Common Market Law Review **55**: 783–818, 2018.
© 2018 *Kluwer Law International. Printed in the United Kingdom.*

ENFORCING EU EQUALITY LAW THROUGH COLLECTIVE REDRESS: LAGGING BEHIND?

SARA BENEDI LAHUERTA*

Abstract

Whilst the enforcement of EU law was initially based on individual and institutional "vigilance", it has progressively expanded to embrace collective redress. However, collective redress mechanisms remain mostly nested in market-oriented areas, like competition law, consumer protection and data protection. Drawing on EU secondary law and soft law, this article contends that collective redress procedures should also be encouraged in more socially-oriented areas, focusing, in particular, on EU equality law. This is essential not only to address the rise of xenophobia in Europe, but also to ensure the substantive supremacy and uniform application of EU equality law, and to achieve more consistency within EU law.

1. Introduction

In its early years, the enforcement of EU law was mainly based on individual[1] and institutional "vigilance".[2] Nevertheless, since the 1980s, the introduction of collective enforcement mechanisms has been increasingly encouraged.[3] In 2013 the Commission issued a horizontal recommendation to promote the development of coherent Collective Redress ("CR") principles throughout the

* Lecturer in Employment Law, University of Southampton, Law School. I am grateful to Mark Bell, Alun Gibbs, Hedvig Schmidt and the anonymous reviewers for their helpful comments on earlier versions of this paper, and to Katie Hunt for valuable research assistance. The usual disclaimer applies.

1. Case 26/62, *Van Gend & Loos* v. *Netherlands Inland Revenue Administration*, EU:C:1963:1.

2. See Dawson and Muir, "Individual , institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", 48 CML Rev. (2011), 751–775.

3. See e.g. Directive 84/450/EEC on misleading advertising, O.J. 1984, L 250/17, Art. 4(1). See also Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart, 2008), Ch. 4.

Member States for *all areas* where it might be relevant.[4] In some fields, like environmental law, competition law, consumer protection or data protection, more specific CR requirements have also been introduced.[5]

The reasons for introducing CR mechanisms were wide-ranging. Firstly, breaches of competition law, consumer and data protection law may affect many individuals across different Member States, and thus, distort the single market.[6] Secondly, in these areas, claimants face considerable obstacles to pursue their individual court claims, which could be lessened through the bundling of individual claims in a single procedure or by enabling a representative entity to bring a single claim on their behalf.[7] For instance, in the field of consumer protection, individual litigation is not only complex and lengthy, but also risky and costly.[8] Consumers are often unaware of the redress options available to them, and even if they are, it tends to be "uneconomic for a consumer to pay court, lawyer and expert fees that may exceed the compensation".[9] In other areas, like competition and environmental law, successful claims require very complex factual analysis and evidence tends to be inaccessible for individuals,[10] which often creates an "unfavourable risk/reward balance for claimants"[11] and limits the effectiveness of one-off claims. Finally, CR is also seen as a tool that can contribute to "improving compensatory justice", which inherently deters future infringements and leads to greater compliance.[12] Accordingly, EU initiatives to develop CR seek not only to promote an efficient single market, but also to improve the accessibility and affordability of enforcement procedures and the overall effectiveness of EU law.

4. Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, O.J. 2013, L 201/60 (hereinafter "the Recommendation").

5. See *infra* section 2.1.

6. See e.g. Commission, White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 final, para 7. See also *infra* section 4.2. For environmental law, however, one of the main drivers was compliance with the Aahrus Convention, see e.g. De Sadeleer and Roller, "Access to justice in environmental matters, final report", ENV.A.3/ETU/2002/0030.

7. Commission, Public consultation: Towards a coherent European approach to Collective Redress, SEC(2011)173 final, para 16.

8. Commission, Green paper on consumer collective redress, COM(2008)794 final, paras. 8–9.

9. Ibid., para 11. This argument could easily be applied in the area of data protection.

10. See e.g. Commission White Paper, cited *supra* note 6; Blennerhassett, *A Comparative Examination of Multi-Party Actions. The Case of Environmental Mass Harm* (Hart, 2016), p. 23, pp. 110–111.

11. Commission, White Paper, cited *supra* note 6, at 2.

12. See e.g. ibid., at 3. See also De Sadeleer and Roller, op. cit. *supra* note 6, at 33–34, and more generally, Cappalli and Consolo, "Class actions for continental Europe: A preliminary inquiry", 6 *Temple International & Comparative Law Journal* (1992), 217–292, at 247.

In other areas, however, there is no specific CR requirement at EU level. The Commission has noted that "careful consideration must be given as to whether and in which areas" an EU initiative in CR should be developed.[13] Arguably, such "careful consideration" is required not only to respect Member States' procedural autonomy[14] and the principles of subsidiarity and proportionality,[15] but also to ensure that the possible risks of CR procedures are not overlooked and do not outweigh the potential advantages. Some scholars have warned that US-style class actions could be difficult to introduce in Europe for conceptual and philosophical reasons,[16] but there are also more practical concerns. For instance, this type of claims often bring large financial incentives for legal intermediaries[17] compared to the size of the individual claimant recovery,[18] which can lead to weak claims[19] that can backlog the court system.[20] Furthermore, the high transactional costs of litigation can be used to pressure defendants to settle despite the little merit of some claims.[21] There is also the possibility that dissent within the class will lead to satellite litigation[22] and that conflicts of interest arise between intermediaries and claimants.[23] Consequently, the Commission is keen to avoid US-style class actions and to introduce precautions so that CR mechanisms can be developed to improve access to justice, but abusive litigation can be prevented.[24]

13. Commission, Public consultation, cited *supra* note 7, para 13.

14. Whilst the expression "procedural autonomy" has received some criticism (see e.g. Van Gerven, "Of rights, remedies and procedures", 37 CML Rev. (2000), 501-536; Bobek, "Why there is no principle of 'procedural autonomy' of the Member States" in Micklitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p. 305), it is favoured in this contribution due to its wide use in scholarly literature.

15. Art. 5(3)-(4) TEU; Commission, Public consultation, cited *supra* note 7, para 14.

16. Cappalli and Consolo, op. cit. *supra* note 12, at 263, 277; e.g. opt-out class actions may lead to involuntary representation, which is against the principle of consent for legal representation.

17. E.g. based on punitive damages and contingency fees, see Commission, "Towards a coherent European approach to collective redress: Next steps", SEC(2010)1192, at 17.

18. Hodges and Money-Kirley, *Safeguards in Collective Actions* (Foundation for Law, Justice and Society, 2012), p. 2.

19. Tzakas, "Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?", 48 CML Rev. (2011), 1125–1174.

20. Cappalli and Consolo, op. cit. *supra* note 12, at 255–257.

21. Hodges and Money-Kirley, op. cit. *supra* note 18, p. 2.

22. Garth, "Conflict and dissent in class actions: A suggested perspective", 77 *Northwestern University Law Review* (1982), 491-503.

23. Hodges and Money-Kirley, op. cit. *supra* note 18, p. 2.

24. Commission, documents cited *supra* notes 17 (at 17–18) and 7, at 21–26; Parliament, Report A7-0012/2012, at 15–20; Money-Kirley and Hodges, "European collective action: Towards coherence?", 19 MJ (2012), 477-504.

Given that EU equality law is one of the areas where there is no specific CR requirement, this contribution argues that there are robust normative reasons for EU action to encourage CR mechanisms. Those reasons outweigh the above-mentioned risks, which can be minimized through a range of safeguards,[25] such as: establishing strict criteria for accepting the representativeness of legal entities,[26] relying on the "loser pays" principle, not allowing punitive damages[27] or regulating the funding of actions.[28] Some of these safeguards have already been discussed or implemented at national and EU level,[29] and they could equally be considered and adapted to the specificities of EU equality law.

Against this background, the paper analyses the legal and socio-political reasons why judicial and/or administrative CR mechanisms are necessary to improve the effectiveness of EU equality law. Considering the increasing trend to incorporate collective vigilance into the existing EU enforcement tool-box, the piece also assesses whether, under the current framework, CR mechanisms are already required for equality law. This analysis highlights the fundamental contradiction that lies at the heart of EU equality law, namely, the fact that, at a *substantive* level, discrimination directed against certain *groups* is prohibited, but at a *procedural* level, Member States are not required to provide enforcement mechanisms if an *individual* victim cannot be identified. Whilst this contradiction tends to be a classic trait of EU law, to ensure its "*substantive* primacy" law some degree of procedural *primacy* may also be required.[30] The paper also highlights the inconsistencies between EU equality law and other fields that bear notable similarities with the former, and for which CR requirements exist at EU level.[31] This comparison also demonstrates – yet again[32] – the dichotomy between the EU approaches to: (a) rights closely linked to the internal market, and (b) social rights, and

25. Safeguards are also controversial, see e.g. Valdes, "Procedure, policy and power: Class actions and social justice in historical and comparative perspective", 24 *Georgia State University Law Review* (2007), 627–661.

26. Commission, document cited *supra* note 17, at 18.

27. Parliament, report cited *supra* note 24, at 15–20.

28. Voet, "The crux of the matter: Funding and financing collective redress mechanisms" in Hess, Bergström and Storskrubb (Eds.), *EU Civil Justice: Current Issues & Future Outlook* (Hart, 2016), p. 201.

29. See e.g. sources cited *supra* note 24.

30. Delicostopoulos, "Towards European procedural primacy in national legal systems", 9 ELJ (2003) 599–613, at 603–604, 609, 612.

31. E.g. consumer protection, data protection and nationality discrimination for mobile EU workers and their families.

32. See e.g. Barnard, "EU 'social' policy: From employment law to labour market reform" in Craig and De Burca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), p. 639; Schiek, Liebert and Schneider (Eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge University Press, 2011).

suggests that, if European citizenship aspires to truly become "the fundamental status"[33] of EU citizens, market and social rights should stop being treated as being different parts of oneself. For reasons of space, practical obstacles for an EU initiative in this field are only very briefly considered.[34]

Before embarking on deeper discussion, the concepts of CR and "effectiveness" need clarification. CR is defined as "any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm cause by such practices".[35] This work focuses on "judicial and/or administrative procedures" for compensatory relief. This expression mirrors the terminology of the Equality Directives, which establish that Member States should provide "judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures".[36] This requirement is generally interpreted in line with the EU right to an effective remedy[37] and Article 6 of the ECHR,[38] so it is considered that judicial procedures are required in most cases, although quasi-judicial administrative procedures[39] would also fulfil the Equality Directives' standards.[40] Accordingly, the expression "judicial and/or administrative procedures" refers to judicial and quasi-judicial procedures that fulfil the general EU law and ECHR requirements for an effective remedy.[41]

CR may take the form of *actio popularis*, which enable citizens and/or certain organizations to pursue litigation in the public interest, even if there are

33. Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31.

