Rights, remedies, and access to justice in consumer-related litigation: Is Union law fit for purpose?

TAKIS TRIDIMAS*

This contribution discusses access to EU justice by reference to two considerations: the extent to which EU law grands consumers and other private parties a right or a remedy; and the extent to which EU law constrains the rules of the Member States which govern remedies and procedure. It explores the rights-remedies dichotomy in EU law; it provides a taxonomy of EU measures based on whether they provide for a private law remedy; and discusses the conditions under which implied rights of action may arise. It then examines some of the factors that affect the invocation of EU rights before national courts. The fundamental model is a hybrid one where EU rights are enforced by national remedies and procedures subject to the requirements of equivalence and effectiveness. But the latter, empowered by Article 47 of the Charter, is applied with added rigour in the field of consumer law. A progressive emphasis on private law remedies and the empowerment of representative associations are to be welcomed.

I. – Introduction

In the context of consumer-related litigation, is the present system for legal and natural persons, including associations, to gain access to justice at the Court of Justice of the European Union (hereinafter the "CJEU" composed of the Court of Justice and the General Court) satisfactory, or is it in need of further reform? If so, what reforms could be suggested?

The above questions invite us to reflect on the system of judicial protection established by the EU Treaties. Before attempting to answer them, there is a need for some clarifications.

First, I understand the concept of consumer widely. EU measures typically define "consumer" as any natural person who is acting for purposes which are outside

* Professor of European Law, King's College London, takis.tridimas@kcl.ac.uk.

his trade, business or profession.[1] But the questions asked apply also to other categories whether they might be covered by specific directives or regulations and irrespective of whether they are natural or legal persons, such as bank depositors,[2] investors in financial products or users of digital platforms. Also, consumer law is intertwined with other areas and consumer interests may be pursued indirectly, or served collaterally, by other actors. This includes, for example, representative associations that pursue public interest litigation[3] or even commercial undertakings that may act as complainants in business-to-business litigation.[4] In any event, many of the limitations on access to CJEU tend to be common to all non-state actors.[5] These considerations make it appropriate to address the questions posed from a wider perspective.

Secondly, access to justice is an essential aspect of the rule of law and stands at the apex of the constitutional rights recognized by EU law.[6] It encompasses a bundle of rights, including: adequate standing rules; access to an independent and impartial tribunal; fair proceedings and trial; timely resolution of disputes; adequate redress (i.e. effective remedy); the right to be represented; and legal aid. Access to justice also presupposes the existence of an underlying right. This contribution will discuss selectively some of the rights identified above.

Thirdly, in most cases, private parties, such as consumers, would wish to assert EU rights against other private parties or national authorities (rather than the EU institutions). Therefore, their access to the Court of Justice via the preliminary reference procedure is dependent on national law. This is not to say that judicial protection against Union institutions should be forgotten. Indeed, the restrictive interpretation of Article 263, paragraph 4, of the Treaty on the Functioning of the European Union

---

1 See e.g. Directive 2020/1828 on representative actions for the protection of the collective interests of consumers, *OJ* 2020, L 409/1, Article 3(1); Directive 2011/83 on consumer rights, *OJ* 2011, L 304/64, Article 2(1) ("Consumer Rights Directive"); Directive 93/13 on unfair terms in consumer contracts, *OJ* 1993, L 95/29, Article 2(b).

2 The protection of bank depositors was thrown into sharp relief in the Cyprus bail in cases: see e.g. Case *Council v. K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P, and C-604/18 P, EU:C:2020:1028.

3 The inter-connection between consumer protection, unfair competition and data protection is illustrated by *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland,* C-873/19, ECLI:EU:C:2022:85, discussed below.

4 Note, in this respect, the role of complainants in competition law and state aid. Access to justice of these categories may benefit consumer causes although whether the effect of specific rights granted to complainants might have positive or negative implication for specific categories of consumers would be very difficult to determine.

5 It should also be recalled that consumer-related litigation includes not only litigation for the protection of consumers but also for the protection of their counter parties.

6 See in particular, *Partie Ecologiste "Les Verts" v. European Parliament* [1986], C-294/83, ECR 1339; *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986], C-222/84, ECR 1651 and *Rosneft,* C-72/15, EU:C:2017:236.

(hereinafter the "TFEU") remains one of the most important hurdles that non-state actors face in challenging EU action.

In the light of the above clarifications, the present contribution focuses on two factors which condition the extent to which consumers and other private parties may invoke EU rights and gain access to the CJEU:

– the extent to which EU law (the EU Treaties, the EU legal acts or other sources of EU law) grands them a right or a remedy;
– the extent to which EU law constrains the rules of the Member States which govern remedies and procedure.

The first theme is discussed in sections 2-4. These explore the hybrid model of EU law, provide a taxonomy of EU measures, and discuss implied rights of action. The second theme is discussed in section 5 by reference to four areas: the rules governing what acts can be the subject of national proceedings (section 5.A); the rules governing standing before national courts (section 5.B); the role of representative associations (section 5.C); and the extent to which national courts may raise points of EU law on their own motion (section 5.D). The objective of this contribution is not so much to propose changes but to conceptualise the hybrid model of EU law and assess some of the requirements that condition access to the CJEU. It does not discuss in detail consumer law directives but engages with the themes identified above based on an analysis of the case law.

II. – Rights, remedies, and the hybrid model of EU law

Access to justice brings to the fore the distinction between rights and remedies.[7] The difference between them is less clear-cut than it appears. The risk of conflation is to some extent innate. The content of a right is closely connected within its effect which, in turn, is determined by the mechanisms available for its vindication. It may thus not be possible to separate the redress requested from the underlying right whose protection is sought. The lack of clarity appears to be particularly prominent in EU law. For one thing, the genesis and development of both rights and remedies has been predominantly the result of the case law of the CJEU. For another, where EU law gives rights against Member States, the remedies for their protection are to be found in national law albeit under conditions and reserves, often highly intrusive, imposed by the CJEU. As a result, judicial protection is characterised by a hybridity which makes the boundaries between rights and remedies all the more difficult to

[7] For a more detailed discussion of the issues arising in sections 2 to 4, see T. Tridimas, "Financial regulation and private law remedies: An EU law perspective", in M. Andenas and O. Cherednychenko (eds), *Financial Regulation and Civil Liability in European Law*, Edward Elgar, 2020, pp. 47-72, from which this contribution borrows.

discern. Furthermore, EU law brings together different legal traditions with varying understandings of the distinction.

A right can be defined as a condition or status of a person recognized by law,[8] (e.g. the right to cancel a contract where certain conditions are fulfilled). The term remedy, by contrast, refers to the means of redress and enforcement of the right in the event that it is violated, (e.g. a right to bring an action for compensation or judicial review). A right or a remedy may be express or implied.

