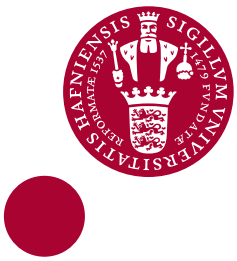

Pursuing Union citizenship rights

access to justice

Adamo, Silvia

Published in:
Civil Rights and EU Citizenship

Publication date:
2018

Document version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Adamo, S. (2018). Pursuing Union citizenship rights: access to justice. In S. De Vries, H. De Waele, & M-P. Granger (Eds.), *Civil Rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Spheres* (pp. 229-252). Edward Elgar Publishing. Interdisciplinary Perspectives on EU Citizenship series

9. Pursuing Union citizenship rights: access to justice

Silvia Adamo

1. INTRODUCTION

Access to justice is a broad notion that encompasses a multiplicity of issues and can be analysed from many angles. Legal inquiries on the limits, scope and possibility of expanding access to justice date back to the 18th or 19th century, while the concept was first subject to a thorough analysis in the 1970s Florence Access to Justice Project.[1] In Europe, the question of access to justice is particularly relevant in environmental[2] and consumer matters.[3] In the present context, access to justice will refer to the legal needs of citizens in making their Union citizenship rights effective, which calls for a reflection upon the protection of fundamental rights such as the right to fair trial and right to legal advice during

[1] Lawrence M Friedman, 'Access to Justice: Social and Historical Context' in Mauro Cappelletti and John Weisner (eds), *Access to Justice* (Vol II, Book I, Sijthoff and Noordhoff – Giuffré Editore, The Florence Access-to-Justice Project, 1978).

[2] See Eva Lohse, Margherita Poto and Giulia Parola (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Duncker & Humblot 2015); Ludwig Krämer, 'The EU Courts and Access to Environmental Justice' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015); Marc Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011).

[3] See for recent examples, Stefan Wrbka, *European Consumer Access to Justice Revisited* (CUP 2014); Michael Stürner, Fernando Gascón Inchausti and Remo Caponi (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Sellier European Law Publishers 2014); Peter Rott, 'Improving Consumers' Enforcement of their Rights under EU Consumer Sales Law: *Froukje Faber*' (2016) 53 CML Rev 509–26.

proceedings. Impediments to accessing justice may strongly affect Union citizens in a multitude of ways. If a citizen cannot achieve a remedy for an infringement of rights, if the length of a legal proceeding impairs a due process, or if legal aid is not available or is limited in their Member State of residence, citizenship rights conferred in virtue of Union law may remain hypothetical. This chapter will thus explore the ways in which lack of access to justice may constitute a barrier to the realisation of Union citizenship.

'Dissatisfaction with the administration of justice is as old as law',[4] and discontent with the judiciary is an important aspect of access to justice. In this perspective, an inquiry into access to justice involves an investigation of the causes of this disaffection towards the judicial institutions. Consequently, an analysis of the notion of access to justice can develop from (at least) two starting points: the institutional starting point (meaning the laws, institutions and actors involved in providing 'justice') and the starting point of citizens (where empirical research may create the basis to unveil the needs and thoughts of the users of the justice system on the receiving end).[5] The present analysis is based on an institutional approach to access to justice, focusing on EU legal sources, their implementation in selected Member States, and their practices in safeguarding access to justice. An empirical study of citizens' legal needs is thus outside the scope of the present analysis.

The chapter will first define the legal basis for the protection of access to justice at a Treaty level in the European Union. It will offer a critical inspection of how the right to an effective remedy (codified in Article 47 of the EU Charter, and in Article 6 and 13 ECHR) is protected and transposed at a national level. From there, the analysis will shift to focus on what type of national judicial remedies are in place in a domestic setting to protect Union citizens' access to justice. In the investigation, specific civil rights will be analysed in selected Member States in order to give concrete examples of how access to justice can have an impact on Union citizens' rights.[6] The analysis will include cases of enforcement of

[4] Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice'. Address before the Annual Convention of the American Bar Association (29 August 1906).

[5] Trevor Farrow, 'What is Access to Justice?' (2014) 51 Osgoode Hall LJ 3. For a review of the empirical legal research approach to access to justice, see Roderick Macdonald, 'Access to Civil Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

[6] The analysis will take as a starting point the work carried out within the bEUcitizen research project, with a focus on the research paper on the legal

data protection legislation, remedies in the field of judicial decisions in civil matters and instances of access to justice in the context of EU criminal matters. Finally, the specific protection of due process rights, right to appeal and access to legal aid in a national setting will be evaluated with an eye on the means to be explored in future to provide a more forward-looking and innovative dimension of the right to access to justice.[7]

2. ACCESS TO JUSTICE AS A FUNDAMENTAL CIVIL RIGHT IN EUROPEAN UNION LAW

The legal frame from which to operate is determined in the EU legal system by Article 47 of the Charter of Fundamental Rights, the foundation of which is Article 6 and Article 13 of the European Convention of Human Rights (ECHR).[8] There are also references to access to justice expressed in the Treaty on the Functioning of the European Union in Article 67 (4), which states that '[t]he Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters' and in Article 81 (e–f) on judicial cooperation in civil matters. The Court of Justice of the European Union (CJEU) has recognised the rights and principles included in the Charter as general principles of EU law and applied them in its jurisprudence. After the signing of the 2009 Treaty of Lisbon, the

framework for civil rights protection in the national and international context, D7.1, by Hanneke van Eijken and Sybe de Vries, 'Research Paper on the Legal Framework for Civil Rights Protection in National and International Context' <https://doi.org/10.5281/zenodo.16530> accessed 26 February 2018, and Marie-Pierre Granger and Orsolya Salát, 'Report Exploring the Mechanisms for Enforcing Cvil Rights with a View to Identifying the Barriers' D 7.2 <https://doi.org/10.5281/zenodo.46835> accessed 26 February 2018.

