The enforcement of EU consumer law

Chapter 23. The enforcement of EU consumer law

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Abstract

The chapter unpacks the key features of the existing enforcement architecture of EU consumer law paying particular attention to its dual (private-public) nature. The chapter delves into the dynamic of relations between the EU and the Member States to better understand how EU consumer law enforcement is co-created and what forces drive this process. The chapter pays special attention to the ongoing transformation of the enforcement framework, from a more collaborative model of enforcement (based on appreciation of the Member States' procedural autonomy), towards a downstream ordering (centred around regulations and maximum harmonization directives which dominate the present-day EU consumer law). The chapter concludes by taking a glimpse into future developments trajectories, especially with the emergence of cooperative enforcement schemes involving both public enforcers and private entities (such as online platforms).

Keywords: consumer, transposition of EU directives, procedural autonomy, digital market, private enforcement, public enforcement

1. Introduction

The development of European consumer law first focused on the development of many consumer rights, the enforcement of which was left to Member States. In recent years, the enhancement of consumer law enforcement has been a focal point, with the adoption of several pieces of legislation added to the European Union (EU) *acquis*, and most recently Directive 2019/2161 on better enforcement and modernization of EU consumer law (the 'Omnibus Directive', Directive 2019/2161). Many of the changes put forward in this piece of legislation were the result of an assessment of the effectiveness of EU consumer law by the Commission 2017 'Fitness Check' (European Commission and Max Planck Institute for Procedural Law 2017). The European Commission identified key issues paramount for consumer enforcement. This included, for example, the limited redress options provided by certain Member States and their high heterogeneity as well as the inability for the current

regulatory environment to serve digital consumers well. This finding pertains to the use of private law instruments (such as damages) as a way of enforcing individual consumer rights, as well as varying approval for collective redress and involvement of business parties and non-governmental organizations (NGOs) in consumer protection. Such divergences led to unequal levels of consumer protection and distorted the level playing field for businesses.

Despite more attention being paid to enforcement and recent changes, the discipline in itself still lacks a coherent conceptual agenda (see Chapter 2, section 2.2.1). As a result, the enforcement of consumer law can still be described as piecemeal and somewhat clunky on many aspects, notably trans-border. There are many reasons contributing to this situation. First, EU consumer law embraces both private and public law leading to tensions in enforcement methods and sanctions (see also Chapter 2). The way to deal with disputes in consumer contracts is largely different from intervention in product safety, the fairness of market practices (with strong competition law underpinnings), data protection or sustainability concerns. EU consumer law was also founded on the assumption that the EU and the Member States are guided by the principle of procedural autonomy in their cooperation efforts, all underpinned by a vast array of domestic legal traditions. Besides, the bulk of the existing body of EU consumer law is built on directives as a regulatory tool, which, by definition, leave a certain margin of flexibility for the domestic legal orders. In addition, the enforcement of EU consumer law has remained vague regarding the exact matrix of values and policy considerations it takes into account, being largely developed by the Court of Justice of the European Union (CJEU), where needs occurred.

With this in mind, it would not be possible to review the entirety of the enforcement apparel available at EU level and/or national level. Instead, this chapter is organized around three main points. Firstly, in section 2, it outlines the main distinctive features of consumer law and its enforcement including exploring the public/private enforcement divide that is prominent in EU consumer law. It also addresses the methods used for consumer law enforcement. Section 3 reflects on the potential development trajectory of the EU consumer law enforcement, as it sketches a possible way forward notably concerning enforcement needs in digital markets. Section 4 concludes.

2. Distinctive features of EU consumer law and its enforcement

Since its beginning, EU consumer law has had a 'dual-purpose' in that it is rooted in social justice and social welfare with the protection of the weaker and vulnerable participants to the market, while conversely being prompted by European economic integration and the enhancement of consumer confidence to foster more intense exchange on the internal market. EU consumer protection seeks to assist consumers in their asymmetric relationships with traders. Indeed, a typical feature of consumer markets is the bargaining advantage entrepreneurs have thanks to their ability to unilaterally shape the content of contracts if not in their entirety, at least in their most substantial provisions (see also eg Howells and Weatherill 2005). EU law primarily addresses this imbalance by not only granting certain rights to consumers (eg in terms of information received before the conclusion of the contract), but also at the level of remedies.

2.1. Principles governing enforcement

The backbone of consumer law enforcement is formed by the Member States' procedural autonomy. Under this principle, the choice of solutions to transpose directives into national order is left to the Member States. Nonetheless, this freedom is constrained insofar as the legal instruments operating in national law must not contradict the effectiveness of EU law. A long line of CJEU decisions elaborated on this standard, setting boundaries to the States' procedural autonomy, by reference to three principles: effectiveness, proportionality and dissuasiveness (cf van Duin 2022; Grochowski and Taborowski 2022). These three principles do not merely inform the implementation of consumer directives into domestic legislation, they also steer application of EU consumer law by courts and administrative authorities as well as play a predominant role in developing EU consumer law through the decisions of the CJEU, typically following on preliminary questions of national courts. Those guiding principles of enforcement have thus influenced the exercise of procedural autonomy. Over time, procedural autonomy has also eroded because of regulatory trends that moved to adopt more constraining legal instrument and substantive rules.

