for instance, C. van Rhee) suggested that harmonization and even unification of civil procedural law may be required for various reasons. Although litigants may, in several cases, opt for a court with their preferred procedural regime, this is not always possible. Apart from legislation prescribing the litigants to conduct their lawsuit before the courts of a specific jurisdiction (e.g., where the case concerns immovable property), a choice of forum may not be feasible for financial reasons. In an economic area like the European Union, this may create problems from the perspective of the four freedoms (free movement of persons, goods, capital and services). Citizens may, for example, decide to abstain from purchasing certain goods outside their jurisdiction because of (perceived) problems should litigation become necessary. Additionally, businesses may be influenced by differences in procedural law in deciding to produce and market products in the various Member States [5, p. 8–9].

A significant number of scholars' works show that the need for civil procedural harmonization is considered "the very essence of the European union" (M. Storme, [6, p. 213]) and "of crucial importance" (E. Radev [7, p. 7]).

At the same time, views on how exactly such a harmonization should take place differ. For instance, Professor B. Hess suggests that "it might be advisable to elaborate a set of common principles of European and of constitutional law to be applied in domestic proceedings with cross-border implications" and "the term: "procedural minimum standards" should be avoided" [8, p. 9]. Therefore, he argues that only non-binding legal instruments may be applied [8, p. 14]. Others suggest a wider list of possible instruments, i.e., harmonizing national legal systems of the Member States in parallel or adopting a directive (the binding document on the European Union level) (E. Radev, [7, p. 1–7]).

Despite such harsh debates, it is evident that originating just as an idea of civil procedure harmonization thirty years ago, in recent years this idea has had a perception among scholars. Such an idea is at last expressed in the Draft Directive, which also suggests common rules for ensuring the efficiency of civil procedure within the European Union. As fairly noted by E. Storskrubb, despite not being yet adopted as the biding act, this legislative initiative "would form the basis for some level of further harmonisation of civil procedure in the EU" [3, p. 27–28].

The Draft Directive is accompanied by an extensive explanatory note that emphasises the key role of the "courts in protecting the rights and interests of all parties and in managing the civil proceedings effectively and efficiently" [9]. To fulfil this global aim, the Draft Directive suggests the minimum standards in the following spheres: fair and effective outcomes (section 1), efficiency of proceedings (section 2), access to courts and justice (section 3) and fairness of proceedings (section 4).

As evident, one of four sections is explicitly devoted to ensuring the efficiency of proceedings. This, along with the abovementioned aim, clearly suggests the important role of such standards/rules on the efficiency of proceedings.

2.1.2. Analysis of the specific rules on the efficiency of proceedings

Section 2 "Efficiency of proceedings" of the Draft Directive consists of 5 articles that cover the following rules: (i) procedural efficiency (Article 7), (ii) reasoned decisions (Article 8); (iii) general principles for the direction of proceedings (Article 9); (iv) evidence taking (Article 10) and (v) court experts (Article 10).

Article 7 prescribes both the general standard of "respect the right to an effective remedy and to a fair trial" while maintaining procedural efficiency, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken, and the specific rule on the court's obligation to act "as early as possible irrespective of the existence of prescription periods for specific actions" [9].

Article 8 concerns the rule on ensuring that "courts or tribunals provide sufficiently detailed reasoned decisions within a reasonable time in order to enable parties to make effective use of any right to review the decision or lodge an appeal" [9]. It seems that the authors of the Draft Directive were guided in this aspect by the well-established practice of the European Court of Human Rights (hereinafter the "ECtHR"), in particular, in the case Gheorghe v. Romania, where in. para. 43 the ECtHR noted that "without requiring a detailed answer to every argument put forward by a complainant, this obligation [court's duty to give reasons] nevertheless presupposes that the injured party can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question" [10]. Meanwhile, we believe that a proposed in Article 7 of the Draft Directive rule also enables the participants to acknowledge that all matters related to the merits and procedure have been properly decided and explained. This normally should preclude the participants from submitting additional motions on deciding such matters separately, which, as a matter of practice, overburden the overall procedure.

Article 9 explains the general principle for the direction of proceedings, which is also known as case management. This provision emphasises the courts' obligation to "actively manage the cases before them", "manage the case in *consultation with the parties*" and provides a non-exclusive list of specific management actions, in particular: "encouraging the parties *to co-operate* with each other during the proceedings", "fixing timetables to control the progress of the action", "deciding promptly which issues need full investigation and disposing summarily of other issues", "deciding the order in which issues are to be resolved", "helping the parties to settle the whole or part of the action" and "making use of available technical means" [9].

