

# Proceduralisation of EU Consumer Law and its Impact on European Consumers

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## Abstract

*European consumers are increasingly exposed to procedural mechanisms deriving from the EU. They are affected by two proceduralisation phenomena: generic developments within the policy of judicial cooperation in civil matters, and 'sectoral proceduralisation', which is the main focus of this special issue – the proceduralisation of consumer law. While the paper briefly presents the first phenomenon and acknowledges its importance for consumers, it places much more emphasis on sectoral proceduralisation, reviewing legislative instruments and the procedural rules they introduce. It argues that, although limited to only a single area of substantive law, this kind of proceduralisation has the potential to affect consumers more significantly than the generic procedural mechanisms. However, this paper concludes that the European Union is in the early stages of the proceduralisation of consumer law. While it is yet to be seen how some of the latest procedural measures will affect consumers, the practical impact of 'proceduralisation of EU consumer law' remains limited at present.*

## Introduction

EU law is becoming more and more comprehensively 'proceduralised'. Scholars highlight consumer law as the field (or sector) of EU law with the most significant volume of regulatory focus on procedures and access to justice.<sup>1</sup> Indeed, European consumers are affected by two proceduralisation phenomena: the more generic developments within the policy of judicial cooperation in civil matters, and 'sectoral proceduralisation', which is the main focus of this special issue – the proceduralisation of consumer law. While the paper briefly presents the first phenomenon, it places much more emphasis on sectoral proceduralisation. The central argument is that although limited to only a single area of substantive law, such a proceduralisation exercise has the po-

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<sup>1</sup> E. Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (Oxford 2008), 27 and literature referred to there.

tential to affect consumers more significantly than the generic procedural mechanisms.

The analysis starts by tracing the genesis of proceduralisation of consumer law through the evolution of the EU involvement in procedural rules. It assesses very briefly how the notions of individual legal protection and the *effet utile* of EU law were applied by the Court of Justice of the European Union (formerly the European Court of Justice).<sup>2</sup> The Court's jurisprudence inspired policy changes and later also legislative inroads into national procedural autonomy, referred to as 'judicial cooperation in civil matters'. It is clear that, while not solely applicable to consumers, the legislative instruments adopted within the scope of judicial cooperation in civil matters are relevant for them. This paper acknowledges their importance, but its main focus is outside the scope of the generic proceduralisation.

It appears that the types of mechanisms fostered by the policy of judicial cooperation in civil matters are ultimately not very useful for typical consumer cases. A typical consumer case is of small value, relatively uncomplicated and requires rather urgent attention. Judicial cooperation in civil matters focuses on court-based procedures and remedies which tend to be expensive, complex and long. Consumer cases are often better dealt with out of court. The specificity of consumer cases can be addressed much more effectively by the procedural measures adopted within the boundaries of consumer policy.

The increasing emphasis on access to justice and on effective protection in various EU policies, including consumer policy,<sup>3</sup> initiated the phenomenon of 'sectoral proceduralisation' where substantive areas of EU policy are implemented through procedural measures adopted within the remit of those policies.<sup>4</sup> It found its way to substantive consumer law directives in the form of enforcement provisions or chapters requiring Member States to put in place or make available certain enforcement mechanisms for consumer rights. Further, some legislative measures in the area of consumer protection focused solely on enforcement and procedures. The author draws common trends and elements in the procedural clauses contained within the substantive law legislation, setting

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<sup>2</sup> Referred to here as the Court of Justice.

<sup>3</sup> As an important consumer right mentioned in Commission's action plans and programmes, and other policy instruments, as well as a more general right of EU citizens enshrined in the Charter of Fundamental Rights: Article 47 provides that 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'.

<sup>4</sup> For some other examples of such sectoral proceduralisation see M. Tulibacka, 'Europeanization of Civil Procedures: in Search of a Coherent Approach' [2009] *CML Review* 1527-1565.

out the catalogue of remedial and procedural rules available to consumers.<sup>5</sup> Further, the distinct procedural measures (the Injunctions Directive, the Consumer Protection Cooperation (CPC) Regulation, the Alternative Dispute Resolution (ADR) Directive, and the Online Dispute Resolution (ODR) Regulation)<sup>6</sup> are examined in some detail as they establish a more generic, umbrella coverage for enforcement of consumer rights. Having analysed these developments, the paper offers insights into their practical effect on European consumers while at the same time indicating the relative prematurity of such assessments. It concludes that the European Union is in the early stages of proceduralisation of consumer law. While it is yet to be seen how some of the latest procedural measures will affect consumers, the practical impact of ‘proceduralisation of EU consumer law’ remains limited at present.

## I Judicial, Policy and Legislative Proceduralisation of EU Law – Generic Developments

### 1.1 The Court of Justice and its Contribution to Proceduralisation

Effective enforcement and uniform application of EU law guarantee the very functioning of the European Union. They stem from the Treaty obligation for Member States to take the steps necessary to fulfil their obligations.<sup>7</sup> Substantive EU laws established the framework of newly harmonised rights for EU citizens (also in their role as consumers). However, the remedies used in the enforcement of these rights as well as procedures employed in the realisation of these remedies were, at least initially, left to Member States. Very early on, the Court of Justice started emphasising the importance of private enforcement, on the basis of the principles of supremacy of EU law and its direct effect. Using these principles, the Court guarded the concept of individual legal protection.<sup>8</sup> Its jurisprudence in this matter set off the process of harmon-

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<sup>5</sup> For an elaboration on the distinction between rights, remedies and procedures see: W. Van Gerven, ‘Of rights, remedies and procedures’ [2000] *CML Review* 501- 536. See also H. Micklitz, ‘The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies’ (December 1, 2011), *EUI Working Papers LAW* 2011/15. It is important to point out here that the notion ‘remedy’ is used by the author of this paper to indicate steps which can be taken in order to realize rights (for instance being able to withdraw from the contract).

<sup>6</sup> References below.

<sup>7</sup> Article 4(3) Treaty on European Union (TEU) – former Article 10 EC Treaty.

<sup>8</sup> N. Reich, ‘Legal Protection of Individual and Collective Consumer Interests’, in: N. Reich, H. Micklitz, P. Rott & K. Tonner, *European Consumer Law*, 2nd Edition (Intersentia 2014), 343. The individual legal protection is now a right incorporated into the Charter of Fundamental Rights of the European Union (Article 47).

isation of national procedures.<sup>9</sup> Decisions in *REWE*,<sup>10</sup> *Comet*,<sup>11</sup> *Palmisani*,<sup>12</sup> and *Factortame*<sup>13</sup> established the requirements of equivalence and effectiveness for national remedies and national procedural measures when enforcing EU laws.<sup>14</sup> The judgments in *Courage*<sup>15</sup> and *Manfredi*<sup>16</sup> confirmed the individual's power to enforce EU law before their national courts against other individuals (even supplanting enforcement by competition authorities).