34. See *infra* section 5.

35. Commission Public consultation, cited *supra* note 7, at 7.

36. See Art. 7(1), Racial Equality Directive (RED) 2000/43/EC, O.J. 2000, L 180/22; Art. 9(1) Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (FED), O.J. 2000, L 303/16; Art. 8(1) Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37;Art. 9(1) 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, O.J. 2010, L 180/1. Note that the slightly different wording of Art. 17(1) of Directive 2006/54/EC (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, recast, O.J. 2006, L 204/23) puts more emphasis on "judicial procedures".

37. Art. 47 of the Charter of Fundamental Rights (CFREU).

38. Tobler, *Remedies and Sanctions in EC non-discrimination law* (MPG, 2005), p. 33.

39. E.g. Procedures before the Irish Workplace Relations Commission (former Equality Tribunal) or the Bulgarian Protection Against Discrimination Commission.

40. Commission, Joint Report on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC, COM(2014)2 final.

41. Whilst administrative pre-litigation procedures may increase accessibility, they are outside the scope of this paper.

no identifiable complainants.[42] This is technically different from representative actions, which are initiated by interest organizations or public bodies *on behalf of a group of individuals* –and not simply to pursue the public interest *in abstracto*. *Actio popularis* and representative actions can be distinguished from joint actions, where multiple individual claims are grouped together into one single procedure, and each member of the claim can directly enforce his/her individual rights.[43] Multiple individual claims can also be channelled through class actions, whereby "one or a few individuals, called 'class representative(s),' sue on behalf of all who are similarly situated."[44] Given that joint actions are already available in most Member States[45] and that the introduction of US-style class actions at EU level seems more risky and controversial compared to *actio popularis* and representative actions,[46] the subsequent discussion will mainly focus on these two latter.

The term "effectiveness" is used narrowly. Whilst recognizing that the best way to ensure the effectiveness of equality legislation is *preventing* discrimination, redress mechanisms are also necessary *ex post*, when discrimination has occured.[47] This paper focuses on improving *ex post effectiveness* through CR, i.e. repairing damage and minimizing moral, financial and time costs for victims.

The article starts by reviewing how EU law enforcement has evolved from focusing on individual and institutional mechanisms to increasingly include CR tools (subsection 2(a)). However, given that this is not the case for EU equality law, the following subsection explains why encouraging CR seems necessary to improve the effectiveness of equality legislation in a context of rising intolerance (subsection 2(b)). The paper then argues that, whilst under

42. These actions have been traditionally used in administrative and criminal law, but they are being increasingly introduced in discrimination law, see e.g. Farkas, "Limited enforcement possibilities under european anti-discrimination legislation – A case study of procedural novelties: *Actio popularis* action in Hungary", 3 *Erasmus Law Review* (2010), 181–196.

43. Wrbka, "European consumer protection law: Quo Vadis? Thoughts on the compensatory collective redress debate" in Wrbka, van Uytsel and Siems (Eds.), *Collective actions: Enhancing access to justice and reconciling multilayer interest?* (Cambridge University Press, 2012), pp. 34–35.

44. Cappalli and Consolo, op. cit. *supra* note 12, at 224.

45. National procedural law usually allows to join several individual claims when they are based on the same set of facts, see e.g. UK Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, s. 9; Spanish Law 36/2011, Art. 25(3), and Law 1/2000, Art. 72.

46. Commission, Public consultation cited *supra* note 7, at 21. See recent comparative analysis between Member States in Chopin and Germaine, *A comparative analysis of non-discrimination law in Europe* (MPG, 2016), pp. 94–96.

47. Benedi Lahuerta, "The effectiveness of the EU Race Equality Directive at national level. A comparative study of British and Spanish legislation and policies" (PhD Thesis, University of Leicester, 2015), Ch. 2.

the current legal framework Member States are not required to develop CR mechanisms in this field (section 3), there are normative reasons why the EU should take action to explicitly encourage so (section 4), and finishes with some concluding remarks (section 5).

2. The evolution of EU law enforcement procedures

2.1. *The emergence of collective redress in the EU law enforcement toolbox*

As is well known, in *Van Gend en Loos* the Court stated that Community law "not only imposes obligations *on individuals* but is also intended to confer upon them rights which become part of their legal heritage".[48] Yet, *Van Gend en Loos'*s significance also lies in the acknowledgement that it is through the "vigilance" of individuals and institutions that the enforcement of EU law is achieved. This suggests that, at that point in time, the ECJ considered that enforcement was to be conducted either at *institutional* level, by the Commission and the Member States, or at *individual* level, by the right-holders.

Indeed, this was confirmed more explicitly by Advocate General Capotorti in *Rewe*:

> "a person who merely has an interest in the enforcement of a rule, or more precisely, *a person who does not stand in a specific legal relationship based on the rule, is not entitled to rely upon that rule before the courts* … Any other view would entail allowing a kind of *azione popolare* [civil action serving as a test case on a matter affecting public interests] on the basis of directly applicable Community provisions; but that would be contrary to the legal traditions common to the Member States and would, moreover, threaten to give rise to serious practical difficulties in the administration of justice."[49]

This case concerned unfair competition originating from customs duties exemptions granted by Germany to importers of goods sold during cruises.

48. See e.g. Eilmansberger, "The relationship between rights and remedies in EC Law: In search of the missing link", 41 CML Rev. (2004), 1199–1246, at 1201–1206; Dawson and Muir, op. cit. *supra* note 2, 754–755; Rassmussen, "Revolutionizing European law: A history of the *Van Gend En Loos* judgment", 12 *I-Con* (2014) 136–163, at 146, 160.

49. Opinion of A.G. Capotorti in Case C-158/80, *Rewe* v. *Hauptzollamt Kiel*, EU:C:1981:71, at 1850.

The plaintiffs were businesses who were adversely affected by these exemptions, but they were not claiming damages for *direct* losses caused by the exemptions, they were simply requesting the observance of EU law. The ECJ confirmed that they did not have *locus standi* because they were not part of the specific legal relationship at stake – *they merely had an interest in the enforcement of EU rules*.[50]

Traditionally, therefore, the enforcement of EU law has been based on "*individual vigilance*"[51] (i.e. natural persons pursuing claims at national level based on alleged violations of their own subjective EU rights)[52] or *institutional* actions, initiated by the Commission[53] or Member States.[54]

In practice, though, institutional and individual vigilance have limits to address certain types of wrongs. Individual litigation may be ill-equipped to stop mass harm and systemic unlawful practices.[55] Furthermore, affected citizens may have little incentive to start an individual complaint if potential compensation awards are unlikely to cover litigation costs.[56] In this regard, the Commission has recognized that:

> "*Individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices*: citizens and businesses are often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices cause significant aggregate loss to European citizens and businesses."[57]

This is quite obvious in areas like consumer protection, where "the smallness of each claim" makes the defendant "immune from suit",[58] unless consumers can share costs by vindicating their rights through some sort of collective procedure. Similarly, environmental law claimants may struggle to prove causation individually due to this area's technical nature, but they may have

50. Case C-158/80, *Rewe* v. *Hauptzollamt Kiel*, EU:C:1981:163, para 44.

51. Dawson and Muir, op. cit. *supra* note 2, 751.

52. Whilst uncommon, individuals may also initiate proceedings against EU institutions before the ECJ (Arts. 263(4), 265(3), 268, 277, and 340 TFEU).

53. Art. 258 TFEU.

54. Art. 259 TFEU.

55. See e.g. Farkas, "Collective actions under European anti-discrimination law", 19 *European Anti-Discrimination Law Review* (2014) 24–40, at 24–26.

56. Commission, Public consultation, cited *supra* note 7, para 4.

57. Ibid.; see similarly Dougan, "Who exactly benefits from the Treaties? The murky interaction between Union and national competence over the capacity to enforce EU Law", 12 CYELS (2010) 73–120, at 95.

58. Cappalli and Consolo, op. cit. *supra* note 12, 241.

a better chance to establish causation collectively.[59] When environmental breaches affect common resources, enabling interest organizations to take action against a polluting company may also be more effective than relying on individual claims from potentially uninformed,[60] dispersed or uncommitted citizens.

In some situations, prospective plaintiffs may actually be so vulnerable and under-resourced, that individual litigation is perceived as an intimidating process,[61] or may not even be an option they would envisage, due to resignation, lack of resources and/or knowledge.[62] For instance, whilst Roma segregation and discrimination is well-documented in housing, education or employment, individual claims challenging these practices remain very limited.[63]

Institutional enforcement through infringement actions also has its own weaknesses. Firstly, infringement actions are rarely activated by Member States[64] to avoid diplomatic crises or bringing attention to their own infringements,[65] or because they favour political rather than legal solutions.[66] Secondly, infringement actions are filed one at a time for each specific Member State breach, so, they, too, are unable "to address the structural problems that persistently noncompliant States pose".[67] Thirdly, the initial informal stages of the procedure may give rise to "political manipulation and 'horse-trading'".[68] Finally, Member States targeted by infringement actions may "create the *appearance* of norm-conform behaviour" without fully aligning national law to EU law.[69]

59. Blennerhassett, op. cit *supra* note 10, pp. 23, 110–111.

60. Glover, "The structural role of private enforcement mechanisms in public law", 53 *William & Mary Law Review* (2012) 1137–1217, at 1155.

61. See evidence from a UK empirical study on vulnerable workers in Busby and McDermont, "Workers, marginalised voices and the Employment Tribunal system: Some preliminary findings", 41 *Industrial Law Journal* (2012) 166–183, at 176.

62. Dawson and Muir, op. cit. *supra* note 2, at 756.

63. See e.g. Liegeois, *The Council of Europe and Roma. 40 years of action* (Council of Europe, 2012); FRA, *Second European Union Minorities and Discrimination Survey*. *Roma – Selected Findings* (EUPO, 2016), at 11.

64. There are only few examples, see e.g. Case 141/78, *France* v. *United Kingdom*, EU:C:1979:225; Case C-364/10, *Hungary* v. *Slovakia*, EU:C:2012:630.

65. Dawson and Muir, op. cit. *supra* note 2, at 757; Talberg, "Paths to compliance: Enforcement, management, and the European Union", 56 IO (2002), 609–643, at 617.

66. Craig and De Burca, *EU Law. Text, Cases and Materials*, 6th ed. (OUP, 2015), p. 454.

67. Scheppele, "What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions" (2013), <ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf> (last visited 1 Nov. 2017).

