Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union

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Abstract

This article investigates important shifts in the way that rights are enforced in the EU. On the one hand, the Commission is increasingly withdrawing from centralised rights enforcement, initiating less and less infringement proceedings and shifting the bulk of its work towards more informal compliance management tools. At the same time, private, de-centralised rights enforcement is becoming more prominent, at least as measured by the amount of preliminary references submitted to the CJEU. The Commission actively supports this trend, and in effect outsources its own enforcement work to private actors, both individual and collective. The article outlines Commission efforts to facilitate private enforcement and discusses whether private enforcement can substitute for centralised enforcement. It concludes that all channels of rights enforcement have a role to play, and the loss of any single channel cannot easily be compensated.

Keywords: European Commission, legal mobilization, rights enforcement, collective redress, interest groups

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Introduction

One of the characteristic features of European Union (EU) law is its emphasis on substantive rights. Over time, the EU has steadily evolved to become a distinctly rights-based polity. The origin of this development was the founding members' focus on the four 'market freedoms', which were interpreted as fundamental rights: a right to the free movement of goods, persons, services and capital. More recently, additional rights have been particularly pronounced in the area of non-discrimination. The foundational principle, the prohibition of discrimination based on nationality (now article 18 TFEU), was first extended to equality between men and women, and later to all discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (article 21 of the Charter of Fundamental Rights). Increasingly, measures pertaining to social policy have also been incorporated in this 'rights revolution' (Mabbett 2011). By virtue of its superiority and direct effect, EU law now vests Union citizens with a wide array of substantive rights that national authorities are obliged to uphold.

Whether EU rights have practical effects, however, depends essentially on the willingness and ability of national authorities to comply with their obligation to grant these rights. Experience shows that this is often not the case, or there is at times enough uncertainty about the actual nature of these rights that conflict arises. In those instances, rights have to be activated – claimed – in the face of alleged infringements. This article argues that over the last years an important shift has taken place in the way EU rights can be enforced in principle and are enforced in practice. Rights enforcement in the EU has traditionally rested on two channels. On the one hand, the Commission oversees a centralised mechanism of rights enforcement, centred around the infringement procedure, by which it can take non-complying member states to the Court of Justice of the European Union (CJEU). On the other hand, the primacy of EU law over national law, coupled with its direct effect, allows private citizens, groups and companies to claim EU rights de-centrally in national courts. The article highlights a distinct shift towards the de-centralised mechanism. The Commission has reduced its centralised enforcement of EU law to levels not seen since the early 1990s, when the EU had less than half the number of member states that it has today. It explicitly links its withdrawal from centralised enforcement to an increase in

private enforcement, and it has continuously supported measures to make de-centralised enforcement more accessible to a larger class of litigants, including collective actors such as interest groups. The article outlines this 'outsourcing' of enforcement to private actors in detail and discusses whether rights enforcement can rely on one channel alone, taking account of the advantages and drawbacks of both the centralised and the de-centralised channel.

The article proceeds in the following way: a first section outlines the centralised channel for rights enforcement in the EU. It demonstrates the on-going withdrawal of the Commission from the infringement procedure and discusses possible reasons for this development. A second section outlines the de-centralised channel for rights enforcement, concentrating on the Commission's efforts to 'level the playing field' by supporting access to justice initiatives designed to facilitate litigation for individuals of limited means, in particular its efforts to promote collective redress and interest group litigation. A final section evaluates the relative merits of both channels of rights enforcements and discusses whether private enforcement is a valid substitute for centralised enforcement.