The requirement of effectiveness should be understood as the need to ensure that the sanctioning mechanisms provided by the Member States in the event of a violation of consumer rights provide effective protection for the consumer. In so doing, this principle refers not only to the form of the sanction itself, but also to the mechanisms for their

application (including at the procedural level) (eg Case C-415/11 Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)). The premise of deterrence, on the other hand, refers to the ability of sanctions to discourage businesses from engaging in behaviour that violates the rights of consumers. In this sense, remedies in consumer law should have a preventive effect, not only levelling the effects of violations already committed, but also creating instruments that would make it unprofitable for a trader to engage in such behaviour in the future. Legal measures used in national orders should also be proportionate (adequate) – namely, that the chosen means of influencing consumer contracts should allow for effective protection of non-professional market participants while creating the least possible burden on traders and market turnover in general. The requirement of proportionality should be understood, in other words, as the correspondence between the legal measure (including the rationale for its application) and the purpose served by its application (eg Reich 2014; Cauffman 2014). As a result, enforcement of consumer law cannot entail negative consequences for the trader without a clear advantage for consumer protection (in terms of effectiveness and deterrence). Recently, effective judicial protection, a principle enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (CFR (cf van Duin 2022)) has become a prominent factor in shaping procedural autonomy. The CJEU case law referred to this principle usually as a benchmark for assessment whether domestic rules (mostly of a procedural nature) do not impede on consumers' access to justice (Grochowski and Taborowski 2022).

Alongside CJEU case law, procedural autonomy found itself also under pressure from EU legislation. The general regulatory strategy in EU law evolved from a 'minimal' to a 'maximal' harmonization model, substantially constraining (Micklitz 2022) the degree of flexibility granted to domestic legal orders in their shaping of legal rights and remedies. This was in stark contrast to the enforcement model, which left to Member States the task of devising the architecture of remedies and the procedure for their application without much more than a vague requirement to provide 'adequate and effective means'(so e.g. art. 7(1) of the Unfair Contract Terms Directive (UCTD, Directive 93/13/EEC)). In certain areas of the consumer market – such as the platform economy – the Commission rejected the use of directives opting for directly effective regulations (eg the Digital Services Act (DSA, regulation 2022/2065) and the Digital Markets Act (DMA, regulation 2022/1925)). In all these instances

the Member States maintain a certain degree of flexibility in setting forth remedies and enforcement schemes, but the margin of this freedom shrinks substantially.

Besides, limitations to procedural autonomy can be also found in the trend for specific EU procedural rules been introduced at Union level, notably in response to increased e-commerce and cross-border shopping. For example, the EU has now laid down some common rules for consumer redress, such as the common European framework for small claims procedure (Regulation 861/2007 on the Small Claims Procedure) or for undisputed consumer claims (Regulation 805/2004 on the European Enforcement Order). The EU also provided a separate set of rules on legal aid for the parties unable to afford the civil procedure (Directive 2002/8 on access to justice in cross-border disputes). EU law also provides substantive remedies that are binding upon the Member States. This pertains in particular to consumer sales where the EU rules set not only the catalogue of remedies for non-conformity of consumer goods with an agreement, but also directly shapes the way they can be enforced, by setting precedence of repair over other remedies (Consumer Sales Directive 2019/771). The EU remedies in the form of damages were also established for product liability (Product Liability Directive 85/374), and for other sectoral acts (such as compensation for delayed or cancel flights in Regulation 261/2004 on air passengers' rights).

2.2. Methods and trends in the enforcement of EU consumer law

Enforcement in EU consumer law is organized around two main goals: remedying individual infringements and providing sufficient deterrence to avoid misconduct at scale, thus preserving the efficiency of consumer markets. In so doing, EU consumer law aims to safeguard both the fairness of individual transactions and the proper functioning of the consumer market. Enforcement in consumer law is, by its very nature, multi-dimensional. It is straddling individual enforcement and collective enforcement as well as private and public enforcement.

In most instances, the enforcement of consumer law rests on a combination of those methods of enforcement, although some legislation may favour a route over the other (see Cherednychenko 2020; see also Chapter 2, section 3.1.). This is for example the case for off-premises and distance contracts or consumer credit agreements that rely more specifically on the individual taking action (see especially Consumer Credit Directive 2008/48). By contrast, regarding quality and safety of goods, including food products (see eg Food Law Regulation

178/2002) a collective and public enforcement approach is favoured, whereby consumers either act as a group, or see their interests represented by consumer associations or defended by national enforcement authorities intervening on the market (so especially Directive 2001/95 on general product safety and Regulation 765/2008 on requirements for accreditation and market surveillance relating to the marketing of products).

While EU enforcement originally very much focused on individual rights, individual action have increasingly been pushed out of courts and towards ADR. The EU harmonization of collective consumer interest has progressed to offer a route of action to consumers acting together as well as a reinforcement of the powers that are grated to public authorities to act in the collective interest of consumers. Those trends very much echo the more general trends in European private law (see Chapter 2, section 2.2.).