68. Dawson and Muir, op. cit. *supra* note 2, at 758.

69. Batory, "Defying the Commission: Creative compliance and respect for the Rule of Law in the EU", 94 *Public Administration* (2016), 685–699, at 686.

These flaws are even more evident following the 1990s–2000s enlargements, which extended the territorial and substantive scope of application of EU law, and thus, "accentuated the need for a more decentralized enforcement".[70] Indeed, the need to introduce CR mechanisms, whereby a public body or an interest organization can start proceedings in its own name or on behalf of a group of complainants, has been increasingly recognized by the EU legislature. This has been particularly the case for consumer law, where, since the 1980s, there have been attempts to empower non-governmental organizations to mobilize the law on behalf of consumers,[71] and these efforts started to take even more prominence in the 1990s–2000s.[72]

In 2010–11 the Commission even launched an initiative for a "coherent European approach on collective redress",[73] which eventually led to the adoption of Recommendation 2013/396/EU ("the Recommendation"), which recognizes that "collective redress is of value" in consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.[74] As discussed in section 4.2, several binding instruments develop the Recommendation in more detail in some of these areas.

EU law has, therefore, evolved from its initial focus on institutional and individual vigilance to recognize, more recently, that collective vigilance, particularly CR and broader standing rules, are necessary to make the enforcement toolkit more comprehensive and effective. Through recent legislative initiatives in consumer, environmental, competition and data protection law,[75] this has become particularly obvious. However, the 2013 Recommendation also recognizes, more generally, that its CR principles "should be applied horizontally and equally … in *any other EU law areas*" where they might be useful.[76]

Through this Recommendation, the Commission sought to establish some "common principles which *any potential future EU initiatives* on collective

70. Commission, Public consultation, cited *supra* note 7, para 2.

71. See e.g. Directive 84/450/EEC, Art. 4(1).

72. See e.g. Directive 93/13/EEC on unfair contract terms, O.J. 1993, L 95/29, Art. 7; Directive 98/27/EC on injunctions for the protection of consumers' interests, O.J. 1998, L 166/51, Arts. 1–3; Directive 2005/29/EC on unfair commercial practices, O.J. 2005, L 149/22, Art. 4; Regulation 2006/2004/EC on consumer protection cooperation, O.J. 2004, L 364/1, Arts. 4(2), 8(3).

73. See Commission, Joint information note: Towards a coherent European approach to collective redress: Next steps, SEC(2010)1192, and Commission, Public consultation, cited *supra* note 7.

74. Recital 7.

75. See *infra* section 4.2.

76. Recital 7.

redress *in any sector* would respect" to ensure that they are in line with the EU and Member States' legal traditions and with existing procedural remedies.[77] The door seems therefore open to further sectoral EU proposals to encourage the development of CR at national level in areas where this may be valuable. Should this be case for EU equality law?

2.2. *Collective redress: Signs that EU equality law should be included in the club?*

From a sociological and psychological perspective, discriminatory prejudices emerge at group level, i.e. due to the perceived differences between the majority ("us") and the minority ("the others").[78] For this reason, they need to be addressed not only at individual level, but also at collective level, both through adjudicatory and non-adjudicatory strategies. For instance, the factual scenario in the recent *CHEZ* case[79] shows how individuals living in neighbourhoods predominantly inhabited by Roma in Bulgaria are put at disadvantage by not having electricity meters at an accessible height – because it is believed that if they were easily accessible, they would be tampered with. The applicant was only able to challenge this practice in *her* personal case, so the ruling in *CHEZ* did not directly affect all the other individuals subjected to the same practice.[80] This suggests that, when equality promotion strategies fail, systemic discrimination rooted in group prejudices must be addressed not only through individual litigation, but also through CR strategies.[81]

77. Commission, Public consultation, cited *supra* note 7, para 10.

78. See e.g. Poiret, "Les processus d'ethnicisation et de raci(ali)sation dans la France contemporaine: Africains, Ultramarins et « Noirs »", 27 *Revue européenne des migrations internationales* (2011), 107–127; Alfinito Vieira and Graser, "Taming the biased black box? On the potential role of behavioural realism in anti-discrimination policy", 35 *Oxford Journal of Legal Studies* (2015) 121; Aime, "Se dice 'cultura', se piensa 'raza'" in Aime et al., *Contra el Racismo. Cuatro Razonamientos* (Economía Digital, 2016), pp. 86–91.

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

80. *CHEZ* led to changes in the Bulgarian definition of "indirect discrimination" (Protection Against Discrimination Amendment Act, 22 Dec. 2016, State Gazette, Issue 105, 30 Dec. 2016), which may have had an influence on the electricity supplier's decisions to introduce a smart meters (<www.cez.bg/bg/novini/1573.html>) and to lower the electricity meters, but *only* in the Montana district (<www.24chasa.bg/Article/6072637>, both last visited 1 Dec. 2017). I am indebted to Svetlana Chobanova for valuable assistance in locating this information.

81. The analysis of strategic litigation based on individual cases is beyond the scope of this paper, but it may be another useful enforcement tool, see e.g. Panke, "The European Court of Justice as an agent of Europeanisation? Restoring compliance with EU law", 14 *Journal of European Public Policy* (2006) 847–866, at 852; Kagan, *Adversarial Legalism: The American Way of Law* (HUP, 2009).

The need for *adjudicatory collective vigilance* is indeed clearly visible in the light of rampant structural discrimination still suffered by the Roma in many Member States.[82] In 2010, the EU started developing a multi-layered governance system to encourage Roma integration based mainly on non-adjudicatory collective enforcement (e.g. funding, monitoring and mainstreaming,[83] largely managed through the EU Platform for Roma Inclusion and National Roma Integration Strategies). Nevertheless, discrimination against Roma prevails: in a 2016 survey, 41 percent of respondents had felt discriminated against at least once in the past five years.[84] Discrimination is particularly high in the fields of access to employment, housing and access to services.[85] Accordingly, non-adjudicatory collective enforcement is not enough to address the systemic disadvantage that the Roma still endure. Yet, unlike EU consumer, data protection or environmental law, EU equality law has not introduced requirements to develop CR at national level.

In fact, besides Roma discrimination, CR may be useful to address discrimination in other fields, such as systemic gender pay inequalities,[86] or the high levels of housing discrimination and segregation suffered by certain ethnic and religious minorities.[87] In these contexts, discrimination is not circumstantial, but structural;[88] it is not the product of isolated "random intentional actions",[89] but rather the consequence of profoundly ingrained

82. Commission, Communication on the social and economic integration of the Roma in Europe, COM(2010)133 final.

83. Dawson and Muir, op. cit. *supra* note 2, at 767.

84. FRA, *European Union Minorities and Discrimination Survey: Roma – Selected Findings* (EUPO, 2016), p. 36.

85. Ibid., p. 38.

86. Class actions have been successfully used in sex discrimination and pay inequalities cases in the US (e.g. Equal Employment Opportunities Commission, "Walmart to pay more than $11.7 million to settle EEOC sex discrimination suit", <www.eeoc.gov/eeoc/newsroom/release/3-1-10.cfm> (last visited 1 Nov. 2017)) and the UK (e.g. *Asda Stores Ltd* v. *Brierley and others*, UKEAT/0011/17).

87. FRA, *European Union Minorities and Discrimination Survey Main Results Report* (EUPO, 2010), pp. 109, 133, 153, 175, 195, 197, 219, 241. See also Semyonov and Glikman, "Ethnic residential segregation, social contacts, and anti-minority attitudes in European societies", 25 *European Sociological Review* (2009) 693–708; Gale, "Religious residential segregation and internal migration: The British Muslim case", 45 *Environment and Planning A: Economy and Space* (2013) 872–891.

88. See similarly Rey Martínez, "La discriminación racial en la jurisprudencia del Tribunal Europeo de Derechos Humanos" in Fundación Secretariado Gitano (FSG), *Informe Anual 2012* (FSG, 2012), p. 75.

89. Hermanin, Moschel and Grigolo, "Introduction: How does race 'count' in fighting racial and ethnic discrimination in Europe?" in Hermanin, Moschel and Grigolo (Eds.), *Fighting Discrimination in Europe. The Case for a Race-Conscious Approach* (Routledge, 2013), p. 2.

social patterns. Addressing these collectively-experienced phenomena only through individual litigation seems oddly inconsistent and merely provides one-off solutions – if it even does that – while leaving the underlying discriminatory patterns unchanged.

The need for collective vigilance in this field has also become more visible in connection with the recent rise of xenophobic populist movements. As the European Commission against Racism and Intolerance (ECRI) has pointed out, following years of uncertainty and ansterity, "[a]n increasing dichotomy between 'us' and 'them' has developed in the public discourse of many countries, which seeks to exclude people on the basis of their skin colour, religion, language or ethnicity. This has not only affected recently arrived migrants, but also minority groups that have been long-established in Europe."[90]

Non-adjudicatory collective vigilance based on self-regulation and codes of conduct[91] may help mitigate this problem,[92] but it is unlikely to be sufficient to eradicate it. Xenophobic speech is often directed at certain groups without targeting specific persons, so individual litigation is often ill-suited to address it. Whilst the worst forms of hate speech ought to be addressed through criminal law, milder everyday "speech acts" may also be challenged through civil, administrative or employment law, but they are often not reported by disempowered individuals.[93] Yet, claims in the public interest started by human rights watch-dogs or/and interest organizations could facilitate enforcement and act as deterrent to avoid the further expansion of this phenomenon. In this line, the ECRI recommends providing standing not only for those directly targeted by hate speech, but also for "equality bodies, national human rights institutions and interested non-governmental organizations".[94] For instance, thanks to a case brought by a Roma NGO, a Bulgarian TV broadcaster was held liable for ethnic discrimination for failing to moderate anonymous comments against the Roma community on its website.[95]

90. ECRI, "Annual report on ECRI's activities, covering the period from 1 January to 31 December 2016", CRI(2017)35, paras. 6–7.

91. ECRI, "General policy recommendation No. 15 on combating hate speech", CRI(2016)15; EU Code of Conduct on countering illegal hate speech online (2016) <ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf> (last visited 1 Nov. 2017).

92. See Commission, "Code of conduct on countering illegal hate speech online: One year after. Fact sheet" (2017) <ec.europa.eu/information_society/newsroom/image/document/2016-50/factsheet-code-conduct-8_40573.pdf > (last visited 1 Nov. 2017).

93. See e.g. FRA, *European Union Minorities and Discrimination Survey: Roma – Selected Findings* (EUPO, 2016), p. 11; FSG, *Informe Anual 2017* (FSG, 2017), p. 12.

