

Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law

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I Introduction

As is well known, the EU is based on a decentralised system of enforcement, where rules set at the EU level are implemented and adjudicated upon mostly at the national level. National courts, as they have been referred to by the Court of First Instance, are thus 'ordinary courts of Community law'.¹ With the increase of EU competences throughout the years, national courts have seen the European dimension of their role becoming broader and broader. While, however, the reach of substantive EU law has increased with each Treaty revision, it is only in the Treaty of Amsterdam that, for the first time, a procedural competence (in the form of former Article 65 TEC, currently 81 TFEU on judicial cooperation in civil matters) was added to the Community Treaty. Explicit procedural competences have thus increased² over the years, but nevertheless remain very limited in scope.

Despite this limited procedural competence, in recent years, there has been a bourgeoning of initiatives and rules placing emphasis on judicial enforcement and remedies³ across several EU policies. The latest examples of such 'enforcement' legislation include Directive 2014/104 on antitrust damages actions,⁴ Directive 2014/54 on the enforcement of the rules of the free movement of

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¹ Case T-51/89 *Tetra Pak Rausing SA v. Commission of the European Communities* [1990] ECR II-00309.

² See e.g. Chapter 4 of Title V (Area of Home, Security and Justice) dedicated to 'Judicial Cooperation in Criminal Matters'.

³ Sometimes among other forms of enforcement.

⁴ Directive 2014/104. Please note that the legislative instruments quoted in this concluding paper have been quoted in full in the contributions to the Special Issue.

worker;⁵ the debate on the implementation of the Aarhus Convention;⁶ several instruments in the field of consumer protection law;⁷ and some key provisions of the current reform on data protection law.⁸

In these cases, procedural standards have been introduced not as a result of the exercise by the EU of its explicit procedural competences but on the basis of a specific policy of the EU – such as those relating to competition law, the free movement of workers, environment, consumers and data protection. The questions arising as a result of these legislative initiatives is whether and to what extent a process of ‘incidental proceduralisation’ of EU law is taking place and is legitimate.

By ‘incidental proceduralisation’ we mean the insertion of procedural rules in secondary EU law measures adopted on the basis of provisions enabling the EU to develop a substantive policy. This definition of ‘incidental proceduralisation’⁹ excludes first of all measures taken on the basis of the procedural legal bases present in the Treaties (such as those on judicial cooperation in criminal matters for instance) where the legitimacy of EU intervention is more explicit and thus does not raise the same legitimacy questions. Secondly, it puts the focus on the creation of procedural rules by the EU legislator to the exclusion of the (albeit very important) proceduralisation process carried out by the Court of Justice of the European Union (CJEU). The role of the CJEU in this field has already been examined by numerous authors.¹⁰ Thirdly, it is limited to procedural rules applicable before national courts, thereby not for example covering

⁵ Directive 2014/54.

⁶ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

⁷ See contribution by M. Tulibacka in this Special Issue.

⁸ See the overview and comments provided in the contribution by A. Galetta and P. De Hert in this Special Issue.

⁹ The expression ‘proceduralisation’ is borrowed from the French language and has been used in French literature by E. Bribosia, ‘La lutte contre les discriminations dans l’Union européenne: une mosaïque de sources dessinant une approche différenciée’, in: C. Bayart, S. Sottiaux & S. van Drooghenbroeck (Eds), *Les nouvelles lois luttant contre les discriminations* (Bruges, Bruxelles, de Keure, La Charte 2008) 47. See also: R. Gellert & P. De Hert, ‘La non-discrimination comme réalité effective en Europe ? Réflexions sur la procéduralisation du droit de l’égalité européen’ [2012/1] *Revue belge de droit constitutionnel* 7.

¹⁰ See the literature on the principle of national procedural autonomy and the limits placed thereupon by the CJEU: T. Tridimas, *The General Principles of EU Law* (OUP 2006, 2nd Ed.), Chapter 9; W. van Gerven, ‘Of Rights, Remedies and Procedures’ [2000/37-3] *CMLRev.* 501-536; M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ’s case law in Italy, Germany and England* (Europa Law Publishing 2008); D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2011); Jan Jans et al., *Europeanisation of Public Law* (Europa Law Publishing 2007).

rules on administrative decision-making. The effects of proceduralisation on national administrative law are already explored elsewhere.¹¹

As evidenced by Olivier Dubos in his introductory contribution to this Special Issue, and particularly in the contributions on public procurement, anti-discrimination law and consumer law, the presence of procedural rules enshrined in EU substantive law is not new. Nevertheless, the impact on *judicial* procedural rules at the domestic level have been subject to little investigation. This is despite the fact that the extent of the phenomenon in recent years is unprecedented, as evidenced by the set of articles collated in this Special Issue. Such an observation calls for two central research questions as announced in the Editorial of this Journal. At the ‘micro’ level: to what extent has there been a process of ‘incidental proceduralisation’ in the EU? Are these developments coherent within a policy or across comparable EU policies? At the ‘macro’ level: does this ‘incidental proceduralisation’ trend tell us anything important about the evolution of the EU legal order?

By compiling a set of reflections on the matter from specialists in EU competition law, consumer law, public procurement, environmental law, data protection and anti-discrimination law, this Special Issue and the workshop on which it is based¹² seek to answer these research questions. After an introduction to the topic of ‘proceduralisation’ of EU law, each of the six contributions critically examine the process of incidental proceduralisation by looking at which procedural rules have been introduced, their rationale, coherence within the policy field as well as perceived usefulness for the application of the substantive EU law provisions they were enacted to serve.

On the basis of these sectoral analyses, it is possible to draw general observations on the dynamics (Section 2) and characteristics (Section 3) of this incidental proceduralisation process. Responding and building on the introduction of the proceduralisation of EU law as ‘a grey area of European federalism’ by

¹¹ See in particular the work of the Research Network on EU Administrative Law (www.reneual.eu/, last visited on April 28 2015). Although the final proposals – ReNEUAL Model Rules 2014 – are only related to the law regulating the actions of EU entities as such, there has also been much reflection on the impact of EU rules on national administrative practices falling within the scope of EU law. Discussing the scope and ambition of the ReNEUAL project see for instance R.J.G.M. Widdershoven, ‘Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?’ [2014/2] *REALaw* 5. For earlier research see, for example, K.-H. Ladeur, *The Europeanisation of Administrative Law: Transforming National Decision-making Procedures* (Ashgate 2002).

¹² We are very grateful to the Limburg University Fund (SWOL), the Research Fund of the Faculty of Law of Maastricht University as well as to the Netherlands Organisation for Scientific Research (NWO, Veni programme) for the financial support that has made the event and the resulting publication possible.

Olivier Dubos, the present paper concludes this Special Issue by stressing that the legitimacy of the proceduralisation process has not (yet) been significantly called into question. Furthermore, despite the wide variety of rules examined, it is possible to identify general trends in the way the EU initiates or supports changes in enforcement or litigation cultures.

2 The Dynamics of Incidental Proceduralisation

The process of incidental proceduralisation raises important legitimacy questions concerned with the existence – or lack thereof – of a competence allowing the EU legislature to adopt the rules that were examined at the outset. Furthermore, even if the issue of competence can be addressed, the contributions to this Special Issue shed light on a variety of policy factors affecting EU political institutions' willingness to legislate on such procedural matters, as will be outlined below.