[7] The scope of the contribution is limited to data protection, civil justice and criminal justice. For a broader approach to the evaluation of the judicial system in and beyond the EU, see, for example, the European Commission for the Efficiency of Justice (CEPEJ) within the Council of Europe, which provides quantitative and qualitative data and analysis on the functioning and efficiency of the judicial systems in the Member States; see <coe.int/cepej> accessed 31 September 2017.

[8] See Dinah Shelton in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) nos 47.06–47.21 at 1200–209 for a thorough examination of the sources of human rights law at the basis of Art 47.

Charter of Fundamental Rights has binding effect as an autonomous source of primary EU law.[9]

Article 47 comprises three paragraphs: first, the article refers to the possibility for Union citizens to obtain an 'effective remedy before a tribunal' for the violations of rights and freedoms stemming from Union law. This right must be guaranteed by Member States when they are implementing Union law and by the institutions of the Union. The second paragraph guarantees the entitlement to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal'. Moreover, this paragraph establishes a right to advice, defence and representation for all citizens. Finally, the third paragraph states that in order to guarantee an effective access to justice, national authorities must provide legal aid to those lacking sufficient resources to hire a legal professional.[10]

The scope of the application of Article 47 is both broad and limited. It is wide[11] as it covers disputes where a link to Union law renders the Charter applicable, and directly connects to Union citizenship rights regarding access to courts and remedies in a national setting. In fact, it includes disputes relating to civil rights and obligations and criminal proceedings, as well as administrative law proceedings, as the scope of application is not as limited as that of Article 6 ECHR. This flows from the principle that the European Union is 'a community based on the rule of law'.[12] Nonetheless, the reference to the rights and freedoms guaranteed by EU law entails that whether it is possible to apply Article 47 is dependent on the interpretation of EU law. This could potentially limit the scope of the right of access to justice (as well as other rights) in the Charter, as that is closely linked to the scope of EU law as determined by the EU legislature and the CJEU.[13]

The insertion in the Treaty of Lisbon of a new provision into Article 19 (1) TFEU may indicate a shift towards an understanding of national

---

[9] Art 6 (1) of the Lisbon Treaty; see also Van Eijken and de Vries (n 6) 12–13.

[10] For the European Court of Justice, a system of legal assistance is also set in place. See 'Explanations Relating to the Charter', Explanation on Article 47 – Right to an effective remedy and to a fair trial, OJ [2007] C 303/17.

[11] Peers et al (n 8) 1199.

[12] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament.* EU:C:1986:166.

[13] Van Eijken and de Vries (n 6) 18.

remedies 'in terms of *effective judicial protection*'.[14] Article 19 (1) reads: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. In the absence of a fully integrated Union-based judicial system, the national Member States provide legal remedies and procedures to protect access to justice, while the CJEU oversees whether the national systems indeed offer an adequate and effective judicial remedy for the protection of rights that flow from EU law.[15] The relevant question in the present context is thus whether provisions on Union citizenship influence the prescribed right to an effective remedy and access to justice enshrined in EU law.

Since Member States are responsible for the effective enforcement of Union law derived rights, it is relevant to look at how they recognise and protect access to justice as an EU-guaranteed right, and what role the Charter plays in a domestic setting. Civil rights standards in general are similar across EU Member States, and this pertains to most of the European and international civil rights.[16] Relevant actors in the enforcement of civil rights, such as lawyers and justices during interpretation, refer mainly to national constitutions and legislative instruments in order to define the range of scope and application of civil rights. When referring to international standards, national courts prefer to apply the ECHR over the EU Charter, although the application of the latter is increasing across Member States.[17] In addition, there are generally few references to either the ECHR or the Charter in national legislative instruments.[18] The lack of awareness regarding the Charter, and clarity regarding the instances in which it is applicable could be an explanation for this preference accorded to the ECHR, mixed with a possible familiarity with the ECHR acquired along the many years since its adoption and implementation. It is hoped that in future the Charter will be referred to more often, in step with increased case law and awareness regarding the Charter itself.

Protection of access to justice as a civil right will thus be substantially dependent on how the Member States uphold civil rights in their domestic setting. There are centralised constitutional review mechanisms

---

[14] Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014) 167, emphasis in the original.

[15] For examples and discussion of effective remedies, see 47.60–47.71 (disputes between individuals and public authorities) and 47.72–47.81 (disputes between individuals) in Peers et al (n 8).

[16] Van Eijken and de Vries (n 6) 11.

[17] Van Eijken and de Vries (n 6) 6.

[18] Van Eijken and de Vries (n 6) 29.

in place, or a more 'diffused' control by ordinary courts. Moreover, the modalities of reception (implementation/transposition) of international civil rights standards, or conversely, an established constitutional human rights protection, will also have influence on the relevance attributed to the rights included in the Charter or in other international legal norms.[19]

After setting the frame around the legal basis provided by Article 47 of the Charter and the relative interpretation of its standards in the interpretation of Member States, the next section will outline what judicial remedies Union citizens have at their disposal in order to uphold and realise their rights in a domestic judicial setting.

3. NATIONAL REMEDIES PROTECTING ACCESS TO JUSTICE: GENERAL CONSIDERATIONS

By virtue of the principle of national procedural autonomy in the Union legal order, Member States are primarily responsible for providing judicial remedies for the enforcement of EU law. The minimum requirements that the CJEU introduced in order to guarantee that national remedies comply with EU rights are equivalence and effectiveness.[20] In the context of access to justice, the principle of effectiveness assumes a special relevance in that it involves not only access to courts, but also a right to fair and due process and access to legal aid.[21] When a breach of Union law occurs, specific legal remedies must be available. As mentioned above, Article 47 codifies the principle of effectiveness and the right to a remedy, while the case law on Article 6 ECHR is important for the realisation of access to justice at the domestic, as well as the Union level.[22]

---

[19] Van Eijken and de Vries (n 6) 49.

