Towards Collaborative Governance of European Remedial and Procedural Law?

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This Article examines consumer law enforcement in the EU. It shows how the effectiveness of collective and individual redress is intrinsically linked to the interplay between administrative and judicial enforcement and alternative dispute resolution (ADR). It addresses the trends and the contradictions of EU enforcement policies and their impact on national systems by looking at the role of general principles and fundamental rights, in particular Article 47 of the European Charter of Fundamental Rights (CFR). It concludes with policy recommendations concerning how the various consumer enforcement mechanisms should be coordinated at the EU and national level to ensure comprehensive and effective protection in compliance with fundamental rights.

I. Introduction: The Institutional Framework — Collective Redress and Coordination in the Light of Fundamental Rights

The enforcement of consumer rights is subject to remarkable transformations at the global, regional, and national level. The internationalization of markets,

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the globalization of trade, and the blooming of digital platforms increase the risk of widespread transborder infringements, calling for adequate enforcement responses.[1] Infringements include both violations committed by the same enterprises through subsidiaries located in different countries, and the same violations committed by independent traders in various countries. The "dieselgate" scandal over the deceptive information provided to buyers of Volkswagen (VW) cars as regards CO_2 emissions is a good illustration of global violations differently sanctioned in the United States, EU, and individual EU Member States (MSs).[2] Similar violations concerning other car manufacturers are emerging, posing challenges to both administrative and judicial enforcement bodies across the globe.[3] The interplay between judicial and administrative enforcement occurs at both the transnational and national level. MSs authorities have already sanctioned or are about to sanction car manufacturers for engaging in unfair trade practices.[4] At the same time, consumer groups and organizations are seeking remedies before

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1 *See* Organisation for Economic Co-operation and Development (OECD), Recommendation of the Council on Consumer Protection in E-commerce (2016), http://www.oecd-ilibrary.org/docserver/download/9316021e.pdf?expires=1513003123&id=id&accname=guest&checksum=C2FC3A29FE837F39F793EC8C52119859.

2 In September 2015, the U.S. Environmental Protection Agency announced that VW had equipped several vehicle models with a so-called "defeat device," software built into diesel engines that was able to recognize when a vehicle underwent an emissions test in order to change the emissions accordingly to achieve a better test result. In September 2017 the European Consumer protection network started a joint action, writing a letter to VW. Press Release, Eur. Comm'n, Consumer Authorities and the European Commission Urge Volkswagen to Finalise Repairs of All Cars Affected by Emissions Scandal (Sept. 7, 2017), http://europa.eu/rapid/press-release_IP-17-3102_en.htm. In the United States, environmental agencies and courts have already fined VW and agreed on damages following class actions. For a discussion, see Julie E. Cohen, *The Regulatory State in the Information Age*, 17 Theoretical Inquiries L. 369 (2016).

3 See, for example, the French Consumer authority investigating the activity of Fiat Chrysler, Renault and Peugeot in addition to VW. *French Probe Alleges 2 Million PSA Cars Had Engine Cheats: Le Monde*, Reuters (Sept. 8, 2017, 5:49 AM), https://www.reuters.com/article/us-peugeot-diesel/french-probe-alleges-2-million-psa-cars-had-engine-cheats-le-monde-idUSKCN1BJ12J.

4 In Italy, AGCM (the Italian consumer and competition authority) issued a five-million-euro sanction in 2016. *See Decision*, The Italian Competition Authority (Aug. 4, 2016), http://www.agcm.it/component/joomdoc/allegati-news/PS10211_Volkswagen_ENG.pdf/download.html.

national courts.[5] This Article examines the EU scenario, but the phenomenon of transborder infringements often goes beyond EU borders and requires global enforcement responses.

EU enforcement of consumers' rights by MSs is based on three pillars: administrative enforcement, judicial enforcement, and alternative dispute resolution (ADR).[6] It includes individual and collective redress. This Article focuses on the different forms of collective redress and how fundamental rights contribute to defining their interaction. Aggregation of claims and administrative enforcement addressed at infringements involving multiple consumers constitutes a potential response to the shortcomings of individual litigation, but the current European design is inadequate. There is a clear enforcement gap as regards the weaknesses of the techniques for claims aggregation deployed in various MSs' enforcement mechanisms. Incentives to aggregate, criteria for defining different and potential conflicting classes of consumers within aggregated claims, and the parameters for balancing divergent objectives between organizations and individual consumers are not well defined at the EU level.

The effectiveness of judicial protection of consumers' rights by MSs has been questioned by the European Commission and new players have proliferated, redefining the balance among different forms of enforcement: in particular between the administrative and judicial.[7] Changes are not uniform, and each substantive area follows its own pattern. Competition law differs from consumer, migration differs from nondiscrimination. When simultaneously in place, various collective redress mechanisms require coordination and possibly cooperation among enforcers.

MSs have to provide effective remedies according to Article 19 of the TEU.[8] The duty to provide effective remedies rests on the shoulders of all national institutions, not only of national legislatures. National courts have a duty to grant effective remedies to protect consumer rights created in EU legislation even when national legislators or administrative authorities fail to provide sufficient, effective, and adequate remedies. The definition of such a duty has been shaped by judicial dialogue between the national courts and

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5 See the class actions in Italy brought before the Tribunal of Venice: Tribunale di Venezia, 17 maggio 2017, n. 12489/2017 (It.) (unpublished case) (on file with author).

6 Hans-W. Micklitz & Mateja Durovic, Internationalization of Consumer Law: A Game Changer (2016).

7 *See* O. Cherednychenko, *Public and Private Enforcement of European Private Law: Perspectives and Challenges*, 23 Eur. Rev. Priv. L. 481 (2015).

8 Consolidated version of the Treaty on European Union art. 19, Oct. 26, 2012, 2012 O.J. (C 326) 1 (EU).

the Court of Justice of the European Union (CJEU).[9] The dialogue — or as is often the case, the trialogue among national courts, national legislatures, and the CJEU — has generated significant distributional consequences for enforcement power.[10] This trialogue does not necessarily constitute a deprivation or reduction of national sovereignty because it increases the protection of the rights of the citizens.

The right to an effective judicial remedy encompasses both the individual and collective right to redress. Article 47 of the European Charter of Fundamental Rights (CFR)[11] concerns the exercise of this right in adjudicatory proceedings.[12] These proceedings certainly include courts and some forms of ADR. In relation to administrative enforcement, the CJEU has opted for the principle of good administration that includes procedural guarantees like the right to be heard and the right to defense. This Article suggests that Article 47 of the CFR could also be applied to administrative proceedings when, but only when, their features are adjudicatory, especially when administrative enforcement constitutes an alternative to judicial enforcement. But, even when Article 47 of the CFR is deemed not directly applicable while the right to good administration applies, stronger coordination between the principles of the right to good administration and the right to effective judicial protection can contribute to a more effective operation of enforcement mechanisms.