2.1 The Question of Legal Basis, Competence or Lack Thereof

The fact that the European Union does not have explicit powers to set down rules for the procedures applicable before national courts could lead to the conclusion that the Union's legislature is not authorised to set down rules in this area. According to this reading of EU law, the only limitation to the procedural autonomy of the Member States would lie in the principles of equivalence, effectiveness and effective judicial protection.¹³

However, as Olivier Dubos notes, the CJEU itself has stated that Member States are free to set detailed rules for the enforcement of EU law before national courts 'in the absence of EU rules governing the matter'.¹⁴ This phrasing suggests that the European Union may be competent in procedural matters. However, as there are no explicit legal bases to harmonise procedural rules, it is necessary to find a legal underpinning to support the legitimacy of EU action in the procedural sphere.

In our view, the legitimacy of incidental proceduralisation – although admittedly unclear – flows from the need to ensure the effectiveness of EU law.¹⁵ The relevant piece of secondary legislation can thus be adopted with reference to

¹³ For the differences between effectiveness and effective judicial protection see S. Prechal & R. Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection [2011/2] *REALaw* 31-50.

¹⁴ See e.g. Case 33/76 *Rewe* [1976] ECR 1989, para. 5.

¹⁵ See also Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para. 48.

the legal basis which is relevant for the substantive policy at hand. In that sense, our understanding of the system of EU competences allowing for incidental proceduralisation can be related to the proposal by Olivier Dubos to conceptualise this process in terms of ‘implied competences’.¹⁶ In legal terms, the genuine controversial question thus revolves around the limits of the exercise of the said competences and ought to be framed primarily in terms of ‘subsidiarity/proportionality’ instead of lack of competence. Among these two principles, that of ‘subsidiarity’ is the most central to the legitimacy questions raised by the process of incidental proceduralisation: it is also the most political, thus explaining the difficulty of grappling with the legal foundation of incidental proceduralisation.¹⁷

Now, a notion that comes back on several occasions in this Special Issue is that of ‘procedural autonomy’. It is important to clarify its relationship with the debate on the competence of the EU to proceed with incidental proceduralisation. ‘Procedural autonomy’ should not be understood as a principle governing the allocation of competences or exercise thereof between the EU and the Member States. These roles are played by the principles of attributed competences, subsidiarity and proportionality. Instead, the principle of procedural autonomy is used to regulate the void left after (legitimate) EU intervention. In other words, the principle of national procedural autonomy may not be used to challenge EU legislative intervention with procedural implications for the domestic legal systems.

Incidental proceduralisation may thus legitimately take place to support the effectiveness of a substantive EU policy and with reference to the legal basis for this policy. As a result there is a limited need to look at Articles 352 (the so-called ‘flexibility clause’) or 81 (on judicial cooperation in civil matters) TFEU except in the absence of a sufficiently encompassing specific legal basis or unless one would want to establish binding rules on procedural mechanisms running across several EU policies. This could have been the case if the Commission Recommendation on Collective Redress would have been adopted in the form

¹⁶ Dubos defines an implied competence as ‘a competence that is necessarily devolved to the Union insofar as the purpose of its exercise is to ensure the effectiveness of substantive rules laid down elsewhere’. On the distinction made by certain academics between ‘implicit powers’ and ‘implicit competences’ see K. Lenaerts & P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxell, 2nd Ed. 2005), 92-93.

¹⁷ For a deeper reflection on the system of allocation of competences in the EU and the role of the principle of subsidiarity see G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ [2006/43] *Common Market Law Review* 63-84; P. Craig, ‘Subsidiarity, a Political and Legal Analysis’ [2012/50] *Journal of Common Market Studies* 772; G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ [2015/21-3] *European Law Journal* 2-22 and M. Bartl, ‘The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit’ [2015/21-3] *European Law Journal* 23-43.

of a Directive or Regulation,¹⁸ or with a possible proposal to adopt common rules of European administrative law.¹⁹

A substantive legal basis which would allow a form of ‘horizontal’ proceduralisation is Article 114 TFEU concerning the internal market. As is well established, this provision can be used by the EU to legislate on a remarkably broad range of topics.²⁰ This legal basis was used in particular to develop procedural rules in the public procurement and consumer protection fields. In this context, the contribution by Magdalena Tulibacka shows that this choice of legal basis allowed for the adoption of legislation going beyond cross-border disputes and that has more impact than those adopted through the explicit legal basis on judicial cooperation on civil matters. Essential, however, for the use of Article 114 TFEU in the procedural sphere, is the capacity to show that procedural differences impair the smooth functioning of the internal market. Should this fact be proven, Mariolina Eliantonio suggests that this legal basis could allow for further procedural harmonisation in the environmental field, for instance. However, whenever a specific legal basis for the development of a given EU policy exists and the principal aim of the measure falls within the scope of this specific legal basis, the EU legislature ought to give it priority.²¹

2.2 The Incentives for Incidental Proceduralisation

Incidental proceduralisation depends on the dynamics of specific EU policies. The analysis of the contributors to this Special Issue highlights several trends in the rationales underlying this ‘sectoral proceduralisation’ (expression borrowed from Magdalena Tulibacka’s contribution to this Special Issue). Indeed, if the common denominator is always a concern to enhance the effectiveness of a given policy, the actual incentives to finally adopt procedural rules may derive from a range of concerns of different natures: four of them stand out.

¹⁸ Recommendation COM(2013)3539 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹⁹ See Article 298 TFEU and the ‘Introduction to the ReNEUAL Model Rules: Book I’, ReNEUAL Model Rules on EU Administrative Procedure [2014, available at www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20I%20-%20general%20provision_2014-09-03%20individualized_final.pdf, last visited on April 28 2015].

²⁰ Eg. B. De Witte, ‘A Competence to Protect – The Pursuit of Non-Market Aims through Internal Market Legislation’, in: P. Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge UP 2012) 25-46.

²¹ See for instance Case C-68/86 *UK v. Council* [1988] ECR 855, paras 14-16; see further: K.S.C. Bradley, ‘Powers and Procedures in the EU Constitution: Legal Bases and the Court’, in: P. Craig & G. De Burca, *The Evolution of EU Law* (OUP 2011) 85-110.

Firstly, in areas of EU law closely connected with the exercise of public power such as public procurement or competition law (where public authorities play an important role in enforcing competition rules), one can observe a shift of perspective from that of public authorities to that of private litigants. Roberto Caranta stresses that EU law supports a ‘litigation culture’²² designed to (at least partly) address the right of undertakings competing for a tender to obtain redress in case of breaches of public procurement rules. He contrasts this approach with that prevailing in certain Member States before the introduction of the EU rules, and according to which litigation was destined to protect public budgetary interests and thus only allowed for restricted rules on standing.²³ Highlighting a similar trend, Michael Frese explains that the extension of the binding effect of decisions by the European Commission on national courts in competition cases to that of decisions by national competition authorities (as a result of the Directive on antitrust damages actions) illustrates a change of rationale of the relevant enforcement mechanisms. There has been a shift from the objective of ensuring the effectiveness of Commission decisions before national courts, an expression of the hierarchical relationship between EU and national authorities, to that of facilitating damages actions for injured parties.²⁴ In that sense, the proceduralisation process of EU law contributes to a broader trend of empowerment of private litigants or ‘privatisation of enforcement’.²⁵

Secondly, another shift from an internal market logic to that of self-standing fundamental rights policies has had a significant influence on the proceduralisation process taking place in the fields of anti-discrimination and data protection. The contribution by Elise Muir on EU equality law highlights that the existence of a broad legal basis for the adoption of anti-discrimination legislation, Article 19 TFEU as inserted by the Amsterdam Treaty, triggered a modernisation of the procedural rules applicable in this field.²⁶ Although EU equality policy was originally closely related to the concern of avoiding distortions of competition in the internal market, the assertion of its fundamental rights’ rationale has supported a more comprehensive and procedural approach to this policy. In a similar vein, Antonella Galetta and Paul De Hert, although critical of the current reform of data protection law, identify a significant qualitative improvement in the new legislation proposed in order to protect ‘the fundamental rights and freedoms of natural persons, and in particular their right to the protection

²² Expression borrowed from R. Caranta in this Special Issue.

