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The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?

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Abstract

Not since 2018 and the “New Deal for Consumers” package has the European Union (EU) seemed so close to stepping up the enforcement of consumer protection rules. The European Commission is expected to unveil a new “consumer enforcement package” by the end of the year, which should include revisions of the Regulation on Consumer Protection Cooperation, the Directive on Consumer Alternative Dispute Resolution and the Regulation on EU Online Dispute Resolution. In parallel, the Representative Actions Directive came into force recently. This paper examines these different initiatives and assesses whether these evolutions can truly be the first steps towards a brighter future for the enforcement of consumer protection rules in the EU or whether they are likely to remain a series of missed opportunities.

Keywords: ADR; consumer; CPC; enforcement; representative actions

“You can’t start a fire without a spark”
Bruce Springsteen, *Dancing in the Dark* (1984)

For those who for years have been calling on the European Union (EU) to strengthen the enforcement of consumer protection rules, 2023 could eventually be remembered as the year in which their wishes finally came true.¹ Not since 2018 and the “New Deal for Consumers” package² has the EU seemed so close to stepping up the enforcement of consumer protection rules. Those attending the latest EU Consumer Summit in February 2023 can attest to this³: “enforcement” is today the new buzzword.⁴ Already in its 2020 Consumer Agenda, the European Commission listed “redress and enforcement of consumer rights” as one of its five key priorities.⁵ In October 2022, its Communication on “Enforcing EU Law for a Europe that delivers” re-affirmed that “the enforcement of EU law is and will remain one of the Commission’s core priorities”.⁶

¹ A Canning and A Biard, “Why 2023 will be the year of consumer rights enforcement” (17 February 2023) <www.beuc.eu/blog/why-2023-will-be-the-year-of-consumer-rights-enforcement/>.

² COM/2018/0183 final, 11 April 2018.

³ <<https://european-consumer-summit-2023.eu/page-3921>>.

⁴ The publication of the so-called “enforcement package” has been postponed several times. Originally foreseen in March 2023, it was postponed to July 2023. At the time of finalising this paper (September 2023), it is hoped that the legislative proposals will be published before the end of 2023.

⁵ COM(2020)696 final, 13 November 2020.

⁶ COM(2022) 518 final, 13 October 2022.

In the second semester of 2023, the European Commission is expected to unveil a new “consumer enforcement package”. It should in principle include a revision of EU Regulation 2017/2394 (Regulation on Consumer Protection Cooperation; “CPC”)⁷ and EU Directive 2013/11/EU (Directive on Consumer Alternative Dispute Resolution; “ADR”)⁸ and (a likely repeal of) EU Regulation 524/2013 (Regulation on EU Online Dispute Resolution; “ODR”).⁹ The legislative proposals are expected to adapt the existing regulatory frameworks to the ever-growing digitalisation of consumer markets and to the rise of new business practices posing new challenges to the enforcement of consumer law. The publication of these legislative proposals should also be accompanied by several evaluation reports and studies carried out during 2022 and 2023 and assessing the current state of play.¹⁰ In parallel, on 25 June 2023, EU Directive 2020/1828 (the Representative Actions Directive; “RAD”)¹¹ came into force. After decades of discussion,¹² the new rules on representative actions allow designated representative entities to seek redress for consumers in mass harm situations.

Remarkably, the current focus on enforcement is not limited to the realm of EU consumer law but goes beyond it. For instance, on 4 July 2023, the European Commission published a new legislative proposal to streamline the cooperation between national data protection authorities (DPAs) and to harmonise some aspects of the administrative procedure that DPAs apply when handling cross-border cases.¹³ The proposal intends to improve the enforcement of the General Data Protection Regulation (GDPR), which has shown several important limitations in the past years.¹⁴ Furthermore, the Commission is also working on a report taking stock of the application of EU Regulation 1215/2012 (“Brussels I bis Regulation”),¹⁵ which could lead to changes into the EU private international law framework in the years to come.¹⁶

Can we then say that the age of consumer law enforcement in the EU has finally begun? It is certainly positive that the European Commission has decided to move forwards, as enforcement has remained the Achilles’ heel of EU law for many years.¹⁷ The enforcement of consumer protection rules remains uneven and still fragmented across Europe, as well as it facing an increasing number of obstacles at the national level. For example,

⁷ 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.

⁸ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.

⁹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

¹⁰ In the area of consumer ADR, for example, the Commission commissioned a behavioural study and other reports. One report on “Recommendations regarding the future needs of ADR” was published in August 2022 (<https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en#adr-related-studies>). Similarly, in the context of the evaluation of the CPC-Network, an evaluation report on the impact of the CPC Regulation in various areas has also been conducted by an external contractor.

¹¹ 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.