A right can be imperfect in that it may be supported by limited remedies or no remedy at all. An example is provided by *Unibet*, where it was held that EU law does not require national law to introduce free-standing review of the compatibility of national law with EU law.[9] The denial of horizontal effect of directives provides another example. Such denial means that, in the absence of implementing legislation, a right recognised by a directive cannot be relied upon. A distinct, secondary, right may then be available against the state to claim reparation for the loss arising from its failure to implement properly the directive.[10] A remedy usually supports a right granted by the law (i.e. a personal right). It is also possible for an implied right of action to arise. In such a case, there is no distinct personal right other than the right to enforce through a specific remedy an obligation imposed on another party. Implied rights of action illustrate the relativity of the distinction between rights and remedies.[11]

EU law tends to provide for rights but not for remedies. This reflects well-established historical path dependencies. First, the EU developed from international treaties, which rarely make provision for remedies.[12] Secondly, whilst EU legislation may provide for rights or impose obligations, it does not, as a general rule, provide for remedies where rights are violated by Member State rather than EU action. The EU is supported by a decentralised system of justice so that enforcement mechanisms are a matter for national law to decide. This has resulted in a hybrid model under which, whilst as a general rule national remedies apply, EU law influences national law through the effectiveness and equivalence tests. According to the classic *Rewe & Comet* formula,[13] in the absence of EU rules, it is for the domestic legal system of each

[8] See W. Van Gerven, "Of rights, remedies and procedures", *CMLRev* 2000, pp. 501-503, although the definition of rights given therein appears to include the existence of a remedy as a component of the right.

[9] *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [2007], C-432/05, ECR I-2271, para 47. This is, however, subject to the principles of equivalence and effectiveness being observed. See below.

[10] See e.g. *Francovich and others* [1991], joined cases C-6 and C-9/90, ECR I-5357; *Faccini Dori v. Recreb* [1994], C-91/92, ECR I-3325.

[11] See below.

[12] But see for an exception: Article 101(2) TFEU which provides for the automatic nullity of anti-competitive agreements.

[13] *Rewe v. Landwirtschaftskammer für das Saarland* [1976], C-33/76, ECR 1989; *Comet v. Productschap voor Siergewassen* [1976], C-45/76, ECR 2043.

Member State to designate the courts having jurisdiction and to lay down the rules governing actions intended to ensure the protection of rights conferred by EU law. Such national rules, however, must comply with two conditions: first, they must not be less favourable than those governing similar domestic actions (principle of equivalence); and, secondly, they must not render the exercise of EU rights virtually impossible or excessively difficult (principle of effectiveness). In articulating those conditions, the case law has gone through several phases.[14] A period of deference to the national legal systems spanning from 1970s to late 1980s was followed by an outburst of remedial expediency reaching its apex in *Francovich*.[15] This was followed by a period of selective deference from the late 1990s to the mid-2000s and then a resurgence of interventionism through greater reliance on the principle of effectiveness.

The hybrid model resulting from *Rewe* & *Comet* has three distinct attributes. First, it is dialogic in that the remedial effects of EU law are the result of a judicial conversation between the CJEU and the national courts. Secondly, it is disruptive and, at times, subversive. EU law has to rely on national remedies but these have to be adjusted and reinvented, jettisoning the elements which fall short of the effectiveness standards. This, in turn, challenges the conceptual coherence of national law, generating uncertainty.[16] Thirdly, the hybrid model is characterised by the pivotal role of the principle of effectiveness whose gravitational force controls the constellation of national laws on remedies and procedures. Effectiveness has evolved to the primary standard for determining the constitutional expectations of the emergent EU legal order from national laws. As the case law evolved, the requirement of effectiveness gradually transitioned from a minimum standard to a demanding rule of conditionality leading to the hybridisation of national remedies: recalibrated in the light of that principle, those remedies may now be said to stand with one leg on national law but with the other on EU law. National procedural autonomy, to which the case law often refers,[17] is not the starting principle but the residue of equivalence and effectiveness. The principle of effectiveness has been strengthened by Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter"), which the Court of Justice invokes in relation to access to justice and which it views as a reaffirmation of the principle of effective judicial protection.[18]

[14] See T. Tridimas, *The General Principles of EU Law*, 2nd ed., OUP, Chapter 9.

[15] *Francovich and others* [1991], joined cases C-6 and C-9/90, ECR I-5357.

[16] See e.g. the *FII litigation: Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, case C-446/04, ECLI:EU:C:2006:774; *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, case C-35/11, ECLI:EU:C:2012:707; *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue*, case C-362/12, EU:C:2013:834.

[17] See e.g. for recent references, *Deutsche Umwelthilfe eV v. Freistaat Bayern,* case C-752/18, ECLI:EU:C:2019:1114, para 33; *Kuhar*, C-407/18, EU:C:2019:537, para 46.

[18] See e.g. *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period)*, C-219/20, EU:C:2022:89, para 42; *Funke sp. z o.o. v. Landespolizeidirektion Wien*, C-626/21, ECLI:EU:C:2023:412, para 75.

III. – EU law and private law remedies: a classification

In general, one may distinguish the following approaches in relation to whether an EU measure provides for a private law remedy: (1) legislative silence, (2) a general reference to the private laws of Member States or (3) express provision for a private law remedy.

Legislative silence may manifest itself at two levels. EU law may impose an obligation without making any reference to rights; also, a provision may establish a right but be silent on remedies. In the first case, the right (and any remedy available for its protection) may be said to be implied. In the second case, the inquiry centers on what remedies might be available. In the field of financial law, legislative silence remains the default position. Thus, the Market Abuse Regulation[19] outlaws certain conduct but is silent on the possible existence of a civil right of action. The Securitization Regulation provides for administrative sanctions but is silent on the issue of private law remedies.[20] The Mortgage Credit Directive imposes a number of pre-contractual and contractual obligations in relation to the provision of consumer credit agreements secured by a mortgage but is silent on the rights of consumers in case they are violated.[21] More widely, it is not always clear whether a legal obligation imposed by EU law on a public or private body might be enforceable by private parties.

EU law may make general reference to national private law remedies. Thus, Article 11(2) of the Prospectus Regulation,[22] states that Member States must ensure that their laws on civil liability apply to those persons responsible for the information given in a prospectus. This provision offers, in fact, little guidance and ample discretion to Member States, its command being meaningful only if it is interpreted in the light of the principles of equivalence and effectiveness to which it adds little.

EU measures may expressly provide for private law remedies. Within this category, one may distinguish sub-categories depending on the type of the remedy provided or the degree of its specificity. Although this is rare, provision may be made for the consequences of illegality (i.e. nullity).[23] The terminology may differ referring to

[19] Regulation No 596/2014 on market abuse, *OJ* 2014, L 173/1.

[20] Regulation No 2017/2402 laying down common rules on securitisation and creating a specific framework for simple, transparent and standardised securitisation, *OJ* 2017, L 347/35.

[21] Directive 2014/17 on credit agreements for consumers relating to residential immovable property, *OJ* 2014, L 60/34. The Directive provides however for the establishment of effective complaints and redress procedures for the out-of-court settlement of consumer disputes: Article 39.

[22] Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, *OJ* 2017, L 16/12.

[23] See e.g. Article 101(2) TFEU; Regulation No 492/2011 on freedom of movement for workers within the Union, *OJ* 2011, L 141/1, Article 7(4); Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, *OJ* 2000, L 303/16, Article 16(b); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal

automatic nullity or the possibility of declaring an agreement null[24] or the obligation to render an agreement non-binding for one of the parties.[25] The opposite (i.e. prohibition of nullity), may also be provided for the benefit of the weaker party.[26] EU provisions may also provide for a right to compensation.[27] The degree of specificity of the remedies provided varies considerably. Thus, the Consumer Rights Directive provides not only for a right of withdrawal and the conditions under which it may be exercised but also for the effects of its exercise in detail, including the obligation of reimbursement,[28] and the right to terminate a contract in the event of non-delivery.[29] Detailed provisions on remedies are also included in the Payments Services Directive II (PSD II).[30]

EU measures may also regulate the procedural framework for the assertion of rights, for example, standing requirements or the burden of proof. This is the case in the field of equality directives and various consumer protection directives.[31] Such intrusion into the national legal systems is a reflection of the existence of specific EU policies in those areas which are colonised by EU law and where, consequently, the need for uniformity acquires greater importance.