[20] The principle of equivalence states that provisions used under national law may not be 'less favourable than those governing similar domestic actions' (Case C-453/99, *Courage and Crehan*, EU:C:2001:465, para 29). In virtue of the principle of effectiveness, enforcement of EU law claims have to be rendered practically viable, and thus national authorities must 'set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect' (Case C-213/89, *Factortame*, EU:C:1990:257, para 20). See Barnard and Peers (n 14) 166–7 and 199–200.

[21] For reference to case law on the topic, see Granger and Salát (n 6) 15.

[22] Granger and Salát (n 6) 17.

A number of Member States[23] ensure and protect the right to effective remedies and the right to access to justice at a constitutional level. However, there are limitations that might restrict the admissibility of certain claims (such as time limits or the interest to act). In some constitutional orders, such as in Belgium, violation of the right to access to justice may result in tort litigation and compensation.[24] Research findings also point to the role of fees and legal costs as a possible barrier to ensuring effective access to justice, as witnessed by the legal obligation to maintain reasonable proceedings fees in France and the debate about court registry fees in the Netherlands.[25]

Finally, non-judicial mechanisms may contribute to guaranteeing the right to access to justice, such as the right to petition parliamentary bodies, or the possibility to file a complaint with administrative organs. Besides these avenues, in the Member States there are independent public agencies or authorities to protect civil rights. Among them, there are bodies and agencies, such as the Ombudsman and human rights agencies, which besides promoting and monitoring civil rights protection in a domestic context, at times have the capacity of sanctioning infractions (for example, the data protection authorities). Civil society organisations also deserve a mention for their efforts in promoting the respect for EU civil rights in a national context.[26] Finally, there are alternative dispute resolution mechanisms and administrative and international judicial avenues that may contribute to ensuring access to justice.[27]

The multiplicity of routes for individuals to follow in order to ensure the protection of their civil rights can be both a strength and a weakness, since this may generate confusion and increase the need for professional legal aid. In other words, '*fragmented justice is often injustice*'.[28] The lack of a consolidated national legal aid scheme may further complicate

---

[23] In the analysis of the civil rights aspects of Union citizenship within the bEUcitizen research project the studies included Belgium, the Czech Republic, Denmark, France, Italy, the Netherlands, Spain and the United Kingdom.

[24] Henri de Waele and Maria Teresa Solis Santos, 'Deliverable 7.2: Mechanisms for Enforcing Civil Rights: Report on Belgium' in Granger and Salát (n 6) 68.

[25] Marie-Pierre Granger, 'Mechanisms for Enforcing Civil Rights: Country Report France' in Granger and Salát (n 6); Hanneke van Eijken, 'Mechanisms for Enforcing Civil Rights: Country Report Netherlands' in Granger and Salát (n 6).

[26] Granger and Salát (n 6) 21.

[27] Granger and Salát (n 6) 19–20.

[28] Graham Taylor, 'Special Procedures Governing Small Claims in Australia' in Mauro Cappelletti and John Weisner (eds), *Access to Justice: Vol. 2, Promising*

the possibility for access to justice.[29] Although providing free access to information on rights and legislation on the internet is a positive and increasing feature of most EU institutions and Member States, access to justice and access to legislation intertwine, but the two are not interchangeable. Rather, 'access to legislative information' is a precondition for effective access to justice.[30]

4. ACCESS TO JUSTICE: CONCRETE CASES AND BARRIERS

This section will concentrate on the protection of access to justice in three specific areas affecting Union citizenship: data protection, judicial decisions in civil matters and judicial decisions in EU criminal matters, analysed in a comparative perspective in selected Member States. The focus will not be on presenting the relevant legislation of interest,[31] but on pinpointing barriers and difficulties in accessing justice in these specific areas of great concern for Union citizens.

4.1 Access to Justice in the Field of Data Protection

This section investigates the remedies at Union citizens' disposal when EU data protection rules are infringed. In light of the new Regulation[32] and Directive[33] on Protection of Personal Data that entered into force in 2016 and the growing interest in the digital economy (and the correlated

Institutions (Sijthoff and Noordhoff 1979) 627. Taylor referred to the proliferation of tribunals, where '*often an individual simply gives up when he is passed from pillar to post in search for a body to determine his case*' (ibid).

[29] Granger and Salát (n 6) 20.

[30] Yaniv Roznai and Nadiv Mordechay, 'Access to Justice 2.0: Access to Legislation and Beyond' (2015) 3 *The Theory and Practice of Legislation* 333–4.

[31] See the study presented in Granger and Salát (n 6).

[32] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

[33] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

need for adequate protection of personal data), it is relevant to include an analysis of the access to remedies for infringement of EU data protection rules.[34] Union citizens can complain about misuse of their personal data and seek remedies via administrative recourse (national protection authorities and administrative courts) or judicial recourse (ordinary courts and constitutional courts). The following sections describe the ways in which selected Member States approach these different remedies, both in administrative instances and in judicial avenues.

4.1.1 Independent national protection authorities

The current Directive 95/46 foresees that independent national protection authorities are in charge of monitoring its implementation, rights and obligations. Besides their role as advisors and information providers on data protection legislation, national data protection authorities possess investigative and sanctioning powers. They are also able to bring matters before a judge. Due process requirements will apply in cases where data protection authorities are involved in proceedings that may lead to sanctions. For example, in France, in order to provide due process rights and to respect the right to a fair trial, the preventive and sanctioning functions of the CNIL (*Commission Nationale de l'Informatique et des Libertés*) are kept separate. Individuals and legal persons can file complaints and petitions with data protection authorities which may investigate the case, but are not always compelled to act on the complaints (as is the case in the Netherlands). Investigative powers also differ, as in some countries (for example, in France and Denmark) data protection authorities may conduct site visits and inspections in the course of their inquiry.

