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Impact of the ELI/UNIDROIT European Model Rules for Civil Procedure on National Law – the Case of Norway

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Abstract
This article offers a first analysis of the potential impact of the new ELI/UNIDROIT European Model Rules for Civil Procedure (ERCP) at the national level. Taking one of the Nordic/Scandinavian countries as an example, the article suggests that the ERCP may come to influence Norwegian civil procedure in three different ways, by: (i) influencing the interpretation and application of the existing national law; (ii) influencing future legal reforms; and (iii) exercising influence via the law of the European Union. In general, the openness and pragmatism of the Nordic/Scandinavian legal culture is likely to enhance the ERCP's impact. Nonetheless, the extent of the impact in concrete cases will depend on the perceived fit of the ERCP to the existing Norwegian Code on Civil Procedure and its underlying aims and values.

Keywords
ELI/UNIDROIT European Model Rules for Civil Procedure, Scandinavian legal culture, Norwegian civil procedure, European Union, European Economic Area, soft law, Lugano Convention

1. Introduction

The European Model Rules for Civil Procedure (ERCP)[1] are the result of a joint project of the International Institute for the Unification of Private Law (*Institut international pour l'unification du droit privé*, UNIDROIT) and the European Law Institute (ELI). As suggested by the project's name, its aim is to develop model rules for civil procedure in Europe. It builds upon an instrument produced jointly by the American Law Institute (ALI) and UNIDROIT,

1. Available at <www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> last accessed 15 March 2023. Published in 2021 as *ELI-UNIDROIT Model European Rules of Civil Procedure. From Transnational Principles to European Rules of Civil Procedure* (Oxford University Press 2021). Further reading, see John Sorabji, 'The ELI-UNIDROIT Project: An Introduction and an English Perspective' in Anna Nylund and Magnus Strandberg (eds), *Civil Procedure and the Harmonisation of Law* (Intersentia 2019) 35–60; Rolf Stürner, 'The ELI/UNIDROIT Model European Rules of Civil Procedure' (2022) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 421. See also Fernando Gascón Incausti, Astrid Stadler and Vincent Smith (eds), *European Rules of Civil Procedure: A Commentary on the ELI/UNIDROIT Model Rules* (Edward Elgar 2023 forthcoming).

the Principles of Transnational Civil Procedure of 2004,[2] adapting those principles to the European context in the light of: (a) the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU); (b) secondary EU legislation; (c) national law and common traditions in the European countries; (d) the Storme Commission's work;[3] and (e) other pertinent European sources.

The project, which started in October 2013, was managed by a Steering Committee with representatives from both ELI and UNIDROIT. The work was organised by Working Groups that each had members from the various European legal families. The Working Groups were entrusted to propose model rules and official comments for all the main topics covered by the ALI/UNIDROIT Principles. Nine Working Groups were thus established, with their fields of responsibility clearly mirrored in their respective names:[4]

- Access to information and evidence
- Provisional and protective measures
- Service of documents and due notice of proceedings
- *Lis pendens* and *res judicata*
- Obligations of the parties and lawyers
- Judgments
- Parties and collective redress
- Costs
- Appeals.

All drafts from the Working Groups were discussed in plenary sessions where all members of the project and all observers were invited. In the very last phase of the project, an overarching 'Structure Group' was established to consolidate the texts from the various working groups, to establish a common structure, to ensure coherence and avoid gaps concerning aspects that might not be covered by any of the designated Working Groups. The Structure Group was also in charge of writing the introductory chapters to the rules. Both ELI and UNIDROIT approved the Model Rules, in English and French as equally authentic language versions, in 2020.

For any assessment of the project's success, it is important to stress that the aim was not to devise a set of rules articulating common practices, ie a 'restatement' of European civil procedure, nor was it to provide a set of rules based on the predominance of approaches across European jurisdictions, or based on compromise.[5] The aim was primarily to devise a

2. Available at <www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles> last accessed 15 March 2023. Published as ALI/UNIDROIT, 'Principles of Transnational Civil Procedure' (Cambridge University Press 2005). Further reading, see Mads Andenæs, Neil Andrews and Renato Nazzini (eds), *The Future of Transnational Civil Litigation. English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (BIICL 2004).
3. Marcel Storme (ed), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union* (Martinus Nijhoff Publishers 1994). For a critical, Nordic perspective, see Per Henrik Lindblom, 'Harmony of the Legal Spheres' (1997) 5 *European Law Review* 11.
4. For a complete list of the members of the Working Groups, see *From Transnational Principles to European Rules of Civil Procedure* (n 1) vii–x. One of the authors of this article, Strandberg, was a member of both the working group on obligations and the working group on appeals. The working group on appeals was organised somewhat differently from the other groups. It had only four members, was established in the latest stages of the project, and worked under a tighter schedule than the other groups.
5. Preamble, para 9.

set of best practice rules for the future development of European civil procedure.[6] Instead, the project adopted the optimum approach, which means the working groups attempted to find or develop European best practice by taking into account the ALI/UNIDROIT Principles, approaches present in different European legal traditions, EU law, and the European Convention on Human Rights.[7] Although the project's primary goal was not to develop comparative legal knowledge, comparative analyses were of course included in the search for best practice. Most working groups gathered information on national law by questionnaires circulated among the groups members before analysing them from a functional perspective.[8] Unfortunately, most of the comparative information and analysis are not included in the final version of the ERCP.

