

Consumer Access to Justice: The Role of the ADR Directive and the Member States

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Abstract: This article takes it to be vital to decide whether the Alternative Dispute Resolution (ADR) Directive provides a version of access to justice that is suitably sensitive to the consumer market. The Directive is deficient in this regard, at least to the extent that it does not make ADR processes mandatory or binding for businesses. Nevertheless, if Member States choose mandatory and binding processes, this may be compatible with the fundamental right to judicial protection, if emphasis is placed on *efficiency* benefits. If they choose voluntary processes/non-binding decisions, success will depend partly on incentives, sanctions, and monitoring at EU and Member State levels.

Résumé: Cet article juge primordial d'évaluer si la directive est à même d'offrir un accès à la justice qui soit adapté aux particularités des consommateurs. A cet égard, la directive s'avère lacunaire, au moins dans la mesure où elle ne rend pas la procédure REL (règlement extrajudiciaire des litiges) obligatoire ou contraignante pour les professionnels. Cependant, le choix par les Etats membres d'une procédure obligatoire et contraignante pourrait être compatible avec le droit fondamental à la protection juridictionnelle, si l'accent est mis sur les avantages *de l'efficacité*. Si les Etats membres optent pour une procédure volontaire ou des décisions non contraignantes, le succès du système dépendra en partie des incitations, des sanctions ainsi que du contrôle au niveau tant de l'UE que des Etats membres.

Zusammenfassung: Dieser Beitrag geht davon aus, dass es entscheidend darauf ankommt, ob die Richtlinie Zugang zum Recht in einer Weise vorsieht, die dem Verbrauchermarkt angemessen ist. Die Richtlinie weist in dieser Hinsicht Defizite auf, jedenfalls insofern als sie alternative Streitbelegungsverfahren für Unternehmen nicht verpflichtend und Entscheidungen nicht bindend macht. Wenn Mitgliedstaaten obligatorische und bindende Verfahren wählen, mag das mit dem Grundrecht auf gerichtlichen Rechtsschutz vereinbar sein, wenn die Betonung auf Effizienzvorteile gelegt wird. Wenn sie freiwillige Verfahren und nicht-bindende Entscheidungen wählen, wird der Erfolg zum Teil von Anreizen und Sanktionen sowie von der Kontrolle durch die EU und die Mitgliedstaaten abhängen.

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1. Introduction

Directive 2013/11 on Alternative Dispute Resolution (Directive)¹ aims to help millions of consumers to enforce their contractual rights, via fast, simple, and cost-effective *out-of-court processes*, i.e., alternative dispute resolution (ADR) schemes.² It is certainly clear that, if consumers could only rely on formal courts, many disputes would remain unresolved.³ Consumers very often do not seek judicial protection, e.g., because of the small value of the claim⁴ and the cost and formality of the courts.⁵ The Directive instructs Member States to make available ADR schemes for all consumer disputes initiated by the consumer,⁶ regardless of whether the dispute arises in relation to a domestic, cross-border, online, or offline transaction.⁷ It also requires Member States to design their ADR schemes in compliance with certain quality requirements.⁸ The Directive is now the key EU measure on consumer ADR, its provisions largely covering what was in earlier non-binding recommendations.⁹ There are separate EU measures – e.g., on legal aid, small claims, and collective actions – that aim to help consumers and others

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- 1 Dir. 2013/11 of 21 May 2013 on alternative dispute resolution for consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32013L0011. Dir. 2013/11 was to be implemented by July 9, 2015 (Art. 25(1)).
 - 2 Dir. 2013/11 only applies to disputes concerning contractual obligations stemming from sales or service contracts between a business and a consumer (Art. 2, para. 1).
 - 3 In 2010, only 2% of consumers turned to courts. Special Eurobarometer 342, ‘Consumer Empowerment’ (2011), ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/search/342/surveyKy/768p 187.
 - 4 Only 1% of consumers sued for claims under EUR 500. Eurobarometer, p 187.
 - 5 Eurobarometer, p 204. If a consumer is trying to take action against a business in another EU country, the cost problems may be even worse, and there may also be geographical, language, and other barriers.
 - 6 Dir. 2013/11 does not cover cases where the business initiates the action (Art. 2, para. 2). See further on this, M. LOOS, ‘Consumer ADR in the EU: Enforcing Consumer Rights at the Detriment of Consumer Law?’, 1. *ERPL (European Review of Private Law)* 2016 (elsewhere in this issue).
 - 7 Rec. 4, Dir. 2013/11.
 - 8 Art. 2, para. 3, also Rec. 7 and 38, Dir. 2013/11.
 - 9 Rec. 37, Dir. 2013/11. See also Rec. 98/257 of 30 Mar. 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:31998H0257; Rec. 2001/310 of 4 Apr. 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32001H0310. Note also Dir. 2008/52 on certain aspects of mediation in civil and commercial matters, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32008L0052. Although Dir. 2008/52 sets out a framework for mediation of cross-border disputes, Dir. 2013/11 applies to all ADR procedures, including mediation, and has primacy in the event of conflict between the two legal acts (Rec. 19, Dir. 2013/11).

to enforce private law rights, but these are about assisting access to courts, not to ADR bodies.¹⁰

This article is concerned with the contribution of the Directive to consumer access to justice. The key questions are: What is consumer access to justice? Does the Directive improve it? To the extent that the Directive is deficient in this respect, what can be done at the Member State level? Given the aims of the Directive, these questions are of the utmost importance. The Directive makes numerous references to its goal of improving consumer access to dispute resolution,¹¹ which must surely be taken to mean access to justice. In addition, the Directive aims at providing a ‘high level of consumer protection’ and at boosting consumer confidence in the internal market.¹² It is hard to see how either of these goals can be achieved if consumers are not guaranteed access to justice.¹³

The Directive has been examined already from various perspectives: the suitability of particular forms of ADR that it covers (e.g., mediation, arbitration),¹⁴ the general effectiveness of the accessibility and quality requirements in the Directive,¹⁵ whether such requirements take due account of consumer behavioural biases,¹⁶ the likely success of the Directive in improving

10 Dir. 2002/8 of 27 Jan. 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32003L0008; Reg. 861/2007 of 11 Jul. 2007 establishing a European small claims procedure, eur-lex.europa.eu/legal-content/ALL/?uri=URISERV:l16028; Rec. 2013/396 of 11 Jun. 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32013H0396. See also, e.g., N. REICH, ‘Legal Protection of Individual and Collective Consumer Interests’, in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner, *European Consumer Law* (Antwerpen: Intersentia 2014), pp 362-374.

11 For example, Art. 2, para. 3; Art. 5, para. 1; Recs 4 and 6, Dir. 2013/11.

12 Art. 1, Dir. 2013/11.

13 Further, the European Commission’s Directorate General for Justice emphasizes the core importance of mediation in achieving access to justice (ADR.ec.europa.eu/justice/civil/access-justice/index_en.htm), and mediation is an important type of ADR.

14 N. REICH, ‘A “Trojan Horse” in the Access to Justice - Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?’, 10. *ERCL (European Review of Contract Law)* 2014, p 258.

15 For example, rules on transparency, speed, cost, expertise, independence, impartiality, and on whether processes should be mandatory and decisions binding; P. CORTÉS, ‘A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward’, 35. *Legal Studies* 2015, p 114; G. WAGNER, ‘Private Law Enforcement through ADR: Wonder Drug or a Snake Oil?’, 51. *CMLR (Common Market Law Review)* 2014, p 165; LOOS, 1. *ERPL* 2016.

16 F. WEBER, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes? - An Assessment of the Incentivizing Effects of the ADR Directive’, 38. *JCP (Journal of Consumer*

the operation of the European single market,¹⁷ and how the Directive fits within the broader picture of (i) consumer ADR and enforcement¹⁸ and (ii) general EU civil justice law.¹⁹ Now some of this work has certainly made reference to whether the Directive achieves access to justice.²⁰ However, there has been no attempt to actually define access to justice, still less to define it in a way that takes into account the distinctive nature of the supplier-consumer relationship. Here, we fill this gap, by developing a new concept of (consumer-oriented) access to justice, and considering whether the Directive contributes to improving this (consumer-oriented) form of access to justice. To the extent that the Directive fails in this regard, we consider what can be done at the Member State level.

The discussion is structured as follows. We explain why ADR is a necessary option for consumers. We then develop our concept of access to justice. This involves reading ‘access’ and ‘justice’ in such a way as to recognize (i) the vulnerabilities that often prevent consumers from obtaining individual redress and (ii) the role of dispute resolution in disciplining future business behaviour, so as to protect the collective interests of consumers. We then argue that while the Directive provides some of the correct foundations for this (consumer-oriented) notion of access to justice, it falls short in two key respects: It does not require that businesses participate in ADR processes, and neither does it require that the outcomes of these processes are binding on businesses. If no process takes place, or if the decision is not binding, then due to various power imbalances, individual consumers will often not obtain redress. This means that there will be fewer cases in which sanctions²¹ are imposed, and therefore, less chance that future businesses behaviour will be disciplined.