The decisions of the national data protection agencies on infringement of data protection rules can be binding and final, entailing compensation and/or sanctions. Individuals and/or companies can appeal these decisions to the parliamentary Ombudsman or the courts. Data protection authorities can bring cases to the attention of the public prosecutor, take cases to the courts directly (for example, in France or Belgium), or report

[34] The section is based on the results of the analysis in Granger and Salát (n 6), 30–75, which took as the starting point Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

to the police infringements of the legislation on personal data (as happens in Denmark[35]).

4.1.2 Sanctions

Although data protection authorities have the capacity to impose sanctions, there is no uniform approach to the question of damages in the selected Member States. In France, for example, fines can reach quite a high level, thus when imposing them authorities take into consideration the seriousness of the violations (most notably against Google in 2014).[36] Authorities in other Member States, for example, the British Information Commissioner's Office, seldom impose fines. This variation results in different access to justice for Union citizens: when fines are very low,[37] the deterrent effect disappears, thus impairing individuals' protection against misuse of personal data.

4.1.3 Conflicts of jurisdiction

In cases of conflict of jurisdiction between administrative authorities and the courts, again, there is no uniform response in the selected Member States. For example, whereas in France the same violation can be heard in both instances, in the Czech Republic the courts take precedence over national data protection authorities.[38] When the courts are called upon to decide on complaints for the infringement of data protection rules, the national legislation implementing the Directive is predominant. Although some limits apply to the extent of the analysis,[39] the Member States examined do not appear to possess an extensive record of case law on the matter of data protection. Although violations occur, also on a large scale, it appears that the national courts in the Member States examined do not sufficiently investigate, prosecute, and/or sanction violations of EU data protection rules. If this statement is correct, access to justice in the field of data protection may be compromised because a more extensive judicial review would be likely to clarify its range and scope. The relevance of recognising and proactively defending the right to privacy

---

[35] See Silvia Adamo, 'Mechanisms for Enforcing Civil Rights: Country Report Denmark' in Granger and Salát (n 6) 19.

[36] See Granger (n 25).

[37] See the examples for Denmark in Adamo (n 35) 19.

[38] Granger (n 25), Katarina Šipulová, Linda Jank, Beata Szakácsová and Jan Komárek, 'Mechanisms for Enforcing Civil Rights: Country Report Czech Republic' in Granger and Salát (n 6).

[39] See Granger and Salát (n 6) 33.

may also have an impact on how the judicial systems sanction violations of data protection rules.

4.1.4 The role of constitutional courts and ordinary courts

When constitutional courts control the compliance of national legislation with EU data protection rules, the main frames of reference seem to be national constitutions and the ECHR, rather than EU legislation.[40] The constitutional courts in the Czech Republic and the Netherlands have invalidated parts of the legislation implementing the data retention directive, while a case is currently still pending in Hungary.[41] Where databases are set up, constitutional courts will also review the legitimacy of the acts that regulate them. Where there are legitimate and proportionate objectives (for example, security), intrusion into citizens' privacy will be tolerated, with the exclusion of the most obvious intrusions into personal data (as happened, for example, in France with the national genetic fingerprint database).[42]

In general, in some Member States (for example, France, Italy and Spain) ordinary courts actively seek to enforce the legislation on personal data protection, but this is not the case in all the examined countries.

4.1.5 Specific hindrances to access to justice in the field of data protection

In the area of data protection, there are at least three specific challenges to achieving access to justice for Union citizens. First, technology and legislation related to this matter are highly complex and difficult for individuals to grasp, as well as for legal actors and institutions called upon to ensure its protection and enforcement. It may also be challenging for individuals who, for example, run an online business to comply with data protection rules if they have limited resources to keep up with the rapidly developing rules and technologies.

---

[40] In line with the research results on the topic of protection of other civil rights in a domestic setting.

[41] Van Eijken (n 25); Šipulová et al (n 38). At the time of writing the case is still pending, the constitutional complaint is registered, and now awaits decision, with no set deadline. Thus the law is still in effect, although it has been clear since the very beginning that it violates the constitution. The constitutional complaint as registered on the website of the Hungarian Constitutional Court <public.mkab.hu/dev/dontesek.nsf/0/EEC2F6E90A6CFC93C12580220058682B?OpenDocument> A summary in English is available at <tasz.hu/node/16417> accessed 31 July 2017.

[42] See Granger (n 25).

Secondly, it is difficult to quantify the individuals' financial stake and the size of possible damage. In order to act as a deterrent for future misuse of personal data, the extent of the damage would have to be particularly high. The financial gain stemming from (mis)handling personal data may also be very high; thus, the risk of incurring a fine could be seen as a 'lesser evil' compared to the gain from not entirely abiding by the rules. There can also be differences in whether Member States allow criminal or civil proceedings as a remedy for abuse in the handling of personal data. Additionally, as mentioned above, depending on how highly the right to privacy ranks in the different Member States (relatively high in France and Italy), or whether the notion of personal data is narrowly construed (as in the United Kingdom), the active role of courts in providing remedies may shift, and can thus be discordant across Member States.

Thirdly, the fast-paced evolution of technology, where individuals are increasingly compelled to share personal information in order to access social media, renders the allocation of responsibility difficult in the case of failure to protect personal data. In addition, the costs of legal proceedings may act as a deterrent for complaints for breach of data protection rules.