A self-evident ambition of the ERCP is to influence and harmonise the development of civil procedural law in Europe, both on the level of supranational European law and within the national jurisdictions. The aim of this contribution is to discuss how the ERCP might fulfil this ambition in a small Nordic country: Norway. Although our analysis is limited to Norway, parts of it may also be relevant for the other Nordic countries and perhaps even other European countries with a comparable procedural tradition. Like the other Nordic countries, Norway has an open legal culture that is receptive to new ideas from abroad, although the impact of foreign rules depends very much upon their perceived fit and 'added value' to the existing body of Norwegian law.[9] The civil procedure of Norway is historically heavily influenced by Germanic law (German and, in particular, Austrian law), but has later sought inspiration from others, in particular English law, to such an extent that it is currently justified to classify it as a distinct procedural system, placed somewhere between the Germanic and the Anglo-American model.[10] As in the other Nordic countries, the Norwegian civil justice system is relatively well funded.[11] The costs of civil litigation in Norway are still worryingly high, but at the same time this allows for the lawyers to search for and include foreign legal material in their pleadings, at least in bigger cases. The knowledge of English is generally good whereas the knowledge of other foreign languages (French, German etc) is much lower, thus heavily favouring consideration of legal sources and literature in the English language. Despite the cost level, the Norwegian civil justice system, like the other Nordic countries, enjoys a very high degree of trust from the public.[12]

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6. ibid. See also Remco van Rhee, 'Approximation of Civil Procedural Law in the European Union' in Burkhard Hess and Xandra Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Hart Publishing 2017) 63–75.
7. The methodological approach taken resembles the one that has always been taken by the Court of Justice of the European Union (CJEU) when developing general principles of Union law. See eg the acknowledgment of this by Advocate General Lagrange in his Opinion in Case 14/61, *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v High Authority of the European Coal and Steel Community*, opinion of 4 June 1962 (ECLI:EU:C:1962:19): 'the case law of the Court, insofar as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical "common denominators" between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the object of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive'.
8. See Sorabji (n 1) 46–50.
9. For a brief introduction to the Nordic legal family, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* third revised edition, translated from the German by Tony Weir (Oxford University Press 1998) 277–285.
10. See Halvard Haukeland Fredriksen, 'German Influence on the Development of Norwegian Civil Procedural Law' in Volker Lipp and Halvard H Fredriksen (eds), *Reforms of Civil Procedure in Germany and Norway* (Mohr Siebeck 2011) 19 ff.
11. The most important factor by far is the generally manageable workload, but, in addition, all Norwegian judges are entitled to one month paid leave of absence for the purpose of study every fourth year.
12. In the 2022 Rule of Law index from the World Justice Project, the first four places are taken by Nordic countries:

Norway is also an interesting test case because the country is not a member of the European Union, but is associated to it through several agreements. Norway shares this status with Iceland as well, and also with (albeit to varying degrees) Liechtenstein, Switzerland and now also the United Kingdom of Great Britain and Northern Ireland. Norway's relationship with the EU complicates, but does not hinder, indirect influence of the Model Rules via EU law, as explained further in section 4 below.

In the following, we discuss the potential influence of the Model Rules on Norwegian civil procedure, highlighting three different paths for such influence: influence on existing national law (section 2); influence on future legal reforms (section 3); and influence via EU law (section 4). Section 5 briefly concludes.

We only discuss the Model Rules' potential impact upon the general 2005 Code of Civil Procedure,[13] which governs civil proceedings before the state courts. Hence, we do not deal with the Norwegian rules on arbitration or any other sort of private, out-of-court, conflict-solving mechanisms.[14] Arbitration is outside the scope of the ERCP.[15] Nor do we discuss the potential influence from ERCP via a contract between the parties. By contrast to arbitration, most rules of Norwegian procedural law are mandatory.[16] Procedural contracts are, however, partly addressed by Rule 58 ERCP, which takes a more flexible approach than the tradition in the Nordic countries.[17]

2. Influencing Existing Norwegian Law

A first route of influence for the ERCP is as a matter of inspiration for the interpretation of existing Norwegian procedural law. Due to the general openness of the Norwegian legal method, no formal recognition by parliament or the government is required for Norwegian courts to be able to take the ERCP into consideration. However, as a soft law instrument, the ERCP will only be considered relevant for the interpretation of the Code of Civil Procedure if the latter's provisions leave a gap, provide the judge with discretionary powers, or at least leave room for interpretation.