Given that the approach of the Directive may be deficient, we go on to consider what can be done at the Member State level to improve consumer access

Policy) 2015, p 265; J. LUZAK, ‘The New ADR Directive: Designed to Fail? A Short but Hole-Ridden Stairway to Consumer Justice’, 1. *ERPL* 2016 (elsewhere in this issue).

17 G. RÜHL, ‘Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts. A Critical Evaluation of the European Legislature’s Recent Effort to Boost Competitiveness and Growth in the Internal Market’, 38. *JCP* 2015, p 431.

18 Including other ADR approaches (e.g., class actions or where regulatory bodies order redress to be provided to groups of consumers) and *ex ante* mechanisms, e.g., injunctions: C. HODGES, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’, 5. *ERPL* 2015, p 829; I. BENÖHR, ‘Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures’, 36. *JCP* 2013, p 87; H.-W. MICKLITZ, ‘The Transformation of Enforcement in European Private Law: Preliminary Considerations’, 4. *ERPL* 2015, p 491.

19 Including, but extending beyond, consumer contracts, to disputes between individuals, between businesses, etc., and covering rules on small claims, legal aid, mediation, injunctions, etc.: E. STORSKRUBB, ‘Alternative Dispute Resolution (ADR) in the EU – Regulatory Challenges’, 1. *ERPL* 2016 (elsewhere in this issue).

20 For example, N. REICH, 10. *ERCL* 2014; BENÖHR, 36. *JCP* 2013.

21 For example, being required to compensate consumers or provide some other remedy.

to justice through ADR. One key argument here is that where Member States choose to make processes both mandatory for and binding on businesses (e.g., as in the case of the UK Financial Ombudsman Service), the ECJ would not necessarily consider this to be incompatible with the fundamental right to judicial protection. The other key argument is that where Member States have opted for schemes with voluntary processes and/or non-binding decisions, then improving access to justice will depend on the use of incentives and sanctions that work best within the relevant legal, regulatory, and socio-economic environment.

The final section considers the challenges now faced by Member States and the European Commission, in working together to deliver consumer access to justice through ADR. It also stresses the importance of taking a holistic approach to consumer access to justice: involving ADR and various other elements, e.g., including access to courts and the facilitation of collective redress by regulators. Finally, the article re-emphasizes the significance of the contextualized, consumer-oriented model of access to justice that is proposed here: not only for consumer ADR but also potentially for access to justice *beyond* the consumer sphere.

It should be noted that Regulation 524/2013 on online dispute resolution²² is not discussed in this article. Nevertheless, the analysis provided here is relevant to Regulation 524/2013, because the online dispute resolution regime established by this Regulation makes use of the ADR schemes that are established in Member States under the ADR Directive.²³

2. Why ADR is a Necessary Option for Consumers

Access to justice was associated historically with access to the judicial system and judicial protection of individuals.²⁴ However, it came to be recognized that such access was subject to economic barriers, in the form of litigation costs; geographical barriers created by centralized court systems; and emotional barriers, associated with the formalities of the process. Individually or cumulatively, these barriers frequently made courts inaccessible in practice.²⁵ It became especially important to deal with such problems when, in 1948, the UN Universal Declaration of Human Rights declared the right to an effective remedy

22 Reg. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32013R0524.

23 Art. 2, Reg. 524/2013; Rec. 12, Dir. 2013/11.

24 M. CAPPELLETTI & B. GARTH, 'Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report', in M. Cappelletti & B. Garth (eds.), *Access to Justice: A World Survey, Vol. 1, book 1* (Alphen aan den Rijn/Milano: Sijthoff, Noordhoff /Giuffrè 1978), pp 6-8.

25 E. JOHNSON, 'Thinking about Access: A Preliminary Typology of Possible Strategies', in M. Cappelletti & B. Garth (eds.), *Access to Justice: Emerging Issues and Perspectives, Vol III* (Alphen aan den Rijn/Milano: Sijthoff, Noordhoff /Giuffrè 1979), pp 8-11.

to be a fundamental right of every citizen.²⁶ The access to justice movement emerged as a response to these developments. Cappelletti and Garth identified three historic ‘waves’ in this movement.²⁷ The first wave involved the introduction of legal aid to help the poor in accessing the judicial system. The second wave sought to ensure representation for diffuse interests, such as consumer interests, via the development of collective representation. The third wave aimed at systemic reforms of legal systems, including, *inter alia*, reforms of litigation procedures, the development of small claims procedures, and the popularization of ADR, which was argued often to be necessary to provide ‘effective’ or ‘real’ access to redress.²⁸

EU legal policy has also moved in this direction. There have been a series of initiatives focused on improving consumer access to courts, i.e., on legal aid, facilitation of small claims procedures, and collective actions.²⁹ There have also been a series of initiatives on ADR: the Recommendations on dispute settlement and consensual dispute resolution,³⁰ the Mediation Directive,³¹ and now, of course, the ADR Directive and Regulation on online dispute resolution. The Directive provides the ADR element in the jigsaw, while ADR remains only part of a broader framework containing various elements aimed at helping consumers to enforce their private law rights.³²

The Directive addresses the striking reality that, in spite of available procedures, consumers often find themselves unable to enforce their rights, suffering significant losses as a result.³³ In other words, the Directive takes ADR to be a necessary element in providing ‘effective’ or ‘real’ access to redress for consumers. This properly recognizes that consumers tend to be in a weaker bargaining position than businesses. They do not have the bargaining skills or experience that businesses often possess, and they are usually not significant enough as individual market players to make their desires important to businesses.³⁴ This means that they will find it hard to persuade businesses to provide redress, if the business does not wish to do so. In addition, compared to businesses, consumers will tend to have limited resources to litigate, limited experience or understanding of the legal issues, and will not be confident about

26 www.un.org/en/documents/udhr/index.shtml#a8.

27 CAPPELLETTI & GARTH, in: *Access to Justice*, pp 21-120.

28 See also *ibid.*, pp 6-9.

29 See, e.g., REICH, in: *European Consumer Law*, pp 362-374.

30 Rec. 98/257; Rec. 2011/310.

31 Dir. 2008/52.

32 That is, legal aid, small claims, collective actions, etc. See also footnote 10 and, for more on EU civil justice measures, STORSKRUBB, 1. *ERPL* 2016.

33 Losses incurred by European consumers because of problems with purchased goods or services are estimated to be 0.39% of Europe’s GDP. Eurobarometer, p 179.

34 C. WILLETT, *Fairness in Consumer Contracts* (Aldershot: Ashgate 2007), pp 43-46.

initiating litigation,³⁵ especially if the process is perceived as formalistic, complex, and long,³⁶ and may not seem worth the trouble, given the relatively low value of the claim.³⁷ Indeed, it is now widely accepted in consumer law scholarship that, without ADR processes, consumers will very often not have realistic access to redress.³⁸

3. What is Consumer Access to Justice and Can the Directive Improve It?

The above analysis takes us only so far. It is one thing to say that it will very often be unrealistic to expect consumers to access redress or justice through courts and that ADR must be available as an option. The further challenge is to think more positively about ADR and how it can offer access to justice for consumers. What amounts to ‘access’? How do we make ADR processes as ‘accessible’ as possible for consumers? What is ‘justice’ within an ADR process? How do we provide adequate standards of procedural and substantive justice, without the formalities and expertise that come with a court process?³⁹ More generally, how do we understand ‘access to justice’ in such a way as to recognize the power imbalance between businesses and consumers?

Previous work on the ADR Directive has, of course, dealt with various elements of the above questions: considering, for instance, the advantages of particular forms of ADR (arbitration, mediation, etc.), the effectiveness of the accessibility and quality requirements in the Directive, and whether the Directive takes sufficient account of the consumer irrationalities and biases established by

35 P. CARTWRIGHT, ‘The Vulnerable Consumer in Financial Services: Law, Policy and Regulation’ (2011), www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf, p 43.

36 Eurobarometer, p 204.

37 The financial threshold for taking the business to court greatly varies across Europe (on average between EUR 101 and EUR 2500). However, consumers seem more inclined to take their low value claims to ADR schemes than to courts. Eurobarometer, pp 187 and 216.

38 See, e.g. WAGNER, 51. *CMRL* 2014, p 183; REICH, in: *European Consumer Law*, p 363; CARTWRIGHT, ‘The Vulnerable Consumer’, p 47. On the advantages of ADR more generally (i.e., not restricted to consumer markets), see e.g. S. ROBERTS & M. PALMER, *Dispute Process: ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press 2015), p 10; M. CAPPELLETTI, ‘Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement’, 56. *MLR (Modern Law Review)* 1993, p 282.