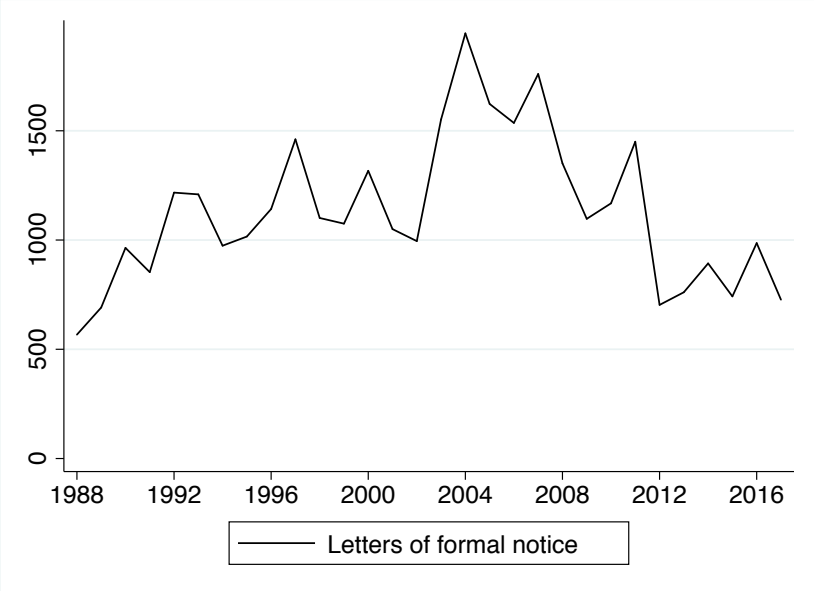
Centralised enforcement by the Commission

Policing member state compliance with legal obligations is one of the central tasks of the Commission. In the textbook version, the Commission, as 'guardian of the treaties', watches over policy implementation in the member states, intervenes where it sees deficiencies or outright non-compliance, and initiates judicial proceedings where the defendant member state does not take appropriate action (Chalmers, Davies, and Monti 2010, 318). In practise, the Commission carries out its enforcement work in several layers of differing formality and visibility (Smith 2016). The most informal layer, which Melanie Smith calls the 'compliance promoting toolkit', consists of such mechanisms as non-binding implementation guidelines, package meetings with member state authorities, fitness checks and ex-post evaluations of legislation, correlation tables that monitor the transposition of directives and the occasional physical inspection (Smith 2016, 70-3). Somewhat more visible, at least when it comes to leaving a quantifiable track record, are the Commission's notification database for transposition measures, its complaints handling database that facilitates correspondence with the complainants, and, perhaps

most prominently, EU Pilot. The latter in particular constitutes a formalisation of the exchange of informal communication between the Commission and member state authorities that used to precede the start of formal infringement proceedings (Smith 2016, 66). EU Pilot acts as an informal clearinghouse for cases of potential infringements but is not formally part of the infringement procedure. The formal legal layer of the Commission's enforcement work consists of the infringement procedure proper, which officially begins with a 'letter of formal notice' addressed to the member state in question and proceeds via a 'reasoned opinion' to a potential referral of the case to the CJEU, which is the final arbiter of such disputes. The Commission has complete discretion over all of its enforcement action and can terminate its investigations at any time so long as the CJEU has not yet issued a judgment (Craig and de Búrca 2011, 415), leading the current CJEU president Koen Lenaerts to describe the procedure as 'a political tool at the Commission's disposal' (Lenaerts and Gutiérrez-Fons 2011, 4).