As already alluded to in the introduction, several characteristics of the Norwegian legal tradition suggest that the Model Rules might influence the interpretation and application of the Code of Civil Procedure in this way. The Nordic legal tradition is not only open to foreign influence, but also rather pragmatic.[18] Nordic law is not based on grand theories, there is no constructive or system-building traditions really comparable to those of many civil

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Denmark in first place, Norway second, Finland third and Sweden fourth. Iceland is not included in the ranking. See <https://worldjusticeproject.org/rule-of-law-index/global> accessed 8 February 2023. Unless otherwise stated, all other URLs referenced below were accessed on the same date.

13. Act 17 June 2005 No 90 relating to mediation and procedure in civil disputes (hereinafter: the Code of Civil Procedure). Unofficial English version: <https://lovdata.no/dokument/NLE/lov/2005-06-17-90>.
14. In Norway, there is a separate Arbitration Act (Act 14 June 2004 no 25). Unofficial English version: <https://lovdata.no/dokument/NLE/lov/2004-05-14-25>.
15. Rule 1, 2 litra d.
16. As stated in the *travaux préparatoires* to the current Code of Civil Procedure: see Norges Offentlige Utredninger [Norway's Official Reports], Report 32 (2001). Further reading, see Anna Nylund and Antonio Cabral (eds), *Contractualisation of Civil Litigation* (Intersentia forthcoming 2023).
17. Rule 58 on 'Related agreements' reads as follows: 'In so far as procedural rules are subject to party disposition, parties may agree on any procedural matter, such as the jurisdiction of the court, provisional measures, and publicity of hearings'.
18. This may also be explained under the label of 'Norwegian legal culture'. For such an approach, see Marius Mikkel Kjølstad, Sören Koch and Jørn Øyrehagen Sunde, 'An Introduction to Norwegian Legal Culture' in Sören Koch and Jørn Øyrehagen Sunde (eds), *Comparing Legal Cultures* (2nd ed, Fagbokforlaget 2020) 105–148.

law countries, and there is neither a comparable tradition of developing abstract concepts.[19] These aspects of Nordic legal thinking prepare the ground for input from abroad, and they fit well with the ideology and style of the ELI/UNIDROIT project. The Model Rules do not try to introduce a grand theory or a complete system with abstract concepts; rather, they are based on a relatively pragmatic best practice approach that takes the quality of expected consequences as the guiding principles for the preferred solutions.

In line with Scandinavian/Nordic legal realism, the Norwegian doctrine of legal sources, and the guidelines for interpretation of such sources, are open and rather flexible.[20] Norwegian legal methodology consists of a fairly long list of generally accepted sources of law, which includes not only 'hard' sources such as statutes and case law, but also 'softer' policy considerations, comparative arguments based on the law in other countries and international sources of law.[21] Soft law of foreign origin may be relevant even if it has not been formally approved by parliament or the government. Within contract law, both the UNIDROIT Principles of International Commercial Contracts (UPICC), the Principles of European Contract Law (PECL), and the Draft Common Frame of Reference (DCFR) are generally regarded as relevant sources of law.[22] Most scholars include such soft law in their analysis of Norwegian contract law, even in textbooks designed for students. As one of many examples, Amund Tørum makes several references to these soft law instruments when dealing with the Norwegian rules for interpretation of commercial contracts.[23] In the field of tort law, both the aforementioned DCFR and the European Principles of Tort Law (PETL) are generally regarded as relevant,[24] and these soft law instruments are routinely included in academic analysis and in textbooks. For example, Bjarte Askeland makes extensive use of ECTL when elaborating on the requirement of causation in Norwegian tort law.[25] Critical voices are heard, of course, but most of the criticism relates either to the content or the quality of a particular soft law project, or highlights certain conditions that must be fulfilled for European soft law to be relevant to Norwegian courts.[26] Arguably, the ERCP should play a similar role in future theoretical analysis of Norwegian civil procedure law.

Nevertheless, there may very well be a difference between theory and practice in this respect. While European soft law instruments will be expected to be included in any thorough scholarly analysis, this may not so readily be the case for the courts' reasoning. Again, a parallel is found in contract law as well as tort law, where a very small number of court decisions include references to European soft law. Recent case law of the Norwegian Supreme Court provides just one example where a European soft law instrument was explicitly mentioned in the reasoning. The judgment from 2014 referred to the UNIDROIT Principles of International Commercial Contracts.[27] The Supreme Court stressed that the principles were

