ECONOMIC IMBALANCE IN LEGAL RELATIONSHIPS AND EU PROCEDURAL LAW

Dr. Ágnes Váradi PhD.

research fellow
Hungarian Academy of Sciences Centre for Social Sciences Institute for Legal Studies

Abstract

The question how to promote the efficient access to justice for “weaker parties” has become highly important recently. Legal relationships where the position of one party is weakened by the lack of information, economic power and legal advice are typically consumer contracts, employment relationships and insurance. Nevertheless, in order to facilitate the asserting of rights for weaker parties efficiently, the determination of a general concept of “weaker party” seems to be necessary. The paper aims in its first part to set up a definition, which can be applied in the context of EU procedural law. Next, those procedural measures will be introduced which aim to compensate the asymmetry in these situations, like the rules of special jurisdiction in the Brussels regime, the specificities of legal aid under EU law, the role of collective actions and alternative dispute resolution methods. The analysis is based on the case-law of the European Court of Justice, sources of EU secondary law and the sources of English-, German- and Spanish- speaking literature.

Introduction

The question how to facilitate, promote the efficient access to justice for the “weaker parties” has become highly important recently. Legal relationships, in which there is a significant difference in the financial possibilities or legal knowledge of the parties are present in several fields of economy: consumer contracts, employment relationships, insurance and other financial services. Some examples for this phenomenon: a.) it can be confirmed that since the beginning of the financial crisis individuals becoming unemployed, debtors struggling with their foreign currency credits, small and medium enterprises having liquidity problems because of badly recoverable debts have to persecute their claims in imbalanced, asymmetric legal relationships; b.) the more and more wide-spread doorstep selling and online sales result in a number of cases, where the position of the consumer is weakened by the lack of information, economic power and legal advice. The economic rationale does not preclude such relationships and in several cases the mass-market character of these services inevitably leads to the differences of power between the parties.

However, if the lack of financial possibilities and legal knowledge (which can be lead back indirectly to the lack of financial means as well) impedes the asserting of rights for wide social groups or in several types of legal relationships, it might lead to the questioning of the basis of the democratic state based on human rights and rule of law, especially in young democracies. This, in turn, can provoke a certain instability in financial transactions and business relationships, the prevention of which is the interest of all economic players as well. ¹

In order to maintain the trust in cross-border transactions and in the correct functioning of the

judiciary, the imbalance between parties in such legal relationships has to be minimized not only with help of material law legislation but also with help of procedural norms.

The latter intention is strongly related to human rights standards, especially to the right to fair trial. Furthermore, Article 47 Para (3) of the Charter of Fundamental Rights of the European Union (hereinafter: ChFR) prescribes that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Such obligations are likely to become even more stressed after the EU’s accession to the European Convention of Human Rights (hereinafter: ECHR) as foreseen in Article 6 Para 2 of the Treaty on European Union.

Nevertheless, at designing the framework of the obligation of the Member States to facilitate the persecution of rights for the “weaker” parties in imbalanced legal relationships, we have to take two limitations. Firstly, Member States have significant elbowroom to adapt the system of legal aid to the capacities of the state budget, as the right to an effective access to justice “may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed”.

Secondly, there is a limitation stemming from the competences of the EU: “even under the TFEU, the authority of the European Union in the area of judicial cooperation remains limited to international civil procedure, i.e. conflicts of jurisdiction. Put differently, it does not extend to domestic disputes that have no cross-border aspect to them, like those involving parties resident in the same Member State.”

So, in the following this paper aims to introduce the concept of “weaker party” in the EU-law context and to describe those procedural measures that aim the compensation of the imbalances in the litigation related to such relationships.