While focusing on the very presence of effective remedies available to individuals, the Court of Justice inevitably came across national procedural rules which could potentially threaten the availability of these remedies, also in consumer cases.<sup>17</sup> The Court reviewed the time limits for civil claims,<sup>18</sup> the rules on standing and on access to justice,<sup>19</sup> the principles of party autonomy and freedom of disposition, and the power of national courts to invoke EU law of their own motion.<sup>20</sup>

What the Court's line of jurisprudence showed is that, while a careful balancing exercise between national laws, cultures and sentiments and the need for EU-wide harmonisation is required, there is a significant scope for EU-level

<sup>9</sup> B. Hess, 'Procedural Harmonisation in the European Context', in: X.E. Kramer & C.H. van Rhee (Eds), *Civil Litigation in a Globalising World* (TMC Asser Press, Springer 2012), 159-173, at 164.

<sup>10</sup> C-33/75 *ReweZentralfinanzGetRewe-Zentral AG v. Landwirtschaftskammer fur das Saarland* [1976] ECR 1989.

<sup>11</sup> C-45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.

<sup>12</sup> C-261/95 *Palmisani v. INPS* [1997] ECR I-4025.

<sup>13</sup> C-213/99 *Factortame I* [1990] ECR I-2433.

<sup>14</sup> Equivalence – requirement that remedies for enforcement of EU-derived rights should be equivalent to those resulting from national laws. Effectiveness – the use of national procedural rules cannot render the recourse to EU-derived rights practically impossible or excessively difficult. See Prechal & Shelkopyas, 'National procedures, public policy and EC law. From Van Schijndel to Eco Swiss and Beyond' [2004/5] *ERPL* 589-611, at 591.

<sup>15</sup> C-453/99 *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297.

<sup>16</sup> Joined Cases C-295/04 and C-298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

<sup>17</sup> Here I am not referring to rules of substantive law such as causation (see the ECJ decision in C-140/95 *Rechberger v. Austria* [1999] ECR I-3499), but rather to purely procedural issues. See C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA, Multiservice Srl v. Telecom Italia SpA* [2010] ECR I-02213.

<sup>18</sup> *Manfredi*, para. 78.

<sup>19</sup> C-222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

<sup>20</sup> C-312/93 *Peterbroeck, Van Campenhout@Cie SCS v. Belgian State* [1995] ECR I-499. See S. Whittaker 'Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law' [2012] *Oxford University Legal Research Paper Series* No 46, 7-23, for the position in English, French and German law. See C-243/08 *Pannon GSM Zrt v. Ercsebet Sustikne Gyrfi* [2009] ECR I-4713, and an earlier judgment in joined Cases C- 240/98 and 244/98 *OceanoGrupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941 (Unfair Contract Terms Directive).

coordination and monitoring of civil procedures.<sup>21</sup> This is where the EU's policies and legislative activities in the area of civil justice come in.

## 1.2 The Policy and Legislative Inroads into National Procedural Autonomy – 'Judicial Cooperation in Civil Matters'

### A. Overview of the Policy and its Legislative Output

The new objective of establishing 'the Area of Freedom, Security and Justice' was formalised in the Treaty of Amsterdam (1997). Within the policy of 'judicial cooperation in civil matters' (coordinated by the Commission's Directorate General 'Freedom, Security and Justice')<sup>22</sup> the EU is aiming to create a 'genuine area of justice, where people can approach courts and authorities in any Member State as easily as their own'.<sup>23</sup> The key objectives are enhancing access to justice, coordinating national procedural rules, and mutual recognition of judicial decisions. The policy is grounded in the principle of mutual recognition, and the need for a 'European judicial area respecting the legal traditions and systems of the Member States'.<sup>24</sup>

So far, legislative initiatives focus on cross-border proceedings only. The EU's legislative competence in the area of judicial cooperation in civil matters is limited to matters 'having cross-border implications'.<sup>25</sup> Article 81 TFEU allows measures to be adopted 'particularly when necessary for the proper functioning of the internal market'.<sup>26</sup> Legislation is aimed at, among other issues, effective access to justice, the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States, and the development of alternative methods of dispute settlement.

<sup>21</sup> For a more detailed analysis of the ECJ's impact on remedies and procedures across the EU: see M. Tulibacka, *supra* at 7, p. 1535-1540, and H. Micklitz, 'The ECJ between the Individual Citizen and the Member States'.

<sup>22</sup> Referred to here as DG Justice. In Autumn 2014 DG Justice was replaced by DG 'Justice, Consumer and Gender equality', comprised of the current DG Justice, Directorate B from DG SANCO concerning consumer affairs, and the Unit for Corporate Governance and Social Responsibility from DG Internal Market.

<sup>23</sup> Tampere Presidency Conclusions (1999): [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm).

<sup>24</sup> Assessment of the Tampere Programme, 2004, COM (2004) 401 final. For some recent developments see: [http://europa.eu/rapid/press-release\\_IP-14-984\\_en.htm](http://europa.eu/rapid/press-release_IP-14-984_en.htm). See also 'The EU Justice Agenda for 2020. A New EU Framework to Strengthen the Rule of Law. Strengthening Trust, Growth and Mobility within the European Union', the European Commission, 11 March 2014, COM (2014) 144 final.

<sup>25</sup> Article 81 of the Treaty on the Functioning of the European Union – former Article 65 EC Treaty.

<sup>26</sup> Tulibacka, *supra* at 7, 1562.

Initially, the main points of focus were issues of private international law: rules aimed at coordinating national laws and civil proceedings.<sup>27</sup> The EU established binding legislation concerning the choice of law in cross-border disputes,<sup>28</sup> and jurisdiction, recognition, and enforcement of judgments.<sup>29</sup> Further, it also covered international taking of evidence<sup>30</sup> and service of documents.<sup>31</sup> These measures are important for cross-border disputes between consumers and traders, and some even contain special rules for such disputes.<sup>32</sup> The Regulations on the European Enforcement Order for Uncontested Claims<sup>33</sup> and on the European Order for Payment Procedure<sup>34</sup> establish minimum requirements for national judicial proceedings and enable free movement of judgments, out-of-court settlements and authentic documents, as well as European orders for payment, across the EU. The recent Regulation on the European Account Preservation Order facilitates cross-border debt recovery.<sup>35</sup>

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<sup>27</sup> X.E. Kramer, 'Harmonisation of Civil Procedure and the Interaction with Private International Law', in: X.E. Kramer & C.H. van Rhee (Eds), *Civil Litigation in a Globalising World* (TMC Asser Press, Springer 2012), 121-139, at 123.