¹² See, *inter alia*, A Biard, “Collective redress in the EU: a rainbow behind the clouds?” (2018) 19 ERA Forum 189–204.

¹³ COM(2023) 348 final, 4 July 2023.

¹⁴ <www.beuc.eu/position-papers/two-years-gdpr-cross-border-data-protection-enforcement-case-consumer-perspective>.

¹⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

¹⁶ The preparatory study commissioned by the European Commission to prepare its application report of the Brussels I bis Regulation was published in February 2023 (<<https://eapil.org/2022/05/05/study-to-support-the-preparation-of-a-report-on-the-application-of-brussels-i-bis-regulation/>>).

¹⁷ <www.beuc.eu/position-papers/stepping-enforcement-consumer-protection-rules>.

asymmetries have been growing between, on the one hand, multinational traders (sometimes located outside the EU) engaging in widespread unlawful practices and, on the other hand, enforcers facing limited budgets and restrained capacities and whose actions may be limited by their national boundaries. It is also positive that the European Commission decided to embrace the issue by looking at the different enforcement pillars (namely public enforcement through the CPC and private enforcement via the RAD and consumer ADR/ODR) all together. It is essential to consider the bridges that may be established between the different enforcement pathways and to reflect on how they can strengthen each other. Finally, a reflection on how to improve the enforcement of EU consumer rules is particularly timely, as the European Commission is currently reviewing the “digital fitness” of several key substantial pieces of EU consumer protection legislation (in particular the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU and the Unfair Contract Terms Directive 93/13/EE).¹⁸

Yet it is equally important to consider critically the current craze for enforcement. This paper therefore reflects on the possible changes and likely missed opportunities that one could expect in the coming months, with a focus on representative actions (Section I), the CPC (Section II) and consumer ADR/ODR (Section III) legislations. It concludes with several ideas and suggestions regarding the directions that the EU could take in the near future to further strengthen the enforcement of consumer rights in the EU (Section IV).

I. EU representative action: real game-changer or pretty plaything?

After decades of discussion and controversy, one may wonder whether the collective redress rollercoaster has at last made its final loop in Europe. By the end of December 2022, all of the Member States were supposed to have implemented the new EU rules laid down in EU Directive 2020/1828 giving to designated “qualified entities” the possibility to seek redress on behalf of harmed consumers under the form of either injunctive relief, compensatory relief or both. This is a breakthrough, in particular in those Member States (eg Slovakia or the Czech Republic) where collective redress was until recently still not available.¹⁹

Yet the situation is more complex in practice. By December 2022, only a handful of Member States had transposed the new rules into their national systems. In January 2023, the European Commission sent letters of formal notice (the first step of the EU infringement procedure) to twenty-four Member States urging them to take action.²⁰ During the first semester of 2023, the situation accelerated, albeit along various paths. Some countries have now fully transposed the Directive (eg Italy, the Netherlands, Hungary, Slovakia) or are in the middle or close to terminating their legislative processes (eg France, Belgium), while several others are still lagging behind (eg Portugal, Austria). By 25 June (ie the

¹⁸ As this initiative (“Digital Fitness Check of EU consumer rules”) mainly concerns substantial laws (namely the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU and the Unfair Contract Terms Directive 93/13/EE), it is not further addressed in this paper, which instead focuses on procedural aspects (for more information, see <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/public-consultation_en>); on this topic, see also N Helberger et al, *EU Consumer Protection 2.0 - Structural asymmetries in digital consumer markets* (March 2021) <www.beuc.eu/brochure/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0>.

¹⁹ COM(2018)40 final, 25 January 2018.

²⁰ <https://ec.europa.eu/commission/presscorner/detail/en/inf_23_262>. After exchanges with the concerned Member States, the European Commission in July 2023 noted that several of them (Estonia, Ireland, Cyprus, Latvia, Luxembourg and Poland) still had not provided satisfactory information on the measures transposing the Directive.

date of entry into force of the Directive), fewer than half of all EU Member States had transposed the Directive.²¹ They numbered thirteen by September 2023.²²

It is also clear that the Directive on representative actions will trigger a myriad of very different procedural mechanisms at the national level. This is the result of the wide procedural leeway that the Directive left to the Member States for transposing the EU rules into their national systems. For example, the Directive left to the Member States the choice to rely either on opt-in (ie individuals must individually opt in to be part of the group) or opt-out (ie all individuals are presumed to be part of the group by default unless they express the wish to be excluded) mechanisms, or a mix between the two. A few Member States have introduced/are considering the possibility of using an opt-out mechanism for representative actions seeking compensation (eg the Netherlands)²³ or for representative actions seeking injunctive relief only (eg Finland, Greece, Spain). A majority have introduced (or are considering introducing) rules based on the opt-in mechanism (sometimes with possible variations as to the moment when the opt-in period will take place; ie before or after the decision on liability has been handed down by the court; eg France, Italy, Germany²⁴). The decision to rely on opt-in or opt-out mechanisms is instrumental to the effectiveness of collective redress and to ensuring compensation for consumers, particularly in those cases in which consumers taken individually may only suffer from limited financial losses, but the damage taken collectively may turn out to be very significant. In such situations, only a limited number of individuals are likely to opt in and join the group to claim compensation.