1. The concept of “weaker party” in the context of EU procedural law

Summarizing the procedural institutions aiming the efficient access to justice of “weaker parties” in EU law context, the first question is how to define the concept of „weaker party“. An evident possible starting point could be to take a look at the process of closing a contract: the “inequality of bargaining power” is the relevant reference point. This concept is namely quite wide-spread in the civil law systems of the European countries and includes several factors, like “forms of moral pressure, personal and social conditions, mental infirmity, and

---

2 C-619/10, Trade Agency Ltd v Ceramico Investments Ltd. (ECLI:EU:C:2012:531) para 55.
more generally unfair advantage taking.\textsuperscript{6} Nevertheless, this concept is rather connected to the attitude of the parties towards each other and towards the subject of the contract. This approach appears in provisions of EU law determining the substantial law consequences of imbalance, e.g. Article 6 (1) of the Directive on unfair terms in consumer contracts.\textsuperscript{7} As the ECJ interpreted this provision, it “aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”\textsuperscript{28} Although this approach seems to be efficient and adequate in legal relationships, where the imbalance between the parties can be lead back to some extent to a mala fide attitude of one party, it does not seem to be applicable, where the difference between the possibilities of asserting rights of the parties follows – quasi naturally – from the difference of their financial resources and legal knowledge. That is why the definition based on the inequality of bargaining power does not seem to be an adequate reference point with regards to the concept of “weaker party” in the procedural context.

After this rather contractual approach the other alternative could be to define whether a party should be considered as weak by taking a look at the specific legal relationship between the parties. Such an approach was used by the European Court of Justice (hereinafter: ECJ) in the Mahamdia-case: in determining whether a particular employment relationship falls into the category of de iure gestionis or de iure imperii, the national court seized has to determine the precise nature of the functions carried out by the employee.\textsuperscript{9} The question can also be formulated in a more abstract manner: “the real issue is whether any situation of socioeconomic dependency is a proper and sufficient condition to classify a labour relationship as subordinate. In essence, the issue concerns whether subordination equates with a socioeconomic status of the employee to which the judiciary would apply legislation expressly provided for the employment contract or if this is a subjective situation that is only of legal importance as the result of the typical effect of a particular type of contract.”\textsuperscript{10} However, if we presume that the “weaker position” of the employee (and per analogiam of the consumer or contracting party involved in a legal relationship based on standard business conditions) in relation to the employer is not a general social phenomenon, an individual evaluation of the relationship would be necessary in every case. This would, however, lead the determination of the parties’ relationship into a too individualized, specific direction. The general acceptance of this approach would not only make it difficult for the parties to evaluate their own situation, but would put an intense workload on the courts as well. So, this “individualized, factual” approach should be extended by automatisms, sweeping clauses.

The third possible approach could be to evaluate the term in the context of “access to justice”-rights. According to Article 47 ChFR „legal aid shall be made available to those who lack


\textsuperscript{7} „Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.” Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 095, 1993.


\textsuperscript{9} C-154/11, Ahmed Mahamdia v People’s Democratic Republic of Algeria (ECLI:EU:C:2012:491)

sufficient resources in so far as such aid is necessary to ensure effective access to justice.” From this follows, that the lack of financial resources can definitely hinder the efficient persecution of rights. The lack of resources has to be interpreted in a broad sense: it does not only refer to the financial neediness *stricto sensu*, but also to the fact that in lack of legal knowledge necessary for the successful litigation and if the party cannot afford qualified legal representation, the persecution of rights is hindered as well. In the decisions of the ECJ the financial neediness as a conceptional precondition of claiming legal aid appears as a factor resulting in the litigation being “prohibitively expensive” for the claimant. The consequent practice of ECJ is that at determining the prohibitively expensive nature of the litigation, all the costs arising from participation in the judicial proceedings have to be taken into account. 'The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.' So, in this sense the “weaker party” is a person whose persecution of rights is hindered by the lack of financial resources and legal knowledge.

From the point of view of the current analysis, it seems to be advantageous to use this concept: firstly, because it is applicable to the specificities of the cross-border civil procedure; secondly, because it unites the lack of financial resources and the lack of information in one concept comparable under common principles throughout the EU; finally: it makes it possible for the legislator to provide specific rules for the procedural position of the party, whose situation is generally, because of socio-economic factors in accordance with this definition (e.g. litigation by the consumer – to be described later) but provides conceptional framework for the individual evaluation as well (e.g. legal aid schemes).