<sup>28</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L-177/6. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 [2007] OJ L 199/40 on the law applicable to non-contractual obligations (Rome II).

<sup>29</sup> Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L-12/1. The Recast of Brussels I was adopted in 2012 and came into force on 10 January 2015. As a result of the Recast, consumers are able to enforce a court judgment in any Member State of the EU without the costly *exequatur* procedure. Further, they may bring a case to the court in the state in which they reside even if the seller or supplier is based outside the EU. (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) [2012] OJ L-351/1).

<sup>30</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters [2001] OJ L-174/1.

<sup>31</sup> Regulation (EC) 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial cases [2007] OJ L-324/79.

<sup>32</sup> It should be noted that the EU adopted a much wider catalogue of measures: including in the areas of family or insolvency law. For an excellent analysis of the 'consumer-relevant' private international law measures adopted by the EU see N. Reich, 'Cross-Border Consumer Protection', in: H.W. Micklitz, P. Rott & K. Tonner (Eds), *European Consumer Law* (Ius Communitatis V), 2nd Edition (Intersentia 2014), 285-337.

<sup>33</sup> Regulation (EU) 805/2004 creating a European Enforcement Order for Uncontested Claims [2004] OJ L-143/15.

<sup>34</sup> Regulation (EU) 1896/2006 creating a European Order for Payment Procedure [2006] OJ L-399/1.

<sup>35</sup> Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L-189/59.

The European Small Claims Regulation<sup>36</sup> introduced the European Small Claims Procedure for cross-border cases that meet specified criteria: they have to be civil or commercial cases with a value below 2,000 EUR excluding interest, expenses and disbursements at the time the claim is received by the competent court.<sup>37</sup> The Regulation also eliminates the *exequatur* procedure: judicial decisions concluding the European Small Claims Procedure are to be recognised and enforced in other Member States.<sup>38</sup> The effects of the Small Claims Procedure are quite limited. The 2013 Commission Report revealed that, while leading to faster and cheaper proceedings in cross-border cases, it is not often used.<sup>39</sup> The reasons for this lack of popularity of the procedure are varied: they include very poor awareness of its existence (over 80% of consumers and 50% of courts do not know about the procedure),<sup>40</sup> relatively high court costs (which have not been harmonised), and the risk of having to cover the opponents' costs if the claimant loses the case.<sup>41</sup> Another reason for the lack of popularity, at least in some states, is that their own small claims procedure is much better known and seems more attractive to an average consumer (for instance in Germany).<sup>42</sup>

The Legal Aid Directive<sup>43</sup> sets out minimum requirements concerning legal aid in cross-border cases: these are cases where a person requesting legal aid does not reside in the Member State where the case is to be heard. The Directive covers legal aid for the following: pre-litigation advice, legal assistance and representation during litigation, the costs of proceedings including the costs related to the cross-border nature of the case such as travel costs or translations, as well as of appeals and enforcement of a judicial decision.

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<sup>36</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L-199/1.

<sup>37</sup> X.E. Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure. Accomplishments, New Features and Some Fundamental Questions of European Harmonization', in: A.W. Jongbloed (Ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports* (Antwerpen: Intersentia 2008), 253-283, at 253.

<sup>38</sup> Article 1.2.

<sup>39</sup> Report from the Commission on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2013) 795 final. See the Report for further problems with the practical application of the Regulation.

<sup>40</sup> The Commission's Report on the application of the Small Claims Procedure Regulation, 2013, 8.

<sup>41</sup> *Ibid.*, 9.

<sup>42</sup> The Commission drafted a proposal for a Regulation amending the Procedure. See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Brussels, 19 November 2013, COM (2013) 794 final.

<sup>43</sup> Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31 January 2003, 41.

In addition to legislation examined above, the EU also set up cooperation networks and databases which enhance judicial cooperation, exchange of information and experiences. The European Judicial Network in civil and commercial matters<sup>44</sup> involves contact points in all Member States (judicial or administrative authorities designated by each Member State), other administrative and judicial authorities responsible for judicial cooperation, and professional associations of lawyers.<sup>45</sup> The European Judicial Atlas in civil and commercial matters provides access to information relevant for judicial cooperation in civil matters, for instance concerning the competent courts and authorities or legal aid. Further, the new European E-Justice Portal (since 2010) is envisaged as a future one-stop-shop in the area of justice,<sup>46</sup> containing databases of resources for national civil justice systems.

### *B. Conclusions – Practical Effects for Consumers*

The practical effects and benefits of this relatively new body of rules for consumers are difficult to determine. EU legislation touches many aspects of cross-border disputes: from decisions on applicable law and jurisdiction, through evidence taking, and legal aid, to enforcement of judgments and settlements, debt recovery, and even brand new procedures.<sup>47</sup> However, whilst they only cover cross-border disputes and leave many procedural and technical aspects of enforcement to national enforcement networks, their impact on European consumers cannot be very significant. The number of consumers shopping cross-border is constantly growing, but the numbers of cross-border disputes where consumers decide to pursue a trader based in another Member State in a court are not high.<sup>48</sup>

Further, as they are essentially court-focused, these procedural mechanisms may not be very useful for a typical consumer case. Such consumer cases are often better dealt with out of court. The specificities of consumer law enforce-

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<sup>44</sup> Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L-174/25.

<sup>45</sup> Decision 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters [2009] OJ L-168/35.

<sup>46</sup> <https://e-justice.europa.eu/home.do?plang=en&action=home>.

<sup>47</sup> Such as the Small Claims Procedure and the European Order for Payment Procedure. The Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, not in force yet, also establishes a new procedure.

<sup>48</sup> For instance: see numbers of requests for the European Small Claims Procedures noted in the Commission's 2013 Report on the Small Claims Procedure Regulation (COM (2013) 795 final). While they have been increasing steadily, they differ across various EU states and are generally not very significant: in 2012 there were 3 applications in Bulgaria, and the highest number was in Spain – 1047. See also, the Flash Eurobarometer No. 282, 'Attitudes towards cross-border sales and consumer protection. Analytical Report', 2010, at 5: about 1 in 4 consumers made a purchase while on holiday abroad, and 9% of consumers made a distance cross-border purchase.



ment can be more adequately addressed by procedural measures adopted within the consumer law sector, examined in detail below.