94. ECRI, report cited *supra* note 90, at 8.e.

95. Sofia City Administrative Court Decision No. 13542 of 12 Dec. 2016, in Case No. 10756/2015 confirmed by the Supreme Administrative Court in 2017.

Overall, therefore, whilst the EU has started to acknowledge that, in areas like consumer protection, environmental protection or data protection, CR must complement existing individual and institutional enforcement mechanisms, this has not been the case in protection against discrimination. The EU has taken *institutional* action to improve the collective situation of some groups affected by long-lasting discrimination, especially the Roma, but this has not been coupled with an encouragement to develop national CR mechanisms. Yet, as this subsection demonstrates, there is a clear need to improve CR avenues in the field of EU equality law.

Against this background, the next two sections consider whether a requirement to develop CR strategies may arise from the combination of existing EU Equality Directives, general EU law principles and the EU Charter of Fundamental Rights (CFREU; section 3), and what are the normative justifications for introducing an express obligation to develop national collective judicial redress mechanisms in this area (section 4).

3. EU equality law and the right to effective judicial protection: A concealed duty to develop collective redress mechanisms at national level?

If, as argued earlier, CR is necessary for EU equality law to be more effective, one could consider whether, under the current legal framework, the EU principles of equivalence, effectiveness and effective judicial protection could have the effect of requiring Member States to grant standing to legal persons (e.g. public bodies,[96] trade unions or interest organizations), to initiate *actio popularis* and/or representative action proceedings.

In determining standing for private actors to enforce EU rights, Dougan has argued that the ECJ tends to focus first on defining the "protective scope" of EU law "as a matter of Union law itself".[97] To do so, the ECJ undertakes a textual and teleological analysis of the substantive and procedural provisions of relevant EU instruments, while also factoring in the policy and regulatory context.[98] In this interpretative exercise, the ECJ must maintain a difficult

96. In the context of Brexit, the "independent national authority" that will likely be created could potentially engage in CR mechanisms, see the Joint Report from the Negotiators (8 Dec. 2017), at 40 <ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> (last visited 20 Feb. 2018).

97. Dougan, op. cit. *supra* note 57, 82–100.

98. Cf. ibid., at 87.

balance between: a) ensuring the uniformity and effectiveness of EU law, and b) not requiring Member States to do so at the expense of their own legal traditions (e.g. by introducing unusual "procedural creatures" in their legal systems).[99]

Once the protective scope of EU law is established, the ECJ considers the margin of discretion left to Member States to exercise their own procedural autonomy. This determines the breadth of Member States' leeway to define *locus standi* according to their own legal systems, with the caveat that they must respect the well-known principles of equivalence and effectiveness, and the principle of effective judicial protection.[100]

In the following, this two-stage analysis is applied to EU equality law, to assess which position the ECJ would be likely to take regarding CR in this field, i.e concerning the standing of legal persons acting in the public interest (*actio popularis*) or representing groups of complainants (representative actions). The section starts by sketching the relevant EU law framework (3.1), which is then considered to determine the protective scope of the Equality Directives (3.2) and the margin of discretion left to Member States (3.3).

3.1. *The EU legal framework*

To investigate whether Member States could already have a duty to allow CR procedures to enforce EU equality law, there are a range of sources to consider (Diagram 1).

Diagram 1. Legal Framework to determine the protective scope of EU equality law

Primary Law	**EU Treaties:** -Art. 19(1) TEU -Arts. 18, 19, 157 TFEU	**CFREU:** -Arts. 21, 47 -Art. 51(1)	**General Principles:** -Effective judicial protection -Equivalence & effectiveness
Secondary Law	**EU Equality Directives:** Directives 2000/43/EC; 2000/78/EC; 2004/113/EC; 2006/54/EC; 2010/41/EU		

Source: Own elaboration.

99. Ibid., at 90.

100. Case C-33/76, *Rewe* v. *Landwirtschaftskammer für das Saarland,* EU:C:1976:188, para 5; Case C-45/76, *Comet BV* v. *Produktschap voor Siergewassen*, ECLI:C:1976:191, paras. 11–18. See also Beljin, "Rights in EU law" in Prechal and van Roermund (Eds.), *The Coherence of EU Law. The Search of Unity in Divergent Concepts* (OUP, 2008), pp. 91–92.

To begin with, the right to equal pay between men and women and the right not to be discriminated against on the ground of nationality have always been recognized in primary law, currently under Articles 157 and 18 TFEU, respectively.[101] These provisions have direct effect,[102] so they are both considered to determine the protective scope of EU equality law (see below, 3.2). Conversely, current Article 19 TFEU, introduced by the Treaty of Amsterdam, does not have direct effect. However, it has been extensively developed through the Equality Directives. Remarkably, the Directives include not only substantive provisions (e.g. definitions of the forms of discrimination) but also, for the first time in this field, procedural provisions on complaint mechanisms, equality bodies, burden of proof, sanctions, etc. Therefore the substantive and procedural requirements of the Equality Directives are also analysed.

The relevant legal framework is completed by the CFREU and some general principles of EU law. The Lisbon Treaty gave the CFREU the same legal value as the Treaties, making it binding for Member States when "they are implementing EU law".[103] This is significant for our purposes because the CFREU contains two provisions which could support the need to develop CR procedures for EU equality law. At a substantive level, Article 21(1) establishes that discrimination based on any of its grounds "shall be prohibited". At a procedural level, Article 47 CFREU recognizes the right to an effective remedy as an expression of the more general EU principle of effective judicial protection. Whilst this principle originates from national constitutional traditions and Articles 6 and 13 ECHR,[104] and it has indeed been present in the ECJ case law for a long time,[105] the new binding character of the CFREU has reinforced its constitutional status within EU law.[106] Since the Lisbon Treaty, this is also supported by Article 19(1) TEU, which, by creating a duty for Member States to provide sufficient remedies to ensure

101. Art. 18 TFEU has classically been considered an internal market provision, but it is clearly linked to idea of equality and equality law, see Bell, *Anti-Discrimination Law and the European Union* (OUP, 2002), p. 39; Kochenov, "Citizenship without respect: The EU's troubled equality ideal" (2010), Jean Monet Working Papers 8 <jeanmonnetprogram.org/wp-content/uploads/2014/12/100801.pdf> (last visited 18 Mar. 2018).

102. See respectively Case 43/75, *Defrenne* v. *SABENA No. 2*, EU:C:1976:56; Case C-85/96, *Martínez Sala* v. *Freistaat Bayern*, EU:C:1998:217.

103. Art. 6(1) TEU, Art. 51(1) CFREU.

104. Joined Cases C-317-320/08, *Alassini* v. *Telecom Italia SpA*, EU:C:2010:146, para 61.

105. See e.g. Case 222/84, *Johnston* v. *CC Royal Ulster Constabulary*, EU:C:1986:206; Case C-97/91, *Borelli* v. *Commission*, EU:C:1992:491, Case C-7/98, *Krombach* v. *Bamberski*, EU:C:2000:164.

106. See e.g. Mak, "Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters" in Micklitz (Ed.), *Constitutionalization of European Private Law* (OUP, 2014), pp. 236, 239.

effective legal protection in the fields covered by Union law, can be seen as the counterpart of Article 47 CFREU.

Although there is some overlap between the principle of effective judicial protection and the so-called "*Rewe* mantra", i.e. the principles of equivalence and effectiveness, they "serve different purposes and are driven by different rationales".[107] This is evidenced by recent case law, where the ECJ has applied them in a separate, yet complementary, manner.[108] The Court relies on the equivalence/effectiveness test to define the boundaries of national discretion to develop remedies for the enforcement of EU law, whereas the principle of effective judicial protection safeguards the right to an effective remedy as a crucial human right in a rule of law system.[109] Accordingly, the "*Rewe* mantra" and the principle of effective judicial protection are considered separately (3.3 below).

3.2. *Defining the protective scope of EU equality law*

To define the protective scope of EU equality law this section focuses first on substantive law. Article 18 TFEU boldly states that "*any* discrimination on grounds of nationality shall be prohibited", which can be interpreted as encompassing both individual and group discrimination. Likewise, Article 157 TFEU, which requires that Member States ensure that the principle of equal pay "for male and female *workers*" (*in plural*) is applied, allows for an analogous interpretation. Article 21 CFREU similarly refers to "*any* discrimination" based either on the open catalogue of grounds listed in paragraph 1 or on nationality (paragraph 2), which also supports the suggested interpretation. Following this simple textual analysis, EU primary law *allows* for a broad definition of the protective scope of EU equality law to potentially grant standing to: a) individual complainants, b) defined groups of complainants (acting in their own names or represented by a third party), and c) legal persons who start proceedings in the public interest when discrimination targets a specific group without any identifiable victim.

Nevertheless, the Equality Directives contain much more detailed provisions which are central to outline the protective scope of EU equality law. Regarding the substantive provisions, the ECJ recognized in *Feryn* that, although the Racial Equality Directive's ("RED") definition of direct

107. Prechal and Widdershoven, "Redefining the relationship between '*Rewe*-effectiveness' and Effective judicial protection", 4 REALaw (2011), 31–50, at 47.

108. See e.g. Case C-12/08, *Mono Car Styling*, EU:C:2009:466, para 49; Cases C-317-320/08, *Alassini,* paras. 47–66; also Prechal and Widdershoven, ibid., at 46–50.

109. Prechal and Widdershoven, ibid., at 46; Ravo, "The role of the principle of effective judicial protection in the EU and its impact on national jurisdictions" in *Sources of Law and Legal Protection* (Edizioni Universita di Trieste, 2012), pp. 111–112.

discrimination is framed in *individual* terms ("*one person* is treated less favourably than another"),[110] a public statement that discriminates against a certain *group* of prospective employees would also be covered by the Directive.[111] Following a teleological interpretation, the ECJ found that "direct discrimination is not dependant on the identification of *a complainant* who claims to have been the victim."[112] Accordingly, discriminatory conducts targeting or affecting a *defined group* (e.g. "immigrants", or "workers over 50 years old") are covered by the Directives, even in the absence of an obvious victim. Arguably, then, despite the wording of the definition of direct discrimination, on a *substantive* level, the RED protects the *rights of groups* falling within their scope.

A few years later, the ECJ confirmed in *Asociaţia* that the same principle applies to direct discrimination in the context of Directive 2000/78/EC.[113] It could therefore also be extended by analogy to all the other Equality Directives which contain identical definitions of direct discrimination.