2. General framework of protection for the “weaker party”: the Brussels Regime

From the above mentioned theoretical concept follows that the concept of “weaker party” may be based on a general presumption of the legislator taking into account which party of a particular legal relationship is generally less experienced and lacking financial resources. The framework for this in the context of cross-border civil procedural litigation is offered by the special regime of jurisdiction as provided for in the Brussels I. Regime. The Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I.

11 C-427/07, Commission v Ireland, ECR 2009 I-06277, para 92.
13 Confirmed by ECJ e.g. in C-508/12, Walter Vapenik v Josef Thurner (ECLI:EU:C:2013:790) para 27.; C-419/11, Česká spořitelna, a.s. v Gerald Feichter (ECLI:EU:C:2013:165), para 33.
14 With regards to the determination of the law applicable to contractual obligations, ECJ ruled that Article 6 of the Rome Convention was intended to provide “a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and … more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship” C-64/12, Anton Schlecker v Melitta Josefa Boecker (ECLI:EU:C:2013:551) para 33. C-29/10, Heiko Koelsch v État du Grand Duchy of Luxembourg, ECR 2011 I-01595, para 40-42; C-384/10, Jan Voogsgeerd v Navimer SA., ECR 2011 I-13275, para 35.
Such a socio-economic factor to be taken into account might be that e.g. in case of consumer credit contracts „grantors of credit often supply consumers with pre-printed forms for entering into the credit agreement. Consequently, the consumer, that is to say the weaker contracting party, is not generally able to amend the agreement.” C-509/07, Luigi Scarpelli v NEOS Banca SpA., ECR 2009 I-03311, para 28. Nevertheless, this paper does not intend to enlist all the possible factors of deliberation for the legislator and all types of contract for which an automatic mechanism could be offered for the protection of the weaker party. The aim is rather to show some general features of this procedural regime.
Regulation) and its Recast, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Recast) contain special heads of jurisdiction for legal relationships where there is a significant imbalance between the parties’ financial possibilities or legal knowledge. The general head of jurisdiction being the “defendant’s domicile”, Section 3 of the Regulation ensures that the policyholder, the insured or a beneficiary can initiate a process against the other party not only in the country of his residence but in that of the contracting party as well [Article 9 Paragraph (1) Regulation, Article 11 Paragraph (1) Recast.]. However, the insurer can start a process only at the court in the weaker party’s country of residence [Article 12 Paragraph (1) Regulation, Article 14 Paragraph (1) Recast.]. The same considerations apply to the rules on consumer contracts as described in Chapter II Section 4 and on individual contracts of employment as regulated in Chapter II Section 5. As the ECJ assessed they reflect an underlying concern ‘to protect the insured who is most frequently faced with a predetermined contract the clauses of which are no longer negotiable and who is in a weaker economic position.’\(^{15}\) That is why the need for affordable and efficient procedures becomes highly important at these fields.\(^{16}\) An interesting question arises from the fact that in this regime the concept of the „weaker party” is not determined according to the above mentioned definition, but is based on the procedural position of the parties or their position in the legal relationship giving rise to the legal dispute. Namely: should this additional protection be granted to each and every person in that special position, or is a differentiation necessary.

It is possible e.g. that the insured person is a legal person (company, institution) which does have the financial resources and legal background to protect and persecute its rights efficiently. The grammatical interpretation of the Regulation leads to the conclusion that such a differentiation does not exist.\(^{17}\) However, it seems to be contrary to the objectives of the Brussels I. Regime that the contractual situation is the decisive factor at determining the entitlement for procedural legal aid: this way, namely, the proper and consistent enforcement of the legislative purpose (protection of the weaker party) seems to be questionable. This point of view has been confirmed by the ECJ as well in a specific case: “The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by Regulation No 44/2001 should not be extended to persons for whom that protection is not justified.”\(^{18}\) [Similarly: „Moreover, Article 12 (5) of the Convention\(^{19}\) excludes from that

\(^{15}\) C-201/82, Gerling Konzern Speziale Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato, ECR 1983 02503, para 17.