In the EU model of integration, regulatory law is dominated by a system of public enforcement. This is the case in relation, for example, to financial law, consumer law, and environmental law.[32] Member States are required to designate competent authorities

treatment between persons irrespective of racial or ethnic origin, *OJ* 2000, L 180/22, Article 14(b); Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ* 2006, L 204/23, Article 23(b).

24 *Cf.* Article 101(2) TFEU and the articles of the equality directives referred to in the previous note.

25 See, in relation to consumers, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95/29, Article 6(1).

26 See Article 20(3) of Directive 2014/17 on credit agreements for consumers relating to residential immovable property, *OJ* 2014, L 60/34. See also Article 18(4) (removal of the creditor's right to cancel the contract).

27 See e.g. Directive 85/374 on liability for defective products (*OJ* 1985, L 210/29); Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *OJ* 2014 L 349/1; Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, *OJ* 2009, L 302/1, as amended, Article 35a.

28 Consumer Rights Directive, Articles 12, 13, 14.

29 *Op. cit.*, Article 18.

30 Directive 2015/2366 on payment services in the internal market, *OJ* 2015, L 337/25, Articles 73 *et seq.*; 89 *et seq.*

31 See e.g. Article 6(9) of the Consumer Rights Directive; Articles 11-12 of Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22, Article 13. And see the Equality directives referred to above.

32 See e.g. O. O. CHEREDNYCHENKO, "Public and Private Enforcement of European Private Law: Perspectives and Challenges", *European Review of Private Law* 2015/23, p. 481; H.-W. MICKLITZ, "The Transformation of Enforcement in European Private Law: Preliminary Considerations", *European*

which must be bestowed with enforcement and investigatory powers to ensure compliance with EU requirements.[33] Member States must also lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to EU measures and take all measures necessary to ensure that they are implemented.[34] According to a standard formula replicated in virtually all modern directives or regulations, the penalties provided for must be effective, proportionate and dissuasive.[35] In some cases, EU measures also make express reference to the power of competent authorities to seek judicial redress to enforce the requirements imposed therein.[36]

A number of reasons account for the preference for a system of public enforcement. The establishment of specialised agencies in the field of financial services law is the predominant model on both sides of the Atlantic. There are efficiency gains by entrusting compliance to a specialised agency which is better placed than consumers to carry out monitoring and take preventive action. The public enforcement model also ties in with the EU governance paradigm. Positive integration occurs through regulation. The primary addresses of EU norms are the States in relation to which it is easier for the EU to claim competence. By contrast, express provision for private remedies at EU level would interfere directly with national private laws. Still, the use of private law remedies appears underrated.[37] More recent measures increasingly rely on them, and their use should be encouraged.

IV. – Implied rights of actions

An implied right of action is one which is not expressly provided but which derives from the imposition of a duty on another party. Understood in this way, the doctrine of implied rights refers to the derivation of a private remedy from the breach of a duty imposed by the law.

Review of Private Law 2015/23, p. 491; O. O. Cherednychenko, "Public and Private Enforcement of European Private Law in the Financial Services Sector" *European Review of Private Law* 2015/23, p. 621.

33 See e.g. Directive 2014/17 on credit agreements for consumers relating to residential immovable property, *OJ* 2014, L 60/34, Article 5.

34 See e.g. Consumer Rights Directive, Article 24(1).

35 See e.g. Directive 2004/109 on the harmonization of transparency requirements, *OJ* 2013, L 390/38, Article 28(1); Directive 2014/17 on credit agreements for consumers relating to residential immovable property, *OJ* 2014, L 60/34, Article 38(1); Regulation (EC) No 1060/2009 on credit rating agencies, *OJ* 2009, L 302/1, as amended, Article 36; Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22, Article 13. For more detailed guidelines on the factors to the be taken into account in determining the appropriate sanction, see Regulation No 596/2014 on market abuse, *op. cit.*, Article 13.

36 See Directive 2014/17 on credit agreements for consumers relating to residential immovable property, *OJ* 2014, L 60/34, Article 5(5)(b) and recital 80.

37 O. O. Cherednychenko, "The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?", *J. Consum. Policy* 2010/33, p. 403.

A prime example is provided by *Janecek*[38] which concerned Directive 96/62[39] on ambient air quality assessment and management. Article 7(3) requires Member States to draw up action plans indicating the measures to be taken where there is a risk that limit values set in relation to certain pollutants are exceeded. The Court of Justice held that the directive imposed an unconditional and sufficiently precise obligation on which individuals could rely upon to require the competent authorities to draw up an action plan.[40] The Court derived a right from a directive which did not expressly provide for one and outlined some of the remedial requirements. The right could be asserted by any individual or corporation directly concerned by a risk that the limit values may be exceeded;[41] the right could be invoked, if necessary, by bringing an action before the competent courts;[42] and it was independent rather than subsidiary to other remedies that could exist.[43]

In *Munoz*,[44] a quality standard for agricultural produce provided by an EU regulation was held to imply a right of action in favour of a competitor to enforce that standard. *Munoz* is important in that an implied right of action was recognized against a private party. The influence of this case has, however, been somewhat underwhelming. It has not led to a flood of claims and in few other cases has the Court of Justice had the opportunity to deal with implied rights action arising against individuals. In the few such claims that have arisen, the CJEU seems to have followed a measured approach.[45]

Although the case law has not established in general terms the conditions under which an implied right may arise, they could be phrased as follows:

(a) the rule of law violated must impose a clear and sufficiently precise obligation;

---

[38] *Janecek v. Freistaat Bayern*, C-237/07, ECLI:EU:C:2008:447.

[39] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (*OJ* 1996, L 296, p. 55); see now Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, *OJ* 2008, L 152/1, as amended.

[40] *Janecek*, *op. cit.*, para 42.

[41] *Op. cit.*, para 39.

[42] *Id.*

[43] *Op. cit.*, para 40.

[44] *Munoz Cia SA and Superior Fruitcola v. Fumar Ltd and Redbridge Produce Marketing Ltd,* C-253/00, ECLI:EU:C:2002:497.

[45] For a refusal to find an implied right of action, see e.g. *Richard Dahms GmbH v. Fränkischer Weinbauverband eV*, C-379/04, 2005 I-08723, ECLI:EU:C:2005:609. In general, *Munoz* has been considered in few other cases. See e.g. *Bureau national interprofessionnel du Cognac v. Gust. Ranin Oy*, joined cases C-4/10 and C-27/10, ECLI:EU:C:2011:484. Note also that in *ÖBB-Personenverkehr v. Schienen-Control Kommission*, C-509/11, ECLI:EU:C:2013:613, it was held that, in the absence of national implementing rules, Article 30(1) of Regulation No 1371/2007 on rail passengers' rights and obligations, which requires national bodies responsible for its enforcement to take the measures necessary to ensure that the rights of passengers are respected, does not by itself provide for a legal basis for a national body to require railway companies to amend their contractual terms. Such a requirement is dependent upon the prior conferral of a power by the exercise of state *imperium*.

(b) the obligation must be intended to protect the interests of an identifiable class of persons to which the claimant belongs;

(c) the claimant's interests as a member of that class must have been adversely affected as a result of the violation.