19. Similarly, from the perspective of contract law, Amund Bjøranger Tørum, *Interpretation of Commercial Contracts* (Universitetsforlaget 2019) 15 ('The absence of grand theories and abstract concepts in Norwegian law on the interpretation of contracts makes it particularly open and well suited for such imports').
20. Kjølstad, Koch and Sunde (n 18) 126–135.
21. International legal sources were not included in the list set up by Torstein Eckhoff, *Rettskildelære* (5th ed, Universitetsforlaget 2000) 23, but he still regarded these factors as relevant: ibid 283 ff. Nils Nygaard, *Rettsgrunnlag og standpunkt* (2nd ed, Universitetsforlaget 2004) 51–55 explicitly included such factors.
22. Viggo Hagstrøm, *Obligasjonsrett* (2nd ed, Universitetsforlaget 2011) 61–70, Kåre Lilleholt, *Kontraktsrett og obligasjonsrett* (Cappelen Damm 2017) 38–41.
23. Tørum (n 19) 14–15.
24. Viggo Hagstrøm and Are Stenvik, *Erstatningsrett* (2nd ed, Universitetsforlaget 2019) 49–50.
25. Bjarte Askeland, 'Om hypotetisk, hendelig skadeårsak i erstatningsretten' (2017) 130(4) *Tidsskrift for rettsvitenskap* 347 <https://doi.org/10.18261/issn.1504-3096-2017-04-02>.
26. Eg Birgitte Hagland, *Erstatningsbetingende medvirkning* (Gyldendal Juridisk 2012) 53–59.
27. HR-2014-247-A, case no 2013/1839, para 37. There is a remarkable contrast here between Norway and Sweden, as the Swedish Supreme Court regularly makes references to European soft law: see Jan Ramberg and Christina

used only as additional support, meaning that the court would have reached the same result anyway.[28]

If the ERCP attain a similar role in Norwegian civil procedure law, the courts will primarily refer to them when they support a solution that already has a legal basis in the Code of Civil Procedure or established case law. However, it is more likely that the ERCP will be invoked in cases where a corresponding rule of Norwegian civil procedure is yet to be settled or the Code of Civil Procedure opens for several interpretations. That is arguably the case for the principle of cooperation, which is perhaps the most prominent principle of the ERCP. It is fairly well developed both in a general way in Rules 2, 6 and 9, and in greater detail in the subsequent chapters of the ERCP. In Norway, there is no general principle of cooperation, either in statutory provisions or in the case law. Still, some rules in the Code of Civil Procedure can be regarded as expressions of a general principle of cooperation between the parties. The law commission that prepared the Code regarded the duty of truthfulness and completeness in section 21-4 as a concrete expression of such a principle.[29] Even though the *travaux préparatoires* are important sources of law in the Nordic legal family, a mere statement from the law commission will normally not be sufficient to establish a general principle of Norwegian procedural law. It thus remains unclear whether there is sufficient support in traditional legal sources to establish such a principle, either in general or for specific situations. Consequently, it is also unclear what such a principle would mean in practice. Here, the ERCP prepare the ground for further debate and, potentially, the development of a principle of cooperation as part of Norwegian civil procedure.

Another related example is the repeated emphasis in the ERCP on sanctions for non-compliance with the duty to cooperate and other procedural responsibilities.[30] The Model Rules' rich variety of sanctions, and emphasis on their importance, may prepare the ground for further development of Norwegian law. A deep change in this direction requires a legal reform, because of a need for a formal legal basis for new sanctions. However, Norwegian law does entail sanctions that might gain practical importance under influence of the new Model Rules. One example might be the rather extensive but not often used rules on preclusion found in Section 9-16 of the Code of Civil Procedure. The reason for their limited practical impact appears to be reluctance on part of the courts to use this sanction in other than the most obvious cases. If the courts are informed that tougher use of sanctions in civil procedure is encouraged by international experts, this might cause some of their judges to reconsider their current practice.

Furthermore, pursuant to Section 20-4 letter c) of the Code, a party may be awarded legal costs irrespective of the outcome of the case when the costs 'have arisen due to the opposite party's omission'. Such a cost sanction is imposed every now and then, but not often. Here too, the ERCP might be invoked as an argument for a change.

The emphasis in the ERCP on sanctions might also influence the application of Norwegian tort law as a legal basis for sanctions against non-compliance with the principle of cooperation or other procedural responsibilities. In a judgment from 2015, the Norwegian Supreme Court emphasised that a party who suffers economic loss which is not considered

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Ramberg, *Allmän avtalsrätt* (12th ed, Norstedts Juridik 2022) 28 and, in more detail, Jori Munukka, 'Transnational Contract Law Principles in Swedish Case Law – PICC, PECL and DFCR' (2012) 57 *Scandinavian Studies in Law* 230.

28. Lilleholt (n 22) 40.
29. Norges Offentlige Utredninger (n 16) 946–947.
30. See Rules 4, 7, 27, 28, 99, 104, 110 and 191 ECRP.

as a legal cost under Chapter 20 of the Code of Civil Procedure could claim for damages against the opposite party if the litigation was an abuse of process.[31] Similar tort claims may result from abuse of other procedural rights, but the current state of Norwegian law is highly uncertain on these matters. Abuse of procedural rights is a core example of non-compliance with the principle of cooperation, which also covers a general duty to act in good faith.[32] Hence, the Model Rules' emphasis on sanctions might be taken to support the application of tort law in situations where a party intentionally or negligently has made a severe procedural error which has caused economic loss which is not regarded as a legal cost.