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9 *See* Collective Enforcement of Consumer Law, Securing Compliance in Europe Through Private Group Action and Public Authority Intervention (Willem H. van Boom & Marco Loos eds., 2007); Fabrizio Cafaggi, *On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues, Instruments and Effect*, *in* Judicial Cooperation and European Private Law 223 (Fabrizio Cafaggi & Stephanie Law eds., 2017); Fabrizio Cafaggi & Hans-W Micklitz, *Administrative and Judicial Enforcement in Consumer Protection: The Way Forward*, *in* New Frontiers of Consumer Protection, The Interplay Between Public and Private Enforcement 401, 403 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009); Samuel Issacharoff & Ian J. Samuel, *The Institutional Dimension of Consumer Protection in* New Frontiers of Consumer Protection, The Interplay Between Public and Private Enforcement, *supra*, at 47.

10 *See* Cafaggi, *supra* note 9.

11 Charter of Fundamental Rights of the European Union art. 47, Dec, 18, 2000, 2000 O.J. (C 364) 1 (EU) [hereinafter CFR].

12 For two different perspectives see Marek Safjan & D. Dusterhaus, *A Union of Effective Judicial Protection*, 33 Y.B. Eur. L. 3, 15 (2014) (connecting the *Rewe* principles and Article 47 and suggesting that the interplay can result in four different scenarios: "superposition, coexistence, infusion and exclusivity"); and Sacha Prechal, The Court of Justice and Effective Judicial Protection: What Has the Charter Changed? (2015).

This Article focuses on the enforcement of consumer law in the EU to show how the effectiveness of collective and individual redress is intrinsically linked to the interplay between administrative and judicial enforcement and ADR. It addresses the trends and the contradictions of EU enforcement policies and their impact on national systems by looking at the role of general principles and fundamental rights, in particular at Article 47 of the CFR.

The Article proceeds as follows. Part II describes the three pillars of collective redress and their relationships. Parts III and IV examine the principle of effectiveness and Article 47 of the CFR and its impact on collective redress, with a description of various coordinating mechanisms and their correlation with the right to an effective remedy. Concluding remarks follow, suggesting that the effectiveness of collective redress depends upon the strength of institutional design concerning coordination among the three pillars: administrative, judicial, and alternative dispute resolution.

II. The Three Pillars of European Collective Redress

Collective redress in Europe is grounded on three pillars: judicial enforcement, administrative enforcement, and ADR. The first deploys courts, the second administrative bodies, the third private entities with sanctioning power grounded on private autonomy or delegated by law. From a remedial standpoint, it includes injunctions, invalidity, restitution, and compensation.[13] In case of noncompliance, private and public fines or penalties are also available. Criminal law plays a significant role at the national level. All the enforcement mechanisms are subject to the principles of equivalence and effectiveness, whereas only judicial enforcement and, to a limited extent, ADR are subject to Article 47 of the CFR. However, even if not directly applicable to administrative enforcement by administrative bodies, Article 47 plays a role in defining the overall architecture of enforcement of EU law rights.

The three enforcement systems differ both procedurally and substantively. The role of parties (consumers and infringers) is paramount in ADR, very relevant in court proceedings, and asymmetric in administrative enforcement, where consumers play a less important role than infringers. These differences are reflected in the features of enforcement, going from highly cooperative (ADR) to hierarchical (administrative). It should, however, be specified that

13 *See* European Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law art. 3, 2013 O.J. (L 201) 60 (EU).

some degree of cooperation (concerning the relationship between enforcer and infringer) has also entered administrative enforcement.[14]

A. Judicial Enforcement

Judicial protection in transborder infringements at both the EU and global level is still primarily national, even if it is based on EU substantive rules. The current framework is under scrutiny given the divergences within MSs as regards the balance and forms of collective and individual redress. The political stalemate related to judicial collective redress has forced the European Commission to use a soft-law approach at the EU level, resulting in both the Communication and the Recommendation issued in 2013.[15]

The Recommendation underlines the complementarity between public and private enforcement in collective redress, but asserts the primacy of public (e.g., administrative) over private enforcement at the EU level.[16] It includes both injunction and compensation without prejudice to current EU law, such as EU directive 2009/22 on injunctions.[17] It defines principles that safeguard individual rights and prevent abusive use of litigation. It privileges opt-in systems.[18] It applies to both judicial and out-of-court proceedings. It underlines the importance of coordination with other judicial proceedings and with

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14 See, for example, the possibility of undertaking commitments to stop the violations and remove the harmful consequences in 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) 2006/2004, 2017 O.J. (L 345) 1 (EU), http://eur-lex.europa.eu/eli/reg/2017/2394/oj; *see also* European Parliament legislative resolution of 14 November 2017 on the proposal for a regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws arts. 4, 20, COM (2016) 283 final (EU), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0426+0+DOC+PDF+V0//EN.

15 *See* European Commission Recommendation 2013/396/EU, *supra* note 13; *see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Towards a European Horizontal Framework for Collective Redress, COM (2013) 401 final (EU).

16 *See* EC Recommendation 2013/396/EU, *supra* note 13, art. 6.

17 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, 2009 O.J. (L 110) 30 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0022.

18 *See* EC Recommendation 2013/396/EU, *supra* note 13, art. 21.

administrative enforcement.[19] It indicates that administrative enforcement should precede judicial action and courts should stay proceedings if administrative authorities start an investigation of the same infringement after an action is brought before them.[20] However, the soft-law nature of the EU Recommendation allows MSs to deviate from some of the features without infringing EU law.

Before and after the 2013 Recommendation was issued, MSs have adopted legislation on collective redress.[21] More specifically, after 2013 some MSs have enacted legislation related to group actions, such as France with the adoption of the law on *actions de groupe*[22] (initially applicable only to consumer and competition law, then rapidly extended to several other areas[23]); the UK with the 2015 Consumer Rights Act, which consolidated the Sale of Goods Act, Unfair Terms in Consumer Contracts Regulations 1999 and the Supply of Goods and Services Act 1982, made some changes to rights to return faulty goods for refund, replacement or repair, and added new rights on the purchase of digital content;[24] and Belgium with the Act of 28 March 2014 (amending Code of Economic Law, Book XVII, Title II).[25]

However, none of the abovementioned legislative acts followed the EU Recommendation in all respects. For instance, the opt-in system is not an exclusive option: the UK Consumer Rights Act introduced the possibility of the Competition Appeals Tribunal (CAT) deciding whether the collective proceedings will be opt-in or opt-out. Thus, anyone residing in the UK who is within the defined class is automatically included in the action unless she opts-out.[26] Similarly in Belgium, it is left to the court to decide whether

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19 *Id.* art. 22.

20 *Id.* art. 33.