39 On the threats to access to justice posed by ADR, e.g., that the absence of legal representation may result in a denial of the weaker parties’ substantive rights, that the absence of clear procedural rules may soften or remove due process guarantees, and then there is the idea of idea that ADR privatizes justice and removes the public policy function of dispute resolution. See e.g. R.L. ABEL, *The Politics of Informal Justice* (New York: Academic Press 1982); O.M. FISS, ‘Against Settlement’, 93. *Yale L.J.* 1984, p 1073; also D. ELLINGHAUSEN, ‘Justice Trumps Peace: The Enduring Relevance of Owen Fiss’s against Settlement’, 5. *Rutgers Conflict Res. L. J.* 2007, p 2.

behavioural science.⁴⁰ Some of this work has even referred to whether the Directive achieves ‘access to justice’.⁴¹ However, there has been no real attempt to actually define access to justice in a way that gets to grips with the above questions. This is what we try to do now: to suggest a model of access to justice that takes proper account of the distinctive characteristics of the supplier-consumer relationship and the consumer market more generally, and to ask how the provisions of the Directive measure up to this concept of access to justice.

For a start, as we have already hinted at above, it is easier to draw the issues out more clearly, if we break down ‘access to justice’ into its constituent parts (i.e., ‘access’ and ‘justice’). This highlights the distinction between access to ADR and the actual ‘quality’ of justice received.⁴² ‘Access’ and ‘quality’ are the two key words in the Directive,⁴³ and what the Directive understands by ‘quality’ equates with the ‘justice’ element in access to justice. The Directive’s goal is to provide access to ‘quality’ ADR schemes, i.e., schemes that are capable of guaranteeing a fair outcome (substantive justice) after conducting a fair process (procedural justice).⁴⁴

Second, we would suggest an approach to the ‘access’ and ‘justice’ elements that is sensitive to the consumer market context. This must surely be appropriate, if we are going to take seriously the Directive’s aspiration to provide a high level of consumer protection and generate consumer market confidence.⁴⁵ So, both ‘access’ and ‘justice’ should be interpreted by reference to the consumer vulnerabilities that hinder individual access to justice and also by reference to the role of dispute resolution in disciplining business activities more generally and thereby proactively protecting consumers collectively.⁴⁶

We shall now consider the Directive in the light of this approach to access to justice. The key conclusion will be that the Directive could have done more to improve consumer access to justice, in particular by mandating business participation in ADR processes, and/or making decisions binding on businesses.

40 See footnotes 14–19 and related text.

41 See footnote 20.

42 See also M. CAPPELETTI & B. GARTH, ‘Access to Justice and the Welfare State: An Introduction’, in M. Cappeletti (ed.), *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff 1981), p 2.

43 ‘Access’ is mentioned 34 times and ‘quality’ is 19 times throughout Dir. 2013/11.

44 It should be noted that Dir. 2013/11 does not mention the notion of access to justice.

45 Footnote 12 and related text.

46 On reading open textured concepts by reference to particular normative ethics, see C. WILLETT, ‘General Clauses and Competing Ethics of European Consumer Law in the UK’, 71. *CLJ* (*Cambridge Law Review*) 2012, p 412. More generally on different understandings of justice in European private law, see H.-W. MICKLITZ (ed.), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar 2011).

3.1. Access

First, the Directive addresses the ‘coverage’ barrier to access to justice.⁴⁷ Before the new regime, there were geographical areas and trade sectors where ADR simply did not exist.⁴⁸ Now Member States are obliged to have ADR schemes for every national, cross-border, or online dispute, whether this is achieved by one residual or numerous sectoral ADR schemes.⁴⁹ Consumers’ access is further fostered by rules on cost effectiveness (free of charge or reasonable fee, no mandatory legal representation),⁵⁰ simple complaints submission (online and offline, in the language of the consumer, using a standard form),⁵¹ and the provision of information.⁵² All of these requirements are important if, as we have suggested, access to justice should be understood in a way that is sensitive to the consumer market context and therefore by reference to consumer vulnerabilities. Consumers will often not have the resources to take formal court action if an ADR scheme does not exist in their geographical area or sector, nor perhaps even the resources to go to ADR if this is also costly. Consumers also tend not to be experienced or expert in dispute resolution processes, so they will tend to be deterred if the processes are complex, and/or there is no suitable information to guide them.⁵³

Nevertheless, a certain degree of discretion is left for process design. Member States can impose conditions for a dispute to be suitable for ADR. For example, commencement of an ADR process may be dependent on meeting a monetary threshold or on preliminary requirements, such as compulsory negotiation with the business.⁵⁴ More importantly however, the Directive only requires the establishment of voluntary schemes.⁵⁵ The minimum nature of the Directive⁵⁶ means that normally Member States are entitled to opt for mandatory schemes.⁵⁷ Nevertheless, Member States are not *required* to make the process mandatory for either businesses or consumers.

47 Art. 1, Rec. 6, Dir. 2013/11.

48 Civic Consulting (Civic Report), ‘Study on the use of Alternative Dispute Resolution in the European Union’, 16 Oct. 2009, ec.europa.eu/consumers/redress_cons/adr_study.pdf, p 15.

49 Art. 5, Dir. 2013/11.

50 Art. 6, Dir. 2013/11.

51 Art. 5, Dir. 2013/11.

52 Art. 7, Dir. 2013/11.

53 On resource, experience, and expertise vulnerabilities, see footnotes 34–37 and related text.

54 Art. 5, Dir. 2013/11.

55 Art. 1, Dir. 2013/11.

56 Art. 2, para. 3, Dir. 2013/11.

57 Some Member States took advantage of this option to make processes mandatory for the business. For example, in the United Kingdom, s. 19 of The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (ADRR) leaves an option for a mandatory process to be provided for by more specific legislation, by rules of trade associations, or by contract. To this effect, s. 226 of the Financial Services and Markets Act 2000 (FSMA) mandates

Now, given that the Directive is premised on the notion that consumers need to be protected, and to be given market confidence,⁵⁸ it is arguably perfectly logical that Member States should only be required to make ADR an option for consumers and not an obligation. However, if we follow the consumer protection logic, and if the aim, therefore, is to understand access to justice in a way that is sensitive to consumer vulnerabilities, then arguably participation in ADR processes *should* be mandatory for businesses. Given the power imbalance between consumers and businesses, failure to make the process mandatory for businesses may result in ADR being inaccessible for consumers. As we highlighted earlier, individual consumers tend to be in a weaker bargaining position than businesses. So, they will usually not have the bargaining skills or experience, or be important enough as market players, to be able to compel businesses to use ADR.⁵⁹ This inherent power imbalance is ameliorated if businesses are required to participate in the ADR process, and this may explain why ADR is commonly mandated in sectors where imbalances are especially striking, i.e., the energy, telecommunications, and financial services sectors.⁶⁰ Mandating ADR particularly makes sense when national law compels consumers to negotiate their disputes directly with the business, as a pre-condition to using ADR. Voluntary participation by the business is perhaps least likely in such cases, given that the business will have already considered the complaint and refused to accept it.

In summary, then, the Directive is weak on the ‘access’ element of access to justice, in failing to recognize that, if businesses are not compelled to participate, consumers will often not be able to access the process, because they will not have the bargaining skill, experience, or power to persuade unwilling businesses to participate.

3.2. Justice

Let us now consider the ‘justice’ element. The Directive aims to provide access to *quality* ADR schemes.⁶¹ Before, the quality of ADR schemes varied considerably.⁶² Although the European Commission adopted two Recommendations that were

the process for financial firms falling under ‘compulsory jurisdiction’. In Hungary, s. 39, para. 8 of the Act CLV on Consumer Protection of 1997 as amended (1997. évi CLV. törvény a fogyasztóvédelemről) (CPA) does not mandate business participation, but it empowers ADR schemes to proceed on the merits of the case without any participation by the business. See below on the fundamental rights issues arising where Member States wish to make processes mandatory and decisions binding.

58 Footnote 45 and related text.

59 WILLETT, *Fairness in Consumer Contracts*, pp 43–46.

60 Civic Report, p 67.

61 See, e.g., Recs 37 and 38, Dir. 2013/11.

62 Rec. 5, Dir. 2013/11.

intended to create a level playing field for business and guarantee the same level of protection for all European consumers,⁶³ these have not been effectively implemented.⁶⁴ Now the Directive establishes compulsory quality requirements,⁶⁵ broadly confirming the requirements in the two soft-law instruments. These quality requirements are very important. They are not only in place to better *protect* consumers but also to induce consumer *trust* in ADR schemes.⁶⁶ This, in turn, goes to the internal market goal of the Directive. The Directive assumes that once consumers trust ADR as a realistic and easily available option for dispute resolution, they will be more confident in concluding domestic, and cross-border, contracts for goods and services.⁶⁷ Nevertheless, we shall now see that, when it comes to providing for the ideal consumer-oriented version of access to justice, the Directive is lacking in some respects, the key problems being in relation to substantive justice.⁶⁸

The Directive lays down fairly detailed criteria for securing *procedural* justice. Article 6 guarantees the independence and impartiality of the persons in charge of the ADR process, while Article 9 provides for the right to independent advice and legal representation and gives an opportunity for the parties to present their views during the process. These requirements are important to a model of justice that is concerned to recognize and ameliorate the power imbalance between consumers and businesses. Consumers will usually have less knowledge and experience of legal rules and processes and therefore be less confident about expressing their views. So a consumer might be more likely than a business to suffer prejudice, if legal advice and representation was not available or if there was no formal opportunity to present a view.