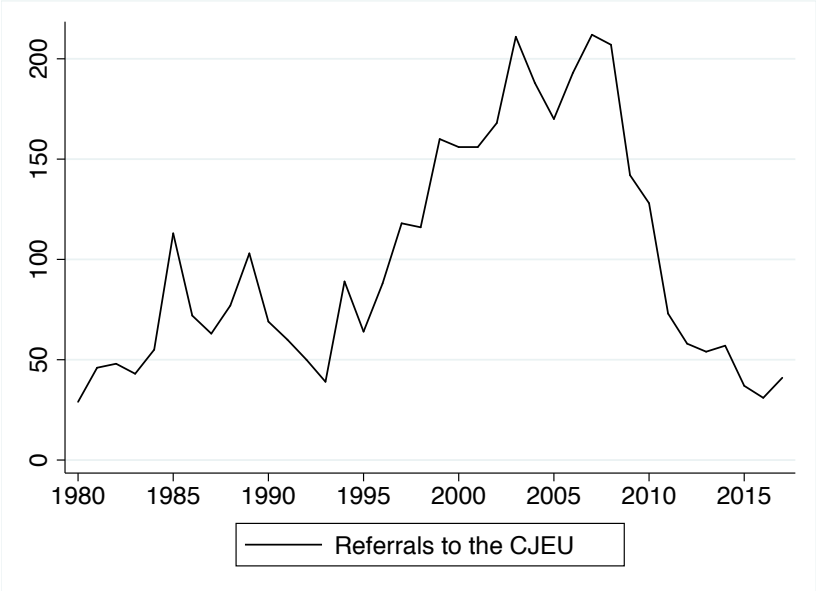
In recent years, the Commission has increasingly withdrawn from the legal layer of centralised enforcement. It initiates less and less formal infringement procedures and over the last years has referred only a very small number of such cases to the CJEU (figures 1 and 2). The number of letters of formal notice sent by the Commission sank from 1492 in 2005 to 727 in 2017. The decline is even more dramatic when it comes to court referrals. While at its peak in 2006 the Commission referred 254 infringement cases to the CJEU, this number dropped to 41 in 2017. This constitutes a fundamental shift in the Commission's approach to centralised enforcement. Numbers as low as the current have not been seen since the early 1990s, a time when the EU *aquis* was much more limited in scope and the number of member states was less than half of what it is today.

Figure 1. Letters of formal notice



Data based on the Commission's annual reports on monitoring the application of EU law and the Commission's online infringement database[2].

Figure 2. Cases referred to the CJEU



Data based on Stone Sweet and Brunell 2007 and the CJEU annual reports on judicial activity.

There are a number of explanations for this development. For one, the decline in infringement proceedings reflects an increasingly restrained policy activism that has begun with the second Barroso Commission (Kassim et al. 2017, 666). To some

[2] Accessible at http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions [last accessed 13.06.2018].

extent, the decline in formal notices goes hand in hand with a recent decline in legislative activity. Between 1988 and 2017, the number of new letters of formal notice sent per year was moderately correlated with the amount of transposition deadlines for directives in the same year (r=0.4184).[3] However, no such correlation exists between transposition deadlines and referrals of infringement cases to the CJEU, even with a two-year (r=-0.0493) or three-year (r=-0.0071) time lag. There is little evidence to suggest that more 'seasoned' pieces of EU legislation pose fewer substantive implementation problems than newer pieces. On-going reviews of the implementation of, for example, environmental law point to substantial problems even with older pieces of EU law (European Commission 2017d). The decline of referrals to the CJEU therefore cannot be explained by reference to legislative activity.

Second, the decline in judicial enforcement reflects a shift in the Commission's focus toward less formal layers of enforcement work. Several studies have pointed toward the Commission's increasing use of management tools (Hartlapp 2009) and ex-post legislative evaluations (van Voorst and Mastenbroek 2017). This shift has been criticised as decreasing transparency and legal certainty from the point of view of the affected individuals (Krämer 2014, 251; Smith 2016), whose complaints continue to serve as a constant fire alarm to the Commission (Tallberg 2002). However, even the amount of cases that the Commission feeds into EU Pilot has decreased almost by half between 2013 (1502 new cases) and 2016 (790 new cases). In response to the criticism toward the 'informalization' of its enforcement work, the Commission has indicated that important cases will no longer go through EU Pilot but proceed straight to the formal procedure (European Commission 2017e, 20). If this should be the reason for the decrease in EU Pilot cases, it has seen no counterpart in the numbers on formal infringement procedures. This should be put in contrast to the continuously high number of complaints received by the Commission, which if anything have increased since 2012 (European Commission 2017e, 18).