²³ See the contribution by R. Caranta in this Special Issue, Section 1.

²⁴ See the contribution by M. Frese in this Special Issue, Sections 1 and 4.

²⁵ For an in-depth analysis of the role of private enforcement in the context of EU integration see D.R. Kelemen, *Eurolegalism: The Rise of Adversarial Legalism in the European Union* (Cambridge, MA: Harvard University Press 2010).

²⁶ Contribution by E. Muir, Section 2.3.

of personal data'.²⁷ While the current system is deemed 'minimalist' in part because the initial data protection directive was adopted mainly to remove barriers to the development of the internal market,²⁸ the reform constitutes in their view the first attempt by the EU legislator to 'proceduralise' the field in order to facilitate access to justice. The more comprehensive ambit of the current reform would thus be supported by the new 'fundamental rights' legal basis specific to the protection of personal data in the form of Article 16 TFEU, introduced by the Lisbon Treaty. The fundamental rights rationale of selected EU policies may thus support a more comprehensive regulatory approach, encompassing more detailed procedural rules.

Thirdly, international law plays an important role as an external driving force supporting the exercise of EU law along procedural routes. This is particularly clear in the field of environmental protection. The need to comply with the Aarhus Convention including provisions on access to justice in environmental matters, and to which the EU is a party, has constituted a powerful trigger for the introduction of procedural rules at the EU level.²⁹ This has been pointed out by Mariolina Eliantonio although the author remains critical of the degree of compliance achieved. It also transpires from the contribution on EU data protection law by Antonella Galetta and Paul De Hert that the ECtHR case law on the right to private life and the right to an effective remedy plays an important role in setting a common floor for procedural standards on which the EU legislature can then elaborate.³⁰ The acknowledgement at international level that access to remedies forms an integral part of the protection of selected interests such as the environment or the right to privacy thus naturally facilitates the adoption of rules on the matter within the EU legal order.

A final and important factor in the process leading to incidental proceduralisation relates to the interplay between the EU judiciary and legislature. As acknowledged in the introduction of this article and in several of our contributions, one of the key triggers for the adoption of EU legislation has been the CJEU's case law. Such an incentive operates at different levels. In several instances EU secondary legislation codifies the jurisprudential *acquis* as is clearly the case for the rules on the burden of proof in EU equality law.³¹ In other instances, the

²⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11/4 draft, Brussels, 25 January 2012, Article 1(2).

²⁸ A. Galetta & P. De Hert in this Issue, Section 1.

²⁹ Contribution by M. Eliantonio, Section 2.

³⁰ Contribution by A. Galetta & P. De Hert, Section 3.

³¹ See contribution by E. Muir, Section 2.

CJEU's case law paves the way for further legislative developments. This is illustrated by the Directive on antitrust damages action constituting a legislative response to the CJEU's case law on the rights of those injured by anti-competitive practices;³² and the Directive on the effectiveness of the review procedure concerning the award contracts that relied on case law, calling into question the sanctity of contract.³³ The legislature may also want to pre-empt the field in order to avoid unwanted judicial intervention³⁴ or simply adopt a truly innovative regulatory approach – as the creation of data protection authorities or equality bodies at the domestic level illustrates.

3 The Characteristics of Incidental Proceduralisation

With this legal and policy framework in mind and despite the large variation between the relevant provisions of EU secondary legislation in precision and formulation, it is possible to identify similar procedural areas which have been affected by EU secondary law in the policy areas identified in this Special Issue.

3.1 The Right of Access to Court

Several EU law instruments contain a generic reference to grant access to the courts where the substantive provisions contained in those very instruments have been violated. For example, from their early years the Directives on non-discrimination on grounds of sex established a right for victims 'to pursue their claims by judicial process',³⁵ and most anti-discrimination directives now require that administrative/judicial avenues be established for those who consider themselves victims of discrimination.³⁶ Similarly, the Access to Information Directive gives a right of recourse to a court to those who allege that their request of access to environmental information has been unduly treated.³⁷ In the field of consumer protection, the Unfair Contract Terms Directive creates the possibility to begin an action in the national courts against an allegedly unfair contract term.³⁸ Finally, in the field of data protection, Article

³² Contribution by M. Frese, Section 2.

³³ Contribution by R. Caranta, Section 1.3.

³⁴ Contributions by A. Galetta & P. De Hert, Section 3 and E. Muir, Section 2.

³⁵ Art. 2 Directive 75/117; see also Art. 6 Directive 76/207; Art. 6 Directive 79/7; Art. 10 Directive 86/378; Art. 9 Directive 86/613; Art. 12 Directive 92/85.

³⁶ Art. 7 Directive 2000/43; Art. 9 Directive 2000/78; Art. 8(1) & (3-4) Directive 2004/113; Art. 9 Directive 2010/4; Art. 17 Directive 2006/54 only refers to judicial remedies.

³⁷ Art. 6(2) Directive 2003/4.

³⁸ Art. 7 Directive 93/13.

22 of the current Directive 95/46 sets out the right to access to the courts for alleged violations of data protection law, and imposes on Member States the obligation to provide for this right in national law. These provisions are thus limited to requiring or encouraging Member States to create judicial avenues, and in any case EU secondary law does not provide detailed requirements as to how the claim should be treated in court.

3.2 Standing

3.2.1 Right vs. Interest

As is well known, EU law confers national procedural autonomy to Member States when it comes to choosing a rights-based or an interest-based model of standing.³⁹ This freedom seems to have been limited by secondary law rules in selected policy areas. For example, in the field of environmental policy, this choice remains partially intact, but procedural rules on standing (to the extent that they fall within the scope of application of the Public Participation Directive) need to be interpreted in a manner compatible with the aim of the Aarhus Convention: namely to ensure ‘wide access to justice’ in environmental matters.⁴⁰ A further limitation to the choice of standing models is contained in the Remedies Directive adopted in the public procurement field, which explicitly opt for and require the Member States to adhere to an interest-based model.⁴¹ As Roberto Caranta noted in his paper,⁴² this choice has forced some traditionally strict Member States, such as Germany, to lower their standard for standing. As will be seen in the next paragraph, German standing rules also came under fire with regard to the standing rules for NGOs.

3.2.2 The Legal Standing of NGOs or Other Legal Entities with a Qualified Interest

More sophisticated than ‘simple’ access to court rules, several secondary law measures contain rules which provide for specific standing rules for NGOs or other specific entities. This kind of rule is specifically prominent in the consumer, environmental and anti-discrimination fields. And this is not accidental, one could argue, given that in all these three policy fields, the substantive EU rules are aimed at protecting either diffuse interests (the interest of a healthy environment being imputable to everyone and no-one at the same)

³⁹ E.g. Cases 87/90, 88/90 and 89/90 *Verholen* [1991] ECR 3757.