21 *See* Christopher Hodges & Stefaan Voet, Delivering Collective Redress in Markets: New Technologies (2017).

22 Loi 2014-344 du 17 mars 2014 relative à la consommation [Law 2014-344 of March 17, 2014 on Consumption], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 18, 2014, p. 5400.

23 Alexandre Biard & Rafael Amaro, *Resolving Mass Claims in France: Toolbox & Experience* (Rotterdam Inst. of Law and Econ. & Behavioural Approaches to Contract and Tort, Working Paper No. 2016/5, 2016), https://www.law.ox.ac.uk/sites/files/oxlaw/france_0.pdf.

24 Consumer Rights Act 2015, c. 15 (Eng.), https://www.legislation.gov.uk/ukpga/2015/15/contents.

25 Code de droit économique (Belg.).

26 Christopher Hodges, Collective Redress in England & Wales (unpublished manuscript), https://www.law.ox.ac.uk/sites/files/oxlaw/england_wales_1.docx (last visited Dec. 8, 2017).

an action should be opt-in or opt-out.[27] Differently, in France the group is constituted only after the decision on liability has been handed down.[28] The differences concern not only the opt-in/opt-out alternatives, but also relate to the effects of the judicial decision and its relationship with the principle of full compensation. In the area of competition law, for instance, the UK system allows the CAT to decide both a stand-alone claim based on an alleged infringement of competition law, and a follow-on claim based on a finding of infringement by the Competition and Markets Authority (CMA), or the CAT (on appeal from the CMA), or the European Commission.[29] In France, instead, the *actions de groupe* in competition law can only be "follow-on" actions; in these cases, since the infringement to competition law has already been established, the court will only decide on causation, quantum of the loss, criteria for group membership and how the final judgment will be advertised in the media.[30] These scattered national replies give rise to a legal patchwork that makes resolution of cross-border litigation difficult.[31] Hence, despite the 2013 Recommendation, the degree of European harmonization differs within collective redress, depending on the type of remedies: higher in relation to injunction, lower in relation to damages.[32]

Legislation is not the only driver of EU consumer enforcement. Rather, the CJEU is playing an active role in defining new powers and new responsibilities of national judges[33]: (1) expanding ex officio power to declare terms and

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27 Code de droit économique arts. XVII.38, XVII.43, §§ 2, 3 (Belg.).

28 Biard & Amaro, *supra* note 23.

29 *See* The Competition Appeal Tribunal Rules 2015 (UK). Note that the Council Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on diesel for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, 2014 O.J. (L 349) 1 (EU), was implemented by the UK in late 2016, and included rules on recognizing a final infringement decision of the national competition authority or a review court of any EU MS.

30 Biard & Amaro, *supra* note 23.

31 *See* Hans-W. Micklitz & Geneviève Saumier, Enforcement and Effectiveness of Consumer Law, Paper Presented at the Int'l Acad. of Comparative Law Thematic Congress, Montevideo (2016), http://tc.iuscomparatum.info/tc/wp-content/uploads/2016/09/Draft-General-Report-Enforcement-and-Effectiveness-of-Consumer-Law-MICKLITZ-SAUMIER-Montevideo-2016-.pdf.

32 This makes enforcement more difficult since often, as the Dieselgate example suggests, injunction and damages are both necessary to address cross border violations. *See supra* note 2 and accompanying text.

33 *See* Simon Whittaker, *Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law*, *in* The Involvement of EU Law in Private

practices unfair;[34] (2) shifting the burden of proof;[35] (3) defining new remedies for violations of the duties to inform;[36] and (4) determining the relationship between individual and collective redress.[37] The CJEU, through the principles of effectiveness and effective judicial protection, is therefore ensuring higher consistency between EU substantive law and national procedural laws. However, changes through the judicial process are not only incremental but also less systematic than legislative reforms. Their impact on the various MSs remarkably differs.

The empowerment of national courts, associated with new responsibilities, profoundly affects the allocation of power between judges and parties in civil proceedings. Judges can intervene and propose changes to the status of consumer, coordinate individual and collective redress, and administer remedies in addition or instead of those specifically sought by the parties, such as granting a price reduction instead of contract termination as requested by the consumer.[38] However, the consumer has the right to oppose judicial "recommendations" related to unfairness and hold firm on its original pleading. Its final right to choose the remedies remains unconstrained.[39] From this perspective, the *ex officio* power case law reduces but does not eliminate the differences between judicial and administrative enforcement, where *ex officio* powers are generally conferred on the administrative authority regardless of the remedy specifically sought by the consumer.

Law Relationships 89 (Stephen Weatherill & Dorota Leczykiewicz eds., 2013).

34 *See* Case C-243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Győrf, 2009 E.C.R I-04713 (EU); Case C-618/10, Banco Español de Crédito SA v. Joaquín Calderón Camino, 2012 EU:C:2012:349 (EU); Case C-421/14, Banco Primus SA v. Jesús Gutiérrez García, 2017 ECLI:EU:C:2017:60 (EU).

35 *See* Case C-497/13, Froukje Faber v. Autobedrijf Hazet Ochten BV, 2015 ECLI:EU:C:2015:357 (EU).

36 *See* Case C-26/13, Árpád Kásler v. OTP Jelzálogbank Zrt, 2014 ECLI:EU:C:2014:282 (EU); Case C-377/14, Ernst Georg Radlinger v. Finway a.s., 2016 ECLI:EU:C:2016:283 (EU).

37 *See* Case C-381/14, Jorge Sales Sinués v. Caixabank SA, 2016 ECLI:EU:C:2016:252 (EU).

38 *See* Case C-32/12, Duarte Hueros v. Autociba SA, 2013 EU:C:2013:637 ¶ 44 (EU).

39 *See* Case C-472/11, Banif Plus Bank Zrt v. Csaba Csipai, 2013 ECLI:EU:C:2013:88 (EU).

B. Administrative Enforcement

Lack of hard-law reform of collective judicial redress does not mean EU institutional inertia. Administrative enforcement is on the rise, growing in scope and width. Enforcement by administrative authorities has increased at both the EU and MS level since early 2000. When given the choice, as in the case of unfair commercial practices, MSs have for the most part opted for administrative enforcement.[40] Similarly, in regulated markets like telecom, energy, and certainly the financial market, administrative enforcement has been strengthened.[41] But the effectiveness of the current administrative enforcement regimes has been questioned, inducing the European Commission to propose a new design concerning not only stronger coordination across MSs, but also increasing the powers of each national authority.[42]

The present weaknesses are related to (1) the insufficient investigative and sanctioning powers of national authorities, (2) the inadequacy of coordination among authorities in EU transborder infringements, and (3) the divergences in sanctioning practices for the same infringements across jurisdictions.[43] The EU Regulation 2017/2394 concerning cooperation among consumer authorities increases the investigative power of administrative authorities.[44] The new Regulation sets the minimum level of enforcement powers that include the power to order cessation and prohibition of infringements and the power to impose penalties that have to be effective, proportionate and dissuasive.[45] National legislations will be able to increase the powers and in particular

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40 *See* European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the functioning of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), COM (2016) 284 final (EU), http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-report_en.pdf.