Finally, the decline in formal enforcement activity can be seen as a reflection of the Commission's efforts to 'outsource' enforcement to other actors. On the one hand, a number of EU agencies have in recent years been delegated direct enforcement

[3] The calculations are based on data from the Commission's annual reports on monitoring the application of EU law, the Commission's online infringement database, and EurLex (for transposition deadlines).

authority (Scholten 2017). For the time being, however, these remain limited to a narrow band of subject matters such as financial markets, medical technologies, aerospace and fisheries. On the other hand, and more importantly, the Commission actively encourages the private, de-centralised enforcement of EU rights. The number of private rights claims that have reached the EU Court of Justice from national courts through the preliminary reference procedure has indeed reached a new record in 2017, with 533 newly registered cases (Court of Justice of the European Union 2018). References for preliminary rulings now make up almost three quarters of the CJEU's caseload. The Commission makes the connection to its own reduced efforts quite explicit: 'The overall decrease of the number of infringement procedures can be put in relation to the important increase of preliminary rulings under Article 267 TFEU since 2010. The Court of Justice has addressed conformity issues of national laws in regard of EU legislation in about half of its judgments under Article 267 TFEU since 2010 and identified non-conformities in numerous cases' (European Commission 2015, 16). This statement indicates that the Commission regards private enforcement as a potential substitute for its own efforts, in effect as a form of de-central infringement procedure.

Outsourcing enforcement to private actors gives the Commission the opportunity to concentrate on its own policy priorities. Over the years, the Commission has issued a number of policy documents outlining its enforcement priorities (European Commission 2002a, 2007, 2017b). Its focus on policies shifts over time, but a common thread is that the Commission intends to target what it calls systematic and persistent infringements. This in particular encompasses national rules and general practices that hinder citizens, groups and companies from accessing national courts and the preliminary reference procedure (European Commission 2017b, 14). In other words, the Commission intends to use centralised enforcement measures to facilitate de-centralised enforcement.

In practice, the Commission's enforcement priorities rarely shine through in the cases that it pursues to the CJEU. Among the 123 cases that the Juncker Commission had referred to the CJEU until June 2017, not a single one targeted obstacles to private enforcement, while about 10 per cent targeted individual infringements (Hofmann 2017), which its policy documents had de-emphasised (European Commission 2017b, 15). It is therefore not evident that the reduced judicial activity of the Commission results in a channelling of limited resources towards the most pressing and systematic

cases. Rather, it appears that the Commission's on-going withdrawal from the legal layer of centralised enforcement more likely constitutes the loss of one of the two channels of the EU's traditional enforcement model.

This would not constitute a grave problem if the two mechanisms, centralised and de-centralised enforcement, were in fact interchangeable. The next section outlines the mechanism of private enforcement and points to some of its deficiencies, particularly where private interest are too powerless to claim rights, or where nobody has standing to enforce a public interest. The Commission has indeed promoted a number of measures to combat these problems in an effort to level the playing field in private enforcement. Subsequent sections outline these efforts and discuss whether this is enough to compensate for its own reduced engagement in enforcement.

De-centralised enforcement of EU Rights

The possibility to privately enforce EU law in national courts is a feature that sets the legal order of the European Union apart from other sources of international law (Dawson and Muir 2011, 754). In its early foundational judgments, the Court of Justice made it clear that EU law would constitute a direct source of rights for citizens and that it was the duty of the legal institutions of the member states to uphold these rights (Wilman 2015, 8). This essential principle is now part of EU primary law. Article 19 TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Article 47 of the EU's Charta of Fundamental Rights provides more details on the principle of 'access to justice' for citizens:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Private rights enforcement entails that citizens who feel their EU rights were infringed upon take their grievances to a national court. The national court assesses the rights claim and can do one of three things: it can discard the rights claim, it can apply EU law itself and enforce the rights claim directly, or it can stay proceedings and refer the question to the CJEU. In the latter case, the CJEU gives an authoritative interpretation on the proper application of EU law – mostly relating to whether a national law contravenes EU law – and passes the case back to the referring court for a final decision on the merits. Member states have autonomy over the (judicial) procedures by which this principle is applied. The CJEU, however, has repeatedly emphasised that such procedures must constitute an effective means of enforcing EU rights, and that it must not be more difficult to enforce an EU right than it is to enforce a national right (Craig and de Búrca 2011, 218-20).