However, the Directive does not actually make express provision guaranteeing a *public hearing*. In this regard, the Directive has relaxed one of the key due process requirements integral to Article 47 Charter of Fundamental Rights of the European Union – CFREU (Right to an effective remedy and fair trial), i.e., the right to a public hearing. Indeed, it seems common for ADR schemes not to provide this right. For example, an ombudsman within the UK *Financial Ombudsman Service* (FOS) has a right to refuse to hear the parties,⁶⁹

63 See footnote 9.

64 Fifty-nine per cent of ADR schemes were aware of the recommendations and only 41% of those fully complied. Civic Report, pp 121-122.

65 Art. 2, para. 3, Dir. 2013/11.

66 Art. 1, Recs 1, 32, and 36, Dir. 2013/11.

67 Recs 4, 6, and 15, Dir. 2013/11.

68 See, e.g., in general for these requirements in the context of ADR: B. McADOO & N.A. WELSH, 'Look before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation', 5. *Nev. L.J. (Nevada Law Journal)* 2004-2005, p (399) at 403.

69 Financial Conduct Authority, Handbook of Rules and Guidance (FCA Handbook), Dispute Resolution (DISP) 3.5.5 R, 3.5.6 R.

while procedures of the Swedish *Allmänna reklamationsnämnden* (ARN)⁷⁰ can *only* be conducted by written submissions.⁷¹ So, procedural rules for ADR are often not so ‘rigorous’ or ‘formalistic’ as within a typical judicial process,⁷² removing some guarantees that the ordinary judicial process has. Nevertheless, on balance, due to the provision of other procedural safeguards, it can probably be said that the Directive manages to provide for a reasonable level of procedural justice. So, although there is no express right to a public hearing, i.e., to be heard in person, Article 9 does give the parties an opportunity to express their views on the arguments, evidence, documents, and facts put forward by the other party and on any statements made and opinions given by experts. So, it seems that Member States would at least need to make provision for such views to be expressed in writing.⁷³ In fact, it might sometimes be the case that a consumer who does not have legal representation, but who (like many consumers) is inexperienced at speaking in public, will benefit from being able to express his or her views in writing.

We now turn to *substantive* justice.⁷⁴ Certainly, to the extent that substantive justice is understood as an outcome consistent with the law, it is important that the Directive requires that persons in charge of the ADR process have a general understanding of the law.⁷⁵ Now, the Directive also allows for the possibility that the outcome may be different from the result that a court would come to after applying the law.⁷⁶ In this way, it recognizes that ADR may result in creative outcomes that do not necessarily reflect the law but may nevertheless result in party satisfaction and thus could be considered substantively fair. This will very often serve our access to justice model well. The nature of the consumer market is such that businesses often develop practices that are detrimental to consumers but which the formal law has not yet got around to banning or regulating. ADR processes can provide protection from such practices, if they are allowed to deviate from the strict legal position. So, for example, the FOS’s power

70 National Board for Consumer Disputes.

71 ‘What Does the Process Look Like?’, www.arn.se/other-languages/english-what-is-arn/.

72 European Agency for Fundamental Rights, ‘Access to Justice in Europe: An Overview of Challenges and Opportunities’ (2011), fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf, pp 45–46.

73 See also C. HODGES, I. BENÖHR & N. CREUTZENFELD-BANDA, ‘Findings and Conclusions’, in C. Hodges, I. Benöhr & N. Creutzenfeld-Banda (eds.), *Consumer ADR in Europe* (Oxford: Hart 2012), pp 419–420.

74 On the relationship between procedural and substantive justice, see J. RAWLS, *A Theory of Justice* (Oxford: Oxford University Press 1999), p 74–5. For empirical research showing that in ADR procedures, parties prefer substantive justice (resolution of the dispute) over procedural justice, see H. GENN, ‘Civil Mediation: A Measured Approach?’, 32. *J. of Social Welfare & Family Law* 2010, p (195) at 199.

75 Art. 6, Dir. 2013/11.

76 Art. 9, para. 2, Dir. 2013/11.

to render decisions based on what is ‘fair and reasonable’ was used in the early days of payment protection insurance (PPI) complaints, enabling the FOS to award consumers compensation that would not have been available under the formal rules.⁷⁷

Of course, if an outcome need not necessarily reflect the formal law, there is always the chance that this could involve an ADR body *subtracting* from the consumer’s legal rights rather than adding to these rights – so providing a solution that is more detrimental to the consumer than the solution that would have resulted if the formal law had been applied. This, in itself, would be a good reason for consumers always to have a right to challenge ADR outcomes in the formal courts (i.e., to challenge outcomes not just on the narrow, primarily procedural grounds that would normally apply in a ‘judicial review’ type action but also to challenge more routinely, based on the substantive outcome). Indeed, even if outcomes did always need to be consistent with the law, it would surely be desirable for the consumer, as the weaker party, to have the opportunity of a new hearing by a body (i.e., the court) that can provide a more rigorous application of the rules.

In fact, the Directive does not insist that Member States provide for outcomes to be binding, leaving this issue to the discretion of Member States.⁷⁸ For the reasons just given, it is appropriate that the Directive at least does not insist that outcomes are binding on consumers. However, if the aim is consumer access to justice, and if this is understood in a way that is sensitive to consumer needs and vulnerabilities, then it is strongly arguable that outcomes *should* be binding on businesses.⁷⁹ There *should* be a final and enforceable outcome,

77 Section 228 FSMA, and see *British Bankers Association v. Financial Services Authority and Financial Ombudsman Service* [2011] EWHC 999. This is a difficult theoretical question leading to lengthy debates on the relationship of law and morality; see, e.g., H.L.A. HART, ‘Positivism and the Separation of Law and Morals’, 71. *Harv. Law Rev. (Harvard Law Review)* 1958, p 593 and L.L. FULLER, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’, 71. *Harv. Law Rev.* 1958, p 630. Note also that the Directive does not require Member States to make ADR decisions binding. This could protect a party aggrieved by a decision based on criteria not laid down in formal law, but it is arguably not conducive to our ideal model of access to justice – see text immediately below.

78 Art. 10, para. 2, Dir. 2013/11. In the United Kingdom, s. 14C of ADRR allows for a binding outcome to be provided for by more specific legislation, by rules of trade associations, or by contract. To this effect, s. 228 FSMA empowers the FOS to impose binding solutions on the business. In Hungary, s. 32 of the CPA in principle makes provision for a non-binding outcome, unless the business accepted any future outcomes of the ADR entity as binding in advance or made a declaration to that effect during the process. See below on the fundamental rights issues, if Member States make processes mandatory and decisions binding.

79 Generally on why, in consumer disputes, ADR schemes are most effective when outcomes are binding on the business, see D. SCHWARCZ, ‘Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict’, 83. *Tul. L. R.*

without an option for the business to challenge the decision routinely, based on the substantive outcome.⁸⁰ Rather, the business should only be able to challenge the outcome on the very limited grounds of a ‘judicial review’ type action.⁸¹

So why exactly is it so important to our concept of access to justice that outcomes should be binding in this way on businesses? To reiterate, this concept of access to justice involves understanding both ‘access’ and ‘justice’ in a manner that is sensitive to the consumer market context. Here, first of all, this means interpreting the ‘justice’ element by reference to consumer vulnerabilities. So it must be recognized that consumers will rarely have the bargaining skills or experience, or be important enough as market players, to force a business to adhere to decisions.⁸² If they cannot persuade the business to adhere to the decision, this will often be the end of the matter. Consumers will often be deterred by costs and other factors from going to court.⁸³ The result will be that they will fail to obtain redress (‘justice’) and will be left to absorb the loss caused by the breach of contract, unfair term, etc. The detriment caused may be especially harmful for consumers: they usually have fewer resources and less insurance to absorb purely economic losses, and in any case, breaches of contract, unfair terms, etc., have ‘consumer surplus’ effects (causing loss of time, distress, inconvenience in personal lives, the indignity of not being taken seriously, the frustration of obtaining no redress).⁸⁴

If the outcome is binding on the business, then at least businesses cannot cause these sorts of problems for consumers, by routinely refusing to adhere to decisions that go against them⁸⁵ or routinely stating an intention to challenge such decisions in the courts (and refusing to comply with the decisions while such challenges are pending). In other words, outcomes that are binding on the business have the potential to ameliorate the inherent inequalities between consumers and businesses, giving consumers fast and cost-effective ways to

(*Tulane Law Review*) 2009, p (739) at 793; A. FEJÓS, ‘The Impact of EU Norms and Policies on Consumer Protection Enforcement in Serbia’, 36. *JCP* 2013, p (247) at 263-264; F. WEBER, C. HODGES & N. CREUTZFELDT-BANDA, ‘Sweden’, in C. Hodges, I. Benöhr & N. Creutzenfeld-Banda (eds.), *Consumer ADR in Europe* (Oxford: Hart 2012), p 252. On lasting and binding outcomes in ADR and access to justice in general, and the link to substantive justice, see MCADOO & WELSH, 5. *Nev. L.J.* 2004-2005, p 403.