2.2.1. Growing use of ADR

Modern consumer law recognizes the possibility of using various forms of out-of-state enforcement of consumer protection instruments (see also Chapter 2, section 2; Chapter 5). This primarily refers to the use of various forms of private regulation in the consumer market, where private entities can become intermediaries both in rule-setting and enforcement (cf Talesh 2015; Busch 2020). Recently, elements of this concept have been introduced in the DSA, which delegates some of the powers related to the settlement of consumer disputes to the platforms themselves, so eg Articles 20-21 of the DSA (see part 3.2.3).

The EU law puts also strong emphasis on the out-of-court consumer dispute resolution and enforcement. They are deemed to provide a cheaper and more efficient alternative to judicial enforcement. Building on existing alternative dispute resolution (ADR), online dispute resolution (ODR) has come to offer a way to access ADR online. The ADR Directive (2013/11) and allied ODR Regulation posits that consumers should enjoy access to 'high-quality, transparent, effective and fair' mechanisms for settling disputes arising from sales and service agreements. Such settlement schemes ought to be available for consumers without a need to hire professional legal support and – if not gratuitous – should be available only for minor fees. The ODR Regulation (524/2013) established the European ODR Platform run by the European Commission. It provides consumers with a facility for submitting complaints that are translated into a relevant language and forwarded to a trader. Along with passing this information, the Platform also funnels complaints towards the most relevant ADR entity and

provides parties with a 30-day period for making a decision about accepting the ADR service (otherwise the case gets closed).

The success of this push towards ADR and ODR has so far been limited, although it may vary from country to country. Empirical evidence in the Fitness Check demonstrates that EU-wide only a small fraction of consumer disputes (5.5%) is channelled into out-of-court resolution (with a 54% satisfaction rate). This may be partly explained because of unsatisfactory education about alternative settlement modes amongst consumers and traders and their limited practical experience. At the same time, as the Fitness Check demonstrated, only 51% of traders was aware of the ADR schemes and merely 30% had participated in such scheme before. Even lower figures describe application of the ODR procedure. For 2019, only in 2% of cases a consumer and a trader agreed for a settlement entity hinted by the Platform. Moreover, in many instances a substantive obstacle for out-of-court resolution is low availability of dispute resolution entities in some Member States, especially in certain sectors of consumer market (see also European Commission 2019). For instance, while some domestic systems have well-developed settlement schemes for consumer financial services, the similar schemes are less widespread or less effective for consumer sales or tourist services.

2.2.2. Reinforcement of collective enforcement mechanisms

Collective enforcement (see also Chapter 2, section 2) is the result of a division of tasks between public regulatory authorities and consumer organizations. The EU Member States – within the frames of procedural autonomy – opted for various models in drawing the boundary between those two actors. While some jurisdictions (such as Poland and Norway) put stronger emphasis on public enforcement bodies, others (like Italy) allocate more tasks upon consumer NGOs. In certain jurisdictions (eg in Germany) the enforcement model builds on a two-tier structure, composed of the State authorities and NGOs that are supported by the State (on further comparative observations in this regard see the Fitness Check).

Notably, public authorities and consumer organizations have instruments at hand to support individual enforcement. Depending on the model adopted in a particular domestic jurisdiction, the measures in question may range from initiating proceedings or entering them in support of a consumer, assisting in evidence collection or supplying courts with *amicus* briefs.

The collective enforcement of EU consumer law is framed by EU legislation at the procedural level. Firstly, under the Representative Action Directive (2020/1828), Member States are obliged to designate 'qualified entities' (consumer NGOs or state authorities) entitled to initiate proceedings to protect the collective consumer interests. Notably, the entities designed in this way may apply not only for injunctions to ban market practices that harm consumer interests, but also for redress measures, such as damages (eg when a defective product harmed a group of consumers). In this way, apart from empowering consumer protection entities in the Member States, the Representative Action Directive also aims to provide a coherent framework for collective enforcement across all the Member States, regardless of various domestic approaches concerning consumer class action. It is worth noting that the Representative Action Directive repealed an earlier Consumer Injunctions Directive (2009/22) which made the first attempt to institutionalize collective consumer redress in EU law. The Representative Action Directive makes a substantial step forward in this regard, especially since the representative action has a much broader scope than the 'old' injunction scheme. While the former act allowed consumers to claim prohibitory injunctions only, the representative action sets a framework for claiming the whole range of remedies, including damages.

In addition, in-depth reform took place as a part of the 2018-2019 consumer law modernization exercise (cf Grochowski 2021). The Omnibus Directive modified several EU consumer acts and harmonized rules on penalties for market practices that violate collective consumer interests (including eg use of unfair contract terms and misleading information – see Articles 1–4 of the Omnibus Directive). The newly enacted provisions put especially strong emphasis on the harmonization of the criteria used by domestic courts and administration to evaluate the severity of consumer harm and adjust the intensity of the sanction (such as a financial penalty) accordingly. In this way the EU law opted for constraining procedural autonomy of Member States in return for higher predictability of enforcement across the Single Market.