Another example regards the assistance to qualified entities as provided for under Article 20 of the Directive. This provision requires the Member States to take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent the qualified entities from effectively bringing such actions. Some Member States have introduced or at least have studied the possibility of introducing some forms of public funding for qualified entities (eg Latvia, the Netherlands).²⁵ Others have considered the possibility of the courts alleviating some procedural costs (eg France,²⁶ the Czech Republic, etc.). Yet, in many countries, insufficient consideration has been given to this pivotal issue, and financing representative actions is likely to remain a major obstacle, ultimately preventing and deterring qualified entities from bringing representative actions.²⁷

In the Member States where collective redress mechanisms had already been in place for several years (eg France, Italy, Belgium), the Directive was an opportunity to clarify the rules, in particular where the existing mechanisms had failed to bring added value for

²¹ Malta, the Netherlands, Hungary, Italy, Greece, Finland, Croatia, Denmark, Lithuania and Latvia.

²² Ireland, Germany and Slovakia, in addition to those listed in note 21.

²³ According to Art 9(3) of the Directive, opt-in mechanisms must, however, necessarily apply to consumers willing to join a representing action brought in a country that is different from the one of their domicile.

²⁴ Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (<www.oireachtas.ie/en/bills/bill/2023/21/>).

²⁵ For example, in the Netherlands, the Ministry of Justice commissioned an academic study to investigate the possibility of financing collective redress: X Kramer et al, "Utility, necessity, design and costs of a (revolving) litigation fund for collective actions", Report for the Research and Documentation Centre (WODC) (September 2023) <<https://repository.wodc.nl/bitstream/handle/20.500.12832/3294/3279-nut-noodzaak-vormgeving-kosten-processenfonds-collectieve-acties-summary.pdf?sequence=3&isAllowed=y>>.

²⁶ See, for example, the French draft legislation at <www.senat.fr/leg/ppl22-420.html> (version of March 2023).

²⁷ There are ongoing discussions on the need to regulate third-party funding in Europe, particularly after a report and resolution of the European Parliament dated September 2022 (<www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html>). At this stage, the European Commission is in the process of mapping the state of play regarding third-party funding in Europe (including its links with collective redress).

consumers because the procedures currently are either too lengthy or too complex.²⁸ However, today it is doubtful whether the concerned Member States have fully seized this opportunity. For example, Italy has adopted another layer of complex rules, ultimately adding to the pre-existing collective redress mechanisms.²⁹ Conversely, France is discussing changes in its existing rules on collective redress, but the effectiveness and added value of the proposed changes remain to be determined in practice.³⁰

Finally, although representative actions may soon exist everywhere in the EU *on paper*, it is still to be seen whether the new instrument will be used actively by qualified entities, and whether representative actions will manage to bring meaningful results for consumers. The European Commission is now assessing the national implementing laws. This study will undoubtedly shed additional light on the EU's collective redress kaleidoscope. At this stage, it already seems clear that representative actions will follow different paths and speeds across Europe. Some national markets for mass claims will continue to expand, with some Member States attracting more easily representative actions than others (particularly where there are financing possibilities for qualified entities or where opting out is possible), while others will experience slower or more limited developments. In parallel, in the absence of EU private international rules adapted to the resolution of mass claims, achieving real cross-border representative actions or representative actions with the participation of consumers from different Member States is likely to remain very complex – if not unlikely – at this stage.³¹ The situation could evolve in the coming years, but this will very much depend on a revision of the EU private international rules, and in particular of EU Regulation 1215/2012 (Brussels I bis Regulation), which today is not adapted to the resolution of cross-border mass claims.³²

Finally, the European Commission will also have a role to play in the near future in the development of collective redress and the building of communities supporting representative actions in Europe. In this respect, the Commission has set up a new digital tool named EC-REACT (standing for “Representative Actions Collaboration Tool”) to support the development of representative actions.³³ This tool has been developed pursuant to Article 14(3) of the Directive and intends to give to national judges, RAD contact points (mainly representatives from ministries) and qualified entities the possibility to communicate and exchange information regarding representative actions in a secure way via the platform. It remains to be seen whether and to what extent the concerned stakeholders will be willing to use this new tool.