While this opportunity for private enforcement has led to a steady caseload of EU rights cases before national courts, there is a concern that this mechanism privileges resourceful claimants and powerful concentrated interests while leaving gaps in the enforcement of the rights of citizens of lesser means (Kelemen 2003; Dawson and Muir 2011). Research on litigation has repeatedly pointed out that access to court proceedings empowers primarily the already powerful (Galanter 1974; Börzel 2006; Slepcevic 2009). Companies, for example, have been very adept at using litigation based on EU law to set aside unfavourable national legislation. But not everybody is equally well positioned to use this system to give effect to their rights claims. Not every individual with a valid claim is aware of their rights and can muster the necessary resources to activate the legal system and sustain a challenge (Conant et al. 2017). In addition, access to justice – in terms of such things as legal standing, the costs and length of legal proceedings, and the available remedies – varies widely between member states. EU institutions, and especially the Commission, have recognised these shortcomings. Individual pieces of EU legislation now contain specific clauses on access to justice for citizens in an effort to partially harmonise procedural law in EU member states (Eliantonio and Muir 2015). Moreover, some horizontal efforts exist within the limited competences the EU has in this field. Directive 2003/8, for example, sets certain minimum standards for legal aid to individuals in certain types of cross-border disputes concerning civil and commercial law. Extensive information campaigns such as the launch of the Commission's E-

Justice portal in 2010 have further added to the resources for individuals seeking redress.

Some conflicts, however, are more intractable. Individuals will have a hard time enforcing their rights where their individual claims are small or where power asymmetries vis-à-vis their opponents are pronounced, such as in cases of consumer fraud or discrimination (Kelemen 2003; Dawson and Muir 2011, 756). In other cases, the interests that are being infringed are collective and diffuse rather than individual and specific, such as in environmental conflicts (Eliantonio 2014, 260; Hilson 2017). Litigation in the public interest has traditionally been absent in most European countries, which makes the private enforcement of EU laws protecting public goods particularly problematic (Hofmann forthcoming).

In such situations, too, the Commission is promoting forms of private litigation that may circumvent some of the shortcomings of de-centralised rights enforcement. These are mechanisms where legal action is not taken by the individual concerned, but by an intermediary on her or his behalf, or by a group of citizens acting to on behalf of a public interest. Essentially, these can be divided into two strands: a system of collective redress where multiple claimants pool their claims in one legal action against the alleged offender, and litigation by interest groups who take legal action on behalf of a citizen or in the public interest. The following sections will outline these in more detail. Procedures of collective redress have been promoted to overcome situations where a rights infringement adversely impacts a large group of people, but every single affected individual might be too powerless to pursue a claim, or each individual claim might be too minimal to justify spending resources on legal remedies. Pooling these claims would create a potent opponent to the alleged offender, who, in the absence of a public prosecutor (such the Commission), would otherwise remain unopposed (Dawson and Muir 2014, 216-7). Interest groups, on the other hand, can provide the necessary ‘legal support structure’ (Epp 1998) to sustain litigation financially and organisationally that individuals of lesser means are often lacking (Kelemen 2003, 229). Interest groups, moreover, can pursue public interests much more effectively than individuals. Since public authorities can often bypass or ‘contain’ individual rulings (Conant 2002), interest groups can more easily engage in wider legal and political mobilization than individuals in order to achieve a lasting impact on public policy (Alter and Vargas 2000; Cichowski 2006; Börzel 2006).