80 See, e.g., s. 229(9) FSMA on the enforceability of binding and final decisions of the FOS.

81 For grounds of judicial review in the United Kingdom, see e.g. M. ELLIOTT & R. THOMAS, *Public Law* (Oxford: Oxford University Press 2014), p 434.

82 WILLETT, *Fairness in Consumer Contracts*, pp 43-46.

83 See footnotes 3, 4, and 27.

84 WILLETT, *Fairness in Consumer Contracts*, pp 37-39; WILLETT, 71. *CLJ* 2012, p 420.

85 Around 50% of disputes ended in favour of consumers in front of the FOS. See Annual Review for 2014/15 financial year (FOS Report), www.financial-ombudsman.org.uk/publications/ar15/ar15.pdf, p 78; ARN usually upholds between 30% and 50% of consumer complaints, www.arn.se/info-konsument/fragor-svar-konsument/.

enforce their private law rights. Empirical research shows that where outcomes are binding on the business, the EU median compliance rate is 100%.⁸⁶ A binding outcome may also actually reduce the time, resources, and inconvenience that is spent going through an ADR process. If a process has several stages, the *prospect* of a binding outcome at the last stage may induce businesses to cooperate with consumers in reaching a mutually agreed settlement earlier than might otherwise be the case.⁸⁷ Binding outcomes are also particularly important in solving cross-border disputes, when consumers might invest substantial resources, just to find out that no solution is achieved.⁸⁸

In short, then, if outcomes are not binding on businesses, individual consumers may not obtain the (*ex post*, corrective) substantive ‘justice’ that is required to meet their distinctive needs. However, our concept of substantive justice, in being sensitive to the consumer market context, should not be solely concerned with individual corrective justice. It should also be concerned to protect collective consumer interests. In this regard, it should perform a preventive, *ex ante* function, seeking to limit the prospects for future business bad behaviour and consequent consumer detriment.⁸⁹ This is arguably a perfectly legitimate dimension of substantive justice in this context. First, it is justifiable in subjective, individual terms. For at least a significant number of those individuals seeking ‘justice’, what they seek is surely something more than corrective justice as a personal possession to be selfishly cherished. They may also wish others like them to benefit, e.g., in that the decision acts as a deterrent to future activities that could harm these others. Second, in broader public policy terms, it is arguably legitimate to view individual justice as a routine conduit to broader social justice, as long as the latter does not actually compromise the former.⁹⁰

86 Civic Report, p 55. In addition, M. LOOS, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe*, Centre for the Study of European Contract Law Working Paper Series 1 (2010), papers.ssrn.com/sol3/papers.cfm?abstract_id=1535819, p 4.

87 For example, out of 1,786,973 enquiries received by the FOS, only 329,509 got to the second stage of the process and only 43,185 to the third. This means that around 80% of complaints were settled between the parties, i.e., mediation (subject to voluntary compliance), a further 10% were adjudicated (subject to voluntary compliance), and only the final 10% of complaints ended with binding decisions of the ombudsman. FOS Report, p 3. See the description of the process by SCHWARCZ, 83. *Tul. L. R.* 2009, pp 770-776. See also www.financial-ombudsman.org.uk/about/organisation-chart.htm.

88 See also Civic Report, p 115.

89 Edging closer to collective or social justice, where there is redistribution between more and less powerful groups. See H.-W. MICKLITZ, ‘Principles of Social Justice in European Private Law,’ 19. *YEPL (Yearbook of European Law)* 1999, p (167) at 171-173.

90 The subjective justification for designing individual redress mechanisms so as to protect collective interests arguably fits within the Humesian idea that man is pleased by utility, i.e., individuals take subjective pleasure in benefits to society at large (of D. HUME, *A Treatise of Human Nature* (1738-1740), reprint (Oxford: Oxford University Press 2011); on the objective

If substantive justice is indeed read in this way – to protect collective consumer interests – then the implication is that ADR processes should impose a ‘forward looking’ discipline on business activities. To achieve this, the process must routinely ensure redress (e.g., compensation, restitution, and/or cure), where such redress is legally due. This should help to incentivize businesses to avoid behaviour that is detrimental to consumers (the routine consequence of such behaviour being the need to expend resources on providing redress).⁹¹ Of course, redress is more likely to be routinely available if outcomes are binding on the business.

3.3. *Access Revisited: Its Link to Justice*

Having already set out the role of mandatory processes in enhancing ‘access’ and the role of binding decisions in enhancing ‘justice’, there are two final points to make about the role that mandatory processes can play in substantive justice. First, as we have just seen, decisions that bind the business may contribute to substantive justice by improving individual consumer redress and protecting collective interests, but it stands to reason that there will be a further improvement in substantive justice, if processes are also mandatory for businesses, as this will produce *more* (binding) decisions. Second, mandating participation by businesses may also enhance substantive justice, in a more indirect manner, through competitive discipline. The point here is that the more dispute processes that take place, the more consumers will know about delinquent businesses. This may increase the chances of competitive pressure being applied to businesses, forcing them to improve their behaviour, i.e., to provide better quality products and services⁹²

public policy dimension, see T. AL-TAWIL, ‘Corrective Justice and Deterrence: Can They Co-exist?’, 6. *EJLS (European Journal of Legal Studies)* 2013, p 109.

- 91 Certainly, businesses may often make a cost-benefit calculation that the behaviour is sufficiently profitable to make it worthwhile to continue it, given that the profits exceed the amount that needs to be set aside in a ‘compensation’ fund to cover the limited number of cases when they are held to account. However, by this very same logic, it becomes less worthwhile to continue the behaviour, the more routinely businesses are held to account for it, and the larger the compensation fund needs to be. On law deterring bad behaviour, see W.J. CARDI, R. PENFIELD & A. YOON, ‘Does Tort Law Deter?’, Wake Forest University Legal Studies Paper 1851383 (2011), papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383.
- 92 On market discipline through enhanced consumer awareness, see J.M. KARPOFF, ‘Does Reputation Work to Discipline Corporate Misconduct’, in T.G. Pollock & M. Barnett (eds.), *The Oxford Handbook of Corporate Reputation* (Oxford: Oxford University Press 2012), pp 361-382. However, note that ADR schemes, and the businesses records they highlight, must be highly visible to overcome consumer behavioural biases and the tendency to make choices based on narrow price and quality elements available ‘in the moment’ from the business (see WILLETT, 71. *CLJ* 2012, p (414) at 423-424).

3.4. *Summing Up*

The above analysis shows that if we interpret both ‘access’ and ‘justice’ by reference to consumer vulnerabilities that prevent individual consumers obtaining redress, and by reference to the role of dispute resolution in protecting collective consumer interests, the conclusion is that the Directive could have done more to improve consumer access to justice, in particular by mandating business participation in ADR processes and/or making decisions binding on businesses.

4. **Can Member States Combine A Mandatory Process With A Binding Outcome?**

We have argued that our suggested concept of access to justice is most likely to be delivered when the process is mandatory for the business and when the outcome is binding on the business. In other words, the ‘ideal’ model is where the process is both mandatory for and binding on the business.⁹³ Now, as we have seen, the Directive does not require either that the process be made mandatory for the business or that the outcome be made binding for the business. Nevertheless, as we have also seen, minimum harmonization certainly allows Member States to provide for a mandatory process in its own right, and minimum harmonization also allows Member States to provide for a binding outcome in its own right. However, what is not clear is whether it is acceptable for Member States to provide *both* for a mandatory process *and* for a binding outcome (a binding outcome, as explained above, being one that is enforceable against the business, and is final, at least to the extent that the business cannot challenge it in the courts, except perhaps on the very limited grounds of judicial review). We will see below that this mandatory and binding combination is indeed present in practice. The problem is whether such a combination can be said to infringe the fundamental rights of businesses and be contrary to the general EU law principle of ‘effective judicial protection’.

The Directive is said to be without prejudice to the right of Member States to introduce legislation making participation in ADR mandatory, ‘provided that such legislation does not prevent the parties from exercising their right of access to the judicial system’.⁹⁴ Although not referring directly to it, it is clear here that the Directive has in mind the fundamental right of the parties (including the

93 See the previous section on why it is not desirable for processes to be mandatory for consumers or for decisions to be binding on consumers. Note that Dir. 2013/11 does not actually prevent Member States from making ADR mandatory for consumers but does prohibit contractual terms making consumer participation mandatory (Arts 1 and 10). Dir. 2013/11 also provides that Member States may only make outcomes binding on consumers where consumers have specifically accepted these outcomes (Art. 10).

94 Art. 1, Dir. 2013/11.

business) to an effective remedy and fair trial, as declared in Article 47 CFREU.⁹⁵ According to the established case law, Article 47 CFREU incorporates the principle of *effective judicial protection*,⁹⁶ which is a general principle of EU law that stems from the constitutional traditions of Member States and is laid down in Articles 6 and 13 of the European Convention on Human Rights.⁹⁷ The Directive is also explicit to the effect that the right to judicial protection belongs to both parties.⁹⁸ So, at first reading, we might conclude that if a process is mandatory for the business, then it cannot also result in a binding outcome for the business, because this would deprive the business of the right to effective judicial protection and therefore would not be compliant with the Directive or with the broader principles of EU law to which it refers.⁹⁹ However, the position is far from clear.