On the one hand, Article 9 evidences the increasing trend of granting the court the powers to actively participate in the proceedings despite the long-lasting adversarial principle which, generally, attributes an active role to the parties to the dispute only. On the other hand, it confirms that the principle of cooperation is considered among milestones for ensuring procedural efficiency. Notably, the Model European Rules suggest that the principle of cooperation is the central one in the civil procedure.

Articles 10 and 11 of the Draft Directive relate to the evidence gathering. Article 10 provides for a general rule on ensuring "that effective means of presenting, obtaining and preserving evidence are available" and usage "of modern communication technology" [9]. Article 11 specifically provides that the court at any time could appoint "court experts to provide expertise for specific aspects of the case" [9]. Those rules are aimed at the expenditure of taking the evidence.

We believe that one more instrument, which is not expressly mentioned in Section 2 "Efficiency of proceedings" of the Draft Directive, could be attributed to the efficiency as well. This is the proportionality principle. Analysis of the rules

set out in Section 2 of the Draft Directive allows us to conclude that their architecture is designed to ensure that civil procedure is proportionate, meaning "does not go beyond what is necessary in order to achieve" respective objectives (para. 22 of the Draft Directive Preamble) [9].

2.2. Model European Rules approach to ensuring the efficiency of proceedings

2.2.1. General overview of the Model European Rules

To begin describing the background of the Model European Rules adoption, one should understand the historical roots of this document. Back in May 2004, the American Law Institute and the International Institute for the Unification of Private Law (also known as UNIDROIT) adopted the Principles of Transnational Civil Procedure [11]. They were accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either the International Institute for the Unification of Private Law or the American Law Institute but constituted a model implementation of the Principles, providing greater detail and illustrating how those Principles could be implemented in procedural rules [12, p. 1].

These Principles and Rules were the first attempt to provide competent universal guidance to the legislators concerning the harmonization of their civil procedures with the best world practices. I. Izarova points out that this is "one of the most successful global projects on civil justice harmonization" [13, p. 62]. As the Principles of Transnational Civil Procedure were positioned as the worldwide instrument, their further implementation was also seen through the development of the regional set of rules as "an important first step towards the wider development of regional projects" [12, p. 2]. Such regional instruments have been seen as more specific about the rules suggested in 2004.

In 2014, the European Law Institute (ELI) and the International Institute for the Unification of Private Law "decided to cooperate on the development of European Rules of Civil Procedure based on the ALI/UNIDROIT Principles, considered in the light of other sources like the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 2000 Charter of Fundamental Rights of the European Union, the wider acquis of binding European Union law, common traditions in the European countries, the Storme Commission's work, and other pertinent European and international sources, be they binding or non-binding [12, p. 1–2].

As a result of this cooperation the Model European Rules, accompanied by comments, were approved by the ELI Council and Membership in the summer of 2020, as well as by the UNIDROIT Governing Council at the second meeting of its 99th session on 23-25 September 2020. The text of the Model European Rules accompanied by the comments was published English in 2021. The somehow unique feature of this document is that it is "a soft law instrument" [14] developed mainly by competent European scholars.

As stated by X. Kramer, one of the reporters who took part in preparing the Model European Rules, their adoption resulted in "the most encompassing set of model rules on civil procedure so far" [14].

The scope of the project drafting Model European Rules focused on European civil procedural law and not European Union civil procedural law [12, p. 2, note 5]. However, as fairly noted by H. Fredriksen and M. Strandberg, "[a] self-evident ambition of the [Model European Rules] is to influence the development of civil procedural law in Europe, both on the level of supranational European law and within the different national jurisdictions" [15, p. 154]. According to X. Kramer "[t]he goal was not to establish a model code of civil procedure, but to cover the most important topics of civil procedure. While the binding EU acquis was observed and common approaches in European countries were guiding, the idea was not to produce rules based solely on existing rules and common practice" [14]. That is why, the Model European Rules accompanied by the comments is a voluminous legal instrument over 500 pages long. The Model European Rules by themselves comprise XII Parts, 31 Sections and 245 rules, while the Principles of Transnational Civil Procedure consisted of 31 rather concise rules.