Another example where the ERCP may be a source of inspiration concerns third-party funding of civil litigations. In Norway, various versions of such funding have emerged in recent times, but the more problematic sides of this development remain to be recognised, both in doctrine and in case law.[33] Rule 245 ERCP, requiring third-party funding to be disclosed to the court and the other party at the commencement of proceedings, and requiring such funding not to provide for inadequate compensation for the funder or enable the funder to exercise any undue influence on the conduct of the proceedings, ought to be taken into account in this debate. This includes sanctions for violations of the requirements for third-party funding as set out in Rule 245(4): violations ought not to constitute a defence against the claim of the party availing itself of third-party funding, but should be taken into account when the court renders its decision on costs. The Norwegian Code of Civil Procedure does not entail any special rule for third-party funded cases, but the essence of Rule 245(4) might well be taken into account by the court in its application of some of the rather vague exceptions to the loser pays principle.

Rule 237 ECRP contains a special clause for third-party funding of class actions that underscores that a 'qualified claimant may use third-party funding'.[34] Recently, a case concerning third-party funding of an opt-out class action based on Section 35-7 of the Norwegian Code of Civil Procedure was rejected by the District Court as well as the Court of Appeal.[35] While third-party funding of opt-out class actions is not generally prohibited under Norwegian law, the funder in this case insisted on a number of conditions which violated several mandatory sections of the Code. During the spring of 2023, the Supreme Court will review the Appeal Court's ruling. Hopefully, Rules 245 and 237 ERCP will be considered in this review.

In general, the weight of an argument based on the ERCP will depend on its perceived quality, ie the ability of the relevant rule to fit into the existing Norwegian Code of Civil Procedure and the underlying aims and values of Norwegian civil procedure. Nevertheless, a more extensive impact of the ERCP might be appropriate in cases that concern the application of substantive EU law in situations where no specific EU procedural rules are involved. However, the potential impact of the ERCP in such settings will be indirect, via general prin-

31. HR-2015-787-A *Roxar* section 34. See also Eirik Wigenstad, 'Erstatning for tap utover sakskostnadene i sivile saker' (2017) 26(1-2) *Tidsskrift for forretningsjus* 202 <https://doi.org/10.18261/issn.0809-9510-2020-01-02-08>.
32. Rule 3 (d) ERCP.
33. As a contrast, see the debate from Europe, elaborated in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing 2010).
34. Stefaan Voet, 'Costs and funding of collective redress proceedings' in Astrid Stadler, Emmanuel Jeuland and Vincent Smith (eds), *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution* (Edward Elgar 2020) 264–295; Astrid Stadler, 'Third-Party Funding in Collective Redress' in Xandra Kramer, Stefaan Voet, Lorenz Ködderitzsch, Magdalena Tulibacka and Burkhard Hess (eds), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amoricum in Honour of Christopher Hodges* (Hart Publishing 2022) 151–160.
35. Borgarting lagmannsrett case no 22-032597 ASK-BORG/04.

ciples of EU law, in particular the principle of effective judicial protection of rights stemming from EU law (see further section 4 below).

3. Influencing Legal Reforms

The ERCP may also serve as a catalyst for legal reforms. Historically, Norwegian civil procedure law has evolved under international influence. The two main reforms of the last century, the old Code of Civil Procedure of 1915 and the current one from 2005, were both inspired by developments in other European countries. Whereas the old Code was highly influenced by Austrian law after the Franz Klein reforms,[36] the current Code draws inspiration from English civil procedure after the Woolf reform.[37] Thus, both reforms took specific jurisdictions as their main foreign source of inspiration. Still, the 1915 reform resulted from a much more thorough process than the 2005 reform, including many years of studies and discussions. The then accepted importance of knowledge concerning the state of affairs in other jurisdictions was reflected in the fact that parliament awarded two scholars entrusted with the drafting of the new code generous scholarships to enable them to go abroad and report in detail on recent reforms of civil procedure in several European countries. In contrast, the studies of foreign law before the 2005 reform were rather limited, primarily focused on English law.

In today's impatient political culture, committees preparing law reforms are rarely given enough time to explore and utilise foreign law. New reforms of civil procedure tend to be catalysed by isolated and more or less urgent problems, with the Ministry of Justice looking for quick solutions. Consequently, the appetite for systematic analysis of foreign law as a source of inspiration for proper reforms is much smaller than it once was. Somewhat paradoxically, however, this development in the legislative culture could actually facilitate the impact of the ERCP on future reforms of civil procedure in Norway. The ERCP and the accompanying comments are easily available online, and in a language that most Norwegian lawyers master quite well (English). Whilst contemporary law commissions may not have the time to consider foreign law, it will be easy for them to consult the ERCP. Of course, comparative lawyers will rightly object that the ERCP, as a soft law instrument yet to be tested in practice, cannot fully replace the knowledge one can get from comparative studies of 'living' national procedural systems. Still, if the realistic alternative is superficial studies of more or less random national systems, recourse to the ERCP is surely preferable.