One way to interpret the Directive is that as long as *any* judicial protection is available, the fundamental right to judicial protection is respected.¹⁰⁰ Binding ADR outcomes are often subject to at least some form of judicial scrutiny. For example, binding decisions of the FOS can exceptionally be challenged via judicial review.¹⁰¹ Similarly, binding decisions of the *Budapesti Békéltető Testület* (BBT)¹⁰² can exceptionally be set aside by the competent court.¹⁰³ These procedures empower the court to scrutinize the ADR outcome on limited grounds, primarily to determine whether the ADR procedure respected the required standard of procedural fairness.¹⁰⁴

However, even if we suppose that the availability of judicial review does not satisfy the ‘right to judicial protection’ requirement, it is certainly the case that fundamental rights, including the right to judicial protection, *can* be restricted by measures pursuing general interest objectives, provided that these

95 See Recs 45, 49, and 61, Dir. 2013/11, which refer directly to Art. 47 CFREU.

96 ECJ 8 Dec. 2011, *Chalkor v. Commission*, curia.europa.eu/juris/celex.jsf?celex=62010CJ0386, para. 51.

97 ECJ 15 May 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, curia.europa.eu/juris/celex.jsf?celex=61984CJ0222&lang1=en&type=TEXT&ancre=, para. 18 and subsequent case law.

98 Art. 1, Dir. 2013/11.

99 See BENÖHR, 36. *JCP* 2013, p 101.

100 See in relation to arbitration awards: J. STUYCK, E. TERRY, V. COLAERT, T. VAN DYCK, N. PERETZ, N. HOEKX & P. TERASZKIEWICZ (Leuven Report), ‘An Analysis and Evaluation of Alternative Means of Consumer Redress Other than Redress through Ordinary Judicial Proceedings’ (17 Jan. 2007), www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf, p 120.

101 See www.financial-ombudsman.org.uk/faq/businesses/answers/rules_a11.html.

102 Arbitration Boards of Budapest.

103 Section 34 CPA.

104 See above footnotes 80 and 81 and related text. See on the limits of procedural fairness in ADR s. 3.2.

restrictions are proportionate to the objective attained.¹⁰⁵ The ECJ has analysed this issue, in the context of consumer ADR, in *Alassini v. Telecom Italia*,¹⁰⁶ assessing the compatibility of mandatory mediation with general principles and fundamental rights of the EU. The Italian rules under scrutiny provided for mandatory mediation in telecommunications disputes. This was in order to implement the requirement of Article 34 of Directive 2002/22 on Universal Services,¹⁰⁷ requiring Member States to provide for ADR in such disputes. The ECJ first observed the importance of ADR in solving consumer disputes, reminding us that Directive 2002/22 aims to enhance the resolution of consumer disputes with the use of ADR. The ECJ said that, insofar as they are systematically used, mandatory schemes *strengthen* the effectiveness of Directive 2002/22.¹⁰⁸ However, given that mandatory mediation introduces an additional step before access to courts, the ECJ then considered whether such schemes are compatible with the general principles and fundamental rights of the EU.

The ECJ first scrutinized the compliance of the Italian provisions with the *principle of effectiveness (and equivalence)*,¹⁰⁹ according to which, national laws must not make it practically impossible or excessively difficult to exercise rights conferred by EU law.¹¹⁰ It was held that imposing (i.e., rendering mandatory) an out-of-court settlement procedure is compliant with the principle of effectiveness, as long as, *inter alia*, it does not result in a decision that is binding on the parties and it does not cause a substantial delay in judicial protection.¹¹¹

The ECJ also found that the particular rules were compliant with the principle of *effective judicial protection* enshrined in Article 47 CFREU,¹¹² because they pursued legitimate objectives in the general interest, and the restriction was proportionate to the objective attained. The rules furthered the public interest, because they provided for ‘quicker and less expensive settlement

105 Art. 52, para. 2, CFREU. In addition, ECJ 13 Dec. 1979, *Liselotte Hauer v. Land Rheinland-Pfalz*, curia.europa.eu/juris/celex.jsf?celex=61979CJ0044&lang1=en&type=TEXT&ancre=, para. 32 and subsequent case law.

106 ECJ 13 Mar. 2010, *Alassini and Others v. Telecom Italia*, curia.europa.eu/juris/celex.jsf?celex=62008CJ0317&lang1=en&type=TEXT&ancre=.

107 Directive 2002/22 on universal services and users’ rights relating to electronic communications networks and services, eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0022.

108 ECJ 13 Mar. 2010 (footnote 106), para. 45.

109 The principle of equivalence is not an issue here and will not be further referred to.

110 ECJ 16 Dec. 1976, *RWE Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* curia.europa.eu/juris/celex.jsf?celex=61976CJ0033&lang1=en&type=TEXT&ancre=.

111 ECJ 13 Mar. 2010 (footnote 106), paras 54-55 and 67 and subsequent case law.

112 ECJ 13 Mar. 2010 (footnote 106), para. 49, and see C. MAK, ‘Rights and Remedies in Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters’, Amsterdam Law School Legal Studies Research Paper 2012-88, papers.ssrn.com/sol3/papers.cfm?abstract_id=2126551, p 12.

of disputes' and 'a lightening of the burden on the court system'.¹¹³ Mandatory mediation was also a proportionate restriction in the light of the objectives pursued. First of all, this was because 'no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives'.¹¹⁴ Second, it was not evident that any disadvantage caused by the mandatory nature of the mediation was disproportionate to those objectives.¹¹⁵

What we see then, when discussing the principle of effectiveness, is that the ECJ referred to the mandatory process being compliant with EU law *as long as the outcome is not binding*. Now, this seems to pose a very serious obstacle to the sort of 'ideal' access to justice model that we have set out above - a model in which processes are mandatory for, and outcomes binding on, the business. We would suggest, however, that the ECJ's statement on this mandatory/binding question remains very much open to interpretation. First of all, the case was one in which the process was mandatory for both businesses and *consumers*. It is possible that this influenced the ECJ's statement to the effect that mandatory processes are only acceptable if they are not binding. We cannot be sure that the ECJ would have made this statement, if it had been pressed to contemplate a process that was only binding on the business.¹¹⁶ Second, not only was the case about a particular form of ADR, i.e., a mediation procedure, but the ECJ's more general statement of principle was that an out-of-court 'settlement' procedure can only be mandatory, as long as the procedure does not result in a decision that is binding. Arguably, a 'settlement' procedure refers to mediation, given that 'settlement' implies an *agreement*, i.e., precisely what is supposed to result from a mediation process. Certainly, this could be taken to mean that, even if the parties in a mandatory mediation process reach an agreement, then it is unacceptable to treat such an outcome as binding. This might further suggest that it is also unacceptable to impose binding decisions in other forms of mandatory ADR. However, the ECJ *could* simply be saying that, if the parties in a mandatory mediation procedure cannot reach an agreement, then the procedure should not be one in which a binding decision can then simply be imposed, *without further consideration of the merits of the case*. Now in many ADR schemes, mediation is the first stage, but if the parties cannot agree, they proceed beyond mediation to stages where there is a more rigorous and expert analysis of the legal and factual

113 ECJ 13 Mar. 2010 (footnote 106), para. 64.

114 *Ibid.*, para. 65.

115 *Ibid.*

116 The logic here is that consumers, as the weaker parties, have more to lose, if a detrimental outcome is binding and there is no recourse to judicial protection.

issues, and then, a binding decision is imposed.¹¹⁷ So, perhaps the ECJ is saying that it may be acceptable for a mandatory ADR procedure to begin with mediation and to end in a binding outcome; so long as the procedure does not *immediately* impose a binding outcome when mediation fails, but rather a binding outcome can only be imposed after further stages, where a more rigorous and expert analysis may take place.¹¹⁸

However, in order for such a model to be acceptable, a further condition would need to be satisfied. As we have seen above, in discussing the principle of *effective judicial protection* enshrined in Article 47 CFREU, the ECJ said that this right can only be limited, if such a limitation serves the public interest and is proportionate to the objective attained. The ECJ then said that the public interest is served, if the ADR process results in quicker and more cost-effective individual dispute resolution than would be achieved through the courts, and this leads to a reduction in the number of disputes referred to courts. In other words, in deciding whether the public interest requirement is satisfied, the ECJ will demand that these sort of *efficiency* criteria are satisfied.¹¹⁹ This was the approach taken in *Alassini* in relation to whether a mandatory process was acceptable, and it would make sense for a similar efficiency test to be applied in order to determine whether a mandatory process may also result in a binding outcome.

If such an approach were to be accepted, it seems highly plausible that mandatory and binding schemes *could* often satisfy the efficiency test. We have already seen in the preceding section that such schemes could potentially provide a powerful mix of individual redress and proactive protection of collective interests (through disciplining trader behaviour). As well as improving access to justice, this also arguably improves efficiency, reducing the costs (for the parties and the courts), of resolving existing disputes, as well as disciplining trader behaviour, so that the number of future disputes is reduced.