41 O Cherednychenko, *supra* note 7.

42 *See* Report on cooperation between national authorities, *supra* note 40; European Commission Proposal for a regulation of the European parliament and of the council on cooperation between national authorities responsible for the enforcement of consumer protection laws art. 4, COM (2016) 283 final (May 25, 2016) (EU), http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf.

43 *See* Report on cooperation between national authorities, *supra* note 40, pts. 4-6

44 *See* Regulation (EU) 2017/2394, *supra* note 14; *see also* EC Proposal on cooperation between national authorities, *supra* note 42.

45 *See* Regulation (EU) 2017/2394, *supra* note 14, arts. 9.4(f)-(h), 9.5.

the width and scope of penalties and remedies. The Regulation provides national authorities with the power to issue interim measures especially related to online content.[46] Commitments offered by the trader or sought by the administrative authority will play a very relevant function in both national and EU infringements. The new Regulation allows traders to propose in their commitments repair, replacement, price reduction, contract termination, and restitution.[47]

The Regulation excludes compensation and restitutionary remedies that as far as EU law is concerned are left to national judiciaries.[48] According to the Regulation, compensation including individual and collective redress remains outside the scope of enforcement by administrative authorities.[49] The new Regulation, however, sets only minimum standards. Individual MSs can confer on administrative authorities both compensatory and restitutionary powers. Some MSs have already introduced redress schemes administered or subject to approval by administrative authorities.[50] These schemes do not prejudice the consumers' right to access courts.[51] The current design could be further revised by the proposal concerning the revision of Directive 2009/22 on injunctions, where the Commission can recommend the use of compensatory and restitutionary remedies also by administrative authorities.[52]

The effectiveness of administrative enforcement also depends on better coordination among national enforcers. Problems arise when infringements committed in different MSs concern the same issues, but instead of being dealt with by the network of competent authorities as a transborder violation are treated as multiple domestic infringements. Sharing information and

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46 *See* European Parliament legislative resolution on cooperation between national authorities, *supra* note 14, art. 14.

47 *See id.* art. 17.

48 *See id.* art. 46.

49 *See id.*

50 Voluntary redress schemes can be submitted for approval to the CMA. They are purely voluntary and are based on opt in. Consumers who do not want to join the voluntary redress scheme are not bound. The CMA has issued guidelines concerning voluntary collective redress where undertakings have been found liable for competition law infringements. *See* Competition & Markets Authority, Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf. In the fields of finance and energy authorities have the power to impose collective redress schemes on the undertakings responsible for infringements.

51 *See id.* § 1.30.

52 Directive 2009/22/EC, *supra* note 17.

harmonizing investigations between MSs becomes much more difficult in that context. The reform of Regulation 2006/2004 is aimed at improving coordination among national authorities in different Member States, especially relevant in cross-border infringements. Coordination with civil and criminal national courts is not specifically addressed.[53]

According to the Regulation 2017/2394, competent authorities should start a coordinated action and could take a common position when the infringement has widespread cross-border dimensions.[54] A distinction is made between widespread infringement and widespread infringements with a Union dimension.[55] There will be an increasing coordinating role of the European Commission and the network of competent authorities.[56] One MS will have the role of coordinator.[57] Coordinated investigations may or may not lead to a coordinated action, which in turn may be concluded with a common position.[58] On the basis of the common position, the trader may propose to undertake commitments.[59] Commitments can include both the cessation of the infringement and the remedial measures.[60] Monitoring compliance with the commitments is a collective task that each authority can individually perform in its MS. Contrary, enforcement of remedies and sanctions is decentralized and each authority preserves its own sanctioning power even when a common position has been taken.[61] National procedural rules define the amount of penalties and the procedural rules to be applied in the sanctioning proceedings. No coordination mechanisms to define common proportionate and dissuasive sanctions are currently in place.

The reform defines different instruments for detecting infringements and coordinating the interaction with the trader.[62] Under the previous regime a coordinated action could be undertaken by a group of authorities while other authorities could decide not to join. According to the new Regulation 2394/2017, some instruments remain voluntary with the possibility for national authorities to act individually without joining, whereas others require mandatory

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53 *See* European Commission Proposal, *supra* note 42, art. 2.3.
54 *See* Regulation (EU) 2017/2394, *supra* note 14, arts. 17-23.
55 *See id.* arts. 3.3, 3.4; *id.* recital 28.
56 *See id.* recital 23; recital 29; art. 29.
57 *See id.* art. 17.2.
58 *See id.* art. 19. A common position does not constitute a legally binding decision for the competent authorities. *Id.* recital 30.
59 *See id.* art. 20.
60 *See id.*
61 *See id.* art. 21.
62 *See id.* recital 28.

participation by those authorities whose thresholds, regarding the harmful consequences of the infringement, have been met.[63]

One major divergence between the Commission and the Parliament concerns the degree of institutional autonomy of MSs and their freedom to define the relationship between administrative enforcers (when multiple authorities have enforcement powers) and the interaction with courts exercising judicial review.[64] The initial Commission approach adding compensation to injunctions and penalties as part of the administrative toolkit has been rejected by the Council and the Parliament.[65] Clearly the tension between uniformity and diversity emerged in the interaction between Commission, Parliament, and Council.

The differences between judicial and administrative enforcement remain significant: the power of the judge in civil proceedings is still limited by the perimeter defined by the parties with the modifications produced by CJEU case law; on the contrary, most administrative authorities can start investigations *ex officio* and define the scope of the inquiry, and the sanctions.[66] Judicial enforcement will remain relevant and cover both compensation and injunctive relief, but its impact on collective harm will probably be more limited. Given the envisioned stronger degree of cooperation among consumer protection authorities and the higher level of harmonization, it is likely that administrative enforcement will pave the way and judicial enforcement will follow.

C. Alternative Dispute Resolution (ADR)

The third pillar of European consumer enforcement is ADR.[67] The consumer ADR directive 2013/11 aims to provide effective individual and collective redress to consumers.[68] Under the Directive MSs have a duty to establish an ADR system for consumers that has to be certified and audited by public authorities and comply with the principles of expertise, independence, impartiality, transparency, effectiveness, fairness, liberty, and legality. The ADR directive leaves the option between voluntary and mandatory, but requires those MSs

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63 *See id.* arts. 21 *et seq.*

64 *See id.* art. 7.

65 *See* European Commission proposal, *supra* note 42.

66 *See* Cafaggi, *supra* note 9.