II. CPC coordinated actions: soft enforcement or sharpened teeth?

In 2004, the EU Commission adopted EU Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (“CPC

²⁸ For example, in France, members of Parliament highlighted (in French) “*force est de reconnaître que l'action de groupe n'a pas été à l'origine d'avancées significatives dans la défense des consommateurs*” (<https://www.assemblee-nationale.fr/dyn/16/textes/116b0639_proposition-loi#>).

²⁹ Legislative Decree n 28 of 10 March 2023 (<[www.gazzettaufficiale.it/eli/id/2023/03/23/23G00036/sg](http://www.gazzettaufficiale.it/eli/id/2023/03/23/23G00036/sg>)>).

³⁰ A Biard, “Transposition de la directive UE 2020/1828 sur les actions représentatives : corriger le tir” (*Contrats Concurrence, Consommation*, March 2023).

³¹ A Stadler, “The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues” (2013) 4 NiPR 483–88; T Bosters, *Collective Redress and Private International Law in the EU* (Berlin, Springer 2018); X Kramer and A Biard, “The EU directive on representative actions for consumers: a milestone or another missed opportunity?” (2019) *Zeitschrift für Europäisches Privatrecht (ZEuP)* 249–59.

³² P Leupold, *Private international law and cross-border collective redress* (August 2022) <www.beuc.eu/sites/default/files/publications/BEUC-X-2022-085_Private_International_Law_and_Cross-Border_Collective_Redress.pdf>.

³³ <<https://representative-actions-collaboration.ec.europa.eu/>>.

Regulation”)³⁴ to improve the public enforcement of EU consumer law. This followed the Commission’s observation that “each Member State ha[d] developed an enforcement system adapted to its own laws and institutions”,³⁵ and that such a situation was “not fully adapted to the challenges of the internal market”.³⁶ The CPC Regulation set up a cooperation framework enabling structured exchanges between national consumer authorities (“CPC Authorities”), their contact points and the European Commission. The Regulation also gave CPC Authorities a set of common minimum powers. In 2012, an evaluation study found that, although beneficial, the CPC Regulation needed some improvements, and in particular a more integrated approach to enforcement. In 2017, the EU updated the CPC framework with EU Regulation 2017/2394. The objective, as then presented by the Commission, was to give “sharper teeth for consumer protection”.³⁷ Importantly, Article 27 of the revised CPC Regulation gives to designated external entities, such as consumer organisations or European Consumer Centres (ECCs), the possibility to alert the CPC-Network (the so-called external alert mechanism) and the European Commission whenever they detect or have suspicions of infringements of EU consumer protection rules.

The new rules came into force in January 2020. Since then, several external alerts have been submitted to the CPC-Network. For example, since 2020, BEUC and its member organisations made alerts about airlines in the context of the COVID-19 outbreak,³⁸ Nintendo,³⁹ TikTok,⁴⁰ WhatsApp⁴¹ and, more recently in June 2023, about seventeen European airlines suspected of greenwashing practices⁴² and four social media companies (YouTube, Instagram, TikTok and Twitter) for the misleading promotion of crypto-assets on their platforms.⁴³ Other stakeholders eligible to submit CPC external alerts (eg ECCs) have also made CPC external alerts on several occasions.

The experience after more than three years shows that the CPC Regulation has in several cases contributed to strengthening the enforcement of consumer rules in cross-border cases.⁴⁴ During a period that was strongly impacted by the COVID-19 pandemic, the CPC-Network conducted several “sweeps” to monitor markets,⁴⁵ launched several coordinated actions and followed up on several external alerts. When focusing on CPC coordinated actions, it turns out that all of them led to informal “dialogues” between the CPC-Network and the concerned traders, the latter agreeing – sometimes several years after the launch of the investigation and after multiple rounds of discussion with the authorities – to make commitments and to modify their practices.⁴⁶ Yet the outcomes of these coordinated actions remain uneven.

³⁴ 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.

³⁵ COM/2003/0443 final – COD 2003/0162

³⁶ *ibid.*

³⁷ <https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation_en>.

³⁸ <www.beuc.eu/air-passenger-rights-travel-chaos>.

³⁹ <www.beuc.eu/nintendo>.

⁴⁰ <www.beuc.eu/tiktok>.

⁴¹ <www.beuc.eu/whats-whatapp>.

⁴² <www.beuc.eu/green-flying>.

⁴³ <www.beuc.eu/hype-or-harm-great-social-media-crypto-con>.

⁴⁴ SWD(2022) 108 final, 12 April 2022 (<https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/consumer-protection-cooperation-network/biennial-overview-cpc-network_en>).

⁴⁵ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en>.

⁴⁶ These took almost a year and a half for TikTok and WhatsApp and two years for Nintendo to conclude.