## 2 Proceduralisation of EU Consumer Law – Greater Potential but still Uncertain Effects

### 2.1 Genesis, Legal Basis and Main Developments

As mentioned above, proceduralisation taking place within consumer law is an example of sectoral proceduralisation. It accompanies similar tendencies occurring in other areas of EU law, such as intellectual property law or competition law.<sup>49</sup> While limited to only a single area of substantive law, this type of proceduralisation has the potential to affect consumers more significantly than the generic procedural mechanisms mentioned above. First of all, the legislative power of the EU in consumer matters derives from the market-building provision of Article 114 TFEU, not Article 81 TFEU as for the measures adopted under the policy of judicial cooperation in civil matters. Thus, the procedural rules introduced within consumer law are not limited to cross-border cases only. They potentially cover a much wider number of disputes and may thus become much more familiar to consumers. Further, they have the potential to be more effectively tailored to the specific needs of consumer law.

Consumer law requires specific focus on access to justice (wider than mere access to courts), dispute resolution, redress, and thus on civil procedures, both at the national and the EU level. It developed in Europe in the 1960s and 1970s, accompanying the rise of welfare states. While consumer redress featured on the agenda of even the earliest European Community's consumer protection programmes,<sup>50</sup> it did not find its way to the substantive law provisions of the EC Treaty which regulated the EC's (and later EU's) powers in this area. Consumer access to justice rather found its basis in the general principles of EU law (as developed by the Court of Justice),<sup>51</sup> Articles 6 and 13 of the European Convention of Human Rights (now binding under Article 6(3) TFEU), and later in the Charter of Fundamental Rights (Article 47). The Treaty provisions concerning consumer protection evolved over time, starting with Article 129(a) TEC

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<sup>49</sup> See Tulibacka, *supra* at 7, for a further description of the process of sectoral harmonisation of procedures and the concerns it leads to.

<sup>50</sup> Alongside the protection of health and safety, protection of economic interests, the right of information and education and the right to representation: the Programmes of 1975 and 1981, *OJ C* 92 25 April 1975, *OJ C* 133, 3 June 1981.

<sup>51</sup> See above for analysis.

inserted by the Maastricht Treaty, subsequently amended and turned into Article 153 TEC by the Treaty of Amsterdam, and more recently into Article 167 TFEU. None of these provisions mentioned access to justice or redress. Access of consumers to justice and their right to redress developed as a policy aim resulting from the need for individual protection as well as the *effet utile* of EU law, and translated into distinct parts (articles or chapters) of substantive consumer law as well as independent procedural instruments. As mentioned above, the legal basis of the latter was the internal market provision, which is now Article 114 TFEU.

In its Green Paper on ‘Access of consumers to justice and the settlement of consumer disputes in the Single Market’, the Commission made proposals aimed at resolving individual and collective cross-border disputes: including actions for an injunction and the simplified settlement of disputes.<sup>52</sup> The 1995 Commission Study ‘The Cost of Legal Barriers to Consumers in the Internal Market’ revealed that in cross-border situations consumers were unlikely to pursue what undoubtedly are typical consumer cases (those valued at less than 2,000 EUR). The Study resulted in the 1996 Commission’s ‘Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market’.<sup>53</sup> The EU institutions recognised that there were significant problems with consumer access to justice: the disparity between values of average consumer claims and the costs of resolving the claims in court, as well as the complexity and length of procedures before courts. These problems were much more significant in cross-border cases.<sup>54</sup> The solutions which the Commission proposed included simplification and improvement of court procedures, but also improvement of communication between consumers and traders and creation of out-of-court mechanisms for resolving disputes.<sup>55</sup>

Very early on in the evolution of the EU policy on consumer redress it became clear that in the context of consumer law access to justice entails more than access to courts.<sup>56</sup> This approach continues to shape the direction of the process of ‘proceduralisation of consumer law’ till today. While on the one hand the focus to some extent remains on judicial proceedings, removing consumer disputes from the judicial arena whenever possible – exploring possible alter-

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<sup>52</sup> COM (1993) 576.

<sup>53</sup> COM (1996) 0013.

<sup>54</sup> See for instance M. Loos, ‘Individual Private Enforcement of Consumer Rights in Civil Courts in Europe’ (13 January 2010), Centre for the Study of European Contract Law Working Paper Series No. 2010/01 for an elaboration of problems with consumer access to justice, especially cross-border justice.

<sup>55</sup> Communication from the Commission on ‘the out-of-court settlement of consumer disputes’ (COM (1998)198).

<sup>56</sup> *Ibid.*, Communication from the Commission (COM(1998)198).

native mechanisms of resolving disputes and providing redress – appears equally important. The role and responsibilities of domestic public regulatory bodies in enforcing consumer law were reinforced. Collective redress became key point of interest. Further, ADR has always featured strongly within consumer protection policies – both at the national level across Europe and at the EU level. European states developed their own models and mechanisms for alternative resolution of consumer cases. These models and mechanisms, some very effective in successfully, quickly and relatively cheaply providing resolution to consumer complaints, have been analysed elsewhere and cannot be further examined here.<sup>57</sup> However, there is no doubt that their operation was an inspiration for an EU-wide interest in ADR for consumer disputes.

More recent policy documents and action plans deriving from the Commission and other EU institutions focus on improving enforcement of consumer law<sup>58</sup> and emphasise the need for greater coordination in national enforcement of EU consumer laws, both through public regulatory bodies, and through judicial and extra-judicial measures. A comprehensive research project on ADR (interestingly, also including small claims, injunctions and collective redress) was also undertaken for the Commission by a team of academics headed by Professor Stuyck, the results published in 2007.<sup>59</sup> It demonstrated significant differences among Member States with regard to the powers, coverage and the overall operation of these mechanisms. The Consumer Policy Strategy for 2007-2013<sup>60</sup> and the 2012 European Consumer Agenda<sup>61</sup> mention consumer empowerment through, for example, effective redress mechanisms.

These policy developments translated into an impressive body of legislation. Below is the analysis of these instruments: it starts with enforcement provisions in substantive law measures, and continues with measures dealing exclusively with procedures.

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<sup>57</sup> See C. Hodges, I. Benohr & N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Oxford: Hart Publishing 2012).

<sup>58</sup> Community's Consumer Policy Strategy 2002-2006, Doc. 8907/02.

<sup>59</sup> Stuyck, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings', Final Report, Study for the European Commission, Leuven 2007.

<sup>60</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'EU Consumer Policy Strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them', 13 March 2007, COM (2007) 99 final.

<sup>61</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'A European Consumer Agenda – Boosting confidence and growth', Brussels, 22 May 2012, COM (2012) 225 final (the 2012 European Consumer Agenda).

