



The Action for Injunction in EU consumer law

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Rodzicom i Przemkowi

Summary

In 1998 the European Union adopted a new self-standing instrument of collective enforcement - the Action for Injunction. Until then, the main focus was on the improvement of the position of the individual consumer through the adoption of substantive consumer law directives. The Injunction Directive provides for a general framework on consumer law enforcement in national and cross-border litigation. Qualified entities, public agencies and/or consumer organisations, are granted legal standing. National courts are bound to mutually respect the standing of EU wide registered qualified entities. Outside these clear-cut rules on the mutual recognition of standing, the Injunction Directive remains largely silent. The implementation into 28 Member States swiftly revealed the rather limited harmonising effect. The thesis investigates and explains how despite the legally approved diversity, the Injunction Directive contains the potential to turn diversity into convergence. The key to understanding the potential is the thesis of dualism of enforcement measures. Read together with the Annex the Injunction Directive establishes the deep interconnection between collective and individual enforcement, of substantive and procedural enforcement, of judicial and administrative enforcement. The different levels and means of enforcement should not be regarded separately but should always be looked at in their interplay, in their mutual institutional design and their mutual impact. Evidence for convergence can be found in the *Invitel* judgment of the ECJ and in the practice of consumer organisations *via* co-ordination actions across borders by which they overcome the boundaries of collective *vs.* individual or judicial *vs.* administrative enforcement. Regulation 2006/2004 re-adjusts the dualistic structure of enforcement in favour of public bodies and promotes convergence through para-legal means, through new modes of enforcement, through co-operation and co-ordination outside courts and in open interaction between administrative bodies, to which consumer organisations are admitted on approval only.

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Introduction

The enforcement of consumer law is fast becoming a key area of policy for the Commission. The European Commission has undertaken substantial efforts in order to improve enforcement by launching studies, statistical analyses and examinations of consumer problems and expectations. It has attempted to attract attention to both nationally and cross-border transactions from a consumer protection perspective.

Until 1998, the European Commission's activities were mainly focused on improving the position of the consumer through the adoption of substantive consumer law directives. The procedural side, the availability of non-context related consumer law remedies was, on the other hand, neglected. The latter derives from the lack of EU competence in procedural matters. Under the Treaty, enforcement is left to the Member States. However, 1998 constitutes a benchmark in the development of procedural law. Directive 98/27/EC introduced the first self-standing directive in the field of consumer protection – the *Action for Injunction* adopted under Article 114 TFEU. This is not to say that the substantive directives adopted before that date did not contain procedural rules. Directive 84/450/EEC on misleading advertising – now Directive 2005/29/EC on unfair commercial practices and Directive 93/13/EC on unfair terms provide for an action for injunction. However, Directive 98/27/EC (now Directive 2009/22)¹ is the only piece of consumer law enforcement legislation which deals with the procedural side alone from a horizontal perspective. The injunction in Directive 98/27/EC is disconnected from any substantive content, only the Annex to the Directive highlights the existence of the substantive law directives, whereas the injunction in the unfair terms Directive or the unfair commercial practices Directive is meant to complete the substance of the directives *via* appropriate remedies. In the Injunction Directive is the other way around.

That is why it is fair to assume that the action for injunction is an atypical remedy which does not fit into the normal classifications in private legal orders. Its *sui generis* character triggered interest among academics as well as practitioners who tried to understand the differences between the normal standard individual private law remedies and the Injunction Directive. The Injunction Directive was designed for extensive practical use; in

¹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers interests (OJ L 166, 11.06.1998, p. 51–55) repealed by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) Text with EEA relevance (OJ L 110, 01.05.2009, p. 30–36), (hereafter "Injunction Directive").

practice it brought about changes in national transactions but it largely failed in terms of transborder transactions. The complexity of the procedure – requiring decisions on the jurisdiction, on the applicable law and on execution in another jurisdiction – require knowledge and resources which are scarcely available to those who enjoy standing. Two spheres of law are tied together in the Injunction Directive. Thanks to the Annex, the Directive provides for a combination of procedural and substantive legal issues. The combination of substantive law and procedural law, of individual civil law remedies and the collective action for injunction, the Injunction Directive serves as background for a “*thesis of the dualism of enforcement*” which is advanced on the basis of the analysis of the Injunction Directive and the way in which it was implemented in the Member States. This is the first major argument I intend to develop in the thesis.