2.2.2. Analysis of the specific rules on the efficiency of proceedings

Since the structure of the Model European Rules is set out differently than in the Draft Directive – by the relevant institutes of civil procedure, there is no one part or section devoted specifically to the efficiency of proceedings. Rather, such provisions could be identified in various parts of the Rules, which, however, do not explicitly indicate their relation to the efficiency of proceedings as such. Meanwhile, some comments to the relevant rules do use the term "efficiency" (for instance, Rule 2 "Duty of co-operation" – "strengthens the efficiency" [12, p. 30] and Part III "Case management" – "securing expedition and efficiency" [12, p. 89]). This along with the content of the relevant provisions allows us to consider them as the ones related to the efficiency of proceedings. Some other provisions described below, i.e., on the principle of cooperation and reasoning of court decisions, were identified by us as such based on their purpose to ensure speedy and swift litigation. Thus, this study focuses on the analysis of the following provisions listed by us as relating to the efficiency of proceedings in the Model European Rules: (i) principles of proportionality and cooperation; (ii) case management; (iii) reasoning of court decisions.

Of course, those provisions are not the only ones that could be linked to the efficiency of proceedings or linked only to it considering the comprehensive and somehow voluminous character of the Rules. This study should be seen as the one that commenced the said analysis, which is complicated by the structure of the Rules that do not provide for a specific section devoted to procedural efficiency alias the Draft Directive does.

We begin our analysis from Part I of the Model European Rules, which provides for general provisions applicable to the whole Rules. Part I mainly concerns the procedural duties that are imposed upon the court, parties and their representatives. The most significant of these duties is the duty of cooperation, which is understood in the Rules to be of fundamental importance to the effective and proper administration of justice, and the general principle of proportionality in dispute resolution.

The principle of *cooperation* is the first principle explained in the Model European Rules. It means that the "[p]arties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute" [12, p. 28]. The cooperation is also further explained through "the activities that must be carried out by parties in the interest of good administration of justice, and further to their duty to co-operate with the court in the proper conduct of proceedings" (Rule 3) [12, p. 31] and responsibility of the court for active and effective case management (Rule 4) [12, p. 33].

Rule 5 provides for a *proportionality* principle, embedding the recent trend of considering it as a general principle of the whole civil procedure. The principle is defined through the duty of the court to ensure that the dispute resolution process is proportionate (Rule 5), the obligation of the parties to cooperate with the court to promote a proportionate dispute resolution process (Rule 6); proportionality of the sanctions (Rule 7), and (proportionality of costs (Rule 8). In particular, "[i]n determining whether a process is proportionate the court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice" (Rule 5) [12, p. 34].

The Model European Rules provide for a similar to the one provided in the Draft Directive rule on reasoned decisions. Rule 12 "Basis of Court Decisions" envisages that "[i]n reaching any decision in proceedings the court must consider all factual, evidential, and legal issues advanced by the parties. Court decisions must specifically set out their reasoning concerning substantial issues" [12, p. 41]. As explained in the comment to

this Article, "[t]o avoid any unnecessary discussions of points or issues that evidently lack relevance, this Rule limits the court's duty to give reasons (also known as motivation) for its decisions to those substantial issues that are reasonably in dispute. This limitation is consistent with the general principle of proportionality of the dispute resolution process" [12, p. 41].

Part III "Case Management" provides for rules applicable both to the parties and court since "[i]n general, responsibility for the efficient and speedy resolution of disputes is shared between the court and parties" [12, p. 89]. The Model European Rules in Rule 49 suggest a non-exclusive list of case management means, in particular, the court must encourage parties to take active steps to settle their dispute or parts of their dispute; set a timetable or procedural calendar with deadlines for procedural steps to be taken by parties and/or their lawyers, limit the number and length of future submissions, determine the order in which issues should be tried and whether proceedings should be consolidated or separated, consider amendments to the pleadings or offers of evidence in the light of the parties' contentions, etc [12, p. 90–91].

An interesting suggestion of the Model European Rules is the case management orders (Rule 50). Those are intended to ensure that management under the Rules is carried out effectively and with sufficient respect for the parties' right to be heard and is not too complicated, time-consuming or expensive. It does so by granting the court the possibility to make any case management order on its motion or the application of a party and vary or revoke any case management order upon a party's or its motion [12, p. 93].

2.3. Main similarities and differences in ensuring the efficiency of proceedings proposed in the Draft Directive and the Model European Rules

The Draft Directive and Model European Rules are both documents that evidence the latest European trends in civil procedure. These acts are the most important developments aiming at harmonization of the civil procedure within the European Union (the Draft Directive) and the European continent, including the European Union (the Model European Rules).