## 2.2 Enforcement Provisions in Substantive Law Measures

Even the early consumer protection directives included enforcement provisions. The Directives on misleading advertising (and later comparative advertising) were addressed to traders as well as consumers until the introduction of the Unfair Commercial Practices Directive.<sup>62</sup> They contained the requirement for Member States to enable persons and organisations with a legitimate interest in preventing misleading advertising to take action before a judicial or administrative authority against such advertising.<sup>63</sup>

The Unfair Contract Terms Directive<sup>64</sup> requires Member States to ensure that

‘persons or organizations, having 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, so that they can apply appropriate and effective means to prevent the continued use of such terms’

and, more generally, that courts and administrative authorities have adequate and effective means of preventing the continued use of unfair terms in consumer contracts.<sup>65</sup> The powers of these organisations, their operation and financing, as well as those of administrative authorities remains subject to national discretion. In cases involving collective consumer interests these issues were to some extent harmonised by the Injunctions Directive (examined below). Importantly, the Unfair Contract Terms Directive contains a remedy for consumers affected by an unfair contractual term: Article 6(1) 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 also places the burden of proof that a term was individually negotiated upon the sellers or suppliers.

The Consumer Sales Directive<sup>66</sup> provides remedies for consumers who acquired goods which do not comply with the contract.<sup>67</sup> These remedies include

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<sup>62</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of Member States concerning misleading advertising [1984] *OJ* L-250/18. It was amended by Directive 97/55/EC (*OJ* L-290/18), and codified by Directive 2006/114/EC (*OJ* L-376/21).

<sup>63</sup> Article 4(1) of Directive 84/450/EEC, and Article 5 of Directive 2006/114/EC.

<sup>64</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] *OJ* L-25/29.

<sup>65</sup> Article 7.

<sup>66</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] *OJ* L-171/12.

<sup>67</sup> Article 2 defines conformity with the contract.

repair, replacement, reduction in price and rescission of contract.<sup>68</sup> It also introduces time limits for claims<sup>69</sup> and to some extent specifies the burden of proof concerning conformity of goods with the contract.<sup>70</sup> No other procedural provisions have been included.

Recital 21 of the Unfair Commercial Practices Directive<sup>71</sup> provides that

‘persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.’<sup>72</sup> ‘While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.’

Articles 11 and 12 of the Directive explore these issues in some detail, albeit leaving a large scope of discretion to Member States. While it is mandatory for a mechanism or mechanisms to exist under national law where persons with legitimate interests may obtain remedies (whether the consumers reside in the territory where the trader is based or in another Member State), the nature of the mechanisms (judicial or administrative) is left to national law. Article 11 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. These are to be available even without proof of actual loss or damage or of intention or negligence on the part of the trader. Member States may decide to confer upon the courts or administrative authorities the power to order, with regard to an unfair practice confirmed by a final decision, publication of the decision and of a corrective statement. Any further types of remedies, including compensation of loss, are awarded according to the rules of national law.<sup>73</sup>

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<sup>68</sup> Article 3.

<sup>69</sup> Two years from delivery – Article 5.

<sup>70</sup> Articles 2(5) (concerning consumer knowledge or awareness of non-conformity) and 5(3) (where non-conformity has been discovered within 6 months from delivery).

<sup>71</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) [2005] OJ L-149/22.

<sup>72</sup> These issues were harmonised (for collective consumer interests) by the Injunctions Directive examined below.

<sup>73</sup> Recital 9 stipulates that the Directive ‘is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products’.

The Consumer Rights Directive<sup>74</sup> provides for detailed information to be supplied to consumers pre-contract, especially in distance and doorstep sales contexts. It also regulates the right of withdrawal from the contract – the key consumer remedy.<sup>75</sup> Further, Article 23 enables one or more – ‘as determined by national law’ – (i) public bodies or their representatives, (ii) consumer associations with a legitimate interest in protecting consumers and (iii) professional organisations with a legitimate interest in taking action to bring a claim before national courts or authorities to ensure application of the Directive. Otherwise the Directive is relatively laconic with regard to enforcement and procedural matters, leaving them largely to other EU instruments (such as the Small Claims Directive or the Consumer ADR Directive) as well as to national procedures.

In addition to these more generic consumer protection measures, the EU enacted a whole range of legislation protecting consumers in certain types of markets or transactions, such as consumer credit, other financial transactions, and energy. They contain enforcement provisions, some of which are relatively comprehensive.

For instance, the Consumer Credit Directive<sup>76</sup> requires Member States to ensure that ‘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’.<sup>77</sup> No other procedural requirement has been inserted, and this Directive is not covered by the Consumer Injunctions Directive described below. Further, Member States retain discretion with regard to the mandatory or voluntary nature of the use of these ADR mechanisms before taking a case to court.<sup>78</sup> The Court of Justice held that national courts may invoke the provisions of the Directive of their own motion even when the consumer involved is unaware of his or her rights in this respect.<sup>79</sup>

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<sup>74</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7 of the European Parliament and of the Council [2011] OJ L 304/64.

<sup>75</sup> For a definition of the notion ‘remedy’ – see footnote 5.

<sup>76</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L-133/66.

<sup>77</sup> Article 24.

<sup>78</sup> P. Rott, *supra* at 10, 197-238, at 233.

<sup>79</sup> See above for the analysis of the ECJ’s contribution in this area. See C-429/05 *Max Rampion, Marie-Jeanne Rampion, nee Godard v. Franfinance SA, K par K SAS* [2007] ECR I-8017; and C-76/10 *Pohotovost’ s.r.o. v. Iveta Korckovska* [2010] ECR I-11557.

The Directive on distance marketing of financial services to consumers<sup>80</sup> contains relatively detailed enforcement provisions which include judicial, extra-judicial and administrative redress. Similarly to other consumer protection measures, it requires Member States to make sure that adequate and effective means of ensuring compliance with the Directive exist, including giving standing to public bodies and their representatives, consumer organisations that have a legitimate interest in protecting consumers, and professional organisations with a legitimate interest to bring an action before a court or an administrative authority.<sup>81</sup> Member States must ensure there are mechanisms which force suppliers or operators of means of distance communication to stop the practices infringing the Directive (either by means of a judicial decision, an administrative decision or a decision of a supervisory authority). They can also shift the burden of proof onto the supplier in terms of the provision of information to consumers which the Directive requires, and of consumer consent to the conclusion of the contract.