According to a holistic perspective, one could expect that many of the ambiguities it gives rise to are answered in the Injunction Directive itself or in the accompanying documents. The contrary is true. The text sets out, at most, a framework centered on the mutual recognition of legal standing and the notification of so-called “*qualified*” entities to the European Commission. There were no explanatory policy documents produced by the Commission in the process of the making the Injunction Directive. The only sources are the First and Second Report on Implementation of the Injunction Directive in the Member States.² The decade-long discussion on collective remedies in the EU which finally led in 2013 to the adoption of Recommendation 2013/396 excluded from the scope of the discussion the action of injunction. This is even true for former Commissioner Kuneva, who during her period in office promoted the elaboration of collective consumer redress through collective compensation claims. The current debate focuses on different forms of class actions and collective compensation *via* test cases or combined actions. There is no explanation for the exclusion of an action for injunction; there is even a lack of bibliographical resources and comments relevant to the debate on injunctions. The lack of clarity has not furthered the use of the action for injunction as a European remedy. This is even more astonishing in light of the Consumer Policy Strategy 2007-2013, which among other priorities highlighted the need to build consumer confidence in the Internal Market through effective consumer law enforcement.

² Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest of 18 November 2008, COM(2008) 756 final, Final Report from the Commission to the European Parliament and the Council – Concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest European Commission, Brussels, 6 November 2012, COM(2012) 635.

The action for injunction does not look to the past, except the injunction of correcting past unlawful behaviour. It is meant to stop future consumer law infringements. According to a modern interpretation an injunction can be defined in the following way: an action for an injunction is an administrative or a court order requiring legal subjects, thus individual consumers, corporations, and other government entities to stop doing something and to refrain from repeating a certain unlawful conduct in the future. Therefore, the action injunction is defined as a tool that brings an illegal practice or an unfair behaviour to an end, a tool that bans repetition of these unlawful activities in the future. Injunctions never concentrate on the past as their legal effect occurs only from the moment an injunction order is issued. None of the scholarly definitions links injunctions to the past.³ That is why an action for injunction contrary to individual classical civil law remedies cannot be used as a tool of compensation or restitution which remedies the harm consumers suffered through the infringement of their economic interests. The main feature that differentiates injunctions from other civil law remedies is its preventive function.⁴ The combination of the two in one piece of EU law enhances the explanatory force of the thesis of dualism.

The broad legal framework of the Injunction Directive established through the choice between judicial and administrative enforcement and through the minimum harmonisation approach left much discretion to the Member States to choose the manner in which to implement the new remedy into their national legal orders. It will be demonstrated that instead of the expected approximation of legal regimes, the Injunction Directive produced a broad variety of enforcement models. The result resembles more a patchwork than to a coherent and consistent European enforcement system. In a way this is surprising as a remedy of injunction in one way or the other existed in legal systems of the Member States. The cross-border dimension adds an additional layer to the rather messy looking enforcement strategy. It does not come as a surprise that the action for injunction ended in a deadlock here. The decisive change of approach took place with the adoption of Regulation 2006/2004 on consumer protection cooperation.⁵ The choice between judicial and administrative enforcement was replaced by a model whereby Member States have to designate public authorities as the institution of law enforcement ultimately responsible in this field. The second move occurred

³ Rose, N (1992), *Pre-emptive Remedies in Europe*, Longman Law, Tax and Finance, Longman Group UK Ltd, p. 215

Fiss(1978), *The Civil Right Injunction*, Indiana University Press Bloomington & London, p. 23

⁵ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws Text with EEA relevance, (OJ L 364, 09/12/2004, p. 1–11), (hereafter “Regulation 2006/2004” or “the Regulation on consumer protection cooperation”).

through the shift from reliance on hard enforcement *via* the action for injunction to soft enforcement *via* transborder co-operation through exchange of information and co-ordination of activities. It will be demonstrated that the combination of the two paves the way for the convergence of enforcement in European consumer law. This is the second major finding of the thesis.