In fact, the teleological justifications put forward by the ECJ to substantiate that interpretation of the concept of direct discrimination[114] could easily be transposed to the concept of indirect discrimination. The latter requires the existence of a group-related disadvantage, which is normally exemplified in the claimant's personal situation. However, indirect discrimination towards a certain group of individuals may exist whether one of them is willing to initiate a claim or not. Indeed, in the Equality Directives, indirect discrimination is defined as a neutral provision, criterion or practice that would put "*persons*" of a certain protected group at particular disadvantage compared to other persons,[115] without specifically referring to *an individual.* For instance, suppose that a company has the policy of having staff meetings from 16h to 18h. This policy may be difficult to combine with childcare responsibilities that – still nowadays – tend to fall upon women's shoulders more frequently. Whilst this internal rule may put women at disadvantage compared to men, affected female employees may not be willing to file a complaint (e.g. for fear of retaliation). Yet, the policy would still constitute indirect sex discrimination. Therefore, from a *substantive perspective, groups*

110. Art. 2(2)(a) RED. On the definitions of indirect discrimination, harassment and instructions to discriminate see notes 15–16 *infra* and accompanying text.

111. Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, EU:C:2008:397, para 25.

112. Ibid.

113. Case C-81/12 *Asociaţia ACCEPT* v. *Consiliul Naţional pentru Combaterea Discriminării* EU:C:2013:275, para 37.

114. Namely, that the Directive seeks to foster a "socially inclusive labour market", which can be undermined by discriminatory "speech acts", Case C-54/07, *Feryn*, paras. 23–25.

115. Art. 2(2)(b) RED.

of individuals targeted by direct or indirect discrimination have an EU right to be protected, even when individual victims cannot be identified.[116]

Nevertheless, in *Feryn,* the ECJ also noted that the substantive rights recognized under the RED "must be distinguished" from the procedural obligations that the Directive imposes upon Member States, which only require that remedies are available "to *persons* who consider that *they* have suffered discrimination".[117] Indeed, Article 7(1) of the RED states that Member States *shall* ensure that *judicial and/or administrative procedures* … for the enforcement of obligations under this Directive are available to *all persons who consider themselves wronged* by failure to apply the principle of equal treatment *to them*". Consequently, the RED, and the other similarly drafted Equality Directives, do not compel Member States to introduce an *actio popularis*.[118] On the other hand, the wording of Article 7(1) does not completely rule out class actions because it requires granting *locus standi* to "*all persons*" who consider themselves victims – *in plural*. However, during the preparatory works several Member States expressed strong opposition to class actions because "they were not foreseen in their own judicial systems",[119] and the Commission is also against US-style class actions.[120] It is therefore likely that the ECJ will take a cautious approach to the interpretation of Article 7(1) to avoid requiring the introduction of procedural mechanisms, like class actions, that would be alien to many Member States' legal systems.[121]

Nonetheless, Article 7(2) RED also establishes that

> "associations, organizations or other legal entities, which have, *in accordance with the criteria laid down by their national law*, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf *or* in support of the complainant, *with his or*

116. Whilst this conclusion could also be easily extended to the concept of instructions to discriminate (Art. 2(2)(4) RED refers to "persons"), it would be more difficult to extend it to harassment, which requires that the unwanted conducted is towards "a person" (Art. 2(2)(3) RED).

117. Case C-54/07, *Feryn*, para 26.

118. See more generally Ruffert, "Rights and remedies in European Community law: A comparative view" 34 CML Rev. (1997) 307–336, at 327; Eilmansberger, op. cit. *supra* note 48, at 1232.

119. Tyson, "The negotiation of the European Community Directive on racial discrimination", 3 *European Journal of Migration and Law* (2001) 199–229, at 212.

120. Commission, Joint information note, cited *supra* note 73, at 17. Similarly, see EESC, Opinion on the Green Paper on Consumer Collective Redress, O.J. 2010, C 128, at 5.2.3.

121. Cappalli and Consolo, op. cit. *supra* note 12, p. 217; Dougan, op. cit. *supra* note 57, at 90. Only 8 Member States clearly allow class actions in the field of discrimination: Bulgaria, Denmark, France (only housing claims), the Netherlands, Portugal, Romania, Slovakia and Slovenia; see Chopin and Germaine, op. cit. *supra* note 46, at 96.

> *her approval*, *in any judicial and/or administrative procedure* provided for the enforcement of [the obligations contained in the Directive.][122]

This provision could be understood as requiring that legal entities with a legitimate interest are able to engage in judicial and/or administrative proceedings through an *actio popularis* and/or representative actions. However, on a careful analysis it becomes evident that this Article contains three "exclusionary" provisos.[123] Firstly, the criteria for determining which organizations have a legitimate interest are determined *by national law*. Secondly, legal entities may *only* engage in legal proceedings *with the complainant's approval*, which rules out an *actio popularis* in cases of "victimless discrimination". Thirdly, the stipulation "on behalf *or* in support" does not require Member States to grant legal entities standing *on behalf* of the complainant, which would be essential to enable representative actions.[124]

Whilst, from a *substantive perspective*, the Equality Directives protect *both individuals and groups* against discrimination, and this is supported by EU primary law and textual and regulatory considerations, from a *procedural perspective*, Member States have a wide discretion to exercise their procedural autonomy,[125] so it is likely that the ECJ would consider that it is their choice to enable CR procedures or not.

3.3. *Exploring the limits of Member States' procedural autonomy in the field of EU equality law*

In exercising their procedural competence, however, Member States must observe the case law based principles of effectiveness and equivalence, and the right to effective judicial protection, enshrined in Articles 19(1) TEU and

122. Art. 7(2) RED.

123. Sarmiento talks about "exclusionary rules": see Sarmiento, "Who's afraid of the Charter; The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013) 1267–1304, at 1285.

124. The initial Commission proposal for the RED clearly required that legal entities be entitled to pursue complaints "on behalf of" individuals (COM(1999)566), but several delegations expressed concerns about this broad wording, namely, Belgium, Denmark, Austria, Spain, France, Sweden and UK (Interinstitutional File: 99/0253 (CNS), Doc. 6435/00, at 13; Doc. 7756/00, at 17). These were overcome through UK and Irish proposals to redraft the wording to "may engage, either on behalf or in support of the complainant" (Doc. 8857/00, at 9; Doc. 8967/00, at 13), despite the Commission's reluctance (Doc. 8857/00, at 9) and Parliament's efforts to introduce amendments to allow organizations to "bring a case without the approval of a victim, in particular where the discrimination affects a group of persons and it may not be feasible to obtain the approval of each individual affected" (Parliament (EU), Report A5-0136/2000, Amendment 41, at 21–22).

125. See e.g. Cases C-87-89/90, *Verholen* v. *Sociale Verzekeringsbank Amsterdam,* EU:C:1991:314; Dougan op. cit. *supra* note 57, at 83.

47 CFREU. Traditionally, the principle of equivalence requires that the rules governing the enforcement of EU law in Member States are not less favourable than those governing similar national actions, whereas the principle of effectiveness establishes that the enforcement of EU law must not be made virtually impossible or excessively difficult.[126] The right to effective judicial protection, in turn, establishes a duty for Member States "to provide remedies *sufficient* to ensure *effective* legal protection in the fields covered by EU law"[127] (emphasis added).

The ECJ's application of the effectiveness-equivalence test has been controversial[128] and has led to unpredictable and contradictory case law.[129] Nevertheless, in that body of case law, the effectiveness-equivalence test tends to take a "*negative role*", i.e. ensuring that national law does not create excessive hurdles for the enforcement of EU law.[130] Whereas some scholars have advocated that a *positive duty* requiring Member States to provide "*adequate*" judicial protection should emerge from these principles,[131] the ECJ has tended to require a *minimum* level of judicial protection only.[132] For instance, Member States would comply with these principles provided the criteria to determine which organizations have a "legitimate interest" are not overly restrictive, so

126. Case C-33/76, *Rewe*, para 5; Case C-45/76, *Comet BV*, paras. 13–16. More recently, the ECJ has favoured a "proportionality-based" application of these principles, see e.g. Cases C-430-431/93, *Van Schijndel* v. *Stichting Pensioenfonds voor Fysiotherapeuten*, EU:C:1995:441, para 19; Craig and De Burca, op. cit. supra note 66, pp. 439–240; Bobek, op. cit. *supra* note 14, at 312.

127. Ravo, op. cit. *supra* note 109, at 105.

128. Adinolfi, "The procedural autonomy of Member States and the constraints stemming from the ECJ's case law: Is judicial activism still necessary?" in Micklitz and De Witte, op. cit. *supra* note 14, at 281, 286.

129. Bobek, op. cit. *supra* note 14, at 312, 319.

130. See e.g. Case C-120/97, *Upjohn* v. *The Licensing Authority*, EU:C:1999:14, paras. 34–37; Case C-12/08, *Mono Car Styling*, paras. 46–49; Joined Cases C-317-320/08, *Alassini*, paras. 52–60; Case C-93/12, *Agrokonsulting-04*, EU:C:2013:432, paras. 48–58, EU:C:2013:432; Reich, "Effective private law remedies in discrimination cases" in Schulze (Ed.), *Non-Discrimination in European Private Law* (Mohr Siebeck, 2011), p. 74. See also Dougan, *National Remedies before the Court of Justice* (Hart, 2004), pp. 24–52.

131. Micklitz, "The ECJ between the individual citizens and the Member States" in Micklitz and De Witte, op. cit. *supra* note 14, p. 395; Reich, ibid., pp. 74–75. However, some authors consider that such duty or some sort of procedural primacy of EU law already exists, see respectively Accetto and Zleptnig, "The principle of effectiveness: Rethinking its role in Community law", 11 EPL (2005) 375–403, at 389; Delicostopoulos, op. cit. *supra* note 30, at 603–604, 609, 612.

132. Except for compensation cases, where the ECJ has required "adequate" compensation, see e.g. Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*, EU:C:1984:153, paras. 23 and 28; Case C-271/91, *Marshall Southampton and South West Hampshire Area Health Authority*, EU:C:1993:335, para 26; Van Gerven, op. cit. *supra* note 14, at 529; Adinolfi, op. cit. *supra* note 128, p. 292

as to nullify the effect of the Equality Directives,[133] and are comparable to criteria applicable to analogous national law. So, the ECJ would probably consider that allowing legal entities to "*support*" complaints in legal proceedings would comply with the *minimum* standards (as opposed to granting standing to act "*on behalf*" of complainants, which could be considered an *adequate* protection). It is therefore unlikely that reliance on these principles could have the effect of requiring Member States to grant standing to legal persons in CR procedures.