On the positive side, in the context of the action against several airlines breaching passengers' rights during the COVID-19 pandemic, the CPC-Network managed to achieve meaningful results. Nearly 2.5 million consumers were given the opportunity to exchange, against money, the mandatory vouchers that had been imposed on them. More than 500,000 consumers used this opportunity to get their money back.⁴⁷ In the context of a coordinated action against Nintendo regarding the early obsolescence of the Nintendo Switch games console's controllers, the trader agreed to give consumers a life-long right to repair.⁴⁸ In the context of a coordinated action targeting Amazon Prime's subscription traps and manipulative methods (so-called "dark patterns"), the trader agreed to modify and to simplify its cancellation practices.⁴⁹

On the negative side, in the context of the Volkswagen "Dieselgate", the multiple requests that the European Commission and the CPC-Network sent to the car manufacturer to facilitate compensation for all European consumers fell on Volkswagen's deaf ears.⁵⁰ In the context of its action against WhatsApp putting pressure on its users to accept new policy terms through persistent and intrusive notifications and the threat to shut down their access to the platform if they did not accept the new terms, the CPC-Network only came up with a yellow card and a mere promise from the trader that they would not do this again in the future.⁵¹ In the context of a coordinated action against Google, the CPC-Network failed to prevent the trader from continuing with one of its contentious practices that the authorities yet found to be contrary to the Geo-blocking Regulation.⁵² In the context of a CPC action against TikTok, the trader only committed to increasing transparency regarding its businesses practices. After having closed its coordinated action in June 2022, the Commission is still monitoring TikTok's commitments. A report that scholars published in February 2023 assessing the outcomes of the TikTok coordinated action highlighted that this action revealed that "there is still too much uncertainty with the procedures laid down in the CPC Regulation and the weight that the CPC-Network has given to 'informal dialogues' raises concerns as their too frequent use may undermine the overall application of consumer law. Moreover, addressing cross-cutting infringements going beyond the realm of consumer law and with relevance for other sectors (such as digital rights or audiovisual media services laws) raises questions which are today unresolved."⁵³

All in all, the public enforcement of consumer law via the CPC-Network has shown improvements but also some worrisome weaknesses.⁵⁴ First, the CPC model remains mostly a decentralised cooperation system in which the EU Commission only plays a coordination role and has itself no enforcement powers. The lead of CPC coordinated actions remains mostly in the hands of national CPC authorities, which may or may not be

⁴⁷ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/air-travel_en#airline-cancellations>.

⁴⁸ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/sustainable-consumption-actions_en>.

⁴⁹ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/market-places-and-digital-services_en#amazon-prime>.

⁵⁰ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/dieselgate_en>.

⁵¹ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/social-media-and-search-engines_en>.

⁵² <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/social-media-and-search-engines_en#google>.

⁵³ MC Gamito and H-W Micklitz, *Too much or too little? Assessing the Consumer Protection Cooperation (CPC) Network in the protection of consumers and children on TikTok* (February 2023) <www.beuc.eu/reports/assessing-consumer-protection-cooperation-cpc-network-protection-consumers-and-children>.

⁵⁴ <www.beuc.eu/position-papers/strengthening-coordinated-enforcement-consumer-protection-rules>; see also in the context of the coordinated action against TikTok <www.beuc.eu/reports/assessing-consumer-protection-cooperation-cpc-network-protection-consumers-and-children>.

keen to act depending on the circumstances, their current priorities and/or their available capacity.⁵⁵ Furthermore, many substantive pieces of legislation in the area of EU consumer law are European directives.⁵⁶ Consequently, there is still no fully unified legal framework, and the interpretation of rules may still diverge across Member States. The CPC-Network must navigate such a regulatory diversity with possible disagreements between national authorities. For these reasons, a more centralised approach at the EU level could be an interesting solution for further exploration in the future, particularly when it comes to addressing widespread infringements with an EU-wide dimension or infringements that may be viewed as strategic (because of their magnitude or impact on European consumers).⁵⁷ According to the results of an EU public consultation published in February 2023,⁵⁸ the majority of respondents (66%) tends to agree that the Commission should have a stronger role in investigating multinational traders in the EU for breaches of consumer law. Some 64% would also agree that the Commission should have the power to impose fines. Giving stronger powers to the European Commission under certain circumstances and conditions could also be beneficial to ensuring the greater effectiveness of the dialogue that the CPC-Network seems keen to start with the concerned traders. This would significantly strengthen the role of the CPC-Network when negotiating commitments with traders, as CPC dialogues would then take place in the shadow of the European Commission and its sanctioning power. Today, there is no possibility of imposing fines against traders that are unwilling to cooperate unless the action is taken up to the national level by one (or several) CPC authority (or authorities). However, in practice, this almost never happens. At this stage, it remains unclear whether the expected legislative proposal amending the CPC Regulation will only strengthen the investigation powers of the Commission or also introduce a possibility for the European Commission to impose fines. This change would be positive, but it is uncertain whether the Member States would welcome this and give their green light to this much-needed evolution.