These conditions partially reflect the conditions discussed by Advocate General Geelhoed in *Munoz* and are reminiscent of the conditions required under US law for an implied right to a civil remedy to arise.[46] Clearly, their identification marks the beginning rather than the end of the inquiry. Suffices to comment here on the first and the second conditions stated above.

Under the first condition, the provision violated must impose a clear and precise obligation on a state authority or a private person. This does not mean that the recipient of the obligation must have no discretion whatsoever but that its discretion must be sufficiently circumscribed so as to exclude certain conduct. There is no need to establish a specific personal right. Rather, the provision at issue must have a minimum identifiable substantive content in respect of which it is sufficiently operational.[47]

The second condition is pivotal. The less stringently this condition is understood, the broader the recognition of implied rights and the more individuals can act as "integration agents", namely actors for the enforcement of EU obligations in the public and private spheres. The case law is imbued by an efficacy rationale which leads to a relatively broad understanding of implied rights. In *Munoz*, Advocate General Geelhoed stated that too strict a test would be detrimental to the direct effect of regulations.[48]

A key factor here are the objectives of the measure. In *Verband deutscher Daihatsu-Händler*,[49] an association of car dealers sought a court order requiring the car importer to publish its annual accounts or, in default, pay a fine. The national courts had dismissed the claim on the ground that, under German law, proceedings for the imposition of a fine may be brought only by shareholders, creditors or workers representatives. The Court of Justice found that limitation incompatible with the First Company Law Directive,[50] focusing on its objectives. *Daihatsu-*

[46] See G. Gamm and H. Eisberg, "The Implied Rights Doctrine", *UMKC L. Rev*. 1972/41, p. 292, p. 296.

[47] See *Kraaijeveld and Others* [1996], C-72/95, ECR I-5403, para 59; *Janecek*, *op. cit.*, paras 45-46.

[48] *Munoz*, *op. cit.*, at para 47 of the Advocate General's Opinion.

[49] *Verband deutscher Daihatsu-Händler*, C-97/96, EU:C:1997:581; see for confirmation: *Axel Springer*, joined cases C-435/02 and C-103/03, EU:C:2004:552.

[50] First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such

Händler provides a broad understanding of implied rights. A consideration that appears to be behind the Court of Justice's approach is to facilitate the effectiveness of the directive as a harmonisation measure by broadening the class of potential plaintiffs. In this respect, the case is reminiscent of the dual vigilance principle advanced in *Van Gend en Loos*[51] and the *CIA* and *Unilever* case law.[52] It follows from *Daihatsu-Händler* that the fact that a measure protects the general interest does not exclude an implied right of action from arising. This is countenanced in other cases decided by the CJEU. According to its case law, where an EU directive imposes a concrete obligation for the protection of public health, such as standards for air quality or drinking water, the persons concerned must be in a position to rely on the mandatory rules included in the directive. The category of persons concerned, however, is understood broadly to encompass everyone who is a beneficiary of the measure, including, for example, local residents or even the wider public, depending on the scope of the obligation imposed by the measure.[53] It is thus not necessary that the class of persons whose interests the measure seeks to protect is limited or somehow closed. A provision may pursue a multiplicity of objectives and seek to protect several interests. Under the CJEU's case law, it suffices that the applicants can establish that link even if the protection of their interests is not the primary goal of the measure. The regulation is issue in *Munoz* pursued both the protection of fair trading and the consumer, but this was not a reason to deny an implied right of action on the part of a competitor. Nonetheless, the protection of the class to which the applicant belongs, however widely that class might be defined, must be one of the main objectives of the measure and not purely an incidental one. Also, for the second condition to be satisfied, namely, the condition that the obligation imposed by the EU provision must be intended to protect the interests of the applicant, it is necessary to establish that the obligation seeks to protect the specific right that the applicant claims and the remedy sought is appropriate.[54]

As a general rule, the fact that an EU measure provides for a public system of enforcement, for example, by requiring the Member States to establish national

safeguards equivalent throughout the Community (*OJ*, English Special Edition, 1968(I), p. 41). This directive has been repealed and replaced by Directive 2009/101/EC (*OJ* 2009, L 258, p. 11).

51 *Van Gend en Loos* [1963], C-26/62, ECR 1.

52 *CIA Security International v. Signalson SA* [1996], C-194/94, ECR I-2201; *Unilever Italia SpA v. Central Food SpA* [2000], C-443/98, ECR I-7535; and for a more recent confirmation: *X (Airbnb Ireland UC case)*, C-390/18, EU:C:2019:1112

53 *Janecek*, *op. cit.*, paras 37-38; *Commission* v. *Germany* [1991], C-361/88, ECR I-2567; *Commission v. Germany* [1991], C-59/89, ECR I-2607 and *Commission* v. *Germany* [1991], C-58/89, ECR I-4983.

54 *Cf. Paul and Others v. Bundesrepublik Deutschland* [2002], C-222/02, ECR I-9425, where the claim failed because the duties imposed on banking supervisors by the directives in question were not intended to guarantee a right to recover fully lost deposits.

authorities and impose administrative penalties for violations, does not mean that an implied right of action is excluded. In other words, the establishment of a public law enforcement mechanism does not create a presumption that that mechanism is exclusive.[55] As Advocate General Geelhoed stated, enforcement by the civil courts forms a useful and necessary adjunct to enforcement by the public authorities contributing to the full effectiveness of EU law.[56] As the Advocate General put it, failure by the supervisory authority to enforce the regulation does not give a producer or dealer the right to infringe the rule.[57] By contrast, the private right of action helps to discourage violations which are often difficult to detect.[58]

The cases decided so far, albeit few, suggest that the requirements for the recognition of an implied right of action are not particularly strict.[59] The case law of the CJEU is driven by the need to ensure the efficacy of EU norms. The preponderant criterion is whether the norm in question imposes a clear and precise obligation. Once this is ascertained, the establishment of a right of action is decoupled from the subjective intentions of the legislature in creating that obligation and the analysis focuses instead on its goals as they can reasonably be ascertained on the basis of an objective analysis. Reliance on national law does not appear to be the default position. By contrast, the existence of a right of action seems to be the presumptive consequence of the specificity of the obligation. This is founded on the principle of *ubi jus ibi remedium* and a broader pro-integration outlook which favours the enforcement of EU law. As Advocate General Geelhoed stated in *Munoz*, an effective right of action in favour of a private person contributes to ensuring full effectiveness of EU law, both by helping to bring a specific violation to an end and by having a preventive effect for the future.[60] In this respect, the claimant is viewed as a facilitator of enforcement assuming the function of an integration agent.

Nonetheless, the case law is not consistent. In the field of financial law, there have been few cases so far concerning civil liability. In those that have arisen, the Court of Justice has taken a deferential approach, interpreting EU directives as being facilitatory and granting wide discretion to Member States in relation to remedies.[61]

55 *Munoz*, para 55 of the Opinion of Advocate General Geelhoed.
56 *Op. cit.*, at para 66 of the Opinion.
57 *Op. cit.*, para 60.
58 See *Munoz*, *op. cit.*, at para 31 of the judgment.
59 But see *Paul and Others v. Bundesrepublik Deutschland* [2002], C-222/02, ECR I-9425.
60 *Munoz*, *op. cit.*, para 67 of the Opinion.
61 See, for a hesitant judgment, *Genil 48 SL v. Bankinter SA,* C-604/11, ECLI:EU:C:2013:344. See further *Hirmann v. Immofinanz AG*, C-174/12, ECLI:EU:C:2013:856; *Paul and Others v. Bundesrepublik Deutschland* [2002], C-222/02, ECR I-9425.