Take for example the FOS.¹²⁰ The process leads to cheap and fast resolution of disputes. It is free of charge for consumers and is considerably cheaper for firms than the judicial process. Firms pay a lump sum levy to fund the FOS, and if the case is settled in the first stage of the process, they do not incur additional charges, only the levy that they would pay anyway. If the case gets to

117 For example, FOS, see footnote 87.

118 For example, FOS, see footnote 117 with related text and footnote 87, describing the move from mediation, through to adjudication, and then to a decision by the ombudsman, with the levels of expertise and standard of legal analysis increasing at each stage. See also www.financial-ombudsman.org.uk/faq/businesses/answers/rules_a11.html.

119 See also *MCADOO & WELSH*, 5. *Nev. L.J.* 2004-2005, p 403.

120 Participation in the process is binding for the majority of firms, and the process may end with a binding decision (see footnotes 57 and 78). On the precise position since implementation of Dir. 2013/11, see 'Our Future Service and Where the ADR Directive Fits In', www.financial-ombudsman.org.uk/publications/technical_notes/alternative-dispute-resolution.html.

the second stage, firms are charged a case fee of GBP 550¹²¹ that may still be considerably less than what they would have to pay to go to court.¹²² The resolution of disputes is fairly fast. The majority of complaints are resolved within three months, although some cases may take twelve months or more.¹²³ So, although some disputes may trigger additional charges for the business and may take longer to reach a final resolution, these are likely to be the more complex or ‘hard’ cases,¹²⁴ which would take considerably more resources if they were to go to court.

This kind of process can also be efficient in allocating public spending, by lightening the burden on the courts, leaving more resources for courts to spend on ‘hard cases’. The FOS, for instance, systematically deals with an enormous number of enquiries.¹²⁵ In 2014–2015, it received 1,786,973 enquiries¹²⁶ that turned into 405,202 disputes,¹²⁷ while in 2014, non-family courts in England and Wales received 60,000 small claims that resulted in 22,000 hearings.¹²⁸

Then, there is the discipline on future trader activities. FOS heard a huge number of cases on mis-selling of PPI, leading to compensation payments of GBP 20.8 billion between 2011 and 2015.¹²⁹ This clearly played a part, along with the more general work of the Financial Conduct Authority, in incentivizing financial firms to desist from these mis-selling practices,¹³⁰ and partly because of the large number of cases to go through FOS, and the broader publicity, it seems far more likely that at least a significant margin of consumers would refuse to buy PPI.

Of course, if a model combining a mandatory process and a binding outcome is to be justifiable, then it must be proportionate to the public policy (in this case, the efficiency) objective attained.¹³¹ It may be possible to satisfy this requirement here. As we shall see in the section to follow, it is difficult to guarantee the success of ADR schemes that do not combine the mandatory and

121 FCA Handbook, FEES 5.

122 Compare with court fees for money order at www.gov.uk/make-court-claim-for-money/court-fees.

123 See FOS Report, p 83. The process should be faster in the future: FOS, ‘Our Future Service and Where the ADR Directive Fits In’, www.financial-ombudsman.org.uk/publications/technical_notes/alternative-dispute-resolution.html.

124 See also Rec. 25, Dir. 2013/11.

125 See FOS Report, p 22.

126 FOS Report, p 22.

127 FOS Report, pp 74–75.

128 HODGES, 5. *ERPL* 2015, p 835.

129 ‘Monthly PPI Refunds and Compensation’, www.fca.org.uk/consumers/financial-services-products/insurance/payment-protection-insurance/ppi-compensation-refunds.

130 On the significant drop in PPI mis-selling in the past decade, see Financial Conduct Authority, ‘Redress for Payment Protection Insurance (PPI) Mis-Sales Update on Progress and Looking Ahead’, TR14/14, August 2014, www.fca.org.uk/static/documents/thematic-reviews/tr14-14.pdf, p 7.

131 See footnote 105 and related text.

binding elements. This is because their success depends not only on additional factors such as incentives and sanctions but also on whether these are selected and combined in such a way as to be effective within the legal, regulatory, and socio-economic environment in which they operate. So, if a reasonably *high level of* success cannot be guaranteed by models where the process is not mandatory for, and the outcome not binding on, the business, it is arguably not disproportionate to opt for the mandatory and binding model.

In conclusion, then, the mandatory and binding (for business) model is not necessarily incompatible with the EU fundamental right to judicial protection, the key element in nurturing this compatibility being the efficiency concept. Indeed, this logic also brings into (at least a degree of) congruence our concept of access to justice (aimed at protecting individual and collective consumer interests), with the efficiency principle that we have argued can be teased out from the jurisprudence of the ECJ.

5. Can An A Voluntary Process And/Or A Non-Binding Outcome Result In Consumer Access To Justice?

Whatever is *permitted* under EU law, we have already seen that Member States are not required to introduce schemes that are either mandatory or binding for businesses. They may opt for schemes with a voluntary process and/or a non-binding outcome.¹³² Can such an approach ever facilitate consumer access to justice, i.e., access to justice that is sensitive to the consumer market, providing for routine *ex post* redress for individuals and imposing the regulatory discipline that promotes *ex ante* preventive protection of collective consumer interests? The empirical data give conflicting information on the success of voluntary process/non-binding outcome schemes. On the one hand, the EU median compliance rate with non-binding decisions is 90%.¹³³ On the other hand, there seems to be evidence that businesses often refuse to enter into voluntary ADR procedures and fail to comply with non-binding decisions.¹³⁴ Take for example the BBT. The report for 2013 shows a median compliance rate of 83% with a non-binding decision, but a considerable number of businesses (241) refused to participate in the process in the first place. This is quite a large rate of refusal, especially if we compare this figure to the 26 who refused to participate in the

132 For example, the process before the BBT is voluntary in a sense that it gives the business a chance to participate in the process and perhaps settle with the consumer. Nevertheless, if the business refuses to take part in the process, the BBT can proceed and decide on the merits of the case. The process by default ends with a non-binding decision, unless the business explicitly accepts the outcome as binding. See footnote 50 and A. FEJÓS, 'Consumer Protection in Sales Transactions in Hungary', 49. *Acta Juridica Hungarica* 2008, p (441) at 460-463.

133 Civic Report, p 55.

134 Civic Report, p 17.

previous year.¹³⁵ There may also be sectoral variations in compliance. For instance, statistics for ARN show that, in particular in banking and insurance, compliance rates come close to 100%, while in other sectors compliance rates remain around 70%.¹³⁶ The differences in participation and compliance rates can probably be explained by the *adequacy* of chosen incentives and sanctions.

The Directive mentions incentives and sanctions as important tools in encouraging business to participate in the process or voluntarily comply with the outcome, but this mention is restricted to one sentence in its recitals.¹³⁷ It therefore leaves Member States to decide whether to use any such incentives and sanctions and provides no guidance as to their selection and combination. It is highly unlikely that national ADR schemes would not use any incentive or sanction, but it *is* plausible that they will not make the right choice.

Member States can opt for frequently used incentives, such as the ‘name and shame’ technique, involving publication of a register of ‘black listed’, non-complying businesses, or they could use the reverse technique and publish a ‘white list’ of complying businesses.¹³⁸ Alternatively, there are one-off creative solutions that have shown great success in practice. For instance, there is the Dutch style ‘trade association guarantee’, where the trade association provides a contractual guarantee to the ADR scheme, this involving the trade association undertaking the guarantee obligation and, at same time, contractually binding its members that they will indemnify this guarantee. So when the business refuses to comply with the ADR decision, the trade association will pay the consumer and claim reimbursement from the business, probably also expelling the business from the trade association.¹³⁹ As this example shows, incentives may involve varying degrees of compulsion. Some incentives come very close to sanctions or may even be argued to be sanctions. For example, as mentioned above, the FOS imposes a case fee on firms that fail to settle their disputes in the first stage of the process. The fee is GBP 550, which may often be much cheaper than a court fee, but can also be expensive compared to the value of the claim.¹⁴⁰ The case fee is therefore in place to *incentivize* businesses to settle small value cases at the earliest stage of the ADR process. At the same time, it can be viewed as *sanction* for failure to settle. The system appears to work, as only 20% of cases get to the second stage of the process.¹⁴¹ Hodges and others suggest that courts should apply a similar

135 Arbitration Board of Budapest, Annual Report for 2013 (*A Budapesti Békéltető Testület 2013. évi beszámolója*), p 13 (BBT Report), www.bekeltet.bkik.hu/5-Kozlemenyek. It is unlikely that a business that refused to participate will comply with a non-binding outcome.

136 ‘To What Extent Firms Follow Our Recommendations?’, www.arn.se/om-arn/statistik/.

