

The access to justice of consumers in the current European Union legal system: challenges and perspectives

JOAQUÍN SARRIÓN ESTEVE*

A multilevel legal architecture governs the European Union legal framework, including consumer protection, which has been instrumental to the European integration process, reinforcing the economic, legal, and constitutional status of EU citizens and residents, as equal players in the EU market, acting both in the legislative and in the jurisprudential fields of the EU legal architecture, but with limitations.

In this paper, I present the situation and perspectives of the effectiveness of the protection of EU consumer rights, through the access to justice, largely guaranteed by CJEU case law, and I defend the potential to foster consumer participation in the infringement proceedings.

I. – The access to justice of consumers in the EU legal framework

A multilevel legal architecture governs the European Union legal framework. In other words, both EU level and national regulations apply to consumer protection.¹

* Dr Joaquín Sarrión. Associate Professor in Constitutional Law. Constitutional Law Department, Universidad Nacional de Educación a Distancia (UNED), Calle Obispo Trejo, 2. 28040 Madrid, Spain. Email address: jsarrion@der.uned.es.

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¹ Because consumer protection is included in the Lisbon Treaty in the so-called shared competences, EU Member States may adopt rules in this area, and EU harmonisation legislation is subject to the subsidiarity principle. However, although national legislative action is not excluded, the national

The Charter of Fundamental Rights of the EU (the “Charter”), in the title “IV. Solidarity”, under Article 38, recognises consumer protection, mandating that “Union policies shall ensure a high level of consumer protection”. Other constitutional national regulations also recognise consumer protection.²

Despite this recognition, the Court of Justice of the European Union (“CJEU”) case law shows, on consumer legal framework rulings, a paradox of a trade-oriented approach on national level restrictions. On one hand, the case law shows a more guaranteed vision for the positive harmonization legislation at the EU level reinforcing the scope of application of the EU consumer regulation.³ On the other hand, certain case law limits the scope of the national consumer ones, thereby restricting measures to the EU market.

Until now consumer protection has been instrumental to the European integration process, reinforcing the economic, legal and constitutional status of EU citizens and residents, as equal players in the EU market, acting in both the legislative and jurisprudential fields of the EU legal architecture.⁴

Following contributions by Cappelletti and Garth on the access to justice in order to make rights effective (1978), the political agenda turned into a debate on the most effective way to resolve conflicts and to a “value-oriented” justice, merging the ideas of corrective, distributive, formal and substantive justice.⁵

The natural evolution of the access to justice of consumers in this legal construction first implied, both at European and national level, the configuration or construction of the access of justice as a “fundamental” right. And second, the recognition of procedural rights for consumers, including access to justice for consumers in small claims.⁶

competence can be exercised to the extent that the EU has not exercised or has ceased to exercise the shared competence. Nevertheless, EU member states can maintain or introduce higher consumer protection measures according to Article 169(4) TFEU.

² See for example, Article 51 of the Spanish Constitution, Article 60 of the Portuguese Constitution, Article 76 of the Polish Constitution, Article 46 of the Constitution of the Republic of Lithuania, Article M of the Fundamental Law of Hungary, Article 19 of the Constitution of the Republic of Bulgaria. In other EU Member States there is a recognition at legal level.

³ H. UNBERATH, A. JOHNSTON, “The double-headed approach of the ECJ concerning consumer protection”, *Common Market Law Review* 2007, No 44, pp. 1237-1284.

⁴ See my previous works, J. SARRIÓN ESTEVE, “Consumer”, in A. BARTOLINI, R. CIPPITANI, V. COLCELLI (eds), *Dictionary of Statutes within EU Law*. Springer, Cham, 2019. doi: 10.1007/978-3-030-00554-2_13; and “The ECJ configuration of an EU constitutional procedural status for consumer protection”, *Questio Juris*, 12(1), pp. 39-55. doi: 10.12957/rqi.2019.36063.

⁵ See S. WRBKA, *European Consumer Access to Justice Revisited*, Cambridge University Press, Cambridge, 2014, pp. 280-283.