III. Consumer ADR/ODR: improvement or status quo?

Directive 2013/11/EU (the “Consumer ADR Directive”) was adopted ten years ago when consumer ADR was still relatively unknown in most Member States and by many consumers.⁵⁹ ODR was also still in its infancy. The Directive set up a new regulatory framework for ADR. Consumer ADR entities must comply with several quality requirements and are certified and supervised by national competent authorities.⁶⁰ The Directive followed a minimum harmonisation approach: it laid down general requirements that Member States were afterwards free to further complement and to adapt to their national landscapes. The Directive also gave some leeway to the Member States when

⁵⁵ For example, whereas BEUC and its members submitted an external CPC alert to inform authorities about the infringements of airlines during the COVID-19 crisis in July 2020, the alert was only taken up in December 2020.

⁵⁶ H-W Micklitz, “The full harmonization dream” (2022) 4 EuCML: Journal of European Consumer and Market Law 117–68.

⁵⁷ Interestingly, in 2022, the EDPB adopted a list of criteria to assess whether a cross-border case can qualify as a case of “strategic importance” requiring closer cooperation between data protection authorities (<https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-document-selection-cases-strategic-importance_en>).

⁵⁸ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13536-Consumer-rights-adapting-out-of-court-dispute-resolution-to-digital-markets/public-consultation_en>.

⁵⁹ The situation varies a lot depending on the country. In some countries, ADR has existed for several decades (eg the Netherlands, France in some sectors). In others, it is a rather new phenomenon (Slovakia, the Czech Republic, Romania, etc.). See A Biard, “Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK” (2019) 42(1) Journal of Consumer Policy 109–47.

⁶⁰ A Biard, “Monitoring Consumer ADR in the EU: A Critical Perspective” (2018) 26(2) European Review of Private Law 171–95.

transposing the rules. This resulted in an uneven playing field across Europe, with ADR entities of various levels of quality co-existing. Moreover, despite the information obligations falling on traders and set by the Directive, the level of consumer awareness and knowledge of consumer ADR has remained limited overall. According to the 2021 EU consumer condition survey, 5% of European consumers on average brought complaints to an ADR entity in 2020, while only 8% of them would approach an ADR body in the future in the event of experiencing problems.⁶¹

In parallel, during the past ten years, the realm of consumer ADR has also experienced pivotal changes.⁶² First, regulatory contexts, at both the EU and national levels, have evolved, and ADR has increasingly been seen as a way to improve access to redress. The COVID-19 crisis and the energy crisis have triggered significant increases in the number of complaints submitted to consumer ADR bodies in several countries. Some ADR entities have also been keen to perform educational roles for consumers to better inform them about their rights. In parallel, consumer ADR has been impacted by the development of new technologies. For instance, some ADR entities driven by a wish to reduce their costs and to increase speed have been relying on (or testing) AI-powered tools to screen or facilitate a preliminary assessment of the numerous consumer complaints they receive. Other ODR platforms have also been multiplying and are today also proposing their services to consumers.⁶³ For these reasons, the rules that were adopted ten years ago no longer appear to be up to date.

The expected new legislative proposal might therefore possibly include a broadening of the scope of the Directive to cover a wider range of consumer disputes and/or to introduce new rules on collective ADR. In parallel, the EU ODR platform seems to be in the hot seat, and its future appears highly uncertain. This is because successive reports from the Commission on the ODR platform have shown that the platform had been of limited use for resolving consumer disputes (one should recall, however, that the EU ODR platform, despite its name, is not an online dispute resolution tool as such, but simply a matchmaking platform whose goal is to put consumers, traders and ADR entities in touch).

At this stage, it remains unclear – or even doubtful – whether the Commission will be ambitious enough in its upcoming legislative proposal amending the ADR Directive. For example, it is unclear whether the Commission will take the necessary measures to improve the quality requirements applying to consumer ADR and ODR bodies, such as by improving the accessibility requirements for vulnerable consumers, or to cope with the lack of independence still affecting many ADR entities, which is an issue spotted in several countries (eg France, Latvia).⁶⁴ Similarly, it also unclear whether the Commission will use this opportunity to propose new rules to remedy the lack of traders' participation in consumer ADR and their limited compliance with the outcomes of ADR procedures. In 2019, the European Commission noted that “while overall traders' participation in ADR has slowly but steadily increased since 2014, currently only one in three retailers is willing to use ADR. This is clearly insufficient.”⁶⁵ In some countries, traders are still sceptical and

⁶¹ Consumer Conditions Survey 2021, “Consumers at home in the single market” <https://ec.europa.eu/info/sites/default/files/ccs_key_highlights_120321_public.pdf> p 9.