67 *See* Christopher Hodges, Law and Corporate Behavior: Integrating Theories of Regulation and Enforcement (2015).

68 *See* Council 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, 2013 O.J. (L 165) 63 (EU).

which opt for mandatory requirements to ensure the right to access the court.[69] MSs have used different models in continuity with their traditions: some deploy an ombudsperson, others use arbitration-like regimes, others mediation. Some are purely private, others are semi-public.

The use of ADR in consumer disputes has so far been limited and the incentives to use ADR seem inadequate, especially with regard to traders' incentives.[70] Problems concern costs and compliance with decisions by traders. If consumers were to be given free access to ADR, the costs of the system would be entirely borne by traders, which may dis-incentivize them from joining. Compliance with ADR decisions is a relevant issue in nonregulated markets. Compliance with ADR in regulated markets, where administrative enforcers can use moral suasion, is higher. Cooperation between ADR and administrative enforcers seems to work more effectively than cooperation between courts and ADR systems.[71]

ADR procedures have primarily been used as instruments for solving individual disputes.[72] They are designed to make solution of the dispute faster and cheaper for the consumers, but do not generally provide for mass dispute mechanisms that remain under the control of judicial and administrative enforcement, but for a few exceptions.[73] Hence, while ADR procedures can be applied within a judicial or administrative system and they must be coordinated with the two enforcement mechanisms, they do not yet provide an adequate solution to mass harm and collective redress.[74] However, there are a few examples of ADR collective redress in the area of competition law infringements and further developments of collective redress via ADR is to be expected.

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69 *Id.* art. 9.

70 *See* Pablo Cortes, *Conclusion: Ensuring the Provision of Consumer Dispute Resolution*, *in* The new Regulatory Framework for Consumer Dispute Resolution 447, 459 (Pablo Cortes ed., 2016).

71 *See id.* at 460.

72 *But see* Commission Recommendation 2013/396/EU, *supra* note 13, art. 26 ("The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case.").

73 *See* Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 Theoretical Inquiries L. 671 (2014).

74 For a different perspective, see Christopher Hodges, *Mass Collective Redress: Consumer ADR and Regulatory Techniques*, 23 Eur. Rev. Priv. L. 829 (2015).

The development of ADR collective redress poses further problems concerning coordination with both administrative and judicial enforcement.[75] ADR is related with both judicial and administrative enforcement. In some countries, the ADR Directive is applicable to dispute resolution mechanisms between consumers and regulated firms prior or subsequent to administrative enforcers or private bodies under the control of administrative authorities.[76] This implies that the intersection between administrative, judicial, and non-judicial enforcement is becoming even more intricate.

The ADR Directive provides coordination mechanisms amongst ADR procedures and between ADR procedures and administrative enforcers. It does not define the mechanisms of cooperation, but it obliges MSs to ensure cooperation in cross-border cases.[77] This provision has led to different approaches to ADR transborder cooperation. Similarly, it imposes on MSs the duty to ensure coordination between ADR and administrative enforcers without specifying the modes of cooperation.[78] Coordination between ADR and courts in relation to collective redress is not defined in the Directive. Article 47 of the CFR can play an important role in defining modes of coordination beyond the mandatory/voluntary issue addressed by the CJEU in the *Menini* case, and earlier in the *Alassini* case.[79]

The applicability of ADR mechanisms not only to purely private enforcers but also to administrative bodies poses challenging questions concerning the sequence between different proceedings in light of the principle of effectiveness. When ADR is mandatory, the individual consumer might be forced to begin an ADR procedure even if she can subsequently withdraw and begin a judicial action or lodge a complaint before an administrative authority. The mandatory

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75 *See* Pablo Cortes, *The New Landscape of Consumer Redress*, *in* The new Regulatory Framework for Consumer Dispute Resolution, *supra* note 70, at 17, 34; Christopher Hodges, *Consumer Redress: Implementing the Vision*, in The new Regulatory Framework for Consumer Dispute Resolution, *supra* note 70, at 351, 360.

76 In Italy, the procedures before Banca D'Italia, Consob, AGCOM, and AEEG are considered to be ADR and the Directive is applicable to them. *See* Italian Consumer code art. 141 oxies. The financial arbitrator has adjudicated a claim concerning unfair commercial practices by an Italian bank making reference to the decisions issued by the consumer protection authority (AGCM). *See* ACF 5/2017, www.consob.it (last visited Dec. 7, 2017).

77 Council Directive 2013/11/EU, *supra* note 68, art. 16.

78 *Id.* art. 17.

79 *See* Case C-75/16 Menini v. Banco Popolare Società Cooperativa, 2017 ECLI:EU:C:2017:457 (EU); Case C-317/08 Alassini v. Telecom Italia SpA, 2010 ECLI:EU:C:2010:146, ¶ 67 (EU).

nature must be balanced with the consumer right to access judicial remedies.[80] An open question is related to the mandatory nature of the ADR for the trader and, as a result, whether the trader should enjoy similar legal protection by Article 47 of the CFR to that of the consumer.[81]

Paradoxically the Directive marks the end of conventional forms of ADR. On the one hand, the national dispute resolution systems have to be accredited and controlled by public entities,[82] but on the other hand, it is clear that the national dispute resolution systems are not alternative but complementary to judicial and administrative dispute resolution regimes. ADR do not operate instead of administrative and judicial enforcement but in addition to them. This change from alternative to complement is not only nominal but redefines the approach to ADR and its voluntary and contractual nature.

The consensual nature of ADR can increase cooperation between infringers and (potentially) injured consumers and can provide faster and cheaper remedies when individual claims are of low value and incentives to bring collective actions before courts may be limited. But a system of private international law of private nature should be designed in order to define lex fori and applicable laws in transborder disputes before national ADRs.

III. Coordination Between Enforcement Mechanisms and Article 47 of the CFR

The new institutional design by the EU Regulation 2017/2394 remains weak on the coordination between courts and administrative enforcers at both the national and EU level.[83] Three potential approaches can be found in national

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80 See the dialogue among Italian courts after the CJEU decision in *Alassini* as regards the possibility for the Court to suspend the proceeding (or not to admit the claim) in case of a mandatory settlement procedure, leading to different positions between the Supreme Court and the first instance courts. *ACTIONES Platform*, Eur. Univ. Inst., https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONESplatform (last updated Nov. 15, 2017) (Module on Consumer protection).

81 *See* Cortes, *supra* note 70, at 38.

82 *See* Council Directive 2013/11/EU, *supra* note 68, art. 20.

83 Interestingly, the reference to coordination is made to allow a competent authority to decline joining a common action. *See* Regulation 2017/2394, *supra* note 14, art. 21.3:

> A competent authority may decline to take part in the common action for one of the following reasons:

legislations concerning the relationship between administrative and judicial enforcement: alternative, complementary, and independent.