In conclusion, a series of factors have the potential to influence Union citizens' access to justice in the area of data protection. First, the somewhat limited and asymmetric competences of data protection agencies entail that the primary forum for enforcement of data protection may have limited reach. Second, the use of fines for breach of data protection rules must be of a certain magnitude in order to function as a deterrent, compared to the large profits that private actors in particular may gain from a lax attitude towards the rules. Again, there is no uniform practice in the application of fines in the Member States examined. Third, national courts (both constitutional and ordinary) may not always have performed an active role in cases involving data protection. Fourth and final, there are discordant procedural rules regarding whether Member States allow civil or criminal proceedings in cases of breach of data protection obligations. The procedural aspect is highly relevant, as the obligations regarding an effective remedy, stemming from Article 47, require that Member States should provide procedural rules that ensure a fair outlook for a case to be instituted.[43] Better access to justice in this field could perhaps be within reach with a combination of less complicated procedures for the enforcement of data protection rules and the

[43] Peers et al (n 8) 1212.

involvement of private actors. This has happened, for example, with regard to the situations in which an individual wants to employ their 'right to be forgotten'; Google as a private actor has adopted a series of steps to make this right an effective possibility, and now, upon application and in certain circumstances, it is possible for individuals to have links with personal information removed from the search engine's results.[44]

4.2 Remedies in the Field of Judicial Decisions in Civil Matters

This section will focus on access to remedies in cross-border civil disputes.[45] The analysis revolves primarily around the effective enforcement of the Brussels I and the Brussels II bis Regulations.[46] These are 'amongst the most frequently litigated EU instruments',[47] and worth examining as they can provide effective remedies to both mobile EU citizens and to 'static' citizens engaging in cross-border economic enterprises.

4.2.1 Strengths of the current system

The Brussels I and II bis Regulations contribute to creating an effective judicial remedy system by virtue of two characteristics. On the one hand, they set up rules for the determination of the competent forum to hear a case, diminishing the possibility for forum shopping, concurrent litigation, and in general obstruction of justice by one of the parties involved in a claim. On the other hand, they provide simplified mechanisms for mutual recognition and enforcement of cross-border judicial decisions.

---

[44] In Case C-131/12 *Google Spain* (EU:V:2014:317), the Court of Justice of the European Union acknowledged that art 12 of the Data Protection Directive recognises a right to be forgotten.

[45] The comparative analysis on enforcement of civil rights protection presented in Granger and Salát (n 6) looked into remedies available for the resolution of cross-border disputes in civil matters (including commercial and family matters). The countries examined were Belgium, the Czech Republic, France, Italy and Spain.

[46] Respectively, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation'), and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/200 ('Brussels II bis Regulation').

[47] Granger and Salát (n 6) 40.

These are effective provided the Member States adopt efficient substantive and procedural standards (for example, due process standards and right of defence). The Brussels Regulations are thus a possible source of inspiration for designing other effective instruments that can contribute to the realisation of access to justice for Union citizens.

4.2.2 Drawbacks

There are, however, also problems with the Regulations. A 2009 Commission report[48] drew attention to the problems in the Brussels I Regulation. These problems concerned the respect for the right to fair trial, issues related to disputes where a party is domiciled in a third country, and the abuse of *lis pendens* rules. Moreover, another problem is the Member States' reluctance to use provisions to refuse the enforcement of a judgment from another Member State in order to guarantee the defendant's procedural rights. The recast Regulation aims at addressing these shortcomings.[49] Some countries (for example, the Czech Republic, France and Italy) have taken the matter into their own hands and attempted to improve the provisions in the Brussels I Regulation that impaired the rights of defence of weaker parties, or those which were not conducive to a correct practice. However, concerns about due process guarantees in the application of the Regulation persist.

In general, though, the rules to determine competence in civil and commercial cross-border disputes are nuanced and widely employed by national courts.[50] For example, issues of protection of the right of defence arise in the case of the simplified procedure for recognition provided for in the Brussels I Regulation. Although highly effective and leading to high recognition enforcement rates of decisions of other Member States' courts, some national legal systems (such as the French and Italian) recognise the right of defence as part of the procedural *ordre public*. Thus, courts in these Member States make use of the possibility provided for in Article 34 of the Regulation to refuse the enforceability of foreign judicial decisions. Conversely, it is certainly an effective protection of the right to access to justice if Member States actually verify that a defendant has been given a real possibility to defend himself, or that

---

[48] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0174 final.

[49] See the analysis in Granger and Salát (n 6) 41–3.

[50] Granger and Salát (n 6) 45–8.

courts in another Member State are in fact impartial.[51] Finally, the scope of the Brussels I Regulation (and the interpretation of the CJEU) may concede delays and obstructive tactics, which is detrimental to the respect of the individual's right to a fair trial.[52]

4.2.3 Family matters

The application of the Brussels II bis Regulation in the area of family matters (relating to cross-border disputes on divorce, separation and custody cases) is also taking shape nicely in national courts. The different grounds for jurisdiction in matrimonial matters provide flexibility to bring a case in front of a suitable court. However, they can also lead to concurrent proceedings in more than one Member State, which may affect Union citizens' right to an effective remedy.[53]

In cases of disputes about parental responsibility, the starting point for determining jurisdiction is the child's habitual residence (except in cases of abduction). Some problems of access to justice have emerged in this area as well. Spanish courts, for example, have employed the same grounds of jurisdiction to both matrimonial matters and parental responsibility cases, but this wrongful interpretation is on its way to being corrected by the courts. Other problems arise from the interpretation of the notion of 'habitual residence of the child', which the Regulation does not define. National courts may then apply divergent criteria. Czech courts have adopted their own criteria, while French and British courts employ the definition deriving from the case law of the CJEU, which has clarified the procedural issues that national courts have to consider when determining the place of habitual residence (case *C.M.*[54]). The remaining issues revolve around the determination of the competence of the court that will handle the removal of a child. Parallel or prolonged proceedings may consequently impair the right to an effective remedy in cases of parental custody.