\(^{19}\) Concerning the applicability of the case-law elaborated by the ECJ with regards to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: Brussels Convention): C-533/07, Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst, ECR 2009 I-03327, paras 50-51, C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, ECR 2002 I-08111, para 49.
protective body of rules insurance contracts in which the insured enjoys considerable economic power.”

According to the ECJ’s practice, in case of certain types of contracts, the application of the beneficial heads of jurisdiction can be excluded. Comparing the legal position of the parties in general (in lack of a solid ground for the protection of a party) the ECJ excluded from the application of this special head of jurisdiction in case of insurance contracts relations between insurers in the context of third-party proceedings and reinsurance. This solution seems to be similar in case of consumer law contracts, where “a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party (…), may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contract.”

Nevertheless, this solution still does not react to the situation where only the comparison of the financial – material situation of the parties could eliminate the unnecessary application of the beneficiary rules of jurisdiction. The case-law of ECJ does not answer either who and how (ex officio or at request) should decide on the existence of a substantial difference in the possibilities of the parties. In lack of a clear statement, national courts have to evaluate the applicability of the special head of jurisdiction at the jurisdictional complaint of the defendant.

The model applied in case of the legal aid schemes, could offer a possibility to evaluate the relation of the financial and legal circumstances of the possibilities. As the ECJ concluded in a leading decision concerning legal aid: “national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. The application of these conditions per analogiam to the jurisdictional questions could facilitate the situation of the national courts applying the Brussels I. Regime. It would not be contrary to the regulatory system of the Brussels I. regime either that the applicability of a special head of jurisdiction and so the circle of the eligible fora would depend on the evaluation of the relation of the parties by the national court.

3. Procedural measures based on individual assessment: the legal aid

The other approach concerning the protection of the “weaker party” might be to make an individual assessment from the point of view of the effective access to justice. This aim might

---

20 C-77/04, Groupement d’intérêt économique (GIE) Réunion européenne and others v Zurich España, and Société pyrénéenne de transit d’automobiles (Soptrans), ECR 2005 I-04509, para 22.
21 C-77/04, Groupement d’intérêt économique, para 23-24.
22 C-412/98, Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC), ECR 2000 I-05925, para 75. Nevertheless, the latter fact does not exclude that the contracting party, insured or beneficiary relied on the special head of jurisdiction, if it would enforce a claim directly against the reinsurer, e.g. in case of bankruptcy or liquidation of the insurer.
24 C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, ECR, 2010 I-13849.
be achieved through legal aid schemes as provided for in the above mentioned Article 47 ChFR. The general framework for legal aid in cross-border disputes is offered by the harmonized rules as provided for in the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (in the following: Legal Aid Directive). 25

This set of rules offers the framework, in which Member States guarantee at least pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings to court as well as legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient.

The specificities of this directive, which are also connected to the persecution of rights of the weaker parties are, briefly, the following: a.) They apply only to natural persons, legal persons, like public benefit organisations, churches, foundations or even profit-oriented legal persons can only be entitled to legal aid under the national procedural schemes. This can be rather disadvantageous in cases, where individual claims are not really sufficient to lead to results extending over the individual case. b.) It applies the ‘means test’ and the ‘merits test’ as well to design the framework of entitlement. The model for determining ‘neediness’ establishes an appropriate balance between the necessity for automatisms (facilitating the decision of the courts/authorities) and the need for individual evaluation of circumstances. The latter fact is especially important from the point of view of the protection of the weaker party: at this point, namely, the necessity for legal aid is not primarily based on the financial neediness, but also the contractual situation, the difference in legal knowledge and the possibilities of obtaining legal advice have to be taken into account. 28 c.) The continuity of

The focus of this paper is, however, the analysis of legal aid in civil procedures.

26 Under ‘means test’ we mean the examination of subjective factors – related to the applicant’s personal, financial status, neediness – at the granting of legal aid. Financial neediness in the context of EU law can be perceived by resulting in the litigation being ‘prohibitively expensive’ for the claimant. C-427/07, Commission v. Ireland, para 92.

27 Article 5 Paras 1-2: ‘1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their economic situation, in order to ensure their effective access to justice. The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.’