⁶² A Biard, “Consumer ADR/ODR in Europe: a wind of change” (2022) 11(5) *Journal of European Consumer and Market Law* 181–87; see also <www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear>.

⁶³ A Biard, “Justice en ligne ou nouveau *Far West* ? La difficile régulation des plateformes en ligne de règlement extrajudiciaire des litiges” (2019) 2 *Revue internationale de droit économique* 165–91.

⁶⁴ For example, in France: <www.quechoisir.org/action-ufc-que-choisir-mediation-bancaire-un-grand-menage-s-impose-n92840/> (1 July 2021); <www.economie.gouv.fr/mediation-bancaire-assurantielle-propositions-amelioration-ccsf> (2 July 2021).

⁶⁵ Report from the European Commission on the application of Directive 2013/11/EU, COM(2019)425 final, 25 September 2019, p 10.

unwilling to engage with consumer ADR, as they perceive them as biased and favouring consumers. Yet consumer ADR remains an essential (if not in some situations the only) option for consumers to obtain redress. For this reason, traders should be requested to adhere to a consumer ADR body of their choice and should be requested to participate in good faith in the ADR procedure. This should be the case at least in those sectors with high-value claims and in those generating a high number of consumer complaints (eg airlines and transport in general). For example, in the UK, the Competition and Markets Authority (CMA) has taken the view that mandatory ADR could be adopted “across all essential markets including air travel and those sectors where consumers are hugely vulnerable due to information asymmetries”.⁶⁶ Similarly, future reform of the EU legislation on air passengers’ rights could consider making participation in ADR compulsory for traders.⁶⁷

IV. Next steps: ambition, cooperation and bridges

With the upcoming consumer enforcement package, the European Commission has a clear opportunity to propose ambitious changes in the various enforcement pathways to facilitate redress for consumers and to improve traders’ compliance with EU law. The key question is, however, whether the Commission will fully seize this opportunity.

In parallel, another important topic seems still to be absent – or at least insufficiently addressed – during the preparatory discussions: how best intertwine the different enforcement pathways and to ensure that CPC, RAD and ADR/ODR can strengthen each other. It is commonly agreed that a sound enforcement of consumer protection rules requires a complementary mix of public and private enforcement.⁶⁸ However, when and how the different enforcement pathways may intertwine and contribute to (or, conversely, damage) each other remain open questions. Establishing connections and bridges between the different pillars is needed today in order to improve the resolution of mass harm situations in a cost-effective and efficient manner. For instance, commitments agreed or common positions issued by the CPC-Network could be used to support follow-on representative actions by qualified entities. The data collected by consumer ADR entities mapping systemic problems and market patterns and communicated to competent authorities (as provided for by Article 17 of the Consumer ADR Directive) could be of relevance for CPC authorities when performing their market monitoring roles. Making such connections between the enforcement pathways remains uncharted territory that should be explored further without delay.⁶⁹

Furthermore, in its Communication on “Enforcing EU Law for a Europe that delivers” of October 2022,⁷⁰ the European Commission made an important statement when highlighting that enforcement should no longer be seen as a solitary endeavour but as a collective exercise. In particular, a key passage of this Communication deserves to be fully quoted. The Commission stressed that “enforcement is about cooperating and working hand in hand with Member States in the first instance, as well as with specialised authorities like consumer or data protection authorities, competition and regulatory

⁶⁶ CMA, *Reforming Competition and Consumer Policy, Driving growth and delivering competitive markets that work for consumers* (4 October 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022615/Reforming_Competition_and_Consumer_Policy_publication_4.10.21.pdf> p 60.

⁶⁷ <<https://www.beuc.eu/position-papers/passenger-rights-20-towards-better-consumer-protection-and-more-resilient-travel>>.

⁶⁸ M Durovic and HW Micklitz, “A Global Perspective on the Enforcement of Consumer Law” in *Internationalization of Consumer Law*. Springer Briefs in Political Science (Berlin, Springer 2017); F Weber, *The Law and Economics of Enforcing European Consumer Law* (London, Routledge 2016) p 336.

⁶⁹ This is a topic that BEUC is currently investigating with the intent to determine how and to what extent the different enforcement pathways can contribute to each other.

⁷⁰ COM(2022) 518 final, 13 October 2022.

authorities, NGOs, businesses and the public. For the system to function effectively, it relies both on the full commitment of national authorities responsible for the proper application and enforcement of the law, and the involvement of the public, civil society, business and others to identify potential breaches.”⁷¹ This statement calls for two observations. The first one regards the cooperation between enforcement authorities and other civil society organisations also playing the role of watchdogs and “alerters”. This cooperation is still uneven across Europe. At the national level, in some countries cooperation is already well established and is sometimes structured around cooperation agreements between authorities and civil society organisations. Yet in many other countries this cooperation is non-existent. At the EU level, BEUC and the CPC-Network agreed in autumn 2022 on a list of guiding principles to improve their cooperation in the context of CPC external alerts, which, among others, include the possibility to organise thematic workshops on topics of common interests⁷² or discussions of their respective enforcement priorities.⁷³ In a time of limited budgets requiring authorities and other enforcers to pick their battles carefully, strengthening cooperation is fundamental. This objective should also find its full place in the upcoming legislative proposals. This could, for instance, be achieved by giving procedural rights to external stakeholders such as consumer organisations in the context of CPC coordinated actions, as the latter could fuel and support the initiatives of consumer authorities.