⁴⁰ Art. 11 Directive 2011/92 and Art. 25 Directive 2010/75, which have been amended as a consequence of the adoption of the Public Participation Directive, i.e. Directive 2003/35.

⁴¹ Art. 1(3) of Directive 89/665.

⁴² Contribution by R. Caranta, Sections 1.1 and 3.

or the interests of dispersed and disenfranchised groups (consumers or victims of discrimination). Hence the need to provide for specific standing rules to enhance the role of NGOs in the enforcement of the substantive EU rules at stake.

In the consumer policy field, the Unfair Contract Terms Directive provides that organisations with a legitimate interest under national law in protecting consumers may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair.⁴³ Magdalena Tulibacka stresses that the powers of these organisations, their operation and financing, as well as those of administrative authorities remains, although subject to national discretion.⁴⁴ The same possibility for organisations with a legitimate interest to have access to a review system is also contained in several other consumer protection directives.⁴⁵

In the field of non-discrimination, several EU equality directives provide that Member States shall ensure that

‘associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations’

under the respective Directives.⁴⁶ As pointed out by Elise Muir, these EU rules do not require a Member State to create access to courts for legal entities acting independently from or in the absence of a victim.⁴⁷

In the environmental policy field, the relevant rules provide for a preferential status for NGOs acting for the environment. This is because Member States, although free to choose from the two models of standing (rights-based and interest-based), need to consider NGOs promoting environmental interests and meeting any requirements under national law capable of showing sufficient

⁴³ Art. 7(2) Directive 93/13.

⁴⁴ Section 2.2 of the contribution by M. Tulibacka in this Special Issue.

⁴⁵ Art. 11(1) Directive 2005/29 (Unfair Commercial Practices Directive); Art. 3 Directive 2009/22 (Consumers Injunctions Directive); Art. 13(2) Directive 2002/65 (Directive on distance marketing of financial services to consumers; Art. 13(2) of Directive 2008/122 (Timeshare Directive); Art. 23(2) of Directive 2011/83 (Consumer Rights Directive).

⁴⁶ Art. 7 Directive 2000/43; Art. 9 Directive 2000/78; Art. 8(1) & (3-4) Directive 2004/113; Art. 9 Directive 2010/4; Art. 17 Directive 2006/54.

⁴⁷ Contribution by E. Muir, Section 2.2.1.

interest and to have rights capable of being impaired in a legal system that has opted for a rights-based approach.⁴⁸ As examined by Mariolina Eliantonio, it is particularly the German rules on standing which made it impossible for NGOs to rely on the alleged violation of a rule only meant to protect the public interest that have been considered in violation of EU law.⁴⁹

Finally, in the data protection field, the General Data Protection Regulation (GDPR),⁵⁰ currently being negotiated as part of the EU Data Protection law reform, would entitle any organisation or association which aims to protect data subjects' rights or interests and has been properly constituted according to the law of a Member State to lodge a complaint with a supervisory authority in any Member State. This is done on behalf of one or more data subjects if data subjects' rights have been infringed, or independently of the data subject's complaint if a personal data breach has occurred.⁵¹ Moreover, Article 76(1) GDPR points out that organisations and associations would be entitled to the right to a judicial remedy against a supervisory authority and the right to a judicial remedy against a controller or processor.⁵² The same provisions would be enshrined in Article 50(2) and 50(3) General Data Protection Directive which is also currently being negotiated.⁵³ Galetta and De Hert however remain rather sceptical of the role of NGOs in the enforcement of EU data protection,⁵⁴ not least because of the scarcity of civil society organisations that are able to offer comprehensive and well-publicised services in this area.

There are EU constraints on domestic rules regulating access to courts for qualified entities in several fields. Yet, these rules largely refer to national law when it comes to specifying the conditions that these entities should fulfil to be granted standing. A remarkable exception is environmental law where, as pointed out by Mariolina Eliantonio, environmental NGOs have a preferential status in the framework of the Public Participation Directive. However, of note

⁴⁸ Art. 11 Directive 2011/92 and Art. 25 Directive 2010/75, which have been amended as a consequence of the adoption of the Public Participation Directive, i.e. Directive 2003/35. See also Art. 12(1) Directive 2004/35 (Environmental Liability Directive)

⁴⁹ Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* [2001] ECR I-3673

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM/2012/011 final.

⁵¹ Art. 73(2) and (3) respectively.

⁵² Art. 74 and 75 respectively.

⁵³ Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data COM/2012/010 final.

⁵⁴ Contribution by A. Galetta and P. De Hert, Section 7.

is that in the debate concerning a general Access to Justice Directive in environmental matters, proposals have been met to set actual requirements to be met by NGOs throughout the EU to be able to gain standing before national courts.⁵⁵

The current data protection law reform would also stand out from this overview for its reference to a form of collective redress through organisations protecting the rights and interests of data subjects as just mentioned. This would indeed constitute a legislative response to the 2013 European Commission's soft law invitation for the Member States to develop common principles on collective redress⁵⁶ to enhance the enforcement of any rights conferred by EU law.⁵⁷ The Commission indeed intends to 'facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law'.⁵⁸ In this Commission Recommendation, collective redress is meant to involve a claim aimed at asking either for the cessation of illegal behaviour or for compensation for unlawful behaviour brought: either collectively by two or more natural or legal persons or, as may be the case in the future for data protection law, by a qualified entity entitled to bring a representative action. In that sense, the new data protection law reform would consolidate the 'soft' proceduralisation process initiated by the 2013 European Commission Recommendation on collective redress.

3.2.3 The Role of Watchdogs

Apart from granting NGOs and other associations a preferential standing status, several consumer directives⁵⁹ also enable specific public bodies or their representatives to take action to bring a claim before national courts or competent administrative authorities to ensure application of the relevant directives.

⁵⁵ See the report by J. Darpö, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, Section 3.3.3, available at <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf> (last accessed on 29 April 2015).

⁵⁶ Commission Recommendation 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. See also M. Dawson & E. Muir, 'One for all and all for one? The collective enforcement of EU law' [2014/41-3] *Special Issue of Legal Issues of Economic Integration*, 215-224.

⁵⁷ Recital 7: this could cover for instance consumer protection, competition, environment protection, protection of personal data, financial services regulation, investor protection and any other areas where collective actions may be relevant.

⁵⁸ Recommendation I.1.

⁵⁹ Art. 13(2) of the Directive 2002/65 on distance marketing of financial services to consumers; Art. 13(2) of Directive 2008/122 (Timeshare Directive); Art. 23(2) of Directive 2011/83 (Consumer Rights Directive).