⁶ M. J. CATALÁN CHAMORRO, “El Derecho fundamental de acceso a la justicia de los consumidores”, *Estudios de Deusto*, 2018, 66 (2), pp. 323-346. doi: [https://doi.org/10.18543/ed-66\(2\)-2018m](https://doi.org/10.18543/ed-66(2)-2018m), p. 337.

The Charter in the title “VI. Justice”, in Article 47, includes access to justice. Taking into account the consolidated CJEU case law,⁷ the Charter defines access to justice as the “right to an effective remedy and to a fair trial”, including the right to a judicial effective remedy for rights and freedoms guaranteed by the EU law,⁸ the right to a fair and public judicial hearing,⁹ the possibility of being advised, defended and represented,¹⁰ and the availability of legal aid for persons with lack of sufficient resources to ensure the effectiveness of the access to justice.¹¹

Therefore, any right recognised in EU law, including those rights included in the status of consumer within the EU legal framework should be effectively protected with the safeguard of a remedy, i.e., an instrument to ensure the enforcement of the rights. Nevertheless, in practice, Article 47 represents a more complex key, a “chameleon-like provision, corresponding to a mosaic of functions” because of the factual, legal, and national issues and contexts, which include legitimising, strengthening, empowering, signalling, eliminatory, generative, reconciliatory, and rhetorical functions as studied and pointed by Duin.¹²

In sum, the effectiveness of EU rights, and particularly consumer rights, is linked to the consumer’s access to justice.

And it is impossible to guarantee the effectiveness of rights without access to justice. And the instruments to address the problems linked to the access to justice by consumers typically focus on reducing barriers that hinder consumers from seeking redress mechanisms and obtaining meaningful remedies.

⁷ The EU principle of effectiveness requires that EU member states provide sufficient remedies to ensure the effective judicial protection of EU law rights, including, therefore, EU law consumer rights. As see CJEU 16 December 1976, *Rewe*, C-33/76, ECLI:EU:C:1976:188, and more recently CJEU 14 March 2013, *Aziz*, C-415/11, ECLI:EU:C:2013:164. On the development of the effective judicial protection principle in Consumer Protection in the CJEU case law, see my previous work J. SARRIÓN ESTEVE, *Effective judicial protection in consumer protection in the ECJ’s Case Law*, 2014. Retrieved from <https://ssrn.com/abstract=2526709>, and the Handbook prepared by FRA and CoE in 2016, European Union Agency for Fundamental Rights and Council of Europe (2016). *Handbook on European law relating to access to justice*. Available at: <https://fra.europa.eu/es/publication/2016/handbook-european-law-relating-access-justice>.

⁸ Art. 47, paragraph 1 of the Charter: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

⁹ Art. 47, paragraph 2, first part of the Charter: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”.

¹⁰ Art. 47, paragraph 2, second part of the Charter: “Everyone shall have the possibility of being advised, defended and represented”.

¹¹ Art. 47, paragraph 3 of the Charter: “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

¹² Duin analysed CJEU case law, and Spanish and Dutch courts case law appreciating different functions for Article 47 of the Charter in the case law. See A. VAN DUIN, *Effective Judicial Protection in Consumer Litigation. Article 47 of the EU Charter in Practice*, Intersentia, Cambridge, 2022, p. 235 ff.

For example, the simplification of the current legal procedures, searching for more friendly forms and the use of online platforms, legislative harmonisation across EU member states, the establishment of cross-border dispute resolution mechanisms, collective redress mechanisms, reinforcement of consumer support services and agencies, consumer education and formation, and the improvement of the access to information by consumers. Or, perhaps more, the simplification of the EU legal framework with a Code of Consumers, including both substantive and procedural regulation.