2.2.3. Towards more widespread public intervention in the enforcement of consumer law

Consumer law is traditionally enforced via a mix of private and public enforcement routes. EU consumer law (as opposed, for instance, to the United States model) builds strongly on the private law regulatory toolbox (see Chapter 2). The bulk of consumer law rules created

by the EU protect consumers within the process of contracting – and, from the structural perspective – belong to private law enforced by civil courts. In particular, most of the remedies provided by EU consumer law is associated – directly or implicitly – with clearly private law concepts, such as ineffectiveness of a contract clause (Article 6(1) of the UCTD), compensation (Product Liability Directive) and restitution of a performance that lost *ex post* its legal ground due to the unfairness review (see Micklitz and Reich 2014). All these remedies are, naturally, enforceable under the general rules of civil procedure.

The pivotal role of judicial enforcement pertains primarily to instruments designed to protect individual consumer interests, where consumers can act alone or together (through collective procedures). However, the protection of the general interest – understood as the interest of consumer clusters or of the consumer population as a whole – belongs mostly to public enforcement. It is performed primarily by national market regulatory bodies, established purposefully to address consumer issues or tackling upon consumer protection within other responsibilities (cf the list of the domestic authorities participating in the Consumer Protection Cooperation Network available on the European Commission website). The range of instruments applied in this regard is substantially different from the judicial mode. It encompasses mostly remedies designed to structure market dynamics in the consumer sector (eg through merger control) or to prevent certain practices towards the general and undefined consumer communities (such as injunctions and financial penalties). It can thus be deemed to be more 'administrative' than judicial, whereby the intervention of a judge is not needed in applying the consumer law rules.

The lines dividing judicial and administrative enforcement are, nonetheless, not clear-cut. As has been said above, the enforcement schemes in consumer law are inherently discursive. With relatively rare exceptions (see section 2.3. of this chapter), the EU law allows the Member States to freely choose in what procedure and with what remedies the particular consumer rights are to be enforced. In many instances this freedom encompasses also the choice between administrative and judicial enforcement modes. One of the most vivid instances of this freedom is provided by Article 7(1) of the UCTD. Under this provision, the Member States should guarantee that 'in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'. In this way UCTD – on top of the individual protection which constitutes its core – establishes a scheme for safeguarding the collective

consumer interests by permanently removing unfair terms from any consumer contract that would be concluded in the future. In response to this provision, the Member States adopted a variety of solutions, including judicial/administrative hybrids (eg in Poland).

In the course of time the ratio of administrative enforcement schemes seems to prevail over that of judicial enforcement (see also Cafaggi 2009). This is mostly due to an evolving perception of consumer law as an instrument of market regulation, which exceeds the frames of particular agreements and individual consumer interests they incorporate (cf section 2.5.2.). This trend was reinforced further in the newly adopted rules concerning digital consumer markets, especially in the DSA. The majority of its provisions are devoted to enforcement mechanisms for regulating users' relationship with online platforms, which is predominantly a consumer relationship. These provisions are based on a two-level enforcement mechanism, carried out by national regulators ('competent authorities' and Digital Services Coordinators), and at the EU level (European Commission and European Board for Digital Services). As opposed to the bulk of the existing EU consumer rules, the DSA provides an extended catalogue of (mostly administrative) remedies and enforcement modes. Hence, although at the current stage it is impossible to identify the practical impact of the DSA, it is a notable forerunner of a new approach to consumer enforcement in EU law. First of all, it departs from the procedural autonomy paradigm and sets a uniform set of enforcement rules directly applicable across the Member States. Secondly, it keeps almost entirely silent about judicial enforcement of individual consumer rights and channels it into administrative regulation of the online market (which only subsequently can be reviewed by courts). The argument for more systematic public enforcement of consumer law in all areas not just digital has been made by scholars (see Siciliani et al. 2019).

The preference for public enforcement is growing, notably, through many reforms concerning product safety, and more recently expanding to other areas of consumer law, such as unfair commercial practices. It takes place via more active coordination as well as harmonization of enforcement procedures. For example, the EU is directly involved in coordination between consumer protection entities via the network of European Consumer Centres (ECC-Net) created to coordinate consumer advocacy across the EU Member States, Iceland and Norway. Its operation has evolved with ever closer cooperation and alignment of methods and rules.

In parallel, the EU established a network of consumer protection authorities, under the Consumer Protection Cooperation (CPC) Regulation (2017/2394). It came into force in January 2020, replacing and updating and earlier Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. The CPC Regulation aims to improve the legacy framework for cooperation between national enforcement authorities. It does so by catering for stronger mechanisms for coordination across an extended field, adopting a one-stop approach to widespread infringements, offering greater powers for 'external bodies' (including consumer organizations) in market surveillance, increasing powers in cross-border situations and allowing for agreements on compensation to be made. The CPC Regulation mandates effective cooperation between authorities in Article 6.