4.2.4 Enforcement of foreign judicial decisions

In cases of non-recognition of enforcement, the grounds for refusal are restrictive and guarantee, *inter alia*, the right of defence (in matrimonial matters) and the right of the child to be heard (in parental custody cases).

---

[51] For examples in France and Italy, see respectively: Granger (n 25), Elisabetta Pulice, Paolo Guarda and Elena Ioratti, 'Mechanisms for Enforcing Civil Rights: Country Report Italy' in Granger and Salát (n 6).

[52] Granger and Salát (n 6) 51.

[53] Granger and Salát (n 6) 54.

[54] Case C-376/14 *C.M.* EU:C:2014:2268.

In Germany, the Basic Law protects the right of the child to be heard. A similar set-up is present in France and Spain; this may indicate that national courts feel a certain pressure to provide this type of procedural guarantee.[55] In addition, while challenging a return decision in cases of child abduction does not prevent its enforcement, the reality of these cases has shown that enforcement is affected by delays, and by keeping the child's domicile hidden. Thus, the divergent national approaches may have an impact on the reach of the right to effective remedy of Union citizens.

In sum, the difficulties that examined Member States experience in attributing jurisdiction in the application of the Brussels II bis Regulation impact the protection of the right to a fair trial, the right to an effective remedy, and due process rights. National courts may exercise caution in the recognition and enforcement of foreign judicial decisions in matters of parental custody. The precautions adopted in order to protect the child's best interest are nevertheless not always sufficient in practice to prevent uncooperative behaviour by one of the parties involved, which may in turn affect the right to effective remedy for the other party.

4.3 Access to Justice in the Context of EU Criminal Matters

The final topic that is likely to have an effect on Union citizens' access to justice is EU judicial cooperation in criminal matters. With the adoption of mutual recognition tools in an effort to counter cross-border criminal activity and support the development of the 'EU Area of Freedom, Security and Justice', new concerns have arisen with regard to the right of defence and the minimum protection standards for victims.[56] Overall, the shortcomings of the EU instruments on mutual recognition in criminal matters stem from the only partial harmonisation of well-rooted national traditions in criminal law. When considering this structural factor in combination with an uneven application of EU law and minimum safeguarding guarantee standards, the Union citizens' right to a fair trial and right to defence become impaired. The best-known tool, which is effectively employed by Member States' authorities, is the European Arrest Warrant (EAW).[57]

---

[55] Granger (n 25), Javier A González Vega et al, 'Mechanisms for Enforcing Civil Rights: Country Report Spain' in Granger and Salát (n 6).

[56] Granger and Salát (n 6) 59–60.

[57] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18/07/2002, 1–20.

4.3.1 Access to justice and the framework decision on the European Arrest Warrant

The Framework Decision on the European Arrest Warrant (EAW) establishes several grounds for refusal to surrender (while also providing some optional grounds in particular circumstances),[58] that can contribute to the protection of arrested individuals' right to defence. For example, authorities have to inform the arrested about the warrant and guarantee their entitlement to a lawyer. Nevertheless, difficulties in upholding due process guarantees continue to occur. For example, a 2011 Commission Report[59] underlined as problematic the lack of legal representation during the surrender procedure; the conditions and length of pre-trial detention, especially for non-nationals; the frequent issuing of warrants even for minor offences; and the unbalanced availability of high quality legal advice.[60]

Member States have the duty to respect fundamental rights when implementing the Framework Decision on the EAW (see Article 1(3) of the Framework Decision and the CJEU case *Advocaten voor de Wereld*).[61] During implementation, some Member States have made efforts to provide better guarantees for the right to fair trial, for example, developing a proportionality assessment for refusal on grounds of minor offences. Implementation measures have also highlighted that Member States have different approaches towards nationals and non-national residents with regard to the possibility to refuse a surrender or make the surrender conditional to the serving of a sentence upon return to the home Member State. The Netherlands has employed criteria that discriminated between nationalities, although the CJEU admitted that requiring a certain link/period of residence in a Member State is an admissible requirement before the said Member States could extend protective provisions against surrender to non-residents (*Wolzenburg* case).[62] A legislative amendment in France follows the same approach, requiring an

---

[58] See Article 4 in the Framework Decision.

[59] Report from the Commission to the European Parliament and Council on the implementation since 2007 of the Council Decision on the European Arrest Warrant and surrender procedure between the Member States (COM(2011) 175 final), mentioned in Granger and Salát (n 6) 61.

[60] Granger and Salát (n 6) 61.

[61] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van den Ministerrad*. EU:C:2007:261.

[62] Case C-123/08 *Dominic Wolzenburg*, EU:C:2009:616 as mentioned in Granger and Salát (n 6) 64.

uninterrupted residence period of five years in order to apply the optional grounds for refusal to non-citizens.

4.3.2 Respect of right to fair trial and effective remedy

In general, national courts can be said to have guaranteed the respect of fundamental rights, including the right to fair trial and effective remedy through the implementation of the European Arrest Warrant. National constitutional courts have also applied the mutual recognition tools in the area of criminal matters. Some national courts have enhanced the right to an effective remedy via the interpretation of national transposition measures. The constitutional courts in the Czech Republic, Hungary, Spain and the United Kingdom have considered to some degree the compatibility of the EAW and the provisions on surrender of own nationals with national constitutional provisions.[63] The French *Conseil Constitutionnel* has referred a national case to the CJEU that involved the interpretation of the Framework Decision. In addition, the Italian *Corte Costituzionale* has assessed that the transposition law regarding precautionary detention periods served abroad contravened the Italian Constitution.[64]

4.3.3 The role of national courts

National courts have been vigilant with regard to the respect for minimum fundamental rights standards in the application of the European Arrest Warrant. In Belgium, France and Italy the courts have been observant with regard to a series of issues that could affect access to justice and the right to defence, such as grounds for refusal of surrender, information requirements, checks of double criminality, calculation of sentence time abroad before a trial, interference of execution with family life, and so forth.[65] Nevertheless, high profile cases have emphasised that there is a need to monitor the routine and systematic execution of the EAW in order to prevent impairing the citizens' right to a fair trial or even free movement within the EU.[66]

---

[63] Šipulová et al (n 38); Sionaidh Douglas-Scott, 'Deliverable 7.2: Mechanisms for Enforcing Civil Rights: Country Report United Kingdom' in Granger and Salát (n 6).