Last, one can see a duality in the images of the “consumer”, as an (actual) person who is in the mind of the EU lawmaker and as the (projected, and finally real) person who will emerge as a result of the EU regulation.¹³

II. – EU measures that seek to enhance access to justice for consumers

There are various measures seeking to enhance access to justice for consumers and address issues related to cross-border disputes and consumer protection, including the adoption of the Directive on Consumer Alternative Dispute Resolution (ADR),¹⁴ the Online Dispute Resolution (ODR) platform regulated under Regulation (EU) No 524/2013;¹⁵ the European Small Claims Procedure established in the Regulation (EC) No 861/2007;¹⁶ the European Consumer Centre Network (ECC-Net), which is a network of independent offices co-funded by the European Commission with the aim of explaining rights and helping consumers to solve their claims;¹⁷ the regulation on cooperation between national authorities which are responsible for the enforcement of consumer protection laws for

¹³ D. LECZYKIEWICZ and S. WEATHERILL (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, Oxford, 2016, available as Oxford Legal Studies Research Paper No 9/2016 at SSRN. Retrieved from <https://ssrn.com/abstract=2743283>.

¹⁴ 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). *OJ* 2013, L 165, 18 June 2013, pp. 63-79. ELI: <http://data.europa.eu/eli/dir/2013/11/oj>.

¹⁵ 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). *OJ* 2013, L 165, 18 June 2013, pp. 1-12. ELI: <http://data.europa.eu/eli/reg/2013/524/oj>. The online dispute resolution platform is available here: <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>.

¹⁶ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. *OJ* 2007, L 199, 31 July 2007, pp. 1-22. Current consolidated version: 14/07/2017. ELI: <http://data.europa.eu/eli/reg/2007/861/oj>.

¹⁷ https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en.

establishing an EU network¹⁸; the Better Enforcement and Modernization Directive which increased transparency and strengthened existing rules and remedies for consumers;¹⁹ and the Collective Redress Mechanisms, covered recently by the Directive (EU) 2020/1828.²⁰

Although these mechanisms aim to facilitate access to justice, there has been ongoing discussion about the effectiveness and efficiency of these systems.

To that end, there are several concerns linked to the complexity of the procedures, costs, and awareness among consumers about their rights and available remedies, which could affect both the effectiveness and efficiency of the current available instruments, including the Collective Redress Mechanisms which, under the Directive (EU) 2020/1828, could be more consumer-friendly or not, depending on the EU member states implementation, given the fragmented approach at national level.²¹

The EU should seek to simplify the legislation by integrating different instruments in a harmonised code regarding consumer protection, in order to sear for effectiveness and reduce the complexity.

The effectiveness of the protection of consumers EU rights, through the access to justice, is mostly based in the application and resolution of EU member States jurisdictions. Nevertheless, the effectiveness has been largely guaranteed by CJEU case law.

III. – The access to justice at the centralized European Union judiciary for consumers

The access to justice, in the EU jurisdiction centralized level, for legal and natural persons, including associations, is limited to direct judicial mechanisms related to EU legislation (actions for annulment and actions on grounds of failure to act, Articles 263 and 265 TFEU) and the prejudicial questions to the CJEU raised by EU

¹⁸ 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 (Text with EEA relevance). *OJ* 2017, L 345, 27 December 2017, pp. 1-26. ELI: <http://data.europa.eu/eli/reg/2017/2394/oj>.

¹⁹ 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 (Text with EEA relevance). *OJ* 2019, L 328, 18 December 2019, pp. 7-28. ELI: <http://data.europa.eu/eli/dir/2019/2161/oj>.

²⁰ 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 (Text with EEA relevance). *OJ* 2020, L 409, 4 December 2020, pp. 1-27. ELI: <http://data.europa.eu/eli/dir/2020/1828/oj>.

²¹ D. FAIRGRIEVE, R. SALIM, “Collective redress in Europe: moving forward or treading water?”, *ICLQ* 2022, No 71, pp. 465-479, doi:10.1017/S0020589322000045, p. 466.

member countries courts and judges in order to clarify the interpretation or validity of EU law (preliminary rulings, Art. 267 TFEU).

Nevertheless, a complaint may also be presented to the European Commission, and the Commission could initiate, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, an infringement proceeding against the State (Articles 258-260 TFEU).