Specific public bodies ‘for the promotion of equal treatment’ are also to be found in the non-discrimination field, currently only endowed with the possibility to assist victims of discrimination in the pursuit of their claims in fairly general terms. However, the Commission has recommended that these bodies also be enabled to represent individuals in equal pay claims and ensure coordination and cooperation with labour market inspection authorities.⁶⁰

Also in the data protection area, the presence of watchdogs (in the form of data protection authorities) and their capacity to engage in litigation or bring violations to the attention of judicial authorities is enshrined in Article 28(3) of Directive 95/46.⁶¹

While we see the growing role of special watchdogs in several fields, other areas such as environmental law remain unaffected by this trend. Importantly, even within the policies where such watchdogs exist, their nature and powers vary greatly. Some of the watchdogs such as national competition authorities⁶² have strong administrative powers and are primarily understood as organs applying competition law in response to complaints or of their own motion and thereby complementing the role of domestic courts (who may in turn review their decisions).⁶³ Others may instead be designed to constitute aids for victims to bring complaints as in the wording of the anti-discrimination directives suggests. In that sense, the data protection authorities seem to occupy an intermediate position with powers to hear and address claims themselves as well as to engage in legal proceedings or bring violations to the attention of judicial authorities.⁶⁴

⁶⁰ Recommendation COM(2014)124 on strengthening the principle of equal pay between men and women through transparency, points 14-15; see also Recitals (17), (20) and Art. 4 of Directive 2014/104 on measures facilitating the exercise of rights conferred on workers in the context of the free movement of workers.

⁶¹ Note that the proposal from the Commission on the data protection law reform suggests to replace ‘or’ with ‘and’: European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11/4 draft, Brussels, 25 January 2012, Art. 53(3).

⁶² Art. 5 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁶³ Recital (7) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁶⁴ Art. 28(3) & (4) of Directive 1995/46. See the Contribution by A. Galetta & P. De Hert, Sections 3 and 4.

3.3 Time Limits

Rules on time limits have been subject to a strikingly limited process of proceduralisation, especially if one contrasts this minimal proceduralisation to the vast amount of case law generated by these rules in light of their compliance with the principle of effective judicial protection.⁶⁵ Of the procedural areas analysed in this Special Issue, our contributors only picked up on rules on time limits in the competition and consumer fields.⁶⁶

In the consumer protection area, the Consumer Sales Directive introduces time limits for claims.⁶⁷ In the competition area, the new Directive on damages in competition cases, in Article 10, sets out certain minimum requirements applicable to limitation periods for bringing damages actions, including a minimum limitation period, as well as rules on the suspension and interruption of limitation periods.⁶⁸

3.4 Evidence Rules

Evidence rules have also been subject to a process of ‘incidental proceduralisation’, apart from having been reviewed by the CJEU.⁶⁹ The process has mostly involved the introduction of rules concerning the burden of proof. Similar considerations to those made above with regard to the standing rules for NGOs can apply to this procedural area. Unsurprisingly, the rules on the burden of proof have been introduced in those areas, namely anti-discrimination and consumer protection, where there is always a particularly ‘weak’ party in need of increased protection.

In this spirit, Article 6(1) of the Unfair Contract Terms Directive provides that such unfair terms are not to be binding upon the consumer. Further, as individually negotiated terms are excluded from the protective effect of the Directive, it places the burden of proof that a term was individually negotiated upon the seller or supplier. The Directive on distance marketing of financial services to consumers also shifts the burden of proof onto the supplier in terms

⁶⁵ See for an overview, M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's case law in Italy, Germany and England*, Chapter 2.

⁶⁶ See also in the data protection law reform, Article 74(2) of the GDPR and Article 51(2) establishing a time frame of three months within which data protection authorities should answer a request concerned with data protection violations. See further the contribution by A. Galetta and P. De Hert in this Special Issue, Section 7.

⁶⁷ Art. 5 Directive 1999/44 sets a limitation period of two years from delivery.

⁶⁸ Directive 2014/104.

⁶⁹ See, e.g., Case 199/82 *San Giorgio* [1983] ECR 3595.

of the provision of information to consumers which the Directive requires, and of consumer consent to the conclusion of the contract.⁷⁰

In the anti-discrimination field, an entire instrument was dedicated to this aspect in the 1990s, the so-called ‘Burden of Proof Directive’.⁷¹ Unlike the consumer protection instruments mentioned above which seem to establish a full reversal of the burden of proof, this Directive provides for a partial shift in the burden of proof in sex discrimination cases. In particular, the Member States must make sure that the applicant only needs to establish facts from which it may be *presumed* that there has been discrimination. The burden of proof is then passed on to the respondent for him or her to prove the *absence* of a breach of the principle of equal treatment.⁷² The same ‘partial shift’ system is also to be found in specific provisions of several anti-discrimination directives, and the contribution by Elise Muir argues that this instrument makes it easier for applicants to enforce their right to equal treatment.

Because of its ‘supportive’ function for weaker litigation parties, Antonella Galetta and Paul De Hert wish a shifting of the burden of proof would have been introduced for data protection claims, especially for damages claims deriving from data protection breaches in the recent data protection reform package.⁷³ One could certainly argue that the same line of reasoning could be applied to environmental claims, where a partial shift of the burden of proof would entail that NGOs would only need to establish facts from which it may be *presumed* that there has been an environmental violation, while it would be left to the authorities to prove that such a violation does not in fact exist.⁷⁴

A very specific evidence rule has recently been adopted in the field of competition law. Pursuant to Article 9(1) of the new Directive on antitrust damages actions,⁷⁵ Member States have to ensure that a finding of an infringement of competition law by a final decision of the domestic national competition authority or review court ‘is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or 102 of the Treaty or under national competition law’. In addition to this provision introducing an ‘irrefutable evidence standard’, pursuant to Article 9(2) of the same Directive, a final decision rendered in another Member State may be presented before the national courts as ‘at least *prima facie* evidence that an

⁷⁰ Art. 15 Directive 2002/65.

⁷¹ Directive 97/80.

⁷² Art. 4 Directive 97/80.

⁷³ See the contribution by A. Galetta and P. De Hert in this Special Issue, Section 9.

⁷⁴ Art. 8 Directive 2000/43 (Racial Equality Directive).

⁷⁵ Directive 2014/104.

infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties'. Furthermore, several provisions of the Directive introduce rules on disclosure to be used by applicants in damages litigation.⁷⁶ Michael Frese stresses that this novel system of binding effect serves a complex set of functions in the field of competition law. It allows for the coordination of public and private enforcement mechanisms, to ensure a more level-playing field for undertakings in addition to facilitating exercise by consumers of their rights.⁷⁷

3.5 The Scope of Review

The environmental field seems to be the only one which provides a standard, albeit a vague one, for the intensity of review required by national courts when they are reviewing an alleged violation of an EU substantive provision. The Environmental Liability Directive and the Public Participation Directive (and, indirectly, also the Access to Information Directive)⁷⁸ require courts to test the 'substantive and procedural legality' of a national decision.⁷⁹

Beyond this standard, more or less marginal reviews will be deemed in compliance with EU law. The different scope of review exercises in the courts of the Member States and the lack of a general European standard is considered by Roberto Caranta as a very problematic gap in the current public procurement procedural framework, specifically, 'when contracting authorities may be said to enjoy – as is often the case – a degree of discretion or are called on to make complex technical assessments'.⁸⁰ One could extend those considerations also to competition cases, where courts are called on to make very complex economic assessments, and where, therefore, different intensities of review may well call into question the uniform application of EU competition law throughout the EU.⁸¹

⁷⁶ See contribution by M. Frese in this Special Issue, Section 3.1.

⁷⁷ See contribution by M. Frese in this Special Issue, Section 1.