The methodology I use is a doctrinal and contextual analysis of the European enforcement model as enshrined in the two major pieces of EU law, the Injunction Directive and Regulation 2006/2004. Both serve as the basis for elaborating and scrutinizing the European framework in which the Member States implementation measures are embedded. I have complemented the existing available comparative analysis through my own studies of the Italian, the Polish and the English legal system. Interviews undertaken in these countries with the enforcement authorities and during my stage at the European Commission in Legal Services helped me to develop a deeper understanding of the context and the deeper cultural background of the Member States decision in choosing judicial or administrative enforcement in implementing the Injunction Directive.

I will develop my argument in four Chapters: The first settles the background for the legal analysis of the remedy of injunction. It explains the timing of and different classifications of injunctions, against the background of the different legal designs given to the action for injunction in the Member States legal orders. It highlights its behavioural, restitutionary, deterrent and regulatory function, the inter-connectedness of procedural and substantive law directives, last but not least the interplay of individual and collective enforcement. The key to understanding and explaining the Injunction Directive is the thesis of dualism of enforcement. Chapter two focuses on an explanation of the relationship between substantive law and procedural matters starting from a clear cut separation of the two spheres of law, as enshrined in a traditional understanding, highlighting the Latin principles of *lex specialis and lex posterior generalis* to understand the relationship between the Directive 98/27 and its Annex in relation to the Directives on misleading advertising and unfair contract terms, which have been adopted prior to the Injunction Directive. Again, it is the dualism of enforcement which helps to understand and to explain the conjunction between substantive and procedural law. Chapter three is dedicated entirely to cross-border consumer matters. The Injunction Directive serves as the starting point for understanding the complex structure which underpins the idea of mutual recognition of legal standing in the hands of both consumer organizations and public authorities. The case study of the only transborder action for injunction brought forward so far by the UK Office of Fair Trading explains the reason

why consumer organizations seek alternatives through co-ordinated action and why the EU legislator shifted the focus towards public enforcement through soft law means in Regulation 2006/2004. Chapter four serves two purposes: to provide an explanation as to why the EU can do no more than establishing a framework for injunctions and can only formally approve the diversity of national enforcement schemes. The reason is found in EU competence rules. Despite its rather difficult EU constitutional basis, - and this is the second purpose - the EU managed to clear the path for convergence through uniting the institutional framework of injunctions whilst shying away from hard enforcement measures.

Chapter I Foundations of Action for Injunction

1. A General Classification

Injunctions are enforcement tools used in consumer protection in all cases in which unlawful activity or unlawful behaviour shall be swiftly brought to an end. Injunctions arise as the most suitable tools applicable in cases that require quick and definitive action ceasing unlawful activity and preventing repetition of the same unlawful activity in the future. The action for injunction is a valuable tool for consumer enforcement in view of the fact that consumers all over Europe are constantly bombarded by different advertisements, unique bargaining offers and other unlawful practices. All those practices may infringe consumer rights individually as well as collectively as a group. Evidently, the remedy of injunction perfectly fits cases in which a consumer is asked to pay for “free” products, which in fact have been offered not ordered, or if an advertisement provides false commercial information which induces a consumer to buy. These are the most common situations in which a fast and effective remedy is required.

The action for injunction in the framework of the Injunction Directive constitutes an appropriate reaction to these situations. It can be developed as a tool which either modifies an individual’s behaviour by cessation or/and brings a practice to an end; and this is an enforcement tool which can be addressed by consumers as a group. The use of injunctions is, however, dedicated to specific fields of law: it is related to substance. That is why the choice of injunction as a remedy depends on the nature of the infringement in terms of substantive law - whether unfair contract terms or unfair commercial practices or other fields of consumer law.⁶

1. 1. A Working Definition

The semantic range of wording used to describe an action for an injunction oscillates between a stop order and a modification order. The EU Directives do not provide for a precise

⁶ Haley (2006), *Stop Now – Injunction: Protecting the Interests of European Consumers, Conference on Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunctions and Group Damages Actions in Vienna*; Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings*, prepared by the Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, Belgium, p. 330-354, <http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf>accessed on April 22, 2014.