The Timeshare Directive<sup>82</sup> develops a range of remedies for consumers (including withdrawal). Article 13 entitled 'Judicial and administrative redress' requires that adequate and effective means of redress exist, including the possibility for bodies established under national law and with a legitimate interest in acting (consumer organisations, professional associations, and public bodies), to bring a claim before a judicial or administrative authority. Article 14 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 this Directive and (...) encourage traders and their branch organisations to inform consumers of the availability of such procedures.<sup>83</sup>

There are a number of common elements in these enforcement systems designed for each Directive. Many establish remedies for consumers:

- a. the right of withdrawal in the Consumer Rights Directive, Timeshare Directive, Consumer Credit Directive and the Directive on distance marketing of financial services to consumers;

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<sup>80</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] OJ L-271/16.

<sup>81</sup> Article 13.

<sup>82</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L-33/10.

<sup>83</sup> See also the Electronic Commerce Directive: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market [2000] OJ L-178/1. The Directive contains a comprehensive enforcement system, which consists of the following key elements: encouraging self-regulation through codes of conduct, out-of-court dispute resolution, court actions, cooperation between Member States, and penalties.

- b. repair, replacement, price reduction or rescission of contract in the Consumer Sales Directive; and
- c. a declaration that an unfair term does not bind the consumer whose contract it has been inserted into (Unfair Contract Terms Directive).

Some deal with the issue of the burden of proof, or with time limits for claims (Consumer Sales Directive, and the Directive on distance marketing of financial services to consumers). The obligation for Member States to make sure that penalties for breaching the rules established by the Directives are effective, proportionate and dissuasive is also a common element.<sup>84</sup>

The Directives do not deal with compensation of loss, which is left to the national contract and tort laws. Most establish standing for ‘bodies with legitimate interests’ to bring claims before a judicial authority or a competent administrative authority. What types of bodies are in fact able to bring claims, the conditions to do so and the procedural mechanisms involved depends on national laws. In cases involving collective consumer interests, the Consumer Injunctions Directive examined below introduces a set of harmonised rules regarding standing. As far as more technical/procedural rules are concerned, the Directives stay silent and leave them to other EU measures and national procedural rules. In most cases they also fall under the enforcement systems established by the independent procedural measures described below.

### 2.3 Independent Procedural Measures

#### *A. Consumer Injunctions Directive*

The first legislative measure devoted solely to procedure in the area of consumer protection was the Consumer Injunctions Directive of 1998.<sup>85</sup> Its aim is to harmonise the conditions under which certain bodies and organisations can bring injunction actions against traders infringing collective interests of consumers. It covers breaches of a range of consumer protection directives, including the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Distance Sales Directive and the Doorstep Sales Directive,<sup>86</sup> the Consumer Sales Directive, the Timeshare Directive, the Directive on distance

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<sup>84</sup> See for instance the Directive on electronic commerce – Article 20, Timeshare Directive – Article 15.

<sup>85</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests [1998] OJ L-166/51.

<sup>86</sup> As explained above, the Distance and Doorstep Sales Directives were replaced by the Consumer Rights Directive (which also amended the Unfair Contract Terms and the Consumer Sales Directives). The Consumer Rights Directive itself is not mentioned in the Annex to the Injunctions Directive.



marketing of financial services to consumers, and the Consumer Credit Directive.<sup>87</sup>

The Directive applies to national as well as cross-border actions, but seems to be specifically aimed at cases where an organisation based in one Member State brings an action in another Member State. It requires Member States to designate courts or administrative authorities competent to rule on actions brought by ‘qualified entities’ – organisations or bodies established under the law of a Member State that have legitimate interests in protecting collective consumer interests.<sup>88</sup> The list of these bodies is kept by the European Commission, published in the Official Journal of the European Communities (where the purpose of the body is also specified), and regularly updated. The designated courts or authorities before which the action is brought cannot question the organisation’s standing in general, although they can examine it in the context of the specific case.<sup>89</sup> These actions can seek: the cessation or prohibition of the infringement; publication of the decision or of a corrective statement in order to eliminate the continuing effects of the infringement; and, if the national law allows it, payment of a sum to the public purse or a designated beneficiary as penalty for non-compliance with the decision.<sup>90</sup> The Directive does not extend to compensatory actions. The Directive was amended a number of times, and new consumer directives were added to the Annex. It was recodified in 2009.<sup>91</sup>

While injunction proceedings are widely acknowledged as crucial for enforcing consumer rights, some problems have been noted in the functioning of the European injunctions procedure.<sup>92</sup> The Directive sets out the framework for injunctive actions, but their details including costs, procedural steps and enforcement differ widely as they have been left to national laws of the Member States. Common challenges include high costs of the proceedings, their often disproportionate length (between one and even five years),<sup>93</sup> complexity of the procedure, and difficulties in enforcing injunctions. Further, injunctions have

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<sup>87</sup> See Annex I for the complete list.

<sup>88</sup> Article 3.

<sup>89</sup> Article 4(1).

<sup>90</sup> Article 2(1).

<sup>91</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (Codified version) [2009] OJ L-110/30. It is in force at present.

<sup>92</sup> Report from the Commission to the European Parliament and the Council Concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interest, 6 November 2012, COM (2012) 634 final (the Second Commission Report on Injunctions Directive). See also the Stuyck 2007 Study on ADR, at 14-15.

<sup>93</sup> The Second Commission Report on Injunctions Directive, at 14.

a limited application: their legal force extends only upon the Member State where they were issued, and in some states they are only effective between the parties to the proceedings. The number of proceedings brought across the EU between 2008 and 2012 was 5,632, with only 70 having a cross-border dimension.<sup>94</sup> The reason for such a low number of cross-border actions, in addition to the potential problems mentioned above, is the greater popularity of the CPC Regulation discussed below.<sup>95</sup>

Injunctions can be quite effective in policing consumer law infringements, especially with regard to unfair contract terms and unfair commercial practices.<sup>96</sup> Their practical impact on consumers can be reinforced by information campaigns by the consumer organisations involved and media coverage of large-scale actions. However, only a minority of Member States have a system where the existence of an injunction actually facilitates individual or collective claims by consumers against the same infringement.<sup>97</sup> Thus, while in Bulgaria and Luxembourg consumers taking individual actions can invoke final judicial decisions concerning injunctions and only need to prove the quantum of damage, in many other Member States consumers must still prove the infringement, damage and causal link.<sup>98</sup>

#### *B. The Consumer Protection Cooperation Regulation*

The Regulation<sup>99</sup> facilitates cooperation between national public enforcement bodies. These public bodies have significant responsibilities in enforcing EU consumer law, and a well-functioning network (CPC network) enhances successful enforcement. While these matters are beyond the scope of this paper, it is important to note that administrative enforcement may sometimes be preferable in safeguarding consumer rights to civil proceedings or ADR. Indeed, it was confirmed that the low number of cross-border actions for injunction is due to the fact that the relevant authorities see the system established by the Consumer Protection Cooperation Regulation as cheaper and simpler.<sup>100</sup>

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<sup>94</sup> *Ibid.*, the Second Commission Report on Injunctions Directive, at 4.