As regards the main similarities in terms of ensuring the efficiency of proceedings, both acts pay special attention to case management and cooperation between parties and the court to ensure swift and efficient proceedings. The Draft Directive and the Model European Rules confirm the major shift of the civil procedure from the court's passive to active role as well as the obligation of the court to encourage the parties to amicably settle the whole or part of the dispute. Also, they both provide for a similar standard for the reasoning of court decisions.

The main differences are as follows: (i) while the Draft Directive provides a separate section for procedural efficiency, similar provisions could be identified in the various parts of the Model European Rules; (ii) the Draft Directive pays major attention to the court's duties about efficiency, the Model European Rules share such duties between the court and parties to the dispute.

2.4. Correlation of the Ukrainian civil procedure with the rules on efficiency of proceedings proposed in the Draft Directive and the Model European Rules

Both the Draft Directive and Model European Rules are important as the most recent development covering the effective European Union acquis. Considering the path of Ukraine towards the European Union's full membership, Ukraine should have a close look at those recent documents. The Draft Directive, once adopted, becomes a binding document that should be implemented into national legislation of all member states of the European Union. Even if it would not be adopted, we suppose that this proposal would be used for the development of future binding documents for the European Union and its members. The Model European Rules, in turn, trying to absorb the best approaches from European countries within contrasting legal families, sets the exemplary European and international standard of civil procedure.

During the 2017 procedural reform, the Civil Procedural Code of Ukraine (hereinafter the "Code") as the major legal act of civil procedure was significantly updated, in particular, to take into account current global and European trends. In particular, the principle of proportionality, elements of encouragement to settle disputes amicably (e.g., settlement of disputes with the participation of a judge, the possibility to refer the case to arbitration or mediation, etc.) were enshrined in the Code. The rules on the reasoning of the court decisions were also updated, establishing the court's duty to respond to each argument of the parties, unless the argument is obviously irrelevant, manifestly unreasonable or inadmissible given the law or established court practice (Article 265 of the Code) [16].

However, the Code does not provide for the obligations of the court and the parties to manage proceedings and clear rules to fulfil this obligation. Although the Code does provide some specific case management elements, for example, establishing the procedure for clarifying the circumstances of the case, and the possibility of changing such a procedure, this does not overall change the situation. We agree with the scholars that case management is "a new institute for the doctrine of civil procedural law of Ukraine" [17, p. 26].

We also draw attention to the fact that the Code also does not contain among its principles the principle of cooperation, which the Model European Rules have identified as one of the main principles of modern civil procedure.

It is noteworthy that since 2017, the Code, in our opinion, has established a higher standard for the reasoning of court decisions than the one proposed in the Draft Directive and the Model European Rules. As we already argued in our previous research piece, the approach developed in the analysed documents based on the ECtHR case law regarding sufficiently detailed reasoned decisions, i.e., those containing specific and clear answers to the arguments that are decisive for the outcome of the relevant proceedings, properly ensures procedural efficiency and is reasonably achievable in the Ukrainian reality, at least in the foreseeable future [18, p. 110].

Described above are our general observations on the correlation of the Ukrainian civil procedure with specific rules on the efficiency of proceedings proposed in the Draft Directive and the Model European Rules. We believe that the relevant issue is a comprehensive one to which an in-depth analysis in a separate study can be devoted.

3. Conclusions. Our research shows that the analysed Draft Directive and Model European Rules are important legal documents as the most recent development covering the effective European Union acquis. Both documents pay great attention to the instruments ensuring the efficiency of proceedings.

Our analysis shows that there are similarities between the Draft Directive and the Model European Rules in this regard. Notably, both acts pay great attention to the current trends in case management and cristalise the duty of cooperation. The main differences, in our opinion, are as follows: (i) while the Draft Directive provides a separate section for procedural efficiency, similar provisions could be identified in the different parts of the Model European Rules; (ii) the Draft Directive pays major attention to the court's duties regarding efficiency, the Model European Rules share such duties between the court and parties to the dispute.

Considering the path of Ukraine towards the European Union's full membership, Ukraine should have a close look at and consider those recent legal documents.

As this study shows, Ukrainian civil procedure has a low level of alignment with the instruments of ensuring the efficiency of proceedings proposed by the Draft Directive and the Model European Rules. Notably, the Code does not provide for the principle of cooperation, the obligations of the court and the parties to manage proceedings and clear rules to fulfil this obligation. Also, the Code establishes, in our opinion, a higher standard for the reasoning of court decisions, the application of which is complicated in Ukraine.

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