Furthermore, Directive 2019/2161 on better enforcement (which enables the operation of the revised CPC Regulation) provides for the amendment of four directives to strengthen the public enforcement of consumer law, fundamentally through the harmonization of effective and proportionate fines and penalties imposed by national consumer authorities. The key aim is to sanction and deter practices of traders that may generate mass harms, both domestically and cross-border.

In the European context, 'cross-border' is limited to intra-community and thus the legislation does not reach out of this geographical zone (a total of 27 countries). Within the EU however, it puts in place some strong mechanisms to deal with infringements that span several states, including:

- intra-Union infringements which harm the collective interest of consumers residing in a Member State other than the Member State in which the act or omission took place, the trader responsible is established, the evidence or assets of the trader are to be found (Article 3(2) of the CPC Regulation).
- Widespread infringements, which harm the collective interest of consumers residing in at least two Member States other than the Member State in which the act or omission took place, the trader responsible is established, the evidence or assets of the trader are to be found (Article 3(3) of the CPC Regulation).
- Widespread infringements with a Union dimension, which harms the collective interest of consumers in at least two-thirds of the Member States, accounting together

for at least two-thirds of the population of the Union (Article 3(4) of the CPC Regulation).

In those contexts, the CPC Regulation puts in place mechanisms for cooperation, including a mutual assistance mechanism (Articles 11 and 5, along with the procedures for requests of mutual assistance and rules on refusal for intra-community infringements involving two Member States under Article 14(1)-(3)) and a mechanism for authorities to assist one another and take appropriate enforcement measures to bring about the cessation or prohibition of infringements. In the event of disagreement between authorities the European Commission can issue an opinion with or without referral (Article 14 of the CPC Regulation on the role of the Commission in monitoring the procedure and its remit for intervention). The CPC Regulation also contains several powers, tools and methods for cross-border enforcement, such as provisions on sweeps (Article 29), Union wide alerts (Article 26), exchange of officials contributing to investigation and enforcement (Article 30), all contributing to a more harmonious enforcement of EU consumer law.

3. How to shape EU consumer law enforcement in the future?

There are of course many ways in which the enforcement framework in the EU could be improved, some of which may concern tweaks in texts or refinements of existing tools and methods. The below focusses on three main areas that will need urgent attention to ensure the efficacy of consumer enforcement in the future. This includes a better assessment of efficiency itself and reconciling the main tensions underlying the adoption and roll out of consumer law (in other words the goals of consumer law); looking to bridge the current digital divide between markets and enforcers supposed to oversee activities.

3.1. Better assessment of efficiency for better reforms

EU consumer law enforcement is undeniably a central issue of the EU consumer policy. It has consequently triggered a relatively substantial volume of studies accompanying both creation of consumer rules at the EU level, and the subsequent assessment of their impact (eg European Commission and Max Planck Institute 2017). The strong interest in enforcement at the level of EU policy is also reflected in a wide range of scholarly studies that tackle upon various aspects of consumer law enforcement (see also Micklitz and Saumier 2018; Rott 2018;

Cafaggi 2008; Cafaggi and Iamiceli 2017; Graef et al. 2018; Cafaggi and Micklitz 2007). At the same time, however, the enforcement of consumer law seems to be approached in a rather piecemeal way – by discussing particular institutions, rules and policy values that underline the enforcement schemes. The existing assessment of the effectiveness of the EU enforcement apparel tend to approach this issue usually from a quantitative perspective, by attempting to measure the degree of practical application of certain instruments and the levels of satisfaction following consumer claims. This approach is substantiated in a number of empirical studies, carried out both at the EU level and domestically, with the EU Consumer Scoreboard (available on the European Commission website) as one of the most prominent examples. A qualitative approach also exists, albeit more timid in the conduct of 'impact assessment' studies commissioned by the European Commission, which tends to focus on identifying qualitative hurdles in consumer law enforcement. Those studies delve into the architecture of consumer protection system in the EU and seek to identify structural deficits and regulatory needs (see eg European Commission 2022).

Against this background it is possible to distinguish two major ways of understanding the idea of 'effectiveness' of consumer law enforcement. First of all, effectiveness may be seen through the lens of political premises of consumer protection in EU law. Under this view, enforcement is effective when it allows to achieve regulatory goals prescribed by the European legislator (eg provide consumers with easily accessible redress for damages caused by defective products, or dissuade traders from misleading advertising). This way of understanding enforcement effectiveness – the most basic and intuitive for EU consumer law – should not overshadow, however, a deeper dimension of consumer protection effectiveness. The EU *acquis* perceives consumer law as instrumental to the Single Market idea, namely that the proper level of consumer protection and confidence contributes to EU economic growth and integration between the Member States' economies (cf Micklitz and Reich 2014). From this vantage point, effectiveness of consumer law enforcement should be measured not merely in terms of fulfilling the EU regulatory agenda, but also regarding the question how economically efficient (in the scale of the particular individuals and of the entire consumer community) enforcement of the particular consumer rights is (cf eg Weber 2014). These two approaches towards enforcement intertwine in legal discourses within the EU. While the CJEU case law seems to favour an aim-oriented approach, the recent policy proposals of the EU (including the 2017 Fitness Check) go towards the efficiency-based

reasoning. In any event, both approaches towards enforcement are two sides of the same coin, as they pertain to setting policy goals and executing them and thus the notion of enforcement effectiveness in the EU should be perceived as an inseparable amalgam of these two vantage points. There is however to date not much clarity as to what and how goals ought to be favoured, meaning that in the absence of a meaningful evaluation, any future changes in consumer law may possibly disappoint.