<sup>95</sup> See below.

<sup>96</sup> See the Second Commission Report on the Injunctions Directive, at 8 and 9 for examples of successful injunctions against Austrian banks and against Foxtons in the UK and their potential financial benefit for consumers.

<sup>97</sup> See the Second Commission Report on the Injunctions Directive, at 9-11.

<sup>98</sup> *Ibid.*, at 10.

<sup>99</sup> Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L-364/1.

<sup>100</sup> The Second Report on Injunctions Directive (2012), at 3.

### C. ADR Measures (Especially the Consumer ADR (CDR) Directive and ODR Regulation)

As mentioned above, ADR is an important part of the EU consumer law enforcement system.<sup>101</sup> The EU looked at ADR in a wider context than consumer protection law. The Code of Conduct for Mediators was drafted by the European Commission in 2004.<sup>102</sup> The Directive on certain aspects of mediation in civil and commercial matters was adopted in 2008.<sup>103</sup> Its legal bases were Articles 61(c) and 67(5) of the EC Treaty (it was adopted within the policy of judicial cooperation in civil matters). It applies to cross-border mediation only, although Member States may apply it to internal mediation procedures as well. The Directive provides a somewhat harmonised approach to mediation, for instance by defining mediation (including voluntary mediation and even mediation to which parties are referred to by court or by law),<sup>104</sup> and mediators.<sup>105</sup>

The 2009 DG SANCO Study on the use of ADR identified significant problems with these mechanisms across the EU: fragmentation of coverage, lack of consumer awareness, the tendency of businesses to refuse to engage in ADR or to follow non-binding decisions of ADR schemes, as well as deficiencies in expertise and consumer trust.<sup>106</sup> The Commission's DG SANCO published a Consultation Document 'On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union' in 2011.<sup>107</sup> The Directive 2013/11/EU on Consumer ADR<sup>108</sup> and Regulation 524/2013 on Consumer ODR<sup>109</sup> followed.

The Directive on Consumer ADR (CDR) applies to 'procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations' stemming from sales and services contracts between traders and consumers (established or resident in the EU) 'through the intervention

<sup>101</sup> See Recommendation 98/257/EC of the Commission of 30 March 1998 regarding the principles applicable to bodies responsible for out-of-court consumer dispute settlements, *OJ L* 115, 18 April 1998, 31, and Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes [2001] *OJ L* 109/56.

<sup>102</sup> *Ibid.*, Benohr, *supra* at 69, 2012, at 8.

<sup>103</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] *OJ L* 136/3.

<sup>104</sup> Article 2.

<sup>105</sup> Article 3(b).

<sup>106</sup> DG SANCO, 'Study on the use of Alternative Dispute Resolution in the European Union', Berlin, Civic Consulting, October 2009.

<sup>107</sup> DG SANCO, 'Consultation Paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union', Brussels, DG SANCO 2011.

<sup>108</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on consumer ADR [2013] *OJ L* 165/63.

<sup>109</sup> Regulation (EU) No 524/2013 of 21 May 2013 on consumer ODR, *OJ L* 165/1.

of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution'.<sup>110</sup> Recital 6 explains that ADR mechanisms ought to be available for all domestic and cross-border disputes covered by the Directive. The Directive introduces quality criteria for all ADR bodies so that consumers can rely on having access to high-quality, transparent, effective and fair mechanisms.<sup>111</sup> Member States are not required to establish new ADR mechanisms and may rely on those already in existence. However, a 'residual' ADR body must be in existence for all those types of disputes not covered by any other ADR mechanism available.<sup>112</sup>

The ODR Regulation sets up an online platform which consumers and traders can use as a single point of entry for dispute resolution. The platform will link consumers to the ADR bodies operating according to the principles established by the Consumer ADR Directive.

#### *D. Cross-border Networks for Alternative Dispute Resolution*

The EU launched a number of cross-border networks aimed at facilitating alternative dispute resolution for consumers. The Extra-Judicial Network (EEJ-Net) was established in 2001, and accompanied by the standardised claim form for consumers.<sup>113</sup> The ECC-Net replaced it in 2005, now consisting of European Consumer Centres in 30 countries (all EU Member States as well as Norway and Iceland). They provide free legal advice and assistance with consumer complaints, and are co-funded by the European Commission and national governments. Their popularity and effectiveness are steadily increasing. The 2013 Report<sup>114</sup> indicated that around 80,000 consumers directly contacted ECC, of which 30,000 made a complaint about a trader. The ECC bodies advise consumers on their options for resolving a dispute, help them resolve it directly with the trader, and assist them in making a complaint to a competent authority, an ADR body or a court.<sup>115</sup>

#### *E. Collective Redress*

Collective redress is an important element of the consumer law enforcement system. The EU interest in it was inspired by national developments in the Member States. During the 1980s, but especially the 1990s and beyond, almost

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<sup>110</sup> Article 2(1).

<sup>111</sup> Article 2(3). Chapter II contains a detailed description of these requirements.

<sup>112</sup> Recital 24 and Article 5(3).

<sup>113</sup> Council Resolution (EC) 2000/C on a Community-wide network of national bodies.

<sup>114</sup> 'Help and advice on your purchases abroad. The European Consumer Centres Network 2013 Annual Report', [http://ec.europa.eu/consumers/ecc/docs/report\\_ecc-net\\_2013\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/report_ecc-net_2013_en.pdf).