Collective redress

The backdrop of the European debate on collective redress has been the most famous example of this procedure, the US system of 'class action'. Some of the perceived excesses of this procedure, in particular the threat of outsized frivolous claims, have given arguments to opponents of such a system in Europe. Opposition is particular strong in the business community, since corporations see themselves as potential targets of such frivolous rights claims (European Commission 2013a).

Despite such opposition, several member states have since the late 1990s introduced at least some elements of collective redress. Since the early 2000s, the Commission has started pursuing a harmonisation of relevant procedural rules at the EU level (Kelemen 2011, 76-7). Much of this effort initially focussed on consumer protection. In a 2005 Green Paper on damage actions in antitrust cases the Commission discussed options of introducing 'collective actions' to facilitate claims by consumers against damages incurred through breaches of EU competition law (European Commission 2005, 8-9). In 2007, what was then DG Health and Consumers commissioned a study on the 'effectiveness and efficiency of collective redress mechanisms' in EU member states in order to prepare a debate on legislative action at the EU level (European Commission 2008a). This was followed the same year by a Green Paper on consumer collective redress, which included an option for a 'binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States' (European Commission 2008b, 12). In a concession to its critics, the Commission added that 'this option should avoid elements which are said to encourage a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements' (European Commission 2008b, 12). This position set the frame for subsequent Commission efforts to promote collective redress beyond consumer policy. In 2011, the Commission launched a broad consultation on introducing harmonised EU rules on collective redress procedures which would serve to 'accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices' (European Commission 2011). Responses to the consultation showed some support for such measures, but highlighted the 'risk of abusive litigation' that might result (European Commission 2013a, 7).

From the point of view of proponents of collective redress, the reaction of the Commission to the public consultation was disappointing (Dawson and Muir 2014,

219). The tangible outcome was a Commission recommendation that suggested common principles for mechanisms of collective redress 'that should be complied with' by the member states within a two year time period (European Commission 2013a, 16). These common principles were formulated cautiously to appease any concerns about US class action-style litigation getting a foothold in Europe. Claimants would have to actively opt into any collective legal action rather than be covered by default, the principles contain strict limits on third-party funding of litigation and there is a clear preference for 'loser pays' rules in the allocation of legal costs (Dawson and Muir 2014, 220-1). The fact the Commission chose a soft-law instrument and a restrictive approach shows the extent of scepticism towards mechanisms of collective redress. Nonetheless, the use of such procedures appears to be on the rise in some EU member states, causing some pro-business groups to voice alarm that some of the restrictive procedural rules in place may be softening (U.S. Chamber Institute for Legal Reform 2017). Moreover, recent pieces of EU legislation, such as directive 2014/54 facilitating the enforcement of free movement rights, which in recital 15 (cautiously) recommends the implementation of collective redress procedures, indicate that at least the language of collective redress will become a feature also of EU hard law.

Interest groups

The second measure aimed at levelling the playing field in the private enforcement of EU rights is the promotion of access to courts for interest groups. While interest groups can support individuals of limited means and pursue cases in the public interest, the conditions for access to courts for interest groups are in many EU member states significantly more restrictive than those for individuals, particularly regarding standing and costs (de Sadeleer, Roller, and Doss 2005; European Union Agency for Fundamental Rights 2011; Darpö 2013). This is an area that the Commission has started to address. Early efforts in limited policy areas such as – again – consumer protection date back to the 1980s (Kelemen 2011, 76), while broader measures aimed at more general access to justice for interest groups are more recent.