The potential impact of the ERCP is further strengthened by their making. Unlike the situation before the 1915 reform, Norway has a comprehensive and mostly coherent Code of Civil Procedure that generally works fairly well. There is and will presumably always be a

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36. See Jørn Øyrehagen Sunde, 'Der organische Zusammenhang des Rechts: How the reception of Savigny came to influence legal reception in Norwegian law in the 19th century' in Volker Lipp and Halvard H Fredriksen (eds), *Reforms of Civil Procedure in Germany and Norway* (Mohr Siebeck 2011) 7–18. Further reading on Franz Klein's ideology for civil procedure law, see eg C H van Rhee, 'Introduction' in C H van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia 2005) 3–23.
37. See Norges Offentlige Utredninger (n 16) 183–184. The influence did, inter alia, concern case management and the preparatory stages: see Anna Nylund, 'Preparatory Proceedings in Norway: Efficiency by Flexibility and Case Management' in Laura Ervo and Anna Nylund (eds), *Current Trends in Preparatory Proceedings. A Comparative Study of Nordic and Former Communist Countries* (Springer 2016) 57–80. Further reading on the Woolf reform, see Adrian Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure* (Oxford University Press 1995); John Sorabji, *English Civil Procedure after the Woolf and Jackson Reforms. A Critical Analysis* (Cambridge University Press 2014).

need for further reforms, but arguably not one requiring a complete makeover, inspired by the system of another country. One of the reasons why the law commission preparing the current Code of Civil Procedure considered German law to be of limited relevance was that, during the twentieth century, Germany developed a more written style of proceeding than what was and still is characteristic of Norwegian law.[38] Furthermore, the various parts of German procedural law are interconnected in ways that make it difficult to draw inspiration from them without taking over the entire thinking of German procedural law. This is much less so with the ERCP, given their making and the fact that they are model rules independent from procedural rules or principles embedded in a specific legal culture.

In general, there is therefore reason to believe that the ERCP will be considered when the Ministry of Justice or a future law commission struggles with a legal question that the ERCP provides a possible solution for. Whether the solution provided by the ERCP will be followed will depend on the perceived fit of the solution into existing Norwegian civil procedure and the aims and values upon which it is based. Nevertheless, the pragmatic and down-to-earth style of Norwegian law, as described in sections 1 and 2, should allow for the ERCP to be taken into consideration. Any law commission that is given the mandate to suggest new rules for Norwegian civil procedure law will be expected to consider the ERCP and to include them in their reasonings.

An example of this is to be found in an important reform proposed by the Court Commission in 2020. The Commission worked from August 2017 until October 2020 with a broad mandate that first and foremost concerned the structure of the Norwegian court system, including the number of courts and the relationship between the different instances. The commission was empowered to suggest new areas for reform and was invited to provide specific proposals for new legislation. Interestingly, when analysing the system for first appeals, the commission made several references to the ERCP.[39]

On a general level, the commission underlined that the Norwegian rules for first appeal differ rather fundamentally from the approach in the ERCP.[40] While Norwegian law, at least in practice, follows the *de novo* principle, the ERCP limit the competence of the appellate courts considerably.[41] In accordance with recent trends in European procedural law, the ERCP take the view that an appellate proceeding should not be an entirely 'new' trial. Rather, the appellate courts' job should primarily be to test the legality of the proceedings in the first instance court. The commission noted these differences, acknowledged the old-fashioned and rather ineffective character of the Norwegian rules on appeal, and pointed out this area of Norwegian procedural law as a candidate for reform.

On this basis, the Commission suggested a reform of the rules concerning challenges to procedural decisions (decisions regarding legal standing or jurisdiction, case management decisions, decisions regarding access to evidence or admissibility of evidence, etc.). The sta-

38. Norges Offentlige Utredninger (n 16) 182. On the oral tradition of Norwegian civil procedure, see Maria Astrup Hjort, 'Orality and Digital Hearings', Anna Nylund, 'Oral Proceedings During the Preparatory Stage' and Magne Strandberg, 'Immediacy, Orality, and Appellate Proceedings' (2022) *International Journal of Procedural Law* Number 1.

39. On the rules on appeals in ERCP, see Christoph A Kern, 'Harmonisation of the Rules on Judgments and Appeals in Europe: A Few Remarks from the Inside' in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?* (Intersentia 2020) 223–237. For a comparative perspective on the Norwegian rules on appeals, see Magne Strandberg and Anna Nylund, 'Utsikt til innsikt: En komparativ tilnærming til reform av reglene om anke til lagmannsretten over dommer i sivile saker' (2020) 59(2) *Lov og Rett* 84 <https://doi.org/10.18261/issn.1504-3061-2020-02-03>.