⁷⁸ Art. 6(2) Directive 2003/4 (Access to Information Directive) provides that courts should be able to consider whether the access request was 'ignored, wrongfully refused or inadequately answered or otherwise not dealt with' in accordance with the provisions of the Directive itself. This phrasing can be considered as covering the 'substantive and procedural legality' of the access request, as suggested by Mariolina Eliantonio.

⁷⁹ Art. 11 Directive 2011/92 and Art. 25 Directive 2010/75, which have been amended as a consequence of the adoption of the Public Participation Directive, i.e. Directive 2003/35; Art. 12(1) Directive 2004/35 (Environmental Liability Directive).

⁸⁰ Section 2.2 of the contribution by R. Caranta in this Special Issue.

⁸¹ Note that the binding effect of decisions by national competition authorities and review courts as results from Directive 2014/105 curtails the scope of review by courts in follow on litigation as much as to alleviate the burden of proof on the victim.

3.6 Remedies

While not often detailing the content of the remedies which should be available before national courts for the violation of EU law, several provisions of secondary law set an ‘adequate and effective’ threshold, which national procedural rules on remedies should respect. Such a threshold is present in the Unfair Contract Terms Directive,⁸² in the Directive on distance marketing of financial services to consumers,⁸³ and in the Timeshare Directive.⁸⁴ This same requirement is also implicitly to be found in the environmental field in the Public Participation Directive and in the Access to Information Directive⁸⁵ as this threshold is the one explicitly contained in the Aarhus Convention, which these two instruments are meant to transpose.

Some other instruments in the consumer law policy specify instead which remedies should be made available. For example, Article 11 of the Unfair Commercial Practices Directive specifies two types of remedies which must be available in an accelerated procedure: a claim for cessation of an unfair commercial practice and a claim for prohibition of a practice not yet used but imminent. Similarly, the Consumers Injunction Directive requires the Member States to provide as remedies at least the cessation or prohibition of the infringement of consumer law and publication of the decision or of a corrective statement in order to eliminate the continuing effects of the infringement.⁸⁶

In the field of public procurement, the Remedies Directives provide for specific remedies to be available, namely annulment of an award and damages.⁸⁷ However Roberto Caranta remains doubtful of whether a broad requirement of annulment or to grant damages as a consequence of annulment suffices to ensure adequate protection against breaches of public procurement rules, if this requirement remains unaccompanied by more detailed rules on the level of scrutiny expected by national courts.

Damages are also to be made available in the field of data protection through Article 23 of Directive 95/46 which entitles persons who have suffered damage to receive compensation for data protection violations. Interestingly, Antonella

⁸² Art. 7 Directive 93/13.

⁸³ Art. 13(1) Directive 2002/65.

⁸⁴ Art. 13(1) Directive 2008/122.

⁸⁵ See further on this point Section 2.2 and Section 2.3, of the paper of M. Eliantonio in this Special Issue. For the applicability of this requirement to the Environmental Liability Directive, see Section 3.

⁸⁶ Art. 2(1).

⁸⁷ Art. 2(1)(a) of Directive 89/665.

Galetta and Paul De Hert also express their concern for a ‘simple’ liability action enshrined in secondary legislation because of the often immaterial nature of data protection harm and the difficulty of identifying the individual victims.⁸⁸

The anti-discrimination field also provides for examples of provisions where Member States have to provide for compensatory relief for victims of discrimination.⁸⁹ In this field, compensation is often coupled with reparation and sanctions, as the contribution of Elise Muir has evidenced. The author shows a trend moving from rules initially designed to primarily serve the purpose of punishing and dissuading from discrimination, towards a new, but complementary, focus on compensation or reparation to victims.

The recent Directive 2014/104 is a legal instrument entirely dedicated to establishing harmonised rules on damages actions resulting from the infringement of EU competition law. This instrument goes way beyond the minimum requirement of ‘adequate and effective remedies’, and also the simple obligation to provide compensatory relief for those harmed by competition law violations. Instead, and unlike any other field analysed in this Special Issue, it provides detailed procedural requirements to be applied in damage actions before national courts, with the explicit aim of creating a procedural level-playing field and avoiding unacceptable distortion of competition.⁹⁰ Given the Directive’s objective, it may be argued that, in line with what Roberto Caranta has noted,⁹¹ the same reasoning could be applied to other policy areas with strong internal market implications, where the need for more detailed remedial rules could equally be welcome.

Although EU legislation thus rarely addresses the principles governing the allocation of damages in details, the recent Recommendation on Collective Redress encourages the Member States to develop specific remedies, in the form of injunctive and compensatory relief across EU policy areas. Injunctive relief covers, according to the Recommendation, the cessation or prohibition of a violation of rights granted under Union law, thereby covering all possible remedies which may be necessary to repair the violation of EU law.⁹² It remains to be seen if this soft approach will pave the way for the adoption of legally binding provisions in specific fields of EU law: it may be the case regarding the

⁸⁸ See the contribution by A. Galetta and P. De Hert in this Special Issue, Section 9.

⁸⁹ See in particular Art. 10 Directive 2010/41 but also Art. 18 Directive 2006/54 and Art. 8(2) Directive 2004/113. See further the contribution by E. Muir in this Special Issue, Section 2.2.5.

⁹⁰ See Recital 7 of Directive 2014/104.

⁹¹ Section 2.2 of the contribution by R. Caranta in this Special Issue.

⁹² Recommendation IV.19.

standing of representative organisations in data protection matters, in the context of the current reform.⁹³

3.7 Interim Relief

When the attainment of a right under EU law might be significantly jeopardized until a ruling on the merits is made by a national court, it may be important for an applicant to obtain an interim measure. This procedural area has not just been at the core of several rulings of the Court of Justice,⁹⁴ but also of secondary measures taken in different policy fields.

The Remedies Directives taken in the field of public procurement, for example, have since their inception contained a specific reference to provide interim protection, with the aim of ‘correcting the alleged infringement or preventing further damage to the interests concerned’.⁹⁵ They include measures to suspend the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. Furthermore, subsequent to the intervention of the CJEU in this area,⁹⁶ Article 2(a) of Directive 89/665 as amended by Directive 2007/66 now also provides for a standstill period of 15 calendar days during which an award contract cannot be signed together with an automatic suspension of the procedure for the award of the contract.

Similarly, in the field of consumer protection, the Injunctions Directive provides the possibility to adopt injunctions, by way of ‘an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement’.⁹⁷

Finally, in the environmental field, though mentioned specifically in the Aarhus Convention, the requirement to ensure provisional protection has not been specifically taken up in the Public Participation Directive, which has partially served to transpose the access to justice requirements mandated by this international instrument. However, this gap has been filled by the CJEU: it has included the need to provide for adequate interim relief in the requirement,

⁹³ As discussed *supra* Section 3.2.2.

⁹⁴ Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433; Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [2007] ECR I-02271.

⁹⁵ Art. 2(1)(a) Directive 89/665.

⁹⁶ See Section 1.2. of the contribution by R. Caranta in this Special Issue.