3.2. Tackling the growing digital divide between markets and enforcers

The 'Fitness Check' identified several issues concerning effectiveness of consumer redress in the online environment. This pertains, first and foremost, to the generally higher degree of consumer inexperience with online contracting, and hence their lower ability to obtain protection in the case of business' misconduct. Furthermore, many ways of consumer participation in the online market are hard to be grasped with the classical regulatory instruments of consumer market that are focused on exchange of goods and services for money, and not for consumer data (on both these issues cf Fitness Check). The future of consumer enforcement is at a crossroads. In a digital environment, the direction chosen today will impact the consumers of tomorrow.

3.2.1. Cross-border interventions

Notably one of the features of digital consumer markets is that they are cross-border. Yet, cross-border enforcement is lacking. The adoption of the CPC Regulation is directly linked to cross-border enforcement issues. Indeed, Recital 3 states:

> The ineffective enforcement in cases of cross-border infringements, including infringements in the digital environment, enables traders to evade enforcement by relocating within the Union. It also gives rise to a distortion of competition for law-abiding traders operating either domestically or cross-border, online or offline, and thus directly harms consumers and undermines consumer confidence in cross-border transactions and the internal market. An increased level of harmonisation that includes effective and efficient enforcement cooperation among competent public enforcement authorities is therefore necessary to detect, to investigate and to order the cessation or prohibition of infringements covered by this Regulation.

While the CPC Regulation at EU level has drastically improved intra-community cross-border enforcement, there is still little focus on cross-border enforcement beyond the borders of the EU despite Recital 40 acknowledging:

> The enforcement challenges that exist go beyond the frontiers of the Union, and the interests of Union consumers need to be protected from rogue traders based in third countries. Hence, international agreements with third countries regarding mutual assistance in the enforcement of Union laws that protect consumers' interests should be negotiated. Those international agreements should include the subject matter laid down in this Regulation and should be negotiated at Union level in order to ensure the optimum protection of Union consumers and smooth cooperation with third countries.

The future tense is telling, showing the gap that still exists in putting such cooperation mechanisms in place. The danger of course in being slow to respond is that international rules may move in different directions, meaning that the high level of protection at EU level may be impinged in a market where providers are mostly headquartering outside of the EU. If consumer law cannot be enforced, it may become illusory. To ensure its perennity and relevance, more work needs to go into building an international framework able to tackle these new challenges.

3.2.2. Tooling up for digital enforcement

Furthermore, it is clear from looking at the structure of digital markets, that businesses have embraced technology at scale to track, predict and influence consumer behaviours and choice (cf Riefa 2022). Helberger et al., drawing on a vast array of multi-disciplinary scholarship highlighted at length the dangers of digital markets advocating for a rethink of rules in their report commissioned by BEUC, Consumer Law 2.0 (see Helberger et al. 2021; Helberger et al. 2022; see also Riefa 2022). The work takes stock of the imbalance of power between consumers and data-powered traders who control digital environments, laying the ground for deep rooted unfair practices that tap into the knowledge businesses acquire about the collective and individual behaviours of consumers in order to maximize profits. The

democratization of artificial intelligence (AI) tools and biometric technology creates a perfect storm for the exploitation of consumer weaknesses that the current consumer law is ill equipped to curb. This is first due to an over-reliance on the 'average consumer' as a benchmark in EU consumer law, as well as a yet inadequate recognition of vulnerability at the heart of digital markets (Riefa 2022). Consumers are unable to claim their rights, often the victims of covert manipulation. This therefore leaves a gap in enforcement that ought to be filled by public enforcers.

However, so far, national enforcers have been rather timid and, in their interventions, have used their traditional tool kit, developed in the analogue era. As businesses use sophisticated technology to exploit consumers, there is an urgent need for enforcers to also tap into those tools and consider the use of technology to monitor and/or sanction industry (Riefa et all. 2022). Indeed, the use of technology in consumer law enforcement is only in its infancy. Only a handful of consumer enforcement authorities around the world are harnessing technology (that goes beyond the running of databases) in their enforcement practice (see also Riefa et al. 2022). At the same time, it also should be noted that the use of new technology in enforcement is more widely adopted in the field of financial services than in the other domains of consumer law nowadays.