V. – Pursuing EU claims before national courts

The vindication of EU rights before national courts depends, among others, on the following. The types of acts that can be challenged before a national court; the rules governing standing; the rights of representative associations; and whether a national court may raise a point of EU law on its own motion.[62]

A. – *What can be challenged before a national court?*

As a general rule, national law must make it possible for an interested party to challenge a national decision that affects their EU rights. This obligation derives from Article 47 of the Charter. An interesting recent example is provided by *Funke*[63] which concerned the rights of companies affected by a notification under the EU Rapid Exchange of Information System (RAPEX). Under Regulation No 765/2008, a Member State which considers that a product poses a serious risk to consumer safety must prohibit it. Also, under the RAPEX system,[64] the Member State must notify the other Member States via the European Commission. It is for the notifying Member State to ensure that notification is accurate and complete. In *Funke*, it was held that notification must be subject to challenge before a national court (a) independently of the possibility of redress against the national measure which bans the product and (b) even though the notification itself does not lead to the banning of the product in other Member States. The Court of Justice held that even though notification does not have direct binding effects on an economic operator such as an importer of the product in issue, it may discourage distributors from selling those products and end-consumers from buying them.[65] Although the ruling is grounded on the specific EU provisions in issue, the Court of Justice founded an actionable right based on economic rather strictly legal harm. This contrasts with other areas of the case law and is welcome. It is also welcome that the Court does not accept an action in damages as an adequate alternative to an action for judicial review of the notification.[66]

Access to a national court is particularly important where, owing to the limited standing of Article 263, paragraph 4, TFEU, a private party is unable to bring a direct

[62] These are by no means the only factors. Other factors such as, for example, limitation periods provided by national law, and entitlement to legal aid are also important. All these factors are subject to the dual principles of equivalence and effectiveness.

[63] *Funke sp. z o.o. v. Landespolizeidirektion Wien*, C-626/21, ECLI:EU:C:2023:412.

[64] The RAPEX rules are laid down in Articles 20 and 22 of Regulation No 765/2008, Article 12 of and Annex II to Directive 2001/95 and the RAPEX Guidelines.

[65] *Funke*, *op. cit.*, para 67.

[66] Ćapeta AG expressly rejected the Commission's submission that it was a sufficient remedy that the party affected could introduce an action in damages against the notifying Member State. In the view of the Advocate General, that would not be an effective remedy within the meaning of Article 47 of the Charter. See Opinion, paras 73-76.

action for annulment. According to the case law, in such cases, it is for the national legal system to facilitate access to a national court which can then raise the issue of invalidity via the preliminary reference procedure.[67] The Court of Justice in fact understands the concept of acts that can be challenged indirectly via the preliminary reference procedure more widely than the concept of reviewable acts under Article 263 TFEU. In *Fédération bancaire française*,[68] it accepted a challenge brought indirectly by the French Banking Federation against guidelines issued by the European Banking Authority (EBA) on the ground that they were beyond the competence conferred on it by EU law. The Court of Justice held that the guidelines could not be challenged under Article 263 TFEU because they were not intended to produce binding legal effect. Nonetheless, that did not preclude the Court of Justice from ruling on their validity under Article 267 TFEU since, under that provision, a reference may refer to the validity of any Union act.[69] It also confirmed that the scope of review is the same under both provisions.[70]

Fédération bancaire française is not entirely convincing. First, the conclusion that the guidelines in question are not intended to be binding is open to question. The ECJ paid no attention to the perception of the EBA guidelines by interested parties, namely the competent authorities and the financial institutions concerned. To the extent that they perceive them as binding, this is a relevant consideration.[71] In fact, it appears that guidelines issued by the EBA are, at least in the overwhelming majority of cases, perceived as binding. Also, Article 16(3) of the EBA Regulation provides for a "comply or explain" obligation: where a national authority does not intend to follow the guidelines issued, it is under an obligation to give reasons. Guidelines therefore give rise to procedural duties. Furthermore, the inability to challenge guidelines under Article 263 TFEU makes it more difficult for interested parties to mount a challenge. Thus, an EU institution or agency which considered that guidelines issued by another EU agency exceeded the latter's competence would not be able to bring proceedings before the CJEU but would need to somehow seek redress in national courts.

B. – *Standing before national courts*

A vital aspect of access to justice is the recognition of standing. *Locus standi* before national courts is governed by national law subject to the requirements of equivalence and effectiveness. Member States must recognise standing to individuals who

[67] *Commission v. Jégo Quéré* [2004], C-263/02 P, ECR I-3425, para 31; *Unión de Pequeños Agricultores v. Council*, C-50/00, ECLI:EU:C:2002:462, para 41.

[68] *Fédération bancaire française (FBF) v. Autorité de contrôle prudentiel et de résolution (ACPR)*, C-911/19, ECLI:EU:C:2021:599.

[69] *Op. cit.*, para 54.

[70] *Op. cit.*, para 68.

[71] *United Kingdom v. ECB*, T-496/11, ECLI:EU:T:2015:133.

are granted personal rights by EU law. Standing is here the adjunct of the right. For example, in *CHEZ*,[72] it was held that a person who is prejudiced by discrimination on grounds of ethnic origin can invoke the Race Equality Directive 2000/43[73] even if they do not belong to the ethnic group being discriminated against. Entitlement to rely on the Directive was based on the fact that the latter intended to bestow the claimant with a right. Therefore, although the Court of Justice did not examine the issue of standing separately, national law had to provide her with standing.

The Court of Justice has had few opportunities to pronounce on the minimum standards that should be guaranteed as regards standing to challenge national measures infringing EU law. In *Verholen*[74] it declared that, although in principle it is for national law to determine an individual's standing and legal interest in bringing proceedings, national law must not undermine the right to effective judicial protection. On that basis, it held that an individual who did not come *ratione personae* within the scope of Directive 79/7 on equal treatment in social security[75] could rely on it if he had a direct interest in ensuring that the principle of non-discrimination was respected *vis-à-vis* persons who were protected by its provisions, for example, his spouse. Thus, national law must provide *locus standi* not only to the addressee of an individual act but also to its "direct victim".[76]

Safalero,[77] however, displays a restrictive view. The Italian authorities had seized remote control units imported from other Member States because they did not bear the approval stamp required by Italian regulations. The units had been imported by Safalero Srl and sold to a retailer from whom they were seized. Safalero argued that the regulations were contrary to EU law but encountered a procedural obstacle: under Italian law, opposition proceedings against confiscation could be brought only by the person who committed the administrative offence (i.e. the retailer). As a result, the importer's challenge was rejected for lack of standing. The Court of Justice accepted that the Italian regulations were contrary to EU law but noted that Safalero had been fined by the Italian authorities as the seller of the products and could challenge the fine. Its interests as an importer were sufficiently protected and, consequently, the fact that it could not challenge the confiscation against the retailer did not violate EU law. The judgment suggests that the denial of a remedy is acceptable if an alternative effective

72 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, C-83/14, EU:C:2015:480.

73 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* 2000, L 180/22.

74 *Verholen and Others v. Sociale Verzekeringsbank Amsterdam* [1991], joined cases C-87 to C-89/90, ECR I-3757, para 24.

75 Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ* 1979, L 6/24.

76 P. Oliver, "State Liability in Damages Following *Factortame III*: A Remedy Seen in Context", in Beatson and Tridimas (eds), *New Directions in European Public Law*, Hart Publishing, 1998, pp. 49-55. See further *Coloroll Pension Trustees v. Russell* [1994], C-200/91, ECR I-4389.