1. The alternative option forces a choice between judicial and administrative; once one avenue is taken the other is precluded.
2. The complementarity option allows both enforcement forms, but requires that the two be structurally and functionally distinguished. The temporal dimension, whether simultaneous or sequential, is an important variable of such a distinction. Enforcement complementarity characterizes the content of the sanctions and remedies administered by courts and administrative bodies.
3. The independence option considers the two enforcement mechanisms to be independent of each other, with potential overlaps and divergent results.

Nowadays, most of the consumer areas are characterized by lack of explicit coordination mechanisms, which corresponds with the third option. This seems to be the result of omission rather than the expression of a conscious institutional design. This approach brings about negative consequences. Administrative authorities can reach different results from courts. The same activity can be considered a violation by one enforcer but not by the other. But even when enforcers reach the same conclusion, coordination is needed to ensure complementarity of remedies and consistency between sanctioning approaches. The same remedies, like injunctions, can be issued by both enforcers and there are no mechanisms to coordinate their effects.

The option that makes the two enforcement mechanisms alternative ones seems to be highly problematic in the light of Article 47 of the CFR. Limiting the option to administrative enforcement can represent a clear violation of the right to effective judicial protection. Consumers cannot be deprived of their right to access court and to seek a judicial remedy. The complementarity option implies that both mechanisms may work together, adopting a coordination mechanism that may or may not impose sequentiality. This option seems consistent with the right to effective judicial protection if some conditions are met.[84]

Complementarity with sequentiality has been adopted in competition law infringements. The scheme adopted by Directive 104/2014 in relation to damages for competition law infringements defines coordination for follow-

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(a) judicial proceedings have already been initiated concerning the same infringement against the same trader in that Member State;

(b) final judgment or a final administrative decision has already been passed in respect of the same infringement against the same trader in that Member State.

84 *See infra* note 112 and accompanying text.

on actions, making administrative findings binding on courts.[85] The binding nature concerns the infringement, whereas causation and damages remain a matter for judicial proceedings.[86] Similar rules to those in competition law might be adopted across the board in consumer law, but they should specify the functional allocation of tasks among enforcement regimes.

Absent clear legislative prescriptions, the CJEU has provided some guidance to MSs about the principles that should be complied with when exercising procedural autonomy.[87] It has become clear that fundamental rights and general principles like equivalence and effectiveness play, and will continue to have, a paramount role in shaping enforcement mechanisms not only at the EU but also at the MS level. Both European and national institutions have to comply with the right to effective judicial protection when adopting and implementing EU legislation.[88] The duty to respect effective judicial protection binds not only the legislator but also the executive, the judiciary, and those independent administrative authorities that exercise adjudicatory power.[89] National courts, even in the absence of specific legislation, are required to provide right-holders with effective remedies by using consistent interpretation techniques or by making preliminary references to the CJEU.[90] The CJEU, making use of the principle of effectiveness and, later, of the right to an effective judicial protection,[91] has redefined the relationship between

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85 *See* Council Directive 2014/104, *supra* note 29, art. 9. On the directive, see Ioannis Lianos, Peter Davis & Paolisa Nebbia, Damages Claims for the Infringement of EU Competition Law (2015).

86 *See, e.g.*, Legislative decree 3/2017 implementing Directive 104/2014 (It.). Only affirmative findings are binding. If the administrative authority decides that no infringement has occurred, such a finding would preclude the consumer from bringing a standalone action against the undertaking.

87 *See* EC Recommendation 2013/396/EU, *supra* note 13.

88 *See* Case C-617/10, Åklagaren v. Hans, 2013 EU:C:2013:280 21 ¶ 17 (EU).

89 *See* Case C-119/15, Biuro Podróży Partner v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, 2016 ECLI:EU:C:2016:987 ¶¶ 26, 27 (EU).

90 *See* Case C-213/89, The Queen v. Sec'y of State for Transp., 1990 E.C-213/89.R (EU). On the different techniques, see the publications stemming from the JUDCOOP project: Ctr. For Judicial Coop., Eur. Univ. Inst., European Judicial Cooperation and Fundamental Rights: Practical Guidelines (2014), http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/JUDCOOPdeliverables/JUDCOOP%20Guidelines%20-%20Multilingual%20version.pdf.

91 *See* CFR, *supra* note 11, art. 47.

individual and collective redress and, to a more limited extent, between judicial and administrative enforcement.[92]

Article 47 of the CFR and the right to an effective remedy have institutional implications for the balance between individual and collective redress and for the relationship between judicial and administrative enforcement. The jurisprudence of the CJEU, using the principle of effectiveness, has led to the reallocation of powers between national institutions and between public enforcers and private litigants. The CJEU has established the complementarity between collective and individual redress, focusing on the relationship between injunctions and invalidity of unfair terms.[93] Proceedings related to individual actions seeking restitution for unfair terms declared void cannot be automatically suspended, waiting for the judicial or administrative decisions on injunctions.[94] The principle of complementarity is likely to have a broader scope with an impact on the substantive relationship between remedies even beyond unfair contract terms.[95]

Only recently has the CJEU explicitly examined the relationship between administrative and judicial enforcement in the area of data protection. The Court has referred to Article 47 of the CFR to determine the lawfulness of an MS legislation (Slovakia) that makes access to courts conditional upon the exhaustion of administrative remedies.[96] The CJEU has recognized that mandatory sequentiality (imposing the exhaustion of administrative remedies before making access to the court available) is a limitation of Article 47.[97] Nonetheless it stated that the limitation is allowed if the duration of the proceeding and its costs are not excessive.[98] On the one hand, it has become clear

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92 *See* Case C-119/15, Biuro Podróży Partner v. Prezes Urzędu Ochrony Konkurencji i Konsumentów 2016 EU:C:2016:987 (EU). For a more detailed analysis, see Fabrizio Cafaggi & Stephanie Law, *Judicial Dialogue and European Private Law: Introductory Remarks*, *in* Judicial Cooperation in European Private Law 1 (Fabrizio Cafaggi & Stephanie Law eds., 2017).

93 *See* Case C-381/14, Jorge Sales Sinués v. Caixabank SA, 2016 ECLI:EU:C:2016:252 (EU).

94 *See* J.M. Fernandes Seijo, La Tutela de los Consumidores en los Procedimientos Judiciales [The Protection of Consumers in Judicial Proceedings] 133 (2017) (Spain).

95 See the judgments by the Constitutional Court and the Supreme Court in Spain interpreting the impact of Sales Sinues in relation to the res judicata effects of collective action in the decision Tribunal Supremo, 24 February 2017.

96 Case C-73/16, Puškár v. Finančné riaditeľstvo Slovenskej republiky, 2017 ECLI:EU:C:2017:725 (EU).

97 *Id.* ¶ 76.