Yet, could the principle of effective judicial protection, enshrined in Article 47 CFREU, require that Member States introduce CR mechanisms to give full effect to EU equality law? This principle is particularly relevant for the standing issues[134] herein considered because it seeks to ensure that substantive rights do not become "an empty promise".[135]

The CFREU arguably aspires to become "the Court's true guiding (written) norm",[136] so the next step in this inquiry is considering the potential of the right to an effective remedy in Article 47 CFREU – as an expression of the above-mentioned principle, and jointly interpreted with Article 21 CFREU – to require that Member States develop CR mechanisms for EU equality law.

Whilst the binding nature of the Charter[137] is limited by Article 51(1) CFREU,[138] following Rauchegger, Member States are compelled "to guarantee the effectiveness of a rule of EU law" when two conditions are fulfilled, namely: (1) that a national measure affects the effectiveness of a provision of secondary EU law, and (2) that the effective implementation is clearly mandated by EU law.[139]

Regarding the first proviso, national procedural law certainly affects the effectiveness of substantive EU equality law. In the same way that the CFREU was applied in *DEB* to national procedural law which hindered access to

133. Case C-427/07, *Commission* v. *Ireland*, EU:C:2009:457.

134. Prechal and Widdershoven, op. cit. *supra* note 107, at 47.

135. Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 ECLR (2012) 375–403, at 381.

136. Groussot and Petursson, "The EU Charter of Fundamental Rights five years on: The emergence of a new constitutional framework?" in de Vries, Bernitz and Weatherill (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart, 2015) at pp. 135, 150.

137. Art. 6(1) TEU.

138. See further Lenaerts, op. cit. *supra* note 135, Sarmiento, op. cit. *supra* note 123.

139. Rauchegger, "The interplay between the Charter and national constitutions after *Åkerberg Fransson* and *Melloni*: Has the CJEU embraced the challenges of multilevel fundamental rights protection?" in de Vries, Bernitz and Weatherill, op. cit. *supra* note 136, at 93, 104.

justice to legal entities in the field of State liability,[140] and it applied in *Textdata* to ineffective national penalties that hindered compliance with an EU directive requiring the disclosure of accounting documents,[141] it may also apply to national procedural laws that impede access to justice to enforce EU equality law. Of course, Member States may have their own procedural provisions which are applicable to the Equality Directives and may pre-date the latter. Yet, following *DEB* and *Fransson*,[142] the Charter applies to national rules which have the *function* of directly or indirectly assisting the transposition EU law, even though they were not originally *intended* to transpose EU law.[143]

The second proviso will normally entail the existence of a specific substantive EU rule governing that area of law.[144] In this regard, under *Fransson*, it is now widely accepted that "the applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter,"[145] that is, the CFREU applies to the Member States not only when they are "*implementing*" Union law,[146] but also in any situation "where national legislation *falls within the scope* of European Union law".[147] For our purposes, the *Feryn* recognition that "victimless discrimination" is prohibited under the Equality Directives could trigger Article 47 CFREU to determine whether, in order to ensure the full effectiveness of that prohibition, groups of complainants and/or legal persons representing their interests[148] should be granted standing at national level. Nevertheless, if such claim ever reached the ECJ, the latter would probably argue that the narrow procedural stipulations of the Equality Directives are, as Sarmiento calls them, "exclusionary rules", which have the effect of "delimiting in the negative the areas of influence of EU law and, consequently, of the Charter".[149] In the light of the partial

140. Case C-279/09, *DEB* v. *Bundesrepublik Deutschland*, EU:C:2010:811, para 33.

141. Case C-418/11, *Textdata*, EU:C:2013:588, paras. 48–52 and 74–76.

142. Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280, para 21.

143. Sarmiento, op. cit. *supra* note 123, at 1279.

144. Ladenburger, "Protection of fundamental rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and national constitutions", (FIDE, 2012), at 16.

145. Case C-617/10, *Fransson*, para 21.

146. Art. 51(1) CFREU.

147. Case C-617/10, *Fransson*, para 21; see also Case C-256/11, *Dereci* v. *Bundesministerium für Inneres*, EU:C:2011:734, para 72; Sarmiento, op. cit. *supra* note 123, at 1277–1278.

148. In *DEB* the ECJ established that "it is not impossible for legal persons to rely on [the principle of effective judicial protection]", Case C-279/09, *DEB*, para 59.

149. Sarmiento, op. cit. *supra* note 123, at 1285.

harmonization achieved by the Directives, the ECJ could recall *Unibet*[150] to state that EU law cannot require the creation of CR procedures given that the collective rights derived from the Equality Directives may be *indirectly* enforced through individual procedures.[151] The Court could equally reject a potential duty to set up CR mechanisms on the basis of *Pohotovost*.[152] In that case, a claim that Articles 38 and 47 CFREU and Directive 93/13/EEC required consumer associations to be allowed to intervene in arbitration procedures was rejected. Under Directive 93/13/EEC, consumer associations should be granted standing to act on behalf of consumers.[153] However, since the Directive did "*not expressly*" provide for consumer associations to *intervene* in individual disputes, the Court ruled that Article 38 CFREU could not, "*by itself*, impose an interpretation of that directive which would encompass such a right."[154] In our context, it is plausible to imagine a similar reasoning: since the Equality Directives do not expressly refer to CR mechanisms, Articles 21[155] and 47 CFREU cannot, *by themselves*, impose an interpretation requiring the development of those procedures.[156]

To conclude: whilst, according to the ECJ in *Feryn,* the substance of the Equality Directives protects groups against discrimination, their narrow procedural provisions do not allow for an extensive interpretation, which, in conjunction with favourable primary law, could require the development of national CR mechanisms. Not even the Lisbon enhancements of the principle of effective judicial protection and its alleged preponderance over national procedural autonomy[157] can make up for the weakness of the Directives' procedural clauses. Whilst this may be considered an "externality" inherent to the specificities of the EU legal order, the following section argues that it is problematic from a normative perspective and creates inconsistencies within EU law.

150. I.e. that EU law does not require the creation of new national remedies, provided there is at least an indirect remedy to ensure respect for EU rights, Case C-432/05, *Unibet* v. *Justitiekanslern*, EU:C:2007:163, paras. 40–41.

151. Ibid.

152. Case C-470/12, *Pohotovosť s. r. o.* v. *Miroslav Vašuta*, EU:C:2014:101.

153. Art. 7(2)-(3); also Case C-470/12, *Pohotovosť*, paras. 54–55.

154. Case C-470/12, *Pohotovosť*, para 52.

155. Although the ECJ has relied on Arts. 20 and 21 CFREU to interpret secondary law extensively and to require that national law is either set aside (Case C-441/14, *Dansk Industri*, EU:C:2016:278, paras. 22, 27) or interpreted in conformity (Case C-149/10, *Chatzi*, EU:C:2010:534, paras. 62–63, 75), the exclusionary provisos of the Equality Directives severely limit that option.

156. Cf. Mak op. cit. *supra* note 106, pp. 257–258, on Case C-472/10, *Invitel,* EU:C:2012:242 and Case C-453/10, *Pereničová and Perenič,* EU:C:2012:144 (decided on the basis of Directive 93/13/EEC) and the potential of the CFREU for collective rights.

157. Arnull, "The principle of effective judicial protection in EU law: An unruly horse?", 36 EL Rev. (2011) 51–70, at 68; Mak, op. cit. *supra* note 106, p. 240.

4. Normative reasons to encourage collective redress for discrimination claims through EU Law

It has so far been argued that, largely due to the flimsy enforcement provisions of the Equality Directives, the ECJ is unlikely to conclude that Member States should develop CR mechanisms to enforce EU equality law. In this section, however, the normative reasons why the EU legislature should overtly encourage CR at national level are explored. These reasons are grouped around two themes: ensuring a coherent and uniform application of EU law (4.1) and overcoming the divide between economic and social rules (4.2).

4.1. *Ensuring a coherent and uniform application of EU law throughout the territory of the Union*

The previous section highlighted a disturbing contradiction. *In theory*, where EU law creates rights for individuals – and for *groups* of individuals – the principle of effective judicial protection requires the existence of effective enforcement mechanisms.[158] Yet, *in practice*, through the combined effect of weak secondary law, national procedural competence and the ECJ requirement of *minimum* – not *adequate* – judicial protection, this principle can become a mere chimera because EU law may not require a particular form of judicial and/or administrative enforcement mechanism at national level.[159] Effectively, therefore, "there can … be EU rights without judicial protection".[160] As *Feryn* exemplifies, minority groups falling within the scope of the Equality Directives have the right not to be discriminated against, but EU law does not require that groups, as such, or legal entities representing them, have access to judicial and/or administrative procedures under national law, which seems paradoxically inconsistent.[161]

Certainly, when EU law recognizes a substantive right, it should also ensure that there are appropriate national procedures to enforce that right – even with no identifiable victim – because "[r]ights which cannot be enforced in practice are worthless".[162] Yet, due to this enforcement paradox, Member States are not required to enable CR mechanisms for individuals whose anti-discrimination rights have *only* been wronged at group level.

158. See e.g. Prechal, "Protection of EU rights: How far?" in Prechal and van Roermund, op. cit. *supra* note 100; Van Gerven, op. cit. *supra* note 14, 503; Dougan, op. cit. *supra* note 57, p. 101.

159. Ruffert, op. cit. *supra* note 118, 332–335; see also Dougan, ibid., p. 104.

160. Beljin, op. cit. *supra* note 100, p. 109.

161. Krause, annotation of Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn*, 47 CML Rev. (2010) 917–931, at 928.

162. Commission, Public consultation, cited *supra* note 7, para 1.

Consequently, only some Member States have developed these mechanisms: apart from Belgium and Romania – where *Feryn* and *Asociaţia* originated – just 11 other Member States clearly allow *actio popularis* in the field of equality law.[163] For instance, in Spain, trade unions are entitled to initiate a "collective conflict procedure" to defend the interests of an abstract group of workers.[164] This procedure can be used even when there is no identifiable victim, because it may still be possible to identify the generic group of workers affected (by discrimination) through objective data which differentiate them from other groups.[165] Thus, whilst a discriminatory recruitment policy may be challenged in Spain and a few other Member States even in the absence of an identifiable victim, this is not possible in many other Member States. In other words, as it currently stands, EU equality law allows for different enforcement standards in different Member States, depending on whether national law goes beyond the minimum requirements established in the Equality Directives or not.