77 *Safalero Srl v. Prefetto di Genova*, C-13/01, ECLI:EU:C:2003:447.

remedy exists. The Court of Justice however did not enter into an assessment of the relative merits of the alternative procedural routes of challenge. The Advocate General by contrast found that Safalero's procedural restriction fell short of the principle of effectiveness and his views appear more persuasive.[78]

In *Unibet*, it was held that the principle of effective judicial protection does not require the availability of a free-standing direct action, provided another legal remedy exists which makes it possible to ensure, indirectly, respect for an individual's rights under EU law.[79] Indirect challenge however may not suffice. In *Deutsche Lufthansa*,[80] an airliner challenged a decision of the Land of Berlin approving airport charges set by the body responsible for managing the airport. The case brought to the fore the distinction between public and private law effects under German law. The Federal Administrative Court had held that the decision of a supervisory authority approving airport charges only produced legal effects in the context of the relationship between the authority and the airport managing body. It did not produce any effects *vis-à-vis* airport users. They could only challenge it indirectly in civil proceedings against the decision of the managing body asking for payment.

The Court of Justice reiterated *Unibet* but found that indirect challenge via civil proceedings did not satisfy the principle of effectiveness. The private law nature of the civil action fell short of the objectives of Directive 2009/12 on airport charges.[81] Article 315(3) of the Bürgerliches Gesetzbuch (Civil Code), in the version applicable to the dispute in the main proceedings, on which the civil action was based, focused exclusively on the economic rationality of the individual contract thus disregarding that equality of treatment among users can be ensured only if the charges are set on the basis of uniform criteria. Also, important aspects of the process leading to the approval of the airport charges or formal defects that may have been relevant to the shaping of the content of the approval decision were not subject to the jurisdiction of the civil court. In short, the private law remedy offered by national law was insufficient to give effect to regulatory obligation provided by the EU framework.

In other cases, the Court of Justice has made pronouncements of principle which may have a bearing on standing without examining the issue directly.[82] The obligation of national laws to provide standing is further underlined by two provisions. The first is

---

78 Stix-Hackl AG argued that, since Safalero had placed the products on the market, their confiscation led to adverse economic repercussions, reflected badly on its reputation, and exposed it to potential lawsuits from other retailers; also, Safalero should not be considered as a third party to the dispute as it was in a contractual relationship with the retailer from whom the goods had been confiscated.

79 *Unibet*, C-432/05, EU:C:2007:163, paras 47 and 53; *Deutsche Lufthansa*, *op. cit.*, para 61.

80 *Deutsche Lufthansa AG v. Land Berlin*, C-379/18, ECLI:EU:C:2019:1000.

81 Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (*OJ* 2009, L 70, p. 11).

82 See e.g. *Unilever* [2000], C-443/98, ECR I-7535. See also *Munoz*, discussed above.

Article 19(1), second sub-paragraph, of the Treaty on European Union which requires Member States to provide sufficient remedies to ensure effective legal protection of EU rights. The second is Article 47 of the Charter which lays down the right to an effective remedy. In fact, in the context of national remedies, the case law relies more on Article 47 than on Article 19(1).

C. – *Representative associations*

The vindication of rights can be much facilitated by empowering representative associations to bring proceedings. EU measures may expressly grant rights to such associations. This is the case, *inter alia*, in the field of equality law,[83] consumer law,[84] and data protection.[85] Encouraging public interest litigation is an effective way of promoting the enforcement of key Union policies and part of a wider strategy in which EU law has a greater say in the field of enforcement.

Directive 2020/1828 on representative actions for the protection of the collective interests of consumers[86] is a game changer. Its detailed examination falls beyond the scope of this paper.[87] Suffice it to say that the Directive requires Member States to allow representative actions before their administrative authorities and their courts brought by associations that fulfil certain requirements. "Collective interests of consumers" is defined as the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers.[88] The scope of the Directive is very wide. It encompasses, among others, misleading advertising, unfair contracts, data protection, services, food and medicinal products, travel and tourism, energy, and telecommunications.[89] It applies without prejudice to other rights

[83] See Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, *OJ* 2000, L 303/16, Article 9(2); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* 2000, L 180/22, Article 7(2); Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *OJ* 2006, L 204/23, Article 17(2).

[84] See the Consumer Rights Directive (Directive 2011/83, *OJ* 2011, L 304/64), Article 23(2).

[85] See Article 80 GDPR, discussed below.

[86] Directive 2020/1828, *OJ* 2020, L 409/1.

[87] See, among others, B. Gsell, "The New European Directive on Representative Actions for the Protection of the Collective Interests of Consumers – A Huge, but Blurry Step Forward", *CMLRev* 2021/58, p. 1365; L. Hornkohl, "Up – and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects", *Journal of European Consumer and Market Law* 2021/10, p. 189; A. Biard and X. E. Kramer, "The EU Directive on Representative Actions for Consumers: A Milestone or Another Missed Opportunity? (December 1, 2018)", *Zeitschrift für Europäisches Privatrecht* 2019, p. 249, available at SSRN: https://ssrn.com/abstract=3836928.

[88] Article 3(3).

[89] See Article 2(1) and the long list of measures stated in Annex I.

or remedies.[90] The Directive is a major piece of law reform. It goes to a considerable level of detail, *inter alia*, in determining the type of redress that representative entities may seek and requires changes to the laws of most, if not all, Member States. National laws must allow consumers to seek both injunctive relief and redress measures, including compensation.[91] This gives representative associations more powers than they have under the laws of many Member States where collective action remedies have been limited to injunctive relief.[92]

In parallel to this legislative development, a lively case law on representative actions has begun to develop. Whilst the Court of Justice takes a restrictive approach of the standing of representative associations in direct actions, it seeks to facilitate their access to national courts.

The standing of associations in direct actions for annulment is governed by Article 263, paragraph 4, TFEU. According to the case law, representative associations, whether they pursue commercial or other interests, have individual concern in three cases: (a) where a provision of EU law expressly grants them procedural powers; (b) where the association represents the interests of its members, who would themselves satisfy the requirement of individual concern; and, (c) where the association is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the act whose annulment is sought.[93] This restrictive approach renders the CJEU unsuitable for public interest litigation. It contrasts with the Court's willingness to facilitate representative actions at national level. This can be illustrated by reference to *Meta Platforms Ireland*,[94] and *Deutsche Umwelthilfe eV.*[95]

Meta Platforms Ireland[96] concerned the interpretation of Article 80(2) of the General Data Protection Regulation.[97] Article 80(1) grants to data subjects the right to mandate

90 Article 2(2).

91 Articles 7-9.

92 See https://www.pinsentmasons.com/out-law/guides/the-impact-of-new-eu-mass-actions-directive-across-europe.

93 See *Unión de Pequeños Agricultores v. Council*, T-173/98, EU:T:1999:296, para 47; *Carvalho and Others v. Parliament and Council*, C-565/19 P, ECLI:EU:C:2021:252, para 85; *Comité Central d'Enterpise de la Société Anonyme Vittel v. Commission* [1995], T-12/93, ECR II-1247; *Comité Central d'Entreprise de la Société Générale des Grands Sources v. Commission* [1995], T-96/92, ECR II-1213; *Métropole Télévision SA v. Commission* [1996], joined cases T-528, 542, 543, 546/93, ECR II-649.