⁹⁷ Art 2(1)(a) of the Injunctions Directive.

implicitly contained in the Public Participation Directive, to ensure ‘adequate and effective remedies’.⁹⁸

Interestingly, in their contributions, the authors of this Special Issue do not identify other policy areas containing references to the possibility to obtain provisional protection. As a consequence, for example in a data protection or non-discrimination case, national procedural rules on interim relief apply, subject only to the limitations of effective judicial protection. Once again, one may wonder if the Commission Recommendation on Collective Redress could constitute a step forward in addressing this situation, by encouraging Member States to ensure that national courts treat ‘claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation’.⁹⁹

3.8 Costs

Rules on costs have not often been subject to intervention by the CJEU,¹⁰⁰ despite their essential role in providing for effective access to courts. Interestingly, the conclusion arising from this Special Issue is that, until now, the ‘incidental proceduralisation’ process which has covered several procedural areas and several EU policies has concerned costs in only a marginal way. Indeed, EU requirements on the costs of proceedings can be found only in the environmental field. The requirement to provide ‘not prohibitively expensive’ proceedings stems in fact directly from the Aarhus Convention, which the relevant environmental directives (the Public Participation Directive and the Access to Information Directive, the latter albeit only indirectly)¹⁰¹ are meant to transpose. In the framework of the transposition of Article 9(3) of the Aarhus Directive and the adoption of a general Access to Justice Directive in the environmental field, this is an issue which is discussed in depth, also in light of the different national procedural frameworks.¹⁰²

⁹⁸ Art. 11 Directive 2011/92 and Art. 25 Directive 2010/75, which have been amended as a consequence of the adoption of the Public Participation Directive, i.e. Directive 2003/35.

⁹⁹ Recommendation IV.19.

¹⁰⁰ See however Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* [2010] I-13849.

¹⁰¹ See Section 2.2. of the contribution by M. Eliantonio in this Special Issue. For the applicability of this requirement to the Environmental Liability Directive, see Section 3.

¹⁰² See the report by J. Darpo, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, Section 3.6.

The conspicuous absence of rules on costs is regrettable, as the requirement that procedures are ‘not prohibitively expensive’ could prove useful in other policy fields where victims of breaches of EU law may have very limited financial resources, such as consumers and victims of discrimination. In that sense, one of the instruments adopted in the field of judicial cooperation in civil matters contributing to consumer protection sets out minimum requirements concerning legal aid in cross-border cases.¹⁰³ Similarly, the latest Directive 2014/54 on measures facilitating the exercise to workers’ free movement rights – including the protection against nationality discrimination – cautiously indicates that where special bodies provide assistance to victims in legal proceedings, such assistance shall be free of charge to persons who lack sufficient resources in accordance with national law or practice.¹⁰⁴ The Recommendation on Collective Redress seeks to address some of these shortcomings and may facilitate the insertion of binding rules in certain fields of EU law, by encouraging not only that Member States ensure that the collective redress procedures are ‘fair, equitable, timely and not prohibitively expensive’,¹⁰⁵ but also rules on cost sharing and funding.¹⁰⁶

Finally, it is worth noting that caps on costs of proceedings have also been considered relevant in areas such as the public procurement field, where strong economic interest and big market players are involved. The paper by Roberto Caranta indeed suggests that the current practices of some Member States would perhaps breach the principle of effective judicial protection.¹⁰⁷

3.9 Out-of-Court Mechanisms

Strictly speaking, rules concerning alternative dispute resolution (ADR) mechanisms fall outside the scope of the concept of ‘proceduralisation’ defined at the outset of this Special Issue and concluding paper. However, given their increasing importance, it is worth discussing their existence and content as they are meant to serve a ‘dissuasive’ function for litigation.

ADR features very prominently in the consumer protection policy. For instance, the Consumer Credit Directive requires Member States to ensure that

¹⁰³ Directive 2002/8.

¹⁰⁴ Art. 4(2) of Directive 2014/54. See further the contribution by E. Muir to this Special Issue, Section 3.1.4.

¹⁰⁵ Recommendation I.2.

¹⁰⁶ On the particular relevance of this aspect for EU consumer law see I. Benhor, ‘Collective Redress in the Field of European Consumer Law’ [2014/3] *Special Issue of Legal Issues of Economic Integration*, 243-256.

¹⁰⁷ See also the question raised in Case C-495/14 *Tita*, pending.

‘adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place, using existing bodies where appropriate’.¹⁰⁸ Article 14 of the Time Share Directive similarly requires Member States to encourage the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes under the Directive and encourage traders and their branch organisations to inform consumers of the availability of such procedures.¹⁰⁹

Furthermore, two entire instruments, the Directive on certain aspects of mediation in civil and commercial matters,¹¹⁰ and the Directive on Consumer ADR have been adopted on this issue. The latter in particular requires the presence of ‘an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution’.¹¹¹

The recent Directive on damages in competition cases also encourages consensual dispute resolution, firstly by suspending the limitation period to bring actions for damages for the duration of the consensual dispute resolution process.¹¹² Secondly, the remaining claim of the settling injured party can, in principle, only be exercised against non-settling co-infringers and the latter cannot recover contribution from the settling co-infringer.¹¹³ Third, a competition authority ‘may consider’ compensation through a consensual settlement as a mitigating factor in the setting of a fine, provided the settlement is reached prior to the administrative decision.¹¹⁴

It should also be noted that alternative dispute resolution or mediation has also been discussed in the context of a possible Access to Justice Directive in environmental matters. Research has however shown that while such mechanisms already exist in many legal systems they play an insignificant role in environmental cases.¹¹⁵ Therefore it has not been considered appropriate to propose ADR as an obligatory component of judicial review. The possibility to use such

¹⁰⁸ Art. 24 Directive 2008/48.

¹⁰⁹ Directive 2008/122.

¹¹⁰ Directive 2008/52.

¹¹¹ Art. 2(1) Directive 2013/11.

¹¹² Art. 18(1) and (2) Directive 2014/104.

¹¹³ Art. 19(2) Directive 2014/104.

¹¹⁴ Art. 18(3) Directive 2014/104.

¹¹⁵ See the report by J. Darpo, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, Section 3.6.5.

mechanisms has, however, been recommended on a voluntary basis.¹¹⁶ ADR in environmental matters has, however, been placed high on the political agenda through its explicit promotion by the 2013-2020 Environmental Action Programme.¹¹⁷

These out-of-court mechanisms may also be read in light of the important functions of special watchdogs such as national competition authorities and data protection authorities that have been granted powers by EU legislation to address complaints in these respective fields. As pointed out in Section 3.2.2 as well as in the respective contributions by Michael Frese, Antonella Galetta and Paul De Hert, the precise functions and powers of these organs may differ significantly, yet they may have an impact on the decision by complainants to bring or not to bring a claim before domestic courts.

4 Conclusions and Perspectives

The papers contained in this Special Issue show that European Union law is becoming subject to a process of incidental proceduralisation characterised by general trends despite its fragmentation. Now, what are the actual practical implications of this process for the fields concerned and beyond? It is naturally difficult for lawyers to quantify the precise impact of procedural rules adopted in a multi-layered legal system. Yet, two important points arise from the cross-sectoral analysis undertaken. Within the specific fields of EU law involved, proceduralisation can contribute to a change of enforcement or litigation culture. Moreover, proceduralisation may reach beyond these specific areas of EU law which are governed by legislative rules that set procedural standards.

4.1 Implications of Incidental Proceduralisation in the Sectors Covered

Several of our authors deplore some of the limits of proceduralisation in their respective fields.¹¹⁸ In particular, in her paper on EU consumer law, Magdalena Tulibacka, observes that the proceduralisation process seems

¹¹⁶ See the report by J. Darpo, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, p. 41.

¹¹⁷ Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L354/171, Art. 65(v).