Finally, there is a crucial need for greater horizontal and cross-sectorial cooperation. An increasing number of infringements (in particular those happening in the digital area) are cross-cutting and are relevant or can be assessed not only from a consumer law perspective, but also from the angle of data protection and competition, among others. The new approach to enforcement should therefore also go “out of silo” and consider multiple angles of practice. There is an increasing need for exchanges between the various enforcements networks. At the national level, some authorities have concluded cooperation agreements to improve and facilitate their work with other authorities. This is the case, for instance, of the Dutch CPC Authority (Autoriteit Consument & Markt; ACM), which has signed agreements with several Dutch regulators, including the Dutch DPA.⁷⁴ In France, the CPC authority (Direction générale de la Concurrence, de la Consommation et de la Répression des frauds; DGCCRF) and the French DPA (CNIL) have signed a cooperation agreement to facilitate the sharing of information and to conduct joint investigations.

At the EU level, this cross-cutting approach to enforcement is progressing, albeit slowly. Recently, the relevance of cooperation was put under the spotlight by a decision of the Court of Justice of the European Union (CJEU) in which the Court ruled that national competition authorities may find, in the context of the examination of an abuse of a dominant position, that the GDPR has been infringed.⁷⁵ The CPC-Network has also started to work with DPAs on topics of common interest.⁷⁶ The European Data Protection Board (EDPB) has recently set up a taskforce to reflect on the interactions between data protection, competition and consumer laws.⁷⁷ Finally, in the context of the implementation of the Digital

⁷¹ *ibid.*

⁷² For instance, a joint BEUC–CPC workshop was organised in 2023 to exchange information on the topic of greenwashing and carbon-offsetting claims.

⁷³ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/cooperation-consumer-organisations_en>.

⁷⁴ <www.acm.nl/en/about-acm/collaboration/national-cooperation>.

⁷⁵ CJEU, Case C-252/21, *Meta Platforms and Others*, 4 July 2023.

⁷⁶ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/cooperation-between-consumer-and-data-protection-authorities_en>.

⁷⁷ During the 31st Spring Conference of European Data Protection Authorities in 2023, the authorities adopted a resolution on the need for enhanced cooperation in the field of data protection and competition law.

Markets Act (DMA), the European Commission has set up a high-level group whose aim is to provide the Commission with advice and expertise. This high-level group is composed of representatives coming from various EU (enforcement) networks, including the Body of the European Regulators for Electronic Communications (BEREC), the European Data Protection Supervisor (EDPS) and EDPB, the European Competition Network (ECN), the CPC-Network and the European Regulatory Group of Audiovisual Media Regulators (ERGA).⁷⁸ It is essential that such cross-cutting approaches to enforcement be firmly established at the European and national level as well.

At the time of finalising this paper, there is still uncertainty with regards to the changes that the European Commission will hopefully propose in the coming months. On some topics, the Commission might not go far enough (eg on traders' mandatory participation in ADR); on others, its proposals might possibly go against the views of some Member States (eg the growing role given to the Commission in CPC coordinated actions). Ultimately, the upcoming consumer enforcement package might also come at a very peculiar moment in time, and the chances of getting the proposals passed before the end of this Commission's mandate are, in reality, low. Hence, it is very likely that it will be up to the next Commission to take over and to finalise the work started by its predecessor.

As to the introductory question and whether we should have high hopes in this new age of consumer law enforcement in the EU, the response is "yes". One of the reasons for this is that enforcing consumer protection rules should not be seen as a result that can be achieved once and for all. It is and will remain a continuous work in progress. Many questions are on the table. Not all of them will be solved in 2023 or beyond, and, as always, there will be hopes and disillusion. However, in a few years from now, we might still remember this as the year when the enforcement sparks started to multiply in the EU.

As Bruce Springsteen once wrote in one of his most famous songs from nearly forty years ago: "You can't start a fire without a spark."⁷⁹

Disclaimer. The views expressed in this paper are personal.

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⁷⁸ <<https://digital-strategy.ec.europa.eu/en/news/digital-markets-act-commission-creates-high-level-group-provide-advice-and-expertise-implementation>>.

⁷⁹ B Springsteen, *Dancing in the Dark* (1984).