However, to take effective enforcement actions against price discrimination (see eg Esposito 2020; Grochowski et al. 2022), choice architecture (CMA 2022), dark patterns, including greenwashing (in this area, see the work of the UNCTAD working group on e-commerce,https://unctad.org/system/files/official-document/tdb_ede2019_WorkingGroupToRs_en.pdf) or against AI biases (Wachter et al. 2021), enforcers need to 'tool up' to continue to meet their legal obligations. As a result, digital markets call for more focus and resources to be placed on public enforcement (Riefa 2020). Luckily some countries in the EU are amongst early adopters, with examples of such practices in Poland and the Netherlands notably, as well as the UK (although now outside of the EU). There are however some marked differences between Member States that will need addressing. Perhaps the already successful adoption of common technological tools, notably common databases and resource in the field of product or food safety, may pave the way for more 'centralized' action in the future and facilitating the pooling of resources that is so critical in this area (see OECD 2019; Hunt 2022; Riefa et al. 2022). Embracing the use of enforcement technology, or Enf Tech for short (see Riefa et al. 2022), seems inevitable. National

enforcement agencies are likely to become quickly obsolete if they cannot keep digital markets in check, potentially contributing to diminishing consumer trust and impacting on economic recovery and growth in the process. In these ways, the algorithmic tools may be used to screen the terms of service and privacy policies for unfair terms or for dark patterns in communicating with consumers, for example. In many cases, a full participation of the platforms themselves will be necessary, opening data sets to scrutiny and monitoring. This thus requires some thinking around how to make this exercise collaborative rather than antagonistic.

3.2.3. Collaborative enforcement

It will be important moving forward to continue to recognize that it is not possible for consumers and enforcers to fill all enforcement needs. At this stage, further avenues are being looked into, evolving from self-regulation and feeding into the idea of legal pluralism (see eg Mak 2020). While still rather nascent in EU law, enforcement in the DSA has been organized in collaboration with market actors. Under such schemes, certain parts of the enforcement procedure or even the setting of selected standards for enforcement can be 'outsourced' onto private parties – including those that directly contract with consumers (cf eg Van Loo 2020). In the DSA, for instance, platforms must make available to their users (including consumers) an out-of-court dispute resolution solution. Similarly, Articles 44-48 of the DSA encourage platforms to set forth standards and codes of conduct, which directly pertain to enforcement (eg to the way how certain content or certain users are to be excluded from the platform). All the delegated enforcement techniques rest on the assumption that certain market actors – due to their especially broad social outreach or market power – are particularly capable of understanding values and dynamics in the consumer community and hence, to be more efficient in setting procedures and administering remedies than the public enforcer. The major part of this outsourced enforcement capability rests on the technical infrastructures for governing users communities and managing their data that were developed as a part and parcel of the online platforms' business model. Furthermore, the trend towards the use of technology in enforcement as well as the collaboration angle links well with already established academic work that signalled a clear shift for the approach towards what Willis has coined 'performance-based consumer law' (see Willis 2017; Loyola-LA 2017; Willis 2015; Loyola-LA 2014).

The key element of this system is ex ante or ex post control by the 'outsourced' enforcement schemes. The DSA opts for a hybrid solution in this regard. While leaving a relatively broad leeway to platforms in shaping their internal enforcement architecture, it also establishes a certification framework (exercised by a Member States' regulatory authorities) for the dispute resolution entities established in this way (Article 21(3) of the DSA). In this sense, the European Commission attempts to strike a reasonable balance between considering platforms as enforcement intermediaries and holding to the public control over the enforcement milieu. In this way, the DSA provides a pioneering attempt to introduce private entity as one of the key elements of the enforcement system in consumer matters. Self-regulation has suffered from bad press in the past. It is not certain it can be fully effective, but the digital economy forces a rethink of the way in which companies can be asked to contribute to enforcement efforts, notably because 'clean' platforms and happy customers also feed into the trust consumers may lend their services.

4. Conclusions

Over the past few years, the enforcement strategies in the EU consumer law have been undergoing a profound reshaping. Although this process is yet still far from a conclusion, it is possible to identify a few threads in this development. First of all, the old 'division of labour' between the EU law and the Member States (reflected in the classical procedural autonomy principle) seems to be in demise. Building the enforcement schemes is increasingly centralized through the full harmonization of directives and regulations. In parallel, Article 47 of the CFR invigorates a more activist approach of the CJEU in creating procedural standards for the Member States. The final 'new' procedural autonomy seems, however, rather distant from taking its final shape. Apart from the growing regulatory centrality, the EU consumer *acquis* extends also the toolbox of enforcement instruments. One of the most enticing examples developed recently have been the resort to private actors as 'regulatory intermediaries'. This is, however, only one in a long line of examples of new measures created or transformed by the EU legislation and the CJEU case law. Last, but not least, the conceptual premises of the consumer law enforcement evolve alongside its legal premises. In particular, the EU scholarship and policy making develops more substantial awareness of consumer harm and the theoretic framework for grasping its economic dimension.