94 *Meta Platforms Ireland Limited v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.,* C-319/20, ECLI:EU:C:2022:322.

95 *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland,* C-873/19, ECLI:EU:C:2022:85.

96 *Meta Platforms Ireland Limited v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.,* C-319/20, ECLI:EU:C:2022:322.

97 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (*OJ* 2016, L 119, p. 1; "the GDPR").

non-for-profit representative associations to exercise their rights on their behalf. Article 80(2) gives Member States the option to allow such associations to act independently of the data subject's mandate. A German consumer association had brought an action for an injunction independently of a specific infringement of a GDPR right and without being mandated to do so by any consumer. It complained that the practices of Meta Platforms were an infringement of the laws protecting personal data, the prohibition of unfair commercial practices, and consumer protection legislation.[98]

The Court of Justice interpreted broadly the personal scope of the representative action. It held that a consumer protection association may be covered by Article 80(1) in that it pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers.[99] Also, it held that a representative association cannot be required to carry out a prior individual identification of the person specifically concerned by the allegedly illegal data processing.[100] It suffices if the persons allegedly wronged are identifiable as a category. Furthermore, the bringing of a representative action is not subject to the existence of a specific infringement of rights. Provided that the association considers that GDPR rights have been infringed, it is not necessary to prove actual harm suffered by the data subject in a given situation.[101] The Court of Justice based its interpretation on the wording of Article 80(2) GDPR, Articles 8 and 16 of the Charter, and the principle of effectiveness. Also, in anticipation of law reform, it supported its interpretation by reference to Directive 2020/1828, even though it did not apply at the time of the judgment, pointing out that the GDPR is mentioned in Annex I of the Directive as one of the instruments in relation to which a representative action could be brought.[102]

The judgment illustrates the inter-relationship between data protection law and consumer law. It increases litigation risk for businesses since it opens the way for GDPR claims to be brought before civil courts and not only before supervisory authorities where so far, they have been mostly contested. It also opens the way for synergies and concerted action by consumer and data protection associations.

Deutsche Umwelthilfe eV[103] concerned the right of environmental associations to bring proceedings under the Aarhus Convention,[104] Article 9(3) of which requires the Contracting Parties to ensure that, "where they meet the criteria, if any, laid down in [their] national law", members of the public have access to administrative or judicial

[98] *Meta Platforms Ireland Limited*, *op. cit.*, para 51.
[99] Paras 64-65.
[100] Para 68.
[101] Paras 70, 72.
[102] Para 80.
[103] *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland,* C-873/19, ECLI:EU:C:2022:85.
[104] The Aarhus Convention has been implemented in EU law by Regulation No 1367/2006 (*OJ* 2006, L 264/13) and is an integral part of EU law.

procedures to challenge acts which contravene provisions relating to the environment. Deutsche Umwelthilfe eV challenged a decision of the German authorities granting EC type approval to certain diesel vehicles arguing that the software approved was in breach of Regulation No 715/2007.[105] The problem was that German law allowed environmental associations to contest measures authorising projects affecting the environment but not to contest decisions approving products.

The Court of Justice stated that Deutsche Umwelthilfe eV enjoyed standing directly under Union law. It reasoned as follows. It held that, under Article 9(3) of the Aarhus Convention, contracting parties may specify criteria relating to the determination of the persons entitled to bring a representative action, not to the determination of the subject matter of the action. Member States could not reduce the material scope of Article 9(3) by excluding certain categories of provisions of national environmental law.[106]

The Court also held that, while Article 9(3) does not have direct effect and cannot, therefore, be relied on, as such, to disapply a contrary provision, national law must be interpreted, to the fullest extent possible, in accordance with its requirements.[107] In any event, even if a consistent interpretation of national law could not be procured, Article 9(3), read in conjunction with Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of EU rights.[108] Thus, if a consistent interpretation was not possible, the referring court had to disapply the provisions of national law precluding an environmental association, such as Deutsche Umwelthilfe, from being able to challenge a decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007.[109]

Deutsche Umwelthilfe eV is a celebration of the principle of effectiveness.[110] It also illustrates that the direct effect of Article 47 of the Charter may make up for the lack of direct effect of other provisions of EU law. This is an important finding as it reverses the normative roles of the provisions engaged. The application of the Charter is not conditional on the direct effect of the EU provision that brings national law within its scope of application but vice versa: it may, essentially, procure such direct effect.

[105] Regulation No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, *OJ* 2007, L 171/1.
[106] *Deutsche Umwelthilfe eV*, *op. cit.*, para 64.
[107] Para 65.
[108] Para 66.
[109] Para 80.
[110] Para 67.

In *Deutsche Umwelthilfe eV*, German law provided for the right of environmental associations to bring proceedings but restricted the subject matter of the actions that could be brought. The reasoning of the Court of Justice begs the question what would happen in the hypothetical case where the law of a Member State did not provide at all for the possibility of an environmental association to bring proceedings. In such a case, also, the national law would be contrary to the requirements flowing from the combined reading of Article 9(3) of the Aarhus Convention and Article 47 of the Charter. There would still be a duty of consistent interpretation. What if that duty proved unfruitful? Could there be direct reliance on Article 9(3) of the Aarhus Convention and Article 47 of the Charter? Although under Article 9(3), Member States may lay down rules governing the determination of persons entitled to bring an action, their discretion is not unlimited. Failure to provide for any possibility of representative actions would clearly be beyond the State's discretion and the Court's reasoning leaves open the possibility that, even in such a case, an environmental association who could objectively establish an interest on the basis of its objectives, could bring proceedings.

D. – *Raising EU law points* ex propriu motu

The invocation of EU rights also depends on the extent to which EU law permits or requires national courts to raise points of EU law on their own motion. A more inquisitorial approach would enhance consumer protection but strain the adversarial nature of civil proceedings and would encounter moral hazard objections. The case law here is generous. In relation to consumers, the principle of effectiveness is applied more rigorously, and national procedural rules are held to a higher standard.

In *Océano Grupo Editorial SA v. Rocío Murciano Quintero*,[111] it was held that a national court may determine on its own motion whether a contractual clause conferring exclusive jurisdiction on the courts of the supplier's domicile is unfair within the meaning of Directive 93/13.[112] The Court of Justice held that the aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if consumers were themselves obliged to raise the unfair nature of such terms.[113] Although *Océano Grupo* referred only to a jurisdiction clause, subsequently, *Codifis*[114] extended the protection offered to consumers by holding that the unfairness of any contractual term may be raised

[111] *Océano Grupo Editorial SA v. Rocío Murciano Quintero* and *Salvat Editores SA v. Sánchez Alcón Prades and Copano Badillo* [2000], joined cases C-240 to C-244/98, ECR I-4941.

[112] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95, p. 29 ("Unfair Terms Directive").

[113] Para 26.

[114] *Codifis* [2002], C-473/00, ECR I-10875.

even after the expiry of a limitation period provided for by national law within which the validity of a contract could be contested.

The obligation of national courts to examine on their own motion infringements of EU rights extends to various provisions of consumer protection directives.[115] It is intended to redress bargaining asymmetry, being premised on the idea that the consumer is in a weak position *vis-à-vis* the supplier, as regards both bargaining power and level of knowledge.[116] Thus, the protection of consumer rights conferred by the Unfair Terms Directive requires the national system to allow a court, during proceedings seeking an order for payment or enforcement of such an order, to check on its own motion whether the terms of the contract concerned are unfair. Such inquiry cannot be left only to the court hearing a substantive action seeking a finding of invalidity of the contractual terms nor can it be made dependent on the consumer taking the initiative.[117] Another example is provided by *OPR-Finance v. GK*,[118] where it was held that a national court must be able to raise on its own motion whether a creditor has failed to comply with its pre-contractual obligation to assess the creditworthiness of a consumer under Article 8 of Directive 2008/48 on credit agreements for consumers.[119] Where that is the case, the national court must also, without waiting for the consumer to make an application to that effect, draw all the consequences arising under national law from that failure, provided always that there has been compliance with the principle of *audi alteram partem*.