[64] Pulice, Guarda and Ioratti (n 51).

[65] De Waele and Solis Santos (n 24); Pulice, Guarda and Ioratti (n 51).

[66] On NGOs, see Granger and Salát (n 6) 70–71.

4.3.4 Other measures of interest on criminal cooperation

Other measures on criminal cooperation include the EU Directives on interpretation and translation in criminal proceedings[67] (which find challenges in implementation in Belgium and Italy regarding the protection of the right to defence) and the Directive on the right to information on criminal proceedings[68] (this Directive has been under scrutiny in Belgium and the Czech Republic with regard to the conditions under which the right to information and any waiver about it were in conformity with EU law). These Directives also have a potential impact on access to justice for Union citizens, and their protection in a domestic setting should be monitored.

5. DUE PROCESS RIGHTS AND LEGAL AID

The analysis of Member State practices has also underlined the limits to access to justice that may arise following the traditional definition of access to justice as due process rights and access to legal aid. In other contexts, the limits to access to justice have been identified in 'the triumvirate of evil – cost, delay and complexity',[69] issues that may indeed curb Union citizens' rights.

The interpretation of 'due process rights' has proven controversial in Belgian courts, while in the Czech Republic it is most often the migrants who incur delays and obstacles that impair their right to due process in visa application cases.[70] Except in countries where trials do not protract unnecessarily, such as Belgium and Denmark, the length of proceedings is a problem and a threat to the right to access to justice, as in the Czech Republic, France, Hungary, Italy and Spain.[71] Due process rights also have the effect of limiting access to justice for specific groups of people (for example, dual citizens deprived of citizenship in the United Kingdom who cannot challenge the decision if they are no longer in the country, or foreigners applying for a visa in the Czech Republic), or

---

[67] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, 1–7.

[68] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, 1–10.

[69] Wayne Martin, 'Access to Justice', (2014) 16 *University of Notre Dame Australia Law Review*, referring to Roscoe Pound (n 4).

[70] De Waele and Solis Santos (n 24), Šipulová et al (n 38).

[71] Pulice et al (n 51); González Vega et al (n 55).

specific rights are at stake (for example, property rights and legitimate expectations in Hungary).[72]

Concerning the system of legal aid, there are inconsistencies across Member States. While legal aid seems to be functioning well, although not always perfect in wealthier countries, such as Belgium and Denmark, it is insufficient and lagging behind in terms of reach and resources in other Member States. There have been cuts to the funding of legal aid for various legal disputes in the United Kingdom (regarding housing, welfare, medical negligence, employment, and debt and immigration issues). NGOs providing legal aid and raising awareness about civil rights offer legal expertise to vulnerable groups, even if in some countries (for example, the Czech Republic and Hungary) their financial situation may be 'precarious'.

The situation with regard to legal aid is especially critical in Hungary since many lawyers do not want to act pro bono as the payment offered for this kind of legal service is very low. In the Czech Republic, the Bar Association is in charge of legal aid, but the system is scarcely known and is unavailable in the pre-trial phase.[73] Pro bono organisations make great efforts in the Czech Republic and in Hungary, but they cannot bear the entire responsibility for providing the quality legal aid needed. In addition, in June 2017 the Hungarian Parliament passed a highly controversial law to create a special registry for 'foreign-funded organizations'. The draft law has been under scrutiny by the European Parliament[74] and the Venice Commission.[75] Despite these and other criticisms, the law as adopted prescribes that foreign-funded NGOs register with the authorities and declare their 'foreign' status on their websites and in all press kits and publications.[76]

More broadly, it could be useful to address the issue of access to justice not only with regard to institutional and procedural matters, but also by framing accessibility more generally, including knowledge,

---

[72] Douglas-Scott (n 63).

[73] Šipulová et al (n 38).

[74] See European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

[75] The Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the compatibility of the draft law with European standards on 27 April 2017. The preliminary opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary was published on 2 June 2017.

[76] See Krisztina Than and Marton Dunai, 'Hungary Tightens Rules on Foreign-Funded NGOs, Defying EU Parliament' <uk.reuters.com/article/uk-hungary-ngo-law-idUKKBN19417T> accessed 31 July 2017.

information and, most importantly, legal competence or 'consciousness', that is, the citizens' capacity to identify that they are having legal issues that need to be dealt with.[77] Many Union citizens are unaware of their rights and entitlements according to Union law, and do not know where to seek help if needed. Improving knowledge and information about these rights would also enhance greater access to justice. It would also be profitable to carry out an empirical investigation of where the legal needs of Union citizens are most pressing. For example, it is very likely that Union citizens experience that they could use legal advice in the areas of family law, employment law, consumer rights, social welfare law, data protection law, housing and tenancy law, and so forth. Moreover, groups of disadvantaged citizens (the mentally disabled, the homeless and migrants) may have wide-ranging legal needs that are currently unmet because of limited monetary, as well as social, cultural and linguistic resources. From an empirical point of view, these 'subjective' and 'socio-cultural' barriers may impair access to justice as much as complex rules and inapproachable institutions.[78]