¹¹⁸ See in particular the concluding comments by R. Caranta on public procurement and A. Galetta & P. De Hert in their respective contributions.

to bring limited added value from the perspective of individuals in the field of consumer protection. However, this is an area of EU law where expectations could have been particularly high. Indeed, Magdalena Tulibacka supports the view that this field of EU law is the one that provides the most substantial volume of regulatory focus on procedures and access to justice.¹¹⁹ Nevertheless, the author also concludes that we are still in the early stages of proceduralisation in that field and further stresses that the objective of establishing a European area where consumers can approach a justice system in any EU Member State with the same expectations 'remains limited at present'.¹²⁰

Yet, a point is also made in several contributions that EU legislation has contributed and is contributing to a change of enforcement or litigation culture in certain domains. This comes out forcefully from the articles on public procurement, data protection and equality law.¹²¹ In the field of public procurement, incidental proceduralisation has called into question the deeply rooted principle of sanctity of contract as evidenced by Roberto Caranta. In the fields of data protection and equality law, EU procedural rules are enhancing the role of independent entities (data protection authorities, equality bodies) to facilitate access to remedies by individual victims. The latest CJEU case law on environmental law also suggests a significant broadening of access to the courts for qualified entities as indicated by Mariolina Eliantonio.

If the practical implications of incidental proceduralisation are indeed as tangible as the changes in enforcement or litigation cultures suggest, then one should take the warning of Michael Frese on the threat that this process may pose to the protection of fundamental rights in the EU very seriously. Owing to a detailed analysis of the provisions of the Directive on antitrust damages actions on the binding effect of decisions by national competition authorities before domestic review courts, this author indeed makes it clear that advanced forms of proceduralisation may make the defendant vulnerable to breaches of its fundamental rights.¹²²

4.2 Spillover Effects of Incidental Proceduralisation

Besides these reflections on the implications of procedural rules in the relevant policy fields, this Special Issue also invites us to reflect on

¹¹⁹ Contribution by M. Tulibacka, Introduction.

¹²⁰ Contribution by M. Tulibacka, Introduction.

¹²¹ Contributions by R. Caranta, A. Galetta & P. De Hert and E. Muir respectively.

¹²² Contribution by M. Frese, Section 5.3.

the possible spillover effects that incidental proceduralisation may have beyond the material scope of each specific legislative instrument analysed herein.

A first set of possible spillover effects of proceduralisation go beyond the scope of EU law. Roberto Caranta in particular points out that some national systems have expanded the relevance of the EU public procurement remedies directives beyond the material scope of EU law.¹²³ One could also give the example, in the field of EU equality law, of equality bodies created under EU law with broader competences than those requested by EU law.¹²⁴ Similarly to what has happened with the CJEU's case law in the field of effective judicial protection,¹²⁵ Member States tend to broaden secondary law procedural requirements to purely national situations.

Secondly, in so far as procedural rules enshrined in EU legislation substantiate the principles of effectiveness and effective judicial protection, it could be argued as Roberto Caranta does, that procedural rules enshrined in secondary legislation could be used – beyond the respective material scope of this legislation – to consolidate the content of general principles of EU law on effective judicial protection or corresponding procedural fundamental rights.¹²⁶ Certain provisions of directives addressing remedies in a broad range of situations covered by EU public procurement law could thereby 'end up acting as a blueprint of what is required from the Member States under the principle of effective judicial protection in areas which are not covered by the directives'.¹²⁷

Without being that explicit on the interplay between secondary law and higher norms of EU law, in her paper on environmental protection, Mariolina Eliantonio observes an intriguing parallel between the procedural rules incorporated in the Environmental Liability Directive and the rules established by the Aarhus Convention as well as the EU directives implementing it.¹²⁸ This could be read as illustrating a reflexive interplay between EU primary and secondary law on the content of the procedural rules relevant to ensure effective

¹²³ Contribution by R. Caranta, Section 1.5.

¹²⁴ In practice, many Member States now have bodies that have a quasi-judicial function. For an overview of the competences of these national bodies see: European Commission, 'Developing Anti-Discrimination Law in Europe' (October 2013, available at www.non-discrimination.net/content/media/Developing%20Anti-Discrimination%20Law%20in%20Europe%20EN%2029042014%20WEB.pdf), pp.122-125 and 155 et seq.

¹²⁵ See, for example, the spillovers of the *Factortame* case in purely internal situations. Further on this point, M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's case law in Italy, Germany and England*, Chapter 5.

¹²⁶ Contribution by R. Caranta, Section 1.5.

¹²⁷ Contribution by R. Caranta, Section 1.5.

¹²⁸ Contribution by M. Eliantonio, Section 3.

judicial protection in a fairly uniform manner in given areas of EU law. What is certain, in any case, is that some areas of EU law are witnessing the emergence of a fairly coherent set of procedural rules, as is the case in EU public procurement law, environmental law and equality law – even if it is owing to a mere copy/pasting drafting technique.

4.3 The Future of Incidental Proceduralisation

The contributions contained in this Special Issue have made it clear that the process of incidental proceduralisation, while not a new phenomenon of the process of European integration, has been intensifying in recent years. However, this has not occurred in a coherent fashion. Some sectoral rules are both specific and sophisticated – as in the case of the rules on damages in anti-trust cases. Some just provide minimum thresholds to be respected at Member State level, such as the ‘adequate and effective remedies’ requirement. Others touch upon a broader range of issues with less advanced legal mechanisms and may constitute fairly coherent sets of procedural rules within selected policy fields such as public procurement, environmental law, data protection, and anti-discrimination law. All in all, though, the proceduralisation phenomenon has been a rather fragmented process until now.

One can impute this lack of overall coherence to the piecemeal approach that has been followed to the different needs that the proceduralisation process was meant to cater for, but also to the lack of an ‘overall plan’ for the introduction of procedural rules in secondary law measures. In other words, the incoherence of the proceduralisation phenomenon can be a consequence of the original (and vastly still persistent) lack of explicit procedural legal basis in the Treaties. The EU was born and still is based on a decentralised system of judicial enforcement. Having realised its importance for the uniform and effective enforcement of EU law, the EU legislator has proceeded to influence national procedural rules through secondary law, but there never was (either on the part of the EU legislator or of the Member States as masters of the Treaty) a broader vision of what the function of proceduralisation is or ought to be in the process of European integration.

As the process of proceduralisation intensifies though, it may be that EU decision-makers in the years to come will be more inclined to transpose and adjust some of the existing procedural mechanisms to other fields of law. This would enable a higher level of procedural coherence amongst the policy fields. Further cross-sectoral analysis of procedural rules may act as a catalyst for such

cross-fertilisation.¹²⁹ Horizontal soft-law initiatives such as the 2013 Commission Recommendation on Collective Redress certainly seems to be a step in the same direction.¹³⁰

¹²⁹ For a similar approach with significant potential spillover effects in the context of administrative law see the work of the Research Network on EU Administrative Law (www.reneual.eu/, last visited on April 28 2014) and the Special Issue of this Journal devoted to it [2014/2] *REALaw*.

¹³⁰ See also the Special Issue of Legal Issues of European Integration for a cross-sectoral analysis of this Recommendation [2014/41-3] as well as the detailed enquiry into domestic rules in light of the Recommendation in V. Harsagi & C.H. van Rhee (Eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia: Ius Commune European and Comparative Law Series 2014).