137 Rec. 49, Dir. 2013/11.

138 See, e.g., WEBER et al., in: *Consumer ADR in Europe*, p 244; BBT Report, p 13.

139 HODGES et al., in: *Consumer ADR in Europe*, p 419.

140 FOS Report, p 88.

141 *Ibid.*, pp 74-75.

technique, by not accepting straightforward cases for which ADR schemes are available, or making the submission of claims conditional on an attempt to use ADR, and/or imposing a cost sanctions on the party that fails to attempt ADR.¹⁴²

Besides displaying varying degrees of compulsion, it is very important to bear in mind that incentives and sanctions function within the broader legal, regulatory, and socio-economic context of a given state or particular sector. For example, the success of incentives may depend on the prospect of being taken to court. Some incentives are less likely to be effective where disputes are unlikely to be brought to court, due to the small value of the claims, the personal circumstances of consumers, etc.¹⁴³ The impact of other incentives may depend on how the court would decide the case and what costs it would trigger.¹⁴⁴ The effect of incentives also depends on the broader regulatory framework in regulated sectors such as financial services and utilities, the success of incentives in these cases being connected to the effectiveness of enforcement by the regulatory authority.¹⁴⁵ Other incentives, such as the ‘name and shame’ technique, target the reputation of the business, and here, the effectiveness of the incentive ultimately depends on the applicable cultural conditions¹⁴⁶ and on market competition.¹⁴⁷ This means, of course, that the effectiveness of incentives will often vary significantly between business sectors and between Member States.¹⁴⁸

Perhaps the most important incentive for businesses is the desire to be associated with an ADR scheme that has a good reputation. Indeed, research shows that compliance rates depend more on how the scheme is designed rather than in which country it operates,¹⁴⁹ there being a direct link between voluntary compliance and the good reputation of the ADR scheme.¹⁵⁰ This would lead to the conclusion that if an ADR scheme respects the requirements of procedural

142 HODGES et al., in: *Consumer ADR in Europe*, p 453. The idea of cost sanctions probably derives from the practice of the English courts; see Halsey [2004] EWCA (Civ) 576, Lord Justice Dyson, paras 1–9. See also S. SHIPMAN, ‘Court Approaches to ADR in the Civil Justice System’, 25. *CJQ (Civil Justice Quarterly)* 2006, p 181.

143 Leuven Report, p 146.

144 See also Civic Report, p 136.

145 ‘Consultation Paper on the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the European Union’, ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf, p 22.

146 Culture as we understand here is a set of habits, systems of beliefs, and values (which might influence, e.g., how much businesses care about reputation). FEJŐS, 49. *Acta Juridica Hungarica* 2008, p 468; FEJŐS, 36. *JCP* 2013, p 248 *et seq.*

147 Civic Report, p 108.

148 Leuven Report, p 56.

149 Civic Report, p 55.

150 Civic Report, p 107.

and substantive justice, it will therefore enjoy a good reputation, and there will be a strong incentive for voluntary participation and compliance. Although well designed schemes are certainly capable of achieving this, problematic sectors or businesses will remain. As mentioned above, compliance rates with ARN vary by sector.¹⁵¹ The BBT reports that frequently complained about businesses in the shoe selling sector specifically stated that they would only comply with court decisions.¹⁵² This would suggest an absence of trust in the BBT, although the process incorporates the quality requirements now envisaged by the Directive.¹⁵³ The ARN conducts a similar quality process.¹⁵⁴ We may therefore conclude that the reputation of the scheme and its process design are very important incentives, producing a high level of compliance in some sectors but still not being able to cover all disputes. Problematic sectors should perhaps be dealt with by specially tailored incentives or by changing the legal, regulatory environment in which these sectors operate. The BBT and the ARN both apply the 'black' and the 'white' list techniques for all disputes, without differentiating by sector.¹⁵⁵ However, some trade associations in Sweden have committed themselves to follow ARN's decisions,¹⁵⁶ and this may explain the difference in compliance rates.

We can see, then, that when consumer access to justice depends on the will of the business, Member States have to find ways to encourage businesses to participate in the process and comply with the outcome. So, while a voluntary process and/or a non-binding outcome can result in consumer access to justice, the success of these kinds of schemes ultimately depends on a careful choice and combination of *adequate* incentives and sanctions that fit well within the broader legal, regulatory, and socio-economic framework of a given Member State or a particular sector.

6. Concluding Thoughts

This article has sought to more fully unpack the relationship between ADR and access to justice. It has suggested a concept of access to justice that seeks to protect individual and collective consumer interests, in ways that take into account the distinctive vulnerabilities of consumers. It has shown that the best way of delivering this form of access to justice is to provide for processes that are mandatory for businesses and outcomes that are binding on businesses. The Directive does not do this. Nevertheless, it has been argued here that where processes have been made both mandatory for and binding on businesses, the ECJ

151 'To What Extent Firms Follow Our Recommendations?', www.arn.se/om-arn/statistik/.

152 BBT Report, p 4.

153 See, e.g., ss 18-33 CPA.

154 'How Is a Dispute Settled?', www.arn.se/other-languages/english-what-is-arn/.

155 See footnote 138.

156 P.H. LINDBLOM, 'ADR - The Opiate of the Legal System?', 1. *ERPL* 63 (2008), p (52) at 81.

would not necessarily consider this to be incompatible with the fundamental right to judicial protection, especially if this could be shown to be the most efficient solution in solving individual consumer disputes and in lightening the burden on courts. Nevertheless, to remove any doubt, the European Commission could possibly issue a recommendation, and/or a communication, providing guidance as to whether (and subject to what conditions) it is acceptable for processes to be mandatory for, and outcomes to be binding on, businesses. Although recommendations and communications are not legally binding, they can be highly effective in directing the behaviour of Member States.¹⁵⁷ The European Commission has certainly used interpretative communications before.¹⁵⁸ Even though this would not prejudice any interpretation that the ECJ might give,¹⁵⁹ it would at least provide some help to Member States, which could be very important if the ECJ do not get a chance to decide on the issue.

Insofar as Member States opt for schemes within which participation is not mandatory for businesses, and/or the outcomes are not binding on businesses, the challenge is to try to ensure that businesses do indeed participate in the schemes and abide by the outcomes. This can only be achieved if Member States select a blend of incentives and sanctions that are best suited to the prevailing legal, regulatory, and socio-economic conditions and continue to monitor the effectiveness of the schemes in the coming years. Again, the European Commission could help Member States by carrying out careful research to identify best practice. This could provide Member States with a ‘catalogue’ of solutions that works well under the different legal, regulatory, and socio-economic conditions prevailing in different countries and sectors.

It is also important to take a holistic approach to consumer access to justice. Individual consumer ADR is one key part of this. However, there are various other important elements, e.g., provisions on legal aid, small claims, and collective actions, which aim to ease access to courts,¹⁶⁰ redress facilitated or provided by regulators,¹⁶¹ and redress achieved through private claims management companies.¹⁶² A major future challenge will be to work out how effectively these different elements can contribute (individually and together) in improving consumer access to justice. This is likely to depend on a range of factors: such as the legal tools used (e.g., whether processes are mandatory, binding, etc.), whether the right powers are given to regulators, how easy the law

157 D. CHALMERS, *European Union Law, Law and EU Enlargement* (Aldershot: Ashgate 1998), p 11.

158 Interpretative Communications, ec.europa.eu/internal_market/capital/framework/communications/index_en.htm.

159 *Ibid.*

160 Section 1 above.

161 HODGES, 5. *ERPL* 2015.

162 P. ROTT, ‘Claims Management Services – An Alternative to ADR?’, 1. *ERPL* 2016 (elsewhere in this issue).

makes it for collective actions to operate); the resourcing of redress schemes, regulators, and legal aid, etc.; the incentives to use different mechanisms; and the trust that businesses and consumers have in different mechanisms.

Finally, it is important to re-emphasize the significance of the contextual model of access to justice proposed here: one that understands ‘access’ and ‘justice’ by reference to consumer vulnerabilities and consumer markets. This model is potentially highly significant. It has been shown to have implications in relation to the particular consumer ADR rules addressed in this article. However, it is also interesting to question to what extent a similar contextual approach¹⁶³ is, or should be, applied much more generally in law, policy, and scholarship on access to justice. Certainly, if, like a consumer, one party is the more vulnerable in a relationship (e.g. employees relative to employers, or citizens relative to governments), it will tend to be the case that the vulnerabilities in question (of a financial, cognitive or whatever other nature) will contribute to the weaker party’s access to justice problems. So, it is important to ensure that this sort of perspective is always adequately embedded in the relevant scholarly and legal policy discourse, i.e. that, whatever sector of civic society is under consideration, the solutions to access to justice problems should be designed based on a proper understanding of significant vulnerabilities suffered by any of the parties involved.¹⁶⁴

163 One that is sensitive to different markets, sectors, power differentials, cultural elements, etc.

164 On the scope for ADR both to reinforce and to ameliorate power imbalances in relationships generally, and specifically in human rights, family and employment relationships, see L. MCGREGOR ‘Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR’ 26 (3) *European Journal of International Law* (2015), 607-634; M. CAPPELLETTI, 290; N. SEMPLE ‘Mandatory Family Mediation and the Settlement Mission: A Feminist Critique’, 24 *Canadian Journal of Women and the Law* (2012) 207; N. BUSBY and M. McDERMONT, ‘Workers, Marginalized Voices and the Employment Tribunal System: Some Preliminary Findings’, 41 *Industrial Law Journal* (2012), 166, at 167.