28 According to Article 5 Para 3 Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings. However, Para 4 of the same Article adds that the definition of thresholds may not prevent legal aid applicants who are above
legal aid shall be ensured. According to Article 9 legal aid shall be provided to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting. This solution ensures the actual realization of the aim: the efficiency of access to justice can only be achieved, if not only the access to judgment is ensured, but also its enforcement. Furthermore, legal aid shall be extended to extrajudicial procedures as well if the parties are required to use them, either by law or by the order of the court. So, the costs and procedural burden caused by obligatory extrajudicial procedures cannot make the position of the weaker party more difficult.

Although the scope of the Directive is limited to cross-border disputes within the EU, it is an interesting question, whether its personal scope should be extended to the everyday growing number of illegal migrants or whether similar mechanisms should be offered for them in a separate legal aid scheme. They are, namely, involved in several administrative and judiciary procedures, where they are – as a matter of course – in the position of the weaker party. As the Legal Aid Directive uses the minimum harmonization method, the extension of the personal scope seems to be possible. For example the Spanish act of 2001 on free legal aid did not restrict its personal scope to people lawfully resident in the country, so even illegal migrants could be entitled to claim the benefits of legal aid.

In lack of such a general extension of scope, the situation at EU level seems to be more complex. In case of administrative or criminal procedures where the legality of stay is examined and the migrant is threatened by expulsion, this interpretation would be in accordance with the right to defence as interpreted by the European Court of Human Rights (ECtHR) as well. The question was partially solved by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, which declared in Article 13 that a) the third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance and b) Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid.

Whether it is a duty of the Member States to extend legal aid to illegal workers in other types of procedure (civil or labour law), must be determined by the European legislator or by the ECJ. In this interpretation, the principles recently developed by the Court in legal aid cases could be supportive.

In the decisions of the ECJ the financial neediness as a conceptional precondition of claiming legal aid appears as a factor resulting in the litigation being 'prohibitively expensive' for the claimant. The consequent practice of ECJ is that at determining the prohibitively expensive nature of the litigation, all the costs arising from participation in the judicial proceedings have to be taken into account. The prohibitive nature of costs must therefore be assessed as a

the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings.


31 The right to legal aid has to be ensured in an efficient way, the rights cannot remain theoretical or illusory. Furthermore, the State has a duty to ensure justice by positive actions. ECtHR, Airey vs. Ireland, 1979, Series A, No. 32, para 25.

32 C-427/07, Commission v Ireland, para 92.
whole, taking into account all the costs borne by the party concerned. So, in this sense the “weaker party” is a person whose persecution of rights is hindered by the lack of financial resources and legal knowledge.

4. Other measures facilitating access to justice for the “weaker party”

Finally some specific provisions should be mentioned that can in a rather indirect way contribute to the protection of the weaker party as well.

a.) Collective actions

At this point, the role of collective actions in the case-law of the ECJ has to be mentioned. As the examples mentioned in the introduction show, the imbalanced legal relationships usually affect broader social groups or at least several contracting parties. This might be a consequence of general terms and conditions of the contract, corporate strategy or the nature of the legal relationships. That is why the connection of the claim to the general social interest might be a decisive factor. Anyway, the common element of all these claims is that the individual, separated claims cannot reach their goals or only in a considerably less efficient manner. In case of legal relationships, where the imbalance between the parties is based on their financial-material situation (like in consumer law cases), only high publicity or a high cumulated fee or compensation could lead to the change of existing practice. This can be achieved by the collective litigation. If, however, the legal interest behind the litigation is a public or quasi-public one (like in environmental cases), a clearly elaborated regime of collective litigation could offer a proper substitute for individual claims, where the locus standi could be questionable.

Because of the high social importance of these cases, the litigation rights of the organizations can usually be derived directly from EU the legislation, as foreseen in Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment or Article 7 of Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts for consumer law cases.

This legal framework has been extended recently by a Recommendation of the Commission proposing that Member States adopt opt-in collective redress mechanisms as to violations of EU law. Nevertheless, the effects of this measure are yet questionable, so it cannot be regarded as a form of procedural legal aid at EU-level at the moment.