<sup>115</sup> There are also more specialised networks, operating within certain areas of consumer law: for instance FIN-NET launched by the Commission in 2001.

all states (including those in Central and Eastern Europe) considered establishing a collective redress procedure.<sup>116</sup> Many succeeded, although the differences in national models are very significant, ranging from the settlement approval model in the Netherlands,<sup>117</sup> and representative-style actions in Spain,<sup>118</sup> to class actions in Sweden and Poland.<sup>119</sup>

The European Commission started seeking ways in which these models could be coordinated and made useful on a cross-border basis. On 27 November 2008 the Commission adopted the Green Paper on Consumer Collective Redress where a number of options were proposed.<sup>120</sup> More recent consultation papers,<sup>121</sup> and discussions in the European Parliament,<sup>122</sup> revealed the extent of political, legal, social and economic problems with a contemplated EU-level collective redress model. Following these discussions, in 2013 the Commission adopted a set of non-binding recommendations for collective redress mechanisms.<sup>123</sup> The recommendations include any rights conferred by EU law (consumer protection, competition, environment protection, protection of personal data, financial services regulation, investor protection and any other areas where collective actions may be relevant).<sup>124</sup> The Commission recommends all Member States to have collective redress mechanisms at the national level. Member States should ensure that the collective redress procedures are ‘fair, equitable, timely and not prohibitively expensive’.<sup>125</sup>

While the recommendations reflect the current state of consensus among the Member States and the EU institutions, the views on the exact role, shape

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<sup>116</sup> See the Stanford Law School’s Global Class Actions Exchange website for updates on national developments across Europe and the Globe: <http://globalclassactions.stanford.edu/about>. See also D. Hensler, C. Hodges & M. Tulibacka (Eds), ‘The Globalization of Class Actions’, in: *The Annals of the American Academy of Political and Social Science* (2009).

<sup>117</sup> See I. Tzankova & D.L. Scheurleer, ‘The Netherlands’, *supra* at 129, 149-160.

<sup>118</sup> P. Gutierrez de Cabiedes, ‘Spain’, *supra* at 129, 170-178.

<sup>119</sup> See for an analysis of the Swedish class actions <http://globalclassactions.stanford.edu/content/national-report-group-litigation-sweden>, and for Poland: <http://globalclassactions.stanford.edu/content/whats-going-poland-update-class-actions-and-litigation-funding>.

<sup>120</sup> Commission of the European Communities, ‘Green Paper on Consumer Collective Redress’, 27 November 2008, COM (2008) 794 final.

<sup>121</sup> Consultation Paper for Discussion on the Follow-up to the Green Paper on Consumer Collective Redress (2009): [http://ec.europa.eu/consumers/archive/redress\\_cons/docs/consultation\\_paper2009.pdf](http://ec.europa.eu/consumers/archive/redress_cons/docs/consultation_paper2009.pdf).

<sup>122</sup> European Parliament Resolution ‘Towards a Coherent European Approach to Collective Redress’, 2 February 2012 (2011/2089), was preceded by the European Commission’s Consultation on a coherent approach to collective redress (COM (2010) 135 final).

<sup>123</sup> 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, *OJ L* 201/60.

<sup>124</sup> Recital 7.

<sup>125</sup> Recommendation I.2.

and desired result of a collective redress procedure differ widely. The recommendations, as well as examples of effective models from various Member States, will contribute to developing coherent and even harmonised approaches, but this is rather a long-term perspective. For the moment, whether a European consumer may or may not rely on an accessible, efficient and effective collective redress mechanism still depends on national procedural arrangements applicable to his/her claim.

#### 2.4 Conclusions: Impact of Sectoral Proceduralisation on Consumers

Proceduralisation of consumer law has led to harmonisation which is deeper and more advanced in scope than the outcomes of the policy of judicial cooperation in civil matters.<sup>126</sup> Legislation is not limited to cross-border proceedings, which means that consumers have much greater opportunities to come in contact with it. Further, it fosters greater uniformity of approach instead of merely introducing a procedure functioning in addition to the one applicable in purely domestic situations. The comprehensiveness of these measures is steadily increasing, as is their responsiveness to the specific needs of consumer law (identified above). European consumers are surrounded by a plethora of laws which, in addition to granting them substantive rights, also deal with remedies and even procedures. With the number of these measures constantly growing, the importance of information about their existence is also increasing. Hence the role of the ECC network and other networks of bodies established by the EU (such as FIN-NET) providing guidance and information to consumers.

Nevertheless, some of the mechanisms examined here are so new that it is impossible to assess their practical effect. Further, both the enforcement provisions in substantive consumer law instruments and, albeit less so, the independent procedural measures in the area of consumer protection continue to rely heavily on national enforcement networks: courts, administrative authorities, other supervisory authorities, as well as civil procedure rules. These differ considerably across the European Union.<sup>127</sup>

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<sup>126</sup> See Tulibacka, *supra* at 7, for some legitimacy concerns with regard to such sectoral proceduralisation.

<sup>127</sup> See A. Uzelac, 'Harmonised Civil Procedure in a World of Structural Divergences? Lessons from the CEPEJ Evaluations', in: X.E. Kramer & C.H. van Rhee (Eds), *Civil Litigation in a Globalising World* (TMC Asser Press, Springer 2012), 175-205.

## Conclusions

This paper presents a general picture of EU-derived procedural mechanisms which envelope EU consumers. Despite the generality, it places a greater emphasis on the type of proceduralisation taking place within EU consumer law – ‘sectoral proceduralisation’. It is submitted that this proceduralisation has the potential to impact consumers more significantly than the generic procedural rules adopted within the policy of judicial cooperation in civil matters. Sectoral proceduralisation of consumer law is not limited to cross-border issues. Further, because it remains within the area of consumer protection law, it is particularly attuned to the needs of consumers and the particularities of an average consumer case. The nature of consumer law entails that proceduralisation must cover more than access to courts and the rules of civil procedure before courts: it reaches regulatory bodies, enforcement actions before public authorities, alternative dispute resolution mechanisms, and collective redress procedures.

It is shown that the catalogue of remedies added by the substantive consumer law measures, the procedural framework for these remedies introduced by provisions in substantive consumer laws, and also by distinct procedural measures, are growing in scope and size. The Injunctions Directive is successful in harmonising elements of national enforcement models by regulating standing for bodies and organisations bringing claims for the protection of the collective interests of consumers. The impact of the Consumer ADR and ODR instruments, when in force, is as yet unknown, although they are likely to contribute to placing ADR in the position of a key mechanism for resolving consumer disputes across the EU. Further, the various networks of consumer protection bodies or judicial and administrative authorities established by the EU are already contributing to greater awareness and assisting consumers across Europe with their cross-border concerns.

However, the paper also argues that proceduralisation of EU law, including EU consumer law, is in the early stages of development. Legislation is being amended and added to, and some concepts and mechanisms (for instance collective redress) remain in the planning phase. Further, legislative coverage is not always comprehensive and it continues to rely on national enforcement networks: administrative authorities and courts, with their own national procedural rules. The future of the proceduralisation of EU consumer law lies in the evolution of these networks towards a more harmonised and coherent model.<sup>128</sup> While it remains to be seen how the latest procedural measures will affect

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<sup>128</sup> For an elaboration of this idea see: Tulibacka, *supra* at 7.

consumers, the impact of the 'proceduralisation of EU consumer law' remains limited at present.