98 *Id.*

that Article 47 influences the relationship between judicial and administrative enforcement, i.e., whether they should be independent or correlated, and in the latter case whether they could be sequential. On the other hand, it is still undefined whether a similar principle applies to quasi-adjudicatory proceedings before administrative authorities.

The applicability of Article 47 to administrative enforcement is still to be determined and its scope will depend on the interpretation of the term "tribunal" that is deployed in the same Article.[99] Such interpretation is partly connected with that related to Article 267 of the Treaty on the Functioning of the European Union (TFEU),[100] and to the ability to engage in judicial dialogue with the CJEU.[101] This increasing influence suggests that the principle of procedural autonomy is subject to a reconfiguration and the conventional divide between rights (EU) and remedies (MS) will be dramatically redefined.[102] EU legislation and the case law of the CJEU will increasingly influence how national enforcers administer sanctions and cast remedies. How much judicial activism will replace political deadlock is hard to predict. Clearly, judicial framing by the CJEU is likely to provide the new architecture of collective redress in the near future.[103]

Fundamental rights influence not only the relationship between administrative and judicial enforcement, but also that between ADR, judicial enforcement and administrative enforcement. Article 47 gives effect to the mandatory/

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99 The CJEU has been asked to clarify issues when national courts exercising judicial review over administrative authorities have submitted preliminary references. *See ACTIONES Platform*, *supra* note 80 (Module on the Right to an effective remedy).

100 Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

101 *See* Case C-503/15, Ramón Margarit Panicello v. Pilar Hernández Martínez, ECLI:EU:C:2016:696, ¶¶ 27, 37-38 (2016).

102 *See* Hans-Wolfgang Micklitz, *The ECJ Between the Individual Citizen and the Member States — A Plea for a Judge-Made European Law on Remedies*, *in* The European Court of Justice and the Autonomy of Member States 349, 373 (Bruno de Witte & Hans-Wolfgang Micklitz eds., 2011).

103 *See* Michal Bobek, Michal Bobek, *The Court of Justice, the National Courts, and the Spirit of Cooperation: Between Dichtung and Warheit*, *in* Research Handbook on EU Institutional Law 353 (Adam Lazowski & Steven Blockmans eds., 2016); Michael Bobek, *Talking Now? Preliminary Rulings in and from Member States*, 21 Maastricht J. Eur. & Comp. L. 781 (2014); *Why There Is No Principle of Procedural Autonomy of the Member States*, *in* The European Court of Justice and the Autonomy of the Member States, *supra* note 102, at 305 (provocatively stating its non-existence).

voluntary distinction, granting a right to access the court when consumers are dissatisfied with the outcomes of ADR.[104] Sequentiality is admissible even when ADR is mandatory, insofar as it does not prevent access to the court. MS legislation, making access to the court conditional upon the prior use of mediation, is compatible with Article 47 to the extent that both duration and costs are not excessive.[105]

The voluntary/mandatory distinction concerning ADR and judicial enforcement differs from the rationales that should ground complementarity between administrative and judicial enforcement. As mentioned, ADR is compatible with both administrative and judicial enforcement, and an appropriate institutional design should determine how a single ADR regime should complement both administrative and judicial enforcement. A second important feature is the relationship between individual and collective redress when, for example, the individual dispute is resolved by ADR and the collective dispute by judicial or administrative enforcement.

Coordination is needed not only among collective redress mechanisms that involve a number of consumers and traders for the same violations, but also between collective and individual mechanisms. It can happen that individual consumers bringing an action before an ADR body are subsequently involved in an administrative proceeding concerning an unfair term and/or a collective action before a court. How should these mechanisms be coordinated so as not to produce divergent results? The structural coordination has to comply with the principle of effectiveness and that of the right to an effective remedy both for individuals and for collective entities like consumer organizations.

IV. Rethinking EU Collective Redress Architecture in Light of Fundamental Rights

The European level is increasingly exercising both legislative and coordination power over enforcement mechanisms with the limits on collective redress outlined above but the institutional design is far from perfect. The current framework has been briefly described above. The erosion of procedural autonomy via the principle of effectiveness, that of sincere and loyal cooperation, and the application of Article 47 of the CFR produces at least three effects: (1) a shift from decentralized to shared and dialogical enforcement of consumer

104 *See* Case C-75/16 Menini v. Banco Popolare Società Cooperativa, 2017 ECLI:EU:C:2017:457 (EU); Case C-317/08 Alassini v. Telecom Italia SpA, 2010 ECLI:EU:C:2010:146, ¶ 67 (EU).

105 *See Menini*, ECLI:EU:C:2017:457 ¶ 67.

law between EU and national enforcers, (2) the empowerment of national judges via changes in the interpretation of national procedural rules driven by CJEU jurisprudence, and (3) a recombination of administrative and judicial enforcement in light of general principles, such as the right to effective judicial protection and the right to good administration.

Collective redress addresses both deterrence and compensation gaps related to individual claims. Individual low-value claims and claims whose pecuniary value is hard or costly to determine often go uncompensated because they are too expensive to litigate. Judicial, administrative, and ADR procedures can provide a complementary response to such gaps. ADR and court proceedings can provide forms of claims aggregation. Claims aggregation at both the domestic and, even more, the transnational level is strongly linked to the right to effective judicial protection. There are no express rules concerning claims aggregation at the EU level. The regulatory gaps in Regulation 44/2001[106] make it difficult to apply its article 16 concerning forum choices by the consumer.[107] Administrative enforcement can also contribute to more effective and consistent consumer protection. Decisions by administrative bodies against unfair commercial practices produce effects towards a class of consumers affected by the same violation of one or multiple infringers. They represent a form of collective redress.

The urgency of a more coherent strategy for collective redress in Europe is clear. Collective redress is ever more the result of a combination of efforts among different enforcement systems whose interaction has been inadequately designed. Judicial and administrative enforcement at the EU and national level lack sufficient coordination regarding collection of evidence and a clear distinction between the remedies respectively available before courts and administrative authorities. Remedies like injunctions or corrective measures can be provided by both administrative and judicial enforcers; they can overlap and there is no common proper understanding of their effectiveness, proportionality, and dissuasiveness. The link between injunctions, removal of harmful consequences, and compensation is not well defined.
Collective redress through ADR is still very fragmented and not well connected with administrative and judicial enforcement both functionally and structurally.

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106 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 012) 1 (EU), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML.

107 *See* Case C-498/16, Maximilian Schrems v. Facebook Ireland Ltd., 2017 ECLI:EU:C:2017:863 (EU) (AG Bobek determining that article 16 of Regulation 44/2001 is not applicable to assignment of clains).

ADR procedures complement the two enforcement mechanisms but cannot and should not replace them.[108] Institutional changes should strengthen both vertical and horizontal cooperation in the enforcement of European consumer law, in light of the Charter of Fundamental Rights.