40. Norges Offentlige Utredninger [Norway's Official Reports], Report 11 (2020) *Domstolene i endring* 324.

41. Rule 169 ERCP.

tus of Norwegian civil procedure is that a procedural decision may be challenged separately and invoked as a ground for appeal against a final judgment.[42] In sharp contrast, the ERCP follow the final judgment rule. Rule 179 ERCP stipulates that in order to promote procedural efficiency and proportionality, a procedural decision cannot be the subject of a separate appeal except in certain specific situations:

> **Rule 179. Separate Appeal Against the Review of Procedural Orders by the Court**
> (1) Unless otherwise provided for in Rule 179(2), a decision on a challenge to a procedural error cannot be made the subject of a separate appeal.
> (2) A separate appeal is available against decisions made in respect of
> (a) a stay of proceedings;
> (b) the transfer of proceedings to another court;
> (c) security for costs;
> (d) the exclusion of a party from a hearing or the imposition of a fine on a party;
> (e) a refusal to disqualify a judge or court-appointed expert; and
> (f) if provided for in a specific rule.
> (3) A separate appeal must be filed with the court within two weeks of notice of the decision.

The Court Commission quoted this Rule and discussed whether the Norwegian Code should be revised in accordance with the ERCP.[43] The Commission concluded that there are good reasons to reform Norwegian law on this matter and proposed a provision quite similar to the one found in Rule 179 ERCP.

Another important suggestion made by the Court Commission was a rule called 'preclusion between instances',[44] which means that procedural steps cannot be taken before the appeal court if they were not taken before the first instance court. At present, a party to appellate proceedings before a Norwegian court can present any source of evidence and rely on any fact, *even if* they were not included in the first instance procedure. By contrast, a rule on preclusion between instances is found in Rule 168 ERCP:

> **Rule 168. New facts and taking evidence**
> (1) Within the relief sought, the appellate court shall consider new facts alleged by the parties
> (a) in so far as those facts could not have been introduced before the first instance court, or
> (b) in so far as the first instance court failed to invite the parties to clarify or supplement facts that they had introduced to support their claim or defence under Rules 24(1) and 53(3).
> (2) Within the relief sought, the appellate court shall take evidence offered by the parties only if
> (a) the evidence could not have been offered to the first instance court;
> (b) the evidence was offered to the first instance court and was erroneously rejected or could not be taken for reasons outside the party's control; or
> (c) the evidence concerns new facts admissible according to Rule 168(1).

The justification of this rule in the accompanying comments is rather telling: new facts may, and must, be considered only insofar as they could not have been introduced before the first instance court or insofar as the first instance court failed to invite parties to clarify or supple-

42. Eg the Code of Civil Procedure sections 29-2, 29-3 and 29-21.
43. Norges Offentlige Utredninger (n 40) 332–334 and 365–366.
44. ibid 328–330 and 364.

ment facts. The limitation ensures that parties cannot withhold facts and evidence as part of their litigation strategy. It also ensures that parties take proper account of, and comply with, the concentration principle.[45]

A similar but not identical rule was suggested by the Court Commission.[46] However, in the consultation round following the suggestion, the Norwegian Bar Association, various courts and other stakeholders voiced their scepticism towards the suggested rule on preclusion between instances. The Supreme Court, for instance, considered the rule too strict and opined that such a reform could diminish the chances of having a materially correct solution to the conflict.[47] Recently, the Ministry of Justice noted that further analysis of the effect of related aspects on the rules on appeal, should be considered before the Court Commission's suggestion may be approved.[48]

Even though the consultation round revealed some resistance towards the latter reform proposal, the work of the Court Commission demonstrates the importance of the ERCP as an inspiration for reforms of Norwegian civil procedure law. Even if the end result should be that Rule 168 will not get an offspring in the Norwegian Code of Civil Procedure in this round, it will surely continue to inform future debates about this matter in Norway.

4. Influencing National Law via EU Law

A third route for the ERCP to influence the national civil procedure of European countries is through the EU. This route requires little explanation for those countries that are members of the Union. If the EU legislators draw inspiration from the ERCP, the ensuing EU legislation will naturally result in the relevant parts of the ERCP affecting the respective parts of the national procedural law of the member states. The same is true if the CJEU draws inspiration from the ERCP in its further elaboration of the general principles of Union law, in particular the principle of effective judicial protection of substantive EU law rights and obligations. Both 'ifs' are considerable, however, as it remains to be seen whether the EU legislators (the European Commission, the European Parliament and the Council of Ministers) and/or the CJEU will take the ERCP into consideration. We return to this matter towards the end of this section.

The picture is more complicated for the European countries that are not members of the Union. Many of them are, in different ways and to various extents, associated to the EU through bi- or multinational agreements with the Union. Especially close ties exist between the EU and the four remaining member states of the European Free Trade Association (EFTA) – Iceland, Liechtenstein, Norway and Switzerland.[49] Among those four, Iceland and Norway are even closer to the EU than Liechtenstein and Switzerland, as they are parties both to the 1992 Agreement on the European Economic Area (EEA) and to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[50] In many situations, the combined effect of the EEA Agreement and