34 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, C-472/10, judgment of 26 April 2012.
37 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. OJ [2013] L 201/60
Finally, the relationship of access to justice rights and alternative dispute resolution methods (ADR) has to be examined. The grounds for this question getting into centre of attention is that ADR methods offer a cheap, simple and efficient method to reach a solution in case of a legal dispute, so their principles are entirely in accordance with the aims of access to justice.

Acknowledging the importance of ADR methods, especially mediation, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters was adopted, which – exactly as the title suggests – rules only on certain aspects of mediation, especially on the confidentiality and the enforceability of the agreements resulting from the mediation.

An interesting feature of the Directive is that it does not harmonise national rules on limitation and prescription periods. Nevertheless, in Recital 24 the legislator encourages Member States to ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails.

Guidance for the structuring of the detailed rules of mediation follows from two Commission Recommendations, which have identified a number of minimum guarantees that ADR schemes should respect including impartiality and effectiveness. These are related to fields (primarily consumer protection) which belong to the centre of attention in the EU. In other sectors or in case of mediation in general, however, there are less concrete instructions. Unfortunately, in a recent case when the ECJ was asked about the compatibility of a compulsory mediation procedure with the requirements of EU law, the question has become hypothetical after the changes of the national law in the meantime, so the Court did not have the possibility to answer the question.

Nevertheless, from the existing case-law of ECJ it seems that the Community judicature does not intend to put more obligations on Member States concerning mediation by the extensive interpretation of the legislation. For example, concerning Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, the Court has declared several times that it 'does no more than require Member States to seek to promote mediation in criminal cases for offences which they consider appropriate, and consequently it is for the Member States to define the circle of offences for which mediation should be available.' So the burden of developing a consistent scheme of ADR in accordance with the requirements of access to justice is put primarily on the national legislator.

The fact that judicial interpretation has less significance at this point follows also from the analysis of problem fields by Commissioner Viviane Reding: 'The three main shortcomings are gaps in the coverage of ADR schemes, lack of awareness of consumers and businesses

40 C-492/11, Ciro Di Donna vs. Società imballaggi metallici Salerno srl (SIMSA), (ECLI:EU:C:2013:428)
and the uneven quality of ADR schemes." While the second problem can be solved by civil actions and centralized campaigns, in the other two fields, the responsibility of the Member States is much more intense. And at this point not only the necessity for collaboration at the level of EU legislation is especially important, but a common understanding of the obligations following from the right to an efficient access to justice as well.

Closing remarks

Summarizing the experience of the analysis on the concept of the “weaker party” in the EU law, it seems to be the most adequate to define this term as a person whose persecution of rights is hindered by the lack of financial resources and legal knowledge. The major areas, where the EU supports the access to justice of the weaker party are primarily consumer law, environmental law and certain cross-border commercial transactions (like insurance law). The procedural measures facilitating the access to justice in these relations, are mainly limited to certain branches of law (as seen in the case of class actions). An overarching ruling is offered by the Legal Aid Directive, while the Brussels Regime offers special, exceptional rules limited to certain types of legal relationships.

It can also be concluded that the procedural aid offered for the “weaker party” is basically drafted for natural persons. (The special rules of jurisdiction in the Brussels Regime are applicable to legal persons as well.) Generally natural persons have access to the widest range of legal aid measures if they prove their neediness under the conditions laid down by the domestic law. In case of legal persons, the national legislator decides whether to grant legal aid under the same conditions as for natural persons. In case of collective litigation, the EU act establishing the possibility is decisive.

Nevertheless, the progressively expanding case-law of ECJ plays an important supportive role at this field. The elaboration of a common theoretical framework for legal aid would serve not only the access to justice of the specific legal entities, but – as seen at the examination of interests behind legal aid – it would serve more general interests as well: “the ‘ends of justice’ should not only be increased opportunity for the poor but also increased stability for society.” This is especially significant, because the above mentioned institutions contribute to the adequate working of the judiciary, to the proper realization of judiciary rights and so to more trust in the stability, predictability of legal institutions.

---