The starting point for the discussion on access to justice for interest groups was a 1978 Commission proposal for a directive in the field of consumer protection which contained a clause stipulating that member states 'shall provide persons affected by

misleading or unfair advertising, *as well as associations with a legitimate interest in the matter*, with quick, effective and inexpensive facilities for initiating appropriate legal proceedings' (European Commission 1978, 4, my emphasis). Shortly after the Council agreed on this proposal (the result was directive 84/450), the Commission started deliberations 'whether it was opportune to draft a framework directive introducing a general right for consumer associations to act in the courts on behalf of the general interest of consumers' (European Commission 1987, 3) so as to create the EU's first horizontal provision for access to justice for interest groups. Concerns for national procedural autonomy, however, prevented agreement, as most member states had no history of allowing litigation in the public interest, and were very reluctant to do so. A decade later, the legislative institutions did pass directive 98/27 'on injunctions for the protection of consumers' interests', which provided one model as to how access to courts for interest groups can be organised: Member states would nominate organisations qualified to bring actions for injunctions, with the purpose of compiling an EU-wide list of organisations whose standing to sue would be mutually recognised. Organisations apply nationally to be registered and are then screened and officially approved to assure cross-border legal standing (Micklitz 2006, 462).

Outside of consumer protection, EU legislation contained no similar clauses until the late 1990s. Not least in anticipation of the upcoming enlargement (European Commission 1999, 4), the Commission proposed in 1999 a more far reaching approach to interest group standing in the field of non-discrimination which skipped the necessity for prior national registration. This time around, the proposal was quickly adopted by the legislative institutions. Both the Racial Equality Directive (article 7.2 directive 2000/43) and the Employment Equality Directive (article 9.2 directive 2000/78) contain a clause that states: 'Member States shall ensure that associations, organisations 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 her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. Such associations include NGOs, trade unions or equality bodies (European Union Agency for Fundamental Rights 2011, 39). This clause has become a blueprint for subsequent directives. An identical phrase was later included in three directives on gender equality (article 8.3 directive 2004/113, article 17.2 directive

2006/54 and article 9.2 directive 2010/41). More recently, two directives aimed at facilitating the enforcement of EU free movement laws (article 3.2 directive 2014/54 and article 11.3 directive 2015/67) and the revised General Data Protection Regulation (article 80.1 regulation 2016/679) also repeat wording to this extent.

EU legislation regulating interest groups' access to courts in environmental matters largely implements the 'Aarhus Convention' that was concluded in 1998 in the framework of the United Nations Economic Commission for Europe (UN/ECE). It was signed and ratified by the EU and all EU member states. The convention provides for access to justice in several respects. In a first step, rights to information and participation in environmental decision-making procedures are enforceable in court. In a second step, the convention provides for substantive and procedural complaints against national permitting processes and environmental impact assessments concerning large construction projects (residential developments, roads, power lines, power plants etc.). Two directives granting legal standing for interest groups in such cases passed the EU legislative process with relatively little conflict (directive 2003/4 and directive 2003/35, respectively). The Commission's 2003 proposal for a general access to courts for interest groups in environmental matters, implementing the third step of the convention, followed the more restrictive approach employed in consumer protection, requiring prior national registration. Nonetheless, it met with opposition in both the European Parliament and the Council, and the Commission withdrew it May 2014. Member state governments in particular had expressed concerns for the integrity of their judicial systems (European Commission 2013b). In its stead, the Commission has issued a soft law measure similar to its recommendation on collective redress procedures, in the form of an 'interpretative communication' on the obligations of member states arising out of existing legislation and case-law (European Commission 2017a). In the absence of a binding legislative measure, case law of the Court of Justice has expansively interpreted member state obligations flowing from the Aarhus Convention itself, with the effect that environmental interest groups now face less and less obstacles to legal standing in national courts (Eliantonio 2016; Hofmann forthcoming).