45. Comments to Rule 168, para 2.
46. Norges Offentlige Utredninger (n 40) 364.
47. Consultation response from the Supreme Court to the Ministry of Justice, 26 March 2021.
48. Prop 34 L (2022-2023) *Endringer i tvisteloven mv* (rettsmekling, ankenektelse mv) 93–94.
49. Following Brexit, it should not be ruled out that the UK might want to rejoin EFTA, even though the preference so far has been for traditional free trade agreements with the four EFTA States.
50. Liechtenstein is a party to the EEA Agreement, but not to the Lugano Convention. Switzerland is a party to the Lugano Convention (as indeed suggested by its name), but not to the EEA Agreement. Both countries are also tied to the EU through several other agreements.

the Lugano Convention is that Norwegian judges find themselves in a situation very similar to that of their colleagues from EU Member States.[51] Still, parts of the EU's interventions into the procedural law of its member states fall outside the scope of the EEA Agreement. As the Agreement was negotiated in 1990–1991, its scope essentially reflects the scope of the EU law as it stood prior to the 1992 Treaty of Maastricht.[52] Thus, the EEA Agreement does not recognise a parallel to Article 81 of the Treaty on the Functioning of the European Union (TFEU) concerning judicial cooperation in civil matters. As a result, none of the EU legal acts based on Article 81 TFEU have been incorporated into the EEA Agreement. As far as the Brussel I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is concerned, this is largely remedied by the above-mentioned Lugano Convention. However, Norway's interest in similar agreements concerning certain other parts of the EU rules on judicial cooperation in civil matters has so far not been acted upon by the EU. Neither has there been follow-up of the proposition to update and widen the scope of the Lugano Convention.[53]

As a result of these peculiarities, the indirect EEA law impact of the ERCP in Norway (and Iceland) depends not only on the EU institutions' openness to the ERCP, but also on what ways the EU lets its future legislation be influenced by them. If the European Commission were to follow up the European Parliament's proposal of 2017 for a general directive on common minimum standards of civil procedure in the European Union,[54] the directive is unlikely to be incorporated into the EEA Agreement due to its expected EU legal basis being Article 81 TFEU. However, based upon the Commission's response to similar propositions from Parliament to propose general directives harmonising entire fields of national law, such as the initiatives towards an EU Civil Code or an EU Administrative Code, there is little reason to believe that the proposal will be followed up in its current form. A number of scholars also emphasise that Article 81 TFEU does not provide any competence for developing a directive with such a general scope of application as the Parliament suggests.[55] For political reasons, the Commission prefers a more limited, low-key, incremental approach based on the Union's competences to regulate the internal market (in particular Article 114 TFEU).[56] Thus, any impact of the Model Rules on EU law is, at least in the short and medium term, likely to be on sectorial internal market legislation – for instance, rules that harmonise

51. See Halvard Haukeland Fredriksen and Magne Strandberg, 'Norwegian Civil Procedure Under the Influence of EU Law' in Alan Uzelac and Cornelis Hendrik van Rhee (eds), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 41-62.
52. In order to maintain a level playing field with equal conditions, the Annexes to the EEA Agreement are continuously updated with new EU legal acts of EEA relevance, but the scope of the Agreement has not been widened to include new fields of EU law.
53. In 2020, the UK applied to (re-)join the Lugano Convention as an independent party. UK accession to the Convention would have provided an opportunity to update and broaden it, but the European Commission opposes the UK's accession, citing the UK's status as a third country with an 'ordinary' Free Trade Agreement facilitating trade but not including any fundamental freedoms and policies of the internal market: see *Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention* (COM(2021) 222 final, 4 May 2021).
54. European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).
55. Astrid Stadler, 'Harmonisierung des Europäischen Zivilprosessrechts – Mindeststandards oder Modellregeln?' (2017) 72(4) *JuristenZeitung* 693; Fernando Gascón Inchausti, 'The 2017 Directive Proposal on Common Minimum Standards of Civil Procedure in the European Union' in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?* (Intersentia 2020) 241–264.
56. The calls for an EU Civil Code or an EU Administrative Code have thus far not been followed up by the Commission.

national procedural law on topics such as EU consumer protection law. Incidentally, this approach will cause any such impact of the Model Rules to be of EEA relevance, and therefore to apply to the EEA/EFTA states in the same way as to the EU member states.

5. Conclusion

The ELI/UNIDROIT European Model Rules for Civil Procedure might come to influence Norwegian civil procedure as a source of inspiration for both academics and practitioners in debates over the best interpretation and application of the existing rules in the Code of Civil Procedure. The ERCP might also serve as a source of inspiration for the legislator in future attempts to improve the existing rules. As the ERCP are based on a pragmatic 'best practice' approach, they fit quite well with the Scandinavian way of legal thinking. This is also true for the style of the Model Rules – they are written in a relatively concise and open form that will be familiar to Scandinavian proceduralists. Finally, the ERCP might influence Norwegian civil procedure indirectly, through new or modified EU rules of relevance to Norway through the EEA Agreement, the Lugano Convention or one of the many other agreements that exist between Norway and the European Union.

Obviously, it remains to be seen whether and to what extent the ERCP will come to influence Norwegian civil procedure. A necessary first step is for the ERCP to be brought to the attention of the Norwegian legal community and included in debates about Norwegian civil procedure.