Looking ahead, there may be novel ways to rethink access to justice also in more innovative terms. In Europe, as in other parts of the world, citizens are confronted with a '*law-thick world*' that requires access to legal resources as information, advice and representation.[79] One of the challenges is to rethink access to justice as a notion encompassing access to affordable legal help and assistance for citizens, in order to prevent the escalation of legal problems. A recent development on the other side of the Atlantic is the expansion of online legal service providers. The cost of providing legal services in the traditional way (support by a lawyer's office for everyday legal occurrences such as divorce, employment issues and so on) increases the cost of legal assistance and is likely to exclude a large part of citizens who cannot afford legal help. Providing legal information, completion of documents and answers to legal questions posed online is a new business model in the United States, financed either through direct fees or via ad-revenues.[80] Taking the leap to rethink and redesign the provision of legal services is a complex exercise that has

---

[77] Roznai and Mordechay (n 30) 359, 362.

[78] Macdonald (n 5) 510–13.

[79] Gillian Hadfield and Jamie Heine, 'Life in the Law-Thick World: Legal Resources for Ordinary Americans' in Samuel Estreicher and Joy Radice (eds), *Beyond Elite Law: Access to Civil Justice in America* (CUP 2016) 21.

[80] Gillian Hadfield, 'The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law' (2014) 38 *International Review of Law and Economics* 43.

to take into account the way costs are constructed and the new legal needs in our societies today.[81] There is in fact an urgent need to pragmatically address the decline in state-offered programmes of legal aid, as well as citizens' increased expectations to be able to deal with legal matters on their own, for example, when dealing with consumer issues and alternative dispute resolution mechanisms. Legal costs should be investigated and their components broken down in order to find out what drives them to being unaffordable to large categories of citizens.[82] Only after a rigorous legal-economic analysis might it be possible to address the cost of legal services without resorting to merely expecting Member States to pour more financial resources into national legal aid schemes.

The shift towards providing more online information about citizens' legal rights does not take away the necessity to access individual counselling and the evaluation of each case history.[83] Online providers should also uphold appropriate standards for professional legal advice; thus a new market for this type of service should be carefully regulated in order to safeguard citizens. New ways of providing legal services at lower costs to citizens in need of legal advice may provide a reasonable stepping-stone towards the modernisation of access to justice. Still, when rethinking access to justice in terms of institutional reorganisation (including innovative web-based solutions), it is necessary to ensure that fundamental guarantees of civil procedure (including impartial adjudicators, the parties' right to be heard and fair procedural rules)[84] continue to be protected.

6. CONCLUSION

In 1978 Cappelletti and Garth compellingly stated that '[e]ffective access to justice can thus be seen as the most basic requirement – the most basic "human right" – of a modern, egalitarian legal system which purports to

---

[81] Hadfield (n 80).

[82] For an analysis of legal costs in Western Australia, see Martin (n 69) 5–12. For the US context, see Hadfield (n 80).

[83] Bettina Lemann Kristensen, 'Retshjælp – fortsat et udækket behov?' in Thomas Gammeltoft-Hansen et al (eds), *Protecting the Rights of Others. Festskrift til Jens Vedsted-Hansen* (DJØF Publishing 2013).

[84] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff.L.Rev 181, 291.

guarantee, and not merely proclaim, the legal rights of all'.[85] Though the terminology and the legal realities have changed over the past forty years, the need to guarantee effective access to justice has not diminished; in fact it may even have increased. A variety of institutional factors may influence Union citizens' access to justice.

There are still well-known procedural deficiencies throughout the entire legal process, starting with the lack of effective access to judicial remedies in courts where the length and costs of proceedings result in Union citizens not fully understanding and accessing their rights. These shortages are not easy to address, since it mostly depends on Member States' political will as to whether they invest the monetary resources into building and maintaining a transparent and accessible judiciary. However, if for whatever constraint, state action is unfeasible in the near future, it will be necessary to expand the concept of access to justice, going beyond access to litigation and judiciary. It could then be desirable to broaden the notion of access to justice and empower Union citizens with an increased legal competence and awareness about their rights and entitlements.

The fields of Union citizenship examined in this chapter, that is, data protection, civil litigation and criminal matters, highlight that European citizens have gained a series of instances of where to pursue their rights. However, the analysis across a selection of Member States has revealed that some obstacles might be present in the EU instruments themselves, as in the case of mutual recognition tools in criminal matters that open the door to the possibility of limiting access to justice.[86] Moreover, the variety of instances and the complexity of the cases where Union citizens may lean on EU law require a series of legal resources that cannot be guaranteed by merely informing the citizens about the existence of their rights. There is still an unavoidable need to understand the legal context, narrate the individual circumstances of the case, and argue adequately, whether in a judicial or other forum. Union citizens will still need legal assistance to make their rights effective in future. A key question will be how to guarantee that all citizens are made capable of accessing legal advice, in spite of limited legal aid schemes, personal resources and vulnerabilities, and cost-related constraints.

Other limits may emerge in Member States, where either at a constitutional or parliamentary level we notice a sort of inertia instead of a robust defence of civil rights of Union citizens stemming from the Treaty

[85] Cappelletti and Garth (n 84) 185.
[86] Granger and Salát (n 6) 115.

or secondary legislation. This inertia may in turn have an impact on the judicial protection of Union citizenship rights, since some national courts will be reluctant to go further or beyond the constitutional and/or legislative protection of civil rights provided for in the domestic systems.[87] The quest for ensuring the 'basic requirement' of access to justice hence continues to deserve our utmost attention and effort.

[87] For an analysis of the protection of civil rights in Denmark, see Silvia Adamo, 'Protecting International Civil Rights in a National Context: Danish Law and its Discontents' (2016) 85 *Nordic Journal of International Law* 119–45.