This not only leads to a lack of uniformity and undesirable inequalities in the application of EU law in different Member States,[166] it also undermines the effectiveness and the "substantive supremacy"[167] of EU (equality) law. The Commission itself has acknowledged that, given the diversity of national systems, "a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights".[168]

This lack of uniform enforcement is clearly linked to the classic EU law disconnection between rights and remedies, i.e. rights are granted by EU law, enforcement procedures are established by national law.[169] Yet, as Delicostopoulos suggests, guaranteeing the effective enforcement and primacy of EU substantive rights may require some degree of EU "procedural primacy", which can coexist with national procedural competence.[170]

Indeed, in some areas – typically with strong economic implications or strategically connected to the internal market, e.g. consumer protection, data

163. Bulgaria, Croatia, France, Hungary, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia and Spain (only in criminal proceedings and, in the field of employment, for trade unions). Austria and Germany only allow *actio popularis* for disability discrimination; Chopin and Germaine, *A comparative analysis of non-discrimination law in Europe* (MPG, 2016), pp. 94–95.

164. Law 36/2011, Arts. 153–162.

165. STS de 25 de enero 1999 (RJ 1999/897).

166. Accetto and Zleptnig, op. cit. *supra* note 131, at 379–380.

167. Delicostopoulos, op. cit. *supra* note 30, at 609–612.

168. Commission, Public consultation, cited *supra* note 7, para 10.

169. See e.g. Beljin, op. cit. *supra* note 100, pp. 91, 109–120.

170. Delicostopoulos, op. cit. *supra* note 30, at 609, 611–612; see also Adinolfi, op. cit. *supra* note 128, pp. 292–294.

protection, competition law – EU law seems to be advancing in that direction. In those fields, EU legislation requires that natural and/or legal persons whose interests have been indirectly affected by a breach of EU law have *locus standi*.[171] In those areas, the ECJ has also been more intrusive into Member States' procedural systems, often defining EU law's protective scope more broadly, and even accepting that claimants act as "private policemen"[172] in the enforcement of EU competition law.[173] As shown in the following, there is no normative reason for a different procedural approach between economic/internal market rules and more socially oriented rules,[174] like equality law.

4.2. *Overcoming the divide between economic and social rules*

In the last years, the EU has taken sectoral measures to encourage Member States to develop *actio popularis* or representative actions mechanisms. For instance, Directive 2004/35/EC requires that environmental non-governmental organizations are allowed to request competent authorities to act to avoid potential environmental damage.[175] Directive 2005/29/EC establishes that "persons or organizations" with legitimate interest should have standing to take action against unfair commercial practices.[176] Directive 2011/83/EU requires that either public bodies, consumer organizations or professional organizations having a legitimate interest have *locus standi* before national courts or administrative authorities.[177] Directive 2014/104/EU on antitrust damages does not introduce CR *stricto senso*, but it widens standing requirements by compelling Member States to ensure that "*any natural or legal person who has suffered harm*" caused by a competition law breach can claim full compensation,[178] even in the absence "of a direct contractual relationship with the infringing undertaking".[179] Arguably, then, the old adage of Advocate General Capotorti in *Rewe* (i.e. that parties outside the "specific legal relationship" could not have *locus standi*) is no longer true for

171. See next section 4.2.
172. Dougan op. cit. *supra* note 57, pp. 90, 92–3.
173. E.g. companies operating in the relevant market have been granted standing when their interests were affected by anti-competitive practices, even when they were not directly affected (see Case C-174/02 *Streekgewest*, EU:C:2005:10).
174. Similarly, Dougan, op. cit. *supra* note 57, pp. 94.
175. Directive 2004/35/EC, Art. 12(1).
176. Directive 2005/29/EC, Art. 11(1).
177. Directive 2011/83/EU, O.J. 2011, L 304/64, Art. 23(2).
178. Directive 2014/104/EU, Art. 3(1).
179. Ibid., Recital 13.

competition law.[180] More recently, Regulation 2016/679/EU on data protection established that individuals shall have the right to mandate certain organizations[181] to, *inter alia*, file complaints and receive compensation on their behalf,[182] and Member States may even provide for these organizations to lodge complaints without an individual's mandate if the right infringed concerns the processing of personal data.[183]

Certainly, competition law, consumer protection and data protection are determinant for the good functioning of the internal market, which has traditionally driven EU integration. The preambles of these instruments reveal that this was a key rationale for introducing broader standing rules in these fields.[184] In contrast, market integration is not considered a central tenet of the Equality Directives.[185] Whilst the economic/market rationale was the main driver behind early EU equality law,[186] the preambles of the newest Equality Directives indicate that they were conceived as human rights instruments, rather than market integration tools.[187]

Having said that, EU legislation in the field of consumer protection, data protection and competition law also has some underlying social objectives, such as achieving "social progress" and "the well-being of natural persons",[188] reaching a "high level of consumer protection",[189] preventing the exploitation of vulnerable consumers (due e.g. to their age, physical or mental characteristics),[190] and achieving greater "substantive effectiveness" and legal certainty for consumers.[191] Accordingly, there are some clear overlaps between the objectives of EU equality law, on the one hand, and competition, data protection and consumer law, on the other. One, therefore, wonders why

180. Opinion of A.G. Capotorti in Case C-158/80, *Rewe.* Claimants would still need to demonstrate "harm", which would be challenging without being part of the "legal relationship". I am grateful to Hedvig Schmidt for bringing this to my attention.

181. Regulation 2016/679/EU, O.J. 2016, L 119/1.

182. Ibid., Art. 80(1).

183. Ibid., Art. 80(2).

184. See e.g. Regulation 2016/679/EU, Recitals 2, 3, 5, 6, 13; Directive 2014/104/EU, Recitals 1, 6 and Directive 2011/83/EU, Recitals 4–6. Note, however, that they may also apply to static situations, see Regulation 2016/679/EU, Arts. 1(1), 3; Directive 2014/104/EU, Arts. 1, 2(2); Directive 2011/83/EU, Art. 3(1)-(3).

185. Bell, op. cit. *supra* note 101, p. 193.

186. See e.g. Bell, "Constitutionalization and EU Employment Law" in Micklitz, op. cit. *supra* note 106, pp. 149–150.

187. See e.g. RED, Recitals 2–4; FED, Recitals 1–6, Directive 2006/54/EC, all cited *supra* note 36, Recitals 2 and 5.

188. Regulation 2016/679/EU, Recital 2.

189. Directive 2011/83/EU, Recital 4.

190. Directive 2005/29/EC, Recitals 18–19.

191. Directive 2014/104/EU, Recitals 7, 9; see also Peyer, "Compensation and the Damages Directive", 12 *European Competition Journal* (2016) 87–112, at 89–92.

individuals whose ethnic origin data have been unlawfully disclosed should enjoy wider CR opportunities[192] than those who have suffered ethnic origin discrimination; or why elderly consumers subjected to *exploitative practices* in the access to some goods should have access to CR procedures[193] but not if they are *discriminated against* in the access to those same goods. Is it logical that EU law requires Member States to provide *locus standi* for either interest organizations or public bodies to challenge aggressive/harassing selling practices,[194] but does not require so if employers harass their employees due to their religion or their sexual orientation?[195]

This seems even more contradictory considering that, in some areas, the internal market objectives are so intertwined with social objectives, that they cannot be clearly separated. For instance, Directive 2014/54/EU,[196] which seeks to facilitate enforcement of EU migrant workers' rights, overtly links "anti-discrimination rights, gender equality and free movement of workers".[197] And, at the same time, it recognizes that "poor enforcement undermines the effectiveness of Union rules applicable in this area".[198] Crucially, this Directive expressly refers to CR for the first time in the field of employment, and it invites Member States "to examine the implementation of common principles for injunctive and compensatory *collective redress mechanisms*".[199] This "invitation", inspired by Recommendation 2013/396, [200] is further supported by a reference to national law on the right to take action *on behalf of* a collective interest in Article 3(3).

Whilst these references to CR are fairly timid, they somehow recognize the relevance of these procedures to increase the effectiveness of the EU prohibition of nationality discrimination for EU workers and their families.[201] If this is the case for workers being discriminated against on grounds of

192. Regulation 2016/679/EU, Art. 9.
193. Directive 2005/29/EC, Arts. 5, 6–8, 11.
194. Ibid., Art. 9.
195. Directive 2000/78/EC, Art. 2(2)(a).
196. Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (O.J. 2014, L 128/8).
197. Ibid., Recital 8. See also Recital 13, which refers to Art. 21 CFREU.
198. Ibid., Recital 9.
199. Ibid., Recital 15; see also Art. 3(3).
200. Parliament, Position adopted with a view to the adoption of Directive 2014/…/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, P7_TC1-COD(2013)0124. The initial amendment "*encouraged*" – not merely "invited"– Member States to implement the Recommendation (See B7-0236/2013 – C7-0114/2013 – 2013/0124(COD), Amendment 18).
201. Directive 2014/54/EU, Art. 2, which has the same scope as Regulation 492/2011/EU.

nationality, should it not be the case for any other type of discrimination? Certainly, Directive 2014/54/EU is aimed at improving the free movement of workers within the internal market,[202] so it could primarily be seen as an "instrument of integration",[203] rather than a measure promoting equality as an autonomous goal,[204] which is the main objective of the Equality Directives. However, as noted earlier, Directive 2014/54/EU itself recognizes the links with mainstream equality law instruments,[205] and it could probably be characterized as a hybrid instrument, rather than a purely market measure. The references to CR within that Directive could then be seen as a small first step towards recognizing and bridging the gap between a) the progressive development of secondary legislation on CR mechanisms in areas closely connected to the internal market, and b) the lack of such legislation in areas like equality law, which have a stronger human rights/social focus.

In fact, the evolving nature of EU law provides several examples of cross-fertilization between internal market law and equality law *stricto senso*.[206] For instance, the ECJ first introduced the concept of indirect discrimination in the context of the internal market,[207] which it then borrowed for its sex discrimination case law[208] before it was eventually codified.[209] The ball moved in the opposite direction with the adoption of Directive 2014/54/EU, given that its enforcement provisions are largely inspired by the Equality Directives.[210] These examples illustrate that fundamental rights (e.g.

202. Its legal basis is Art. 45 TFEU, see Recitals 1–5.

203. Tridimas, "The application of the principle of equality to Community measures" in Dashwood and O'Leary (Eds.), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997), p. 218.

204. De Burca, "The role of equality in European Community law" in Dashwood and O'Leary, ibid, pp. 30–31.

205. See e.g. Recital 8; Muir, "Procedural rules in the service of the 'transformative function' of EU equality law: Bringing the prohibition of nationality discrimination along", 8 REALaw (2015), 153–176.

206. See e.g. More, "The principle of equal treatment: From market unifier to fundamental right" in Craig and De Burca (Eds.), *The Evolution of EU Law* (OUP, 1999), pp. 517, 548; Bell, "The principle of equal treatment: Widening and deepening" in Craig and De Burca (Eds.), *The Evolution of EU Law*, 2nd ed., (OUP, 2011), p. 612.