Finally, a horizontal issue in access to justice for interest groups beyond legal standing that the Commission has attempted to address is legal aid. A 1993 Green Paper on consumer protection identified the costs of legal proceedings as an obstacle to private rights enforcement for individuals and interest groups alike (European

Commission 1993, 81), and a 2000 Green Paper on legal aid in civil matters highlighted that 'Legal aid could solve the problem that consumers' associations are most likely to face when trying fully to take advantage of the *locus standi* which the directive gives them, i.e. the scarcity of financial resources' (European Commission 2000, 7). This carried on into its 2002 proposal for a general legal aid directive, which stated that 'Legal aid shall be granted to not-for-profit legal persons based in a Member State where proceedings are designed to protect legally-recognised general interests and they do not have sufficient resources to bear the cost of the proceedings' (European Commission 2002b, article 15). However, the Commission was unsuccessful in getting the legislative institutions to adopt this provision, and seems to have abandoned the project since.

Can EU rights rely on de-centralised enforcement?

As the previous section has shown, the opportunity structure for the de-centralised enforcement of EU rights, even in difficult conflict constellations, has improved. This development has been actively supported by the Commission, even if legislation has stayed behind its ambitions. While the Commission has not been successful in mandating that member states introduce procedures of collective redress, interest group standing is now enshrined in legislation concerning areas such as consumer protection, non-discrimination, free movement and posting of workers, data protection, and environmental protection. This should be seen in the context of its own reduced engagement in centralised enforcement. Can private enforcement then serve as a substitute?

Despite the Commission's efforts, national heterogeneity will remain an obvious limitation to effective de-centralised rights enforcement. National rules on collective redress procedures vary widely and harmonising EU legislation is not on the table. The EU lacks both the resources and the competence to achieve a truly level playing field for private litigants both across member states and across different types of litigants. Even in the environmental field, where access to justice has been substantially liberalised, national variance remains significant (Darpö 2013; Eliantonio 2015). Moreover, the private enforcement of rights also depends on factors independent of procedural rules. Interest group litigation is naturally predicated on the existence of such groups in the first place, and the degree of organisation of European

civil societies is very diverse (Versluis 2007). Groups also vary in their resources, their expertise and their disposition to use legal action, and not all issues and conflicts will be equally well covered (Conant et al. 2017). Another aspect that lies largely outside the influence of EU legislation is the overall performance of national legal systems. The private enforcement of EU law can only work if national legal systems provide effective remedies in practice. The Commission's own 'justice scoreboard' shows stark differences in measures for judicial efficiency across member states, such as the average length of proceedings (European Commission 2017c, 7-8). Some – predominantly southern European – member states' judicial systems take exceedingly long to process claims. This will present major obstacles to rights enforcement no matter how generous standing rules and how well equipped and litigious interest groups are.

The advantage of centralised enforcement in this context is evident. The Commission, for all its discretion over the use of the infringement procedure and the pursuit of its own policy priorities, shows no sign of systematic bias toward individual member states (Börzel et al. 2010, 1374). It is comparatively well funded and commands a large and experienced legal staff. It wins the vast majority of cases that it pursues to the CJEU (Börzel, Hofmann, and Panke 2012, 456). In this sense, centralised enforcement can more reasonably act as a substitute for de-central enforcement where private actors face formidable obstacles, than the other way around. The Commission is better placed to level the playing field by enforcing rights on its own than to pursue long shots on ambitious horizontal access to justice initiatives.

This is not to say that centralised enforcement is inherently preferable. The infringement procedure is time-consuming. The Commission's addition of measures towards informal dispute resolution have added to the length of the process, and have been extensively criticised as potentially inducing 'complaint fatigue' (Smith 2010, 156). Some remedies, such as injunctions to the administrations, cancellation of national decisions, or damages, are only available in national courts (European Commission 2007, 8). What this highlights is that the effective enforcement of EU rights is dependent on multiple channels. While there are obvious drawbacks to the Commission's infringement procedure, it has a role to play in an encompassing *system* of rights enforcement across the EU. The different channels complement one another; they are not mere substitutes. No single channel can easily be replaced.

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