As the Court of Justice has put it, to guarantee the protection intended by the consumer directives, "the imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract."[120] The case law is far reaching and requires essentially the civil judge to undertake an active role, to some extent, transforming the contestation from one between the supplier and the consumer to one between the supplier and the national court.

[115] See e.g. *Pannon GSM*, C-243/08, EU:C:2009:350; *Radlinger v. Finway*, C-377/14, ECLI:EU:C:2016:283; (Directive 93/13); *Martín Martín*, C-227/08, EU:C:2009:792 (Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, *OJ* 1985, L 372/31; now replaced by Directive 2011/83 on consumer rights, *OJ* 2011, L 304/64); *Duarte Hueros*, C-32/12, EU:C:2013:637 (Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999, L 171/12; now repealed by Directive 2019/771, *OJ* 2019, L 136/28; *OPR-Finance v. GK*, C-679/18 ECLI:EU:C:2020:167 (Directive 2008/48 on credit agreements for consumers, *OJ* 2008, L 133/66).

[116] *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, para 63.

[117] *Kuhar v. Addiko Bank*, C-407/18, ECLI:EU:C:2019:537.

[118] *OPR-Finance v. GK* C-679/18 ECLI:EU:C:2020:167.

[119] *Op. cit*.

[120] *Radlinger v. Finway*, C-377/14, ECLI:EU:C:2016:283, para 67.

The principle of effectiveness, however, does not go as far as "to make up fully for the total inertia on the part of the consumer".[121] Thus, the national court cannot exceed the limitations of the subject matter of the dispute as defined by the parties. It may only raise on its own motion the fairness of contractual terms which, although not challenged by the consumer's action, are connected to the subject matter of the dispute as defined by the parties in the light of their pleas in law and the forms of order sought; and provided that the legal and factual elements necessary for that task are available to the Court.[122]

It has correctly been observed that the Court of Justice has not imposed a general obligation "that each judge at every stage of the proceedings should check whether a term in a consumer contract is potentially unfair".[123] Nonetheless, the case law places the bar quite high: it is necessary to determine whether, having regard to the specific characteristics of the national procedure concerned, there is "a non-negligible risk" that consumers are deterred from asserting rights conferred on them by Directive 93/13.[124] This standard of fairness is somewhat elusive. Assessing whether it is reached requires a detailed examination of the applicable rules with all legal and factual circumstances being taken into account.[125] This, in turn, draws the Court of Justice into a detailed analysis of national law. Its rulings often do not just provide guidelines to the national court but offer ready-made solutions leaving little margin to the referring court of how to apply the ruling.

The guidance provided by the Court of Justice is so detailed that one can speak of the development of a hybrid form of law applicable to procedure and remedies for the protection of EU rights where the role of the Court is not confined merely to setting limits to the national rules but also providing specific instructions; and where, essentially, many elements of that body of law are a mixture of national and Union law. This, in turn, raises the issue whether the Court of Justice is the proper forum for the detailed adjudication of national procedural rules and even contractual terms.[126] Once the general principles of law in a specific area have been laid down in the case law, there is value in delegating more powers to the national courts. In this respect, the imminent reform of the preliminary reference system, where references in some subject areas are transferred to the General Court is to be welcomed

[121] See e.g. *Kušionová*, C-34/13, EU:C:2014:2189, para 56; *Vicente v. Delia*, C-335/21, ECLI:EU:C:2022:720, para 56.

[122] *Lintner v. UniCredit Bank Hungary Zrt.*, C-511/17, ECLI:EU:C:2020:188, para 34.

[123] K. Lenaerts, K. Gutman, J. Nowak, *EU Procedural Law*, 2nd ed., 2023, p. 143.

[124] *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paras 54 and 56; *Vicente v. Delia*, *op. cit.*, para 56.

[125] See e.g. *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira* [2009], C-40/08, ECR I-9579; *RTG v. Tuk Tuk Travel SL*, C-83/22, ECLI:EU:C:2023:664; *Vicente v. Delia*, *op. cit.*

[126] See e.g. *Aziz*, C-415/11, ECLI:EU:C:2013:164, where the ECJ examined in detail the contractual terms in issue.

and encouraged.[127] Once the system is established and runs, there is no reason why more subject-areas, including in the field of consumer law, should not be entrusted to the General Court.

VI. – Conclusion

The extent to which EU law affords access to consumers to the centralized EU judiciary depends essentially on two considerations: (a) the extent to which EU law grants rights and (b) the extent to which it grants remedies or controls the remedies provided by national law.

The distinction between rights and remedies is, in fact, not clear-cut and the blurring of the two is exacerbated in EU law. The extent to which EU harmonization measures provide for specific rights or remedies depends on a number of factors, including the subject area, the era when a measure was adopted, the importance attached to the policy in question, and the vicissitudes of policy making. The evolution of EU law displays a gradual transition from legislative silence to the express provision of at least some remedies or mechanisms for the vindication of EU rights. The fundamental model remains a hybrid one where EU rights are to be enforced by national remedies and procedures subject to the requirements of equivalence and effectiveness. The latter is applied with added rigour in the field of consumer law in combination with Article 47 of the Charter, although conceptually the relationship and interaction between the two remains elusive. It is submitted that the hybrid model is correct. It is not for the EU to colonise the law of procedure and remedies.

In relation to remedies, effectiveness has assumed the role of the golden standard traditionally enjoyed by proportionality in relation to rights, becoming a proxy for the heavy hand of EU primacy. The emphasis placed by the Court of Justice on effectiveness illustrates the use of double standards: if that principle were applied to assess the direct access of non-state actors to the CJEU, the outcomes of many cases on the application of Article 263, paragraph 4, TFEU would have been much different.

The enforcement of EU regulation is based on a double model. The imposition of administrative sanction by regulatory authorities which must be effective, proportionate and dissuasive, and private enforcement. The EU legal system has a firm bias in favour of the former. Whilst this is a *sine qua non* for effective compliance, the value of private remedies, which is utilized in the field of consumer law, could be further extended. The absence of strong private remedies is not the result of a coherent,

[127] See Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/P_64268/en/.

systematic analysis of the relative merits of public and private enforcement models but is dictated by the regulatory bias of the integration paradigm and a reluctance to intervene directly into the national law of obligations.[128] Still, consumer law is an area where the private law model of enforcement has been encouraged more than any other.

A new development is the empowerment of representative associations. This has been the combined result of legislative and case law developments. It is to be welcomed. Public interest litigation has an important role to play in enforcing compliance with EU obligations and the role of representative associations should be further encouraged not only in national proceedings but also before the CJEU.

Still, the legal framework must strive for a balance. Whilst consumer protection ranks high in the Union policy agenda, countervailing interests should also be taken into account, and the objectives and the economic rationale of regulation should be clearly articulated.

[128] See further O. O. Cherednychenko, "Public Supervision over Private Relationships: Towards European Supervision Private Law?", *European Review of Private Law* 2014/22, p. 37.