207. The first case on natural persons was Case 152/73, *Sotgiu* v. *Deutsche BundesPost*, EU:C:1974:13, paras. 11–12.

208. Case 96/80, *Jenkins* v. *Kingsgate*, EU:C:1981:80, paras. 11–13; Case 170/84, *Bilka* v. *Weber von Hartz*, EU:C:1986:204, paras. 25–30.

209. First in Directive 97/80/EC, Art. 2(2). See further Schiek, Ch. 3 "Indirect discrimination" in Schiek, Waddington and Bell (Eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, 2007), pp. 352–359.

210. See Brinkmann, "Equal treatment on the ground of nationality for EU migrant workers", 17 *European Journal of Migration and Law* (2015), 239–257, at 239, 255; Muir, op. cit. *supra* note 205, p. 167.

equality law) and internal market freedoms do not stand in silos, but "mutually affect each other".[211] It would be desirable that, following Directive 2014/54/EU's novel reference to CR procedures, the ball bounces back again from this hybrid instrument to the neighbouring court of EU equality law, where CR mechanisms are also much needed.

Additionally, the different treatment on CR matters granted to consumer and data protection law, on the oner hand, and to equality law, on the other, seems all the more inconsistent if we consider that these are *all* fundamental rights recognized under the CFREU.[212] All three have been protected through an extensive corpus of substantive legislation, but anti-discrimination rights have been treated as "the poor cousin" in terms of enforcement opportunities. There is no apparent good reason for this different treatment, except political pragmatism based on the fact that Article 19 TFEU requires the Council's unanimity to adopt anti-discrimination legislation, whereas the legal basis for approximation of national laws in consumer and data protection only requires an agreement by qualified majority.[213]

Yet, in these three areas, when relevant rights are wronged, individually or collectively, public interests are negatively affected, and the market can be negatively affected too.[214] For instance, in the field of consumer protection, one of the rationales for introducing CR mechanisms was preventing the continued use of unfair commercial practices or contract terms that can harm competitors and/or consumers.[215] Similarly, structural discrimination can go on indefinitely, thereby harming workers and competitors, and ultimately, the EU labour market, unless it is effectively challenged. Indeed, there is extensive economic and sociological evidence demonstrating that discrimination is anti-competitive and leads to an inefficient allocation of resources,[216] and that

211. De Vries, "The EU Single Market as 'normative corridor' for the protection of fundamental rights: The example of data protection" in de Vries, Bernitz and Weatherill, op. cit. *supra* note 136, pp. 234, 236.

212. Arts. 8, 21 and 38. On data protection, see Commission, A comprehensive approach on personal data protection in the European Union, COM(2010)609 final; Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart, 2015), pp. 90–94.

213. See Arts. 95, 251 EC and Art. 114 TFEU for consumer protection, and Art. 16 TFEU for data protection.

214. Adinolfi, op. cit. *supra* note 128, pp.295–296.

215. See e.g. Opinion of A.G. Trstenjak in Case C-471/10, *Invitel*, EU:C:2011:806, para 37, referring to Directive 93/13/EEC, Art. 7(1).

216. E.g. Roithmayr, "Barriers to entry: A market lock-in model of discrimination", 86 *Virginia Law Review* (2001) 728–802; Sunstein, "Why markets don't stop discrimination", 8 *Social Philosophy and Policy* (1991) 22–37.

improved working conditions created by equality laws enhance labour productivity and lessen "the onerousness of work".[217]

Individuals affected by wrongs in the field of consumer protection, data protection and equality law often have an additional trait in common: they tend to have less bargaining power, knowledge, and resources[218] than the usual respondents in those fields, e.g. large utility companies relying on pre-formulated standard contracts (consumer protection), giant high-tech corporations collecting data through complex internet algorithms (data protection) and affluent employers and landlords with influence over essential aspects of one's life, work and home (equality law).

If we focus, in particular, on the similarities between consumers and discrimination complainants, Advocate General Trstenjak's description of the advantages of collective action for consumers in *Invitel* can easily be transposed to equality law by replacing "consumer" with "complainant" and "consumer protection associations" with "anti-discrimination associations":

> "By means of collective actions, consumer protection associations give consumers a voice and a weight that they would often not have in this form in isolated proceedings because of their generally weaker position. … [C]ollective action helps to enhance the status of the consumer at the procedural level and relieves him of the risk of costs in civil proceedings if he is unsuccessful, which may deter a consumer from individually asserting his rights … The successful enforcement of rights by way of a collective action creates a just balancing of the interests of consumers and undertakings, ensures fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer."[219]

For these reasons, requiring that some forms of CR are available for consumer and data protection but not for equality law creates enforcement inconsistencies within EU law, which do not seem justified from a normative perspective. In fact, at national level, there are examples of cross-pollination as regards CR mechanisms between consumer protection and equality law. For instance, in France, following the introduction of a representative action which allows consumer associations to start proceedings on behalf of groups

217. E.g. Donohue, "Prohibiting sex discrimination in the workplace: An economic perspective", 56 *University of Chicago Law Review* 1337–1368, at 1349; Cohn, Herrmann and Schneider, "Social comparison in the workplace: Evidence from a field experiment", 12 *Journal of the European Economic Association* (2014) 877–898.

218. Case C-471/10, *Invitel*, para 33; Case C-453/10, *Pereničová*, para 27.

219. Opinion of A.G. Trstenjak in Case C-471/10, *Invitel*, para 41.

of consumers,[220] a bill was proposed in 2014 to create a similar action in the field of employment equality law.[221]

On the whole, different CR standards between different EU law areas lead to national divergences that "may undermine the enjoyment of rights by citizens".[222] To avoid this, the EU should foster advancement towards a comprehensive horizontal approach to CR that would include not only internal market areas *stricto senso*, but also social policy areas, like equality law.[223]

5. Conclusion

This contribution has argued that CR mechanisms can be valuable to improve the effectiveness of EU equality law at national level and that there are socio-political and (normative) legal reasons why the EU should take measures to urge the introduction of these mechanisms in Member States. In the last years, the EU has increasingly incorporated CR to its enforcement and supervision tools. The EU efforts to push for the development of CR mechanisms are particularly visible in the fields of, *inter alia*, consumer protection and data protection, where hard-law measures require so. These areas have notable similarities with equality law, i.e. their fundamental rights status, their relevance for both individual and public interests, and the weaker position of prospective complainants compared to the larger bargaining power of usual respondents. It seems logical, therefore, that these efforts are extended to EU equality law, and this is also necessary to ensure the uniform application[224] and the substantive primacy of EU law.

Some may argue, however, that taking EU action in this field may be difficult. Indeed, it may be intricate, but not impossible. The Equality Directives already contain limited provisions *allowing* the introduction of CR mechanisms, and the hybrid Directive 2014/54/EU *invites* Member States to develop CR to address workers' nationality discrimination. These provisions could be expanded using the general legal base for judicial cooperation in civil

220. Loi No. 2014–344 du 17 mars 2014 relative à la consommation; Guiomard, "L'action de groupe peut-elle contribuer à lever les freins à l'action contentieuses?" RDH (2016) 1.

221. Proposition de loi instaurant une action de groupe en matière de discrimination et de lutte contre les inégalités, No. 1699, déposée le 14 janvier 2014 (approval pending; available at <www.assemblee-nationale.fr/14/dossiers/action_groupe_discrimination_inegalites.asp>, last accessed 19 Apr. 2018)

222. Parliament, Towards a coherent approach to collective redress (2011/20189(INI)), Committee on Legal Affairs, A7-0012/2012, at 5.

223. See e.g. ibid., at 13; Farkas, op. cit. *supra* note 55, 39.

224. The uniform application of EU law is linked to the principle of equal treatment itself (ensuring equal rights across Member States), cf. Micklitz, op. cit. *supra* note 131, p. 400.

matters (Art. 81(2) TFEU),[225] in combination with the specific equality legal basis (Arts. 19 and 157 TFEU), which were already used to adopt the Equality Directives' enforcement measures.[226]

Some have also claimed that the Commission will not propose new legislation in this field unless it can be justified that "collective redress is so politically important that it deserves action".[227] Yet, this contribution demonstrates that encouraging the development of CR for EU equality law is both *legally* important – to improve the effectiveness of legislation– and *socio-politically* important – to counter the rise of xenophobic movements in Europe.

This paper has also evidenced that the Lisbon Treaty constitutionalization of both equality law and the principle of effective judicial protection is at odds with the feeble enforcement provisions of the Equality Directives. Once hailed for their innovative character,[228] these provisions are now lagging behind the latest EU primary and secondary law developments in areas like consumer or data protection.

Overall, the launch of the European Pillar of Social Rights[229] is a good opportunity to reconsider the rights of EU citizens at a macro level, and not just at *substantive* level, but also at *procedural* level. In the aftermath of the financial crisis and unpopular austerity measures, if the EU really wants to address the existing dichotomy between economic and social rights[230] and promote a "social Europe" that is closer to its citizens, taking legislative measures to ensure a more uniform and effective enforcement of EU equality rights seems imperative.

Citizens always have the same face, whatever the "type" of rights they are exercising.[231] To elevate the concept of European citizenship to a truly

225. This provision refers to adopting measures "aimed at ensuring … (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".

226. The principles of subsidiarity and proportionality could be complied with by providing Member States enough flexibility to decide, *inter alia*, which legal entities should be granted standing (e.g. equality bodies, NGOs, trade unions, or other), whether CR procedures should be judicial or administrative, etc.

227. "Conference notes. EU Collective Redress Project 2016", 12–13 Dec. 2016, Oxford University, Jacek Garstka (European Commission), speaking in a personal capacity, <www.law.ox.ac.uk/sites/files/oxlaw/conference_notes.docx> (last visited 14 Sept. 2017).

228. See e.g Bell, op. cit. *supra* note 101, pp. 78–79.

229. Commission, Establishing a European Pillar of Social Rights, COM(2017)250 final.

230. See e.g. Barnard, op. cit. *supra* note 32, p. 639.

231. This links with ideas of Kochenov (op. cit. *supra* note 101) and Comandé, "The Fifth European Union Freedom. Aggregating citizenship… around private law" in Micklitz, op. cit. *supra* note 106, p. 61.

"fundamental status"[232] beyond its mere economic function,[233] better integrating market and social rights seems essential. Developing a more horizontal EU approach to CR and extending it to equality law is one of the key fronts where improvements are needed.

232. Case C-184/99, *Grzelczyk*, para 31.
233. Cf. Opinion of A.G. Sharpston in Case, C-34/09, *Ruiz Zambrano*, EU:C:2011:124, para 127.