I will focus on the potential future participation of consumers in the infringement proceedings. Certainly, sanctions derived from infringement proceedings could enforce EU Member States to accomplish with EU consumer law, and stimulate consumer associations, groups, and natural persons to mobilize to check national policies and administrative practices on consumer protection.

For example, Article 228 TFEU serves as an instrument to open a space of interaction with several actors; and the process of infringement as a forum which enables the interaction between actors.²²

The Commission can initiate the investigation by its own or because of a complaint. If there is a case, the Commission usually starts the EU pilot in order to contact the Member State and try to solve the concerns. If not, or in case of urgency, the Commission can issue a formal notice letter to the Member State, starting the infringement proceeding, which could end at the CJEU. The Commission then prepares an annual report on monitoring the application of EU law, which includes the review of key aspects of the application of EU law and the infringement cases by policy areas and countries.²³

Although complaints have an important role, the complainant has no right to require the Commission to initiate proceedings or to be involved in either the administrative or the judicial phase. The administrative phase rights are particularly controversial because the Commission communicates and recognises principles for the complainant, after several concerns outlined by the European Ombudsman, updated in 2012, but also retains discretionary power on the initiation and management.²⁴

The complainant's position in infringement proceedings, both in the administrative and the judicial phases, could be reinforced by regulating participation of consumers in the proceedings with rights and obligations.

²² See D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 348.

²³ https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en.

²⁴ Regarding several complaints concerning the administrative phase, see several decisions of the European Ombudsman (1997, 2001), and the communication of the European Commission of 2002 on relations with the complainant in respect of infringements of community law (European Commission, 2002), updated in 2012 (European Commission, 2012).

On the potential paper of consumers in the access to justice, perhaps we should not only introduce changes and improvements in the Treaties and EU regulation, but also introduce a more flexible interpretation of EU legal framework to foster the access to justice.

Because the remedial system is incomplete, the CJEU has interpreted EU Treaties, and particularly the procedural regulation of actions, in a flexible way, placing more importance on guaranteeing the right to an effective remedy before a tribunal instead of a rigorist lecture of legal requirements.²⁵ This could be an option to allow consumers, natural persons or consumer associations, to participate in the judicial phase of infringement proceedings.

IV. – Conclusions

Consumer protection has been instrumental to the European integration process, reinforcing the economic, legal, and constitutional status of EU citizens and residents, as equal players in the EU market, acting both in the legislative and in the jurisprudential fields of the EU legal architecture.

The natural evolution of the access to justice of consumers in this legal construction first implied, both at European and national level, the configuration or construction of the access of justice as a fundamental right. And second, the recognition of procedural rights for consumers, in order to guarantee the effectiveness of consumer rights derived from EU legal framework, i.e., with the safeguard of judicial remedies.

At the EU level, there are various measures seeking to enhance access to justice for consumers and address issues related to cross-border disputes and consumer protection. But there are several concerns linked to the complexity of the procedures, costs, and awareness among consumers about their rights and available remedies, which could affect both the effectiveness and efficiency of the current available instruments. It is therefore important to simplify the legislation at the EU level, by perhaps enacting a code for consumer protection, including both substantive and procedural regulations.

The effectiveness of the protection of EU consumer rights, through the access to justice, is mostly based in the application and resolution of EU member States jurisdictions. Nevertheless, the effectiveness has been largely guaranteed by CJEU case law.

The access to justice, in the EU jurisdiction centralized level for legal and natural persons, including associations, is generally limited, to direct judicial mechanisms related to EU legislation and the prejudicial questions to the CJEU raised by EU

²⁵ See J. NOWAK, “On the incompleteness of the system of remedies established by the EU Treaties and how to proceed”, *EU Law Live Weekend Edition* 2020, No 21.

member countries courts and judges to clarify the interpretation or validity of EU law. However, it is also possible to use infringement proceeding mechanisms against the State. The paper of consumers is a secondary instrument, limited to the presentation of a complaint, the European Commission develops the protagonist role holding discretionary power on the initiation and management of the proceeding, including both the administrative and judicial phases. Here, I defend the potential to foster consumer participation in the infringement proceedings.

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