Reference list

Academic and policy sources

C Busch, 'Self-regulation and regulatory intermediation in the platform economy' in M Cantero Gamito and H-W Micklitz (eds.), The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes, Edward Elgar 2020, 115-134

F Cafaggi, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16 European Review of Private Law 391

F Cafaggi, 'The Great Transformation Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective' (2009) 21(4) Loyola Consumer Law Review 496

F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 575

F Cafaggi and H-W Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community' EUI LAW Working Paper No. 2007/22 (2007)

C Cauffman, 'The Principle of Proportionality and European Contract Law' in J Rutgers and P Sirena (eds.), Rules and Principles in European Contract Law, Intersentia 2014, 69-98

OO Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law' (2020) 26(1-2) European Law Journal 27

CMA, 'Online Choice Architecture: how digital design can harm competition and consumers' (2022)

F Esposito, 'Making Personalised Prices Pro-Competitive and Pro-Consumers' Cahiers du CeDIE Working Papers 2020/02 (2020)

European Commission, 'Press Release: European Commission lays the ground work for future action in EU consumer law' (2017)

European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes' COM 425 final (2019)

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM/2020/825 final (2020)

European Commission, ‘Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation: final report’ (2022)

European Commission and Max Planck Institute for Procedural Law, ‘An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 2 Procedural Protection of Consumers’ JUST/2014/RCON/PR/CIVI/0082 (2017)

I Graef, D Clifford and P Valcke, ‘Fairness and Enforcement: Bridging Competition, Data Protection and Consumer Law’ (2018) 8(3) International Data Privacy Law 200

M Grochowski, ‘European Consumer Law after the New Deal: A Tryptich’ (2021) 39 Yearbook of European Law 387

M Grochowski, A Jabłonowska, F Lagioia and G Sartor, ‘Algorithmic Price Discrimination and Consumer Protection. A Digital Arms Race?’ (2022) Technology and Regulation, Special Issue: Should Data Drive Private Law? 36

M Grochowski and M Taborowski, ‘Effectiveness and EU consumer law: the blurriness in judicial dialogue’ in F Casarosa and M Moraru (eds.), The Practice of Judicial Interaction in the Field of Fundamental Rights, Edward Elgar 2022, 236-57

N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, ‘EU Consumer Protection 2.0: Structural asymmetries in consumer markets’ BEUC (2021)

BEUC, ‘EU Consumer Protection 2.0: protecting fairness and consumer choice in a digital economy’ BEUC (2022)

G Howells and S Weatherill, Consumer protection law, 2nd edn, Routledge 2005

S Hunt, ‘The technology-led transformation of competition and consumer agencies: the Competition and Markets Authority’s experience’ CMA Discussion Paper (2022)

V Mak, Legal Pluralism in European Contract Law, Oxford University Press 2020

H-W Micklitz, 'The Full Harmonization Dream' (2022) 11 Journal of European Consumer and Market Law 117

H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) Common Market Law Review 771

H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (eds), *Enforcement and Effectiveness of Consumer Law*, Springer 2018, 3-45

OECD, 'Using digital technologies to improve the design and enforcement of public policies' OECD Digital Economy Papers No 274 (2019)

N Reich, General Principles of EU Civil Law, Intersentia 2014

C Riefa, 'Coronavirus as a catalyst to transform consumer policy and enforcement' (2020) 43 Journal of Consumer Policy 451

C Riefa, 'Protecting vulnerable consumers in the digital single market' (2022) 33 European Business Law Review 607

C Riefa et al., 'Cross-border enforcement of consumer law: looking to the future – a report to UNCTAD's working group on e-commerce, sub-working group 3: cross-border enforcement cooperation' (2022) https://unctad.org/system/files/information-document/ccpb_WG_e-commerce_cross-Border_Riefa_en.pdf.

P Rott, 'The EU Legal Framework for the Enforcement of Consumer Law' in H-W Micklitz and G Saumier (eds.), Enforcement in Enforcement and Effectiveness of Consumer Law, Springer 2018, 249-286

P Siciliani, C Riefa and H Gamper, 'Consumer Theories of Harm, An economic approach to consumer enforcement and policy making' Hart 2019

S Talesh, 'Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements' (2015) 37(1-2) Law & Policy 1

A van Duin, Effective Judicial Protection in Consumer Litigation. Article 47 of the EU Charter in Practice, Intersentia 2022

R Van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2020) 106(2) Virginia Law Review 467

S Wachter, B Mittelstadt and C Russell, ‘Bias prevention in machine learning: the legality of fairness metrics under EU non-discrimination law’ (2021) 123 West Virginia Law Review 735

F Weber, The Law and Economics of Enforcing European Consumer Law. A Comparative Analysis of Package Travel and Misleading Advertising, Routledge 2014

LE Willis, ‘Performance-Based Consumer Law’ (2015) 82 University of Chicago Law Review 1309

LE Willis, ‘Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud’ (2017) 80(3) Law and Contemporary Problems 7

Legal texts and case law

Charter of Fundamental Rights of the European Union, C 326/391

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29

Council 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 [2003] OJ L 26/41

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L 11/4

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

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165/63

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU)

2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC PE/27/2019/REV/1 [2019] OJ L 136/28

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules PE/83/2019/REV/1 [2019] OJ L 328/7

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1

Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143/15

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

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L 218/30

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165/1

Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1

Case C-415/11 Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) [2013] ECLI:EU:C:2013:164