Changes driven by the application of fundamental rights have happened not only between enforcement mechanisms but also within them. The influence of fundamental rights over the powers and responsibilities of judges has been remarkable. Article 47 of the CFR applies to all judicial enforcement procedures, including administrative and criminal proceedings, and to adjudicatory proceedings within ADR.[109] The design of follow-on regimes within civil enforcement and between administrative and civil institutions may affect the effectiveness of remedies and, therefore, the protection of consumer rights.

In addition to affecting the more conventional procedural and substantive features of enforcement, fundamental rights and specifically Article 47 play an institutional function; they contribute to shaping the overall enforcement architecture. Article 47 not only concerns the individual right to an effective remedy within one enforcement system, but it also impinges on the relationship between different enforcement mechanisms.[110] It affects the mechanisms of enforcement coordination, whether voluntary or mandatory, public or private, or civil or administrative. The systemic impact of Article 47 on enforcement is still to be fully seen, but if read in conjunction with the principle of loyal and sincere cooperation and with those on cooperation in civil, commercial and criminal matters, it provides MSs with guidance on how to coordinate enforcement mechanisms that are respectful of individual and collective rights to an effective remedy.

Collective redress and claims aggregation is one of the milestone of consumer enforcement, but it is probably one of the starkest expressions of the EU enforcement gap. Its effectiveness partly depends upon the coordination between modes of enforcement and content of remedies. It is

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108 *See* Council Directive 2013/11, *supra* note 68, recital 45.

109 *See* Case C-464/13, Europäische Schule München v. Silvana Oberto, 2015 ECLI:EU:C:2015:163 (EU) (the CJEU considering whether the Complaint board of the Schule can be qualified as a tribunal and verifying the existence of the specific features, allowing the Court to affirm that the exclusive jurisdiction of a non-judicial body "does not adversely affect the right of the interested parties to effective judicial protection," and determining that Article 47 applies to administrative enforcement before courts, whereas so far it has not been applied to enforcement by administrative authorities, the right to good administration being applied instead).

110 *See* Case C-199/11, Europese Gemeenschap v. Otis NV, 2012 EU:C:2012:684 (EU).

therefore strongly recommended that new EU legislation be adopted or at least the 2013 EU Recommendation on collective redress be revised to define a clearer coordination between ADR, administrative and judicial enforcement on the basis of the principles articulated by the CJEU in relation to Article 47.[111] Granting effective remedies to groups of consumers in cross-border violations is not only the expression of a fundamental right but also the institutional precondition for a well-functioning internal market. But it has to be compatible with individual rights to opt out and pursue individual remedies. The potential revised Recommendation could identify several options that MSs can follow when coordinating collective redress based on procedural economy and effectiveness. The incentives and costs differ, and procedural economy calls for the use of ADR as a preliminary filter. However, given the opt-in nature of ADR, the avenue of administrative and judicial enforcement should remain open for those who decide not to join the ADR proceeding or are dissatisfied with the results.

Collective judicial redress can be subject to sequentiality and be made conditional upon the exhaustion of non-judicial avenues. However, sequentiality has to comply with the right to effective judicial protection under Article 47 and the provisions of Directive 2013/11, both when it imposes the mandatory use of ADR and when it demands the prior exhaustion of administrative remedies.[112] The national laws can only impose a sequence between enforcement mechanisms, but cannot prohibit the ultimate access to court if the consumer is not satisfied with the outcome of the ADR proceeding or with the outcome of administrative enforcement. Efficiency and cost savings have to be balanced with the necessity to ensure prompt and adequate remedies and effective sanctions.

The interplay between the three pillars, even if the sequence were properly designed, would still be likely to produce divergent and even conflicting interpretations. A national system of preliminary references by ADR to administrative enforcers and/or courts could mitigate the risks of divergences and provide guidance in collective redress.[113] Such a preliminary reference regime would reflect the complementary nature of ADR and be in line with the right to effective judicial protection. Accordingly, ADR bodies should be able, if they feel it necessary, to submit preliminary references to national administrative and judicial bodies to shed light on the interpretation of substantive rules. Eventually, in case of conflicts among final decisions and judgments, courts

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111 *See* Case C-73/16, Puškár v. Finančné riaditeľstvo Slovenskej republiky, 2017 ECLI:EU:C:2017:725 (EU).

112 *See* Council Directive 2013/11, *supra* note 68, arts. 9.2(b)(ii), 10.1, 12.1.

113 *See* Cortes, *supra* note 70, at 465.

should be given the final power to resolve conflicts and provide a uniform interpretation of EU law at the national level.

Conclusion

EU collective enforcement of consumer law is based on three pillars: judicial enforcement, administrative enforcement, and ADR. Effective coordination for cross-border violations with global reach is a strategic feature of institutional design to ensure adequate consumer protection. Lack of adequate coordination among national courts and administrative enforcers is bringing about different responses and uneven levels of protection for consumers suffering similar or identical harms. Inadequate enforcement architecture may result in a violation of MSs' duty to provide effective remedies for EU-granted rights.[114]

This Article has shown that various modes of coordination among the three pillars can be in place: alternative, complementary, or independent. Compliance with the right to effective judicial protection (Article 47 of the CFR) suggests that complementarity is the desirable approach. Complementarity implies that the rules concerning standing, *ex officio* powers, the content of remedies, and the possibility of using evidence generated in other proceedings should be regulated to avoid overlaps and inconsistencies across enforcement mechanisms. Functional coordination should lead to structural coordination, therefore a sequence between the various enforcement mechanisms is recommended. Such a sequence can either be mandatorily defined by law or left to an agreement (soft law) among the enforcers, with a discretionary power to stay proceedings while the other enforcer is making the final decision. The most effective sequence would be to use ADR first, then administrative enforcement, and eventually the courts. This sequence would maximize the effectiveness with the highest degree of legal protection in a complementary fashion, combining deterrence and compensation. ADR represents a collaborative and faster resolution mechanism. Administrative enforcement effectively allows stopping infringement with effects to the entire class of affected consumers. Judicial enforcement provides consumers with restitution and compensation.

While Article 47 requires the right to access a court, it does not prevent MSs from defining a sequence where adjudication is preceded by other enforcement mechanisms, as long as consumers retain the right to access courts and to opt out if mandatory ADR were chosen. If, instead, MSs decide to put simultaneous mechanisms in place without a legislative mandatory sequence, they should avoid conflicting outcomes. Coordination power and conflict resolution among divergent interpretations and outcomes in consumer

114 *See* TFEU, *supra* note 100, art. 19.

enforcement should be given to courts in compliance with Article 47. Absent a legislative intervention at the EU level, it is the CJEU with the interpretation of Article 47 that will provide MSs with guidance on how to coordinate national collective redress mechanisms to ensure effective remedies.