and one-sided definition of the remedy of injunction defined either as cease or desist order, which at both ends provides for the modification of a person's behaviour. This has left leeway to Member States to provide their own particular definition of injunctions.⁷ They developed various wording schemes for injunctions. This is partly an effect of language differences as well as of translation issues. A more complex analysis of the most commonly used notions of injunctions will show the extent to which national definitions differ and how many elements they have in common.⁸

A starting point for clarifying the meaning of an injunction is the distinction between prohibition and inhibition: I adopt a working definition of injunction based on its dictionary definition as a proxy/common standard to compare how the injunction is understood in various legal systems (1) a prohibition refers to "*a certain behaviour, which is forbidden or not allowed by the rules of law*"⁹, (2) an inhibition refers to "*an order preventing someone from doing or repeating a certain activity*".¹⁰

1. 2. Bilateral Timing

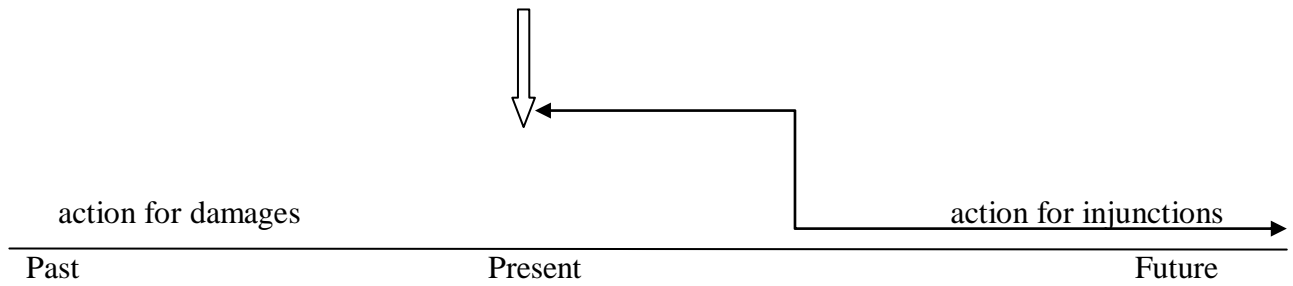
An injunction is a civil law remedy which may be addressed to situations occurring at two different moments (i) at the moment in which unlawful activity occurs - this is a present accent of injunctions, and (ii) in the future - this is a future accent of injunctions. The latter variant makes the remedy of injunction special and unique among existing civil law remedies, because normally remedies are brought for past infringement, not in anticipation of future events. The following illustration illustrates the differences relative to the two timelines: past-present-future (Graph 1).

⁷ Craig/De Búrca (2011), *The Legal Effect of Directives, EU Law: Text, Cases and Materials*, 5th ed., OUP, 2011, p. 279-280. The authors state as follows: "(...) *A directive may leave some discretion to the Member States, it will always require further implementing measures; and if it sets out its aim only in general terms, it may not be sufficiently precise to allow for proper national judicial enforcement*".

⁸ See Chapter I 1.5.

⁹ Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/british/prohibition_1?q=prohibition+> accessed on April 22, 2014.

¹⁰ Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/british/inhibition_1?q=inhibition> accessed on April 22, 2014.



Graph Nr 1 – Time-frame of Action for Injunction

1. 3. Bilateral Content

Regarding its content, the remedy of injunction is understood as a prohibitory order aimed at banning a certain activity that infringes consumer rights. The unlawful activity has already occurred and the effects continue to influence the future. Here the injunction combines the future element of prevention, and the present element of prohibition. Exactly this combination of present and future elements, linked to a particular subject matter, makes the remedy of injunction special among other civil law remedies. Injunction, in the language of judicial review¹¹, is an order granted by a court whereby someone is required to act or refrain from doing a specified act.

The order for injunction aims at slowing down or restraining a certain activity, for example, it should stop the unlawful activity or modify certain behaviour once the injunctive order is issued. Therefore, the injunction either reverts to previous behaviour or indicates the moment in which the actors are supposed to stop the unlawful activity. It also prevents someone from doing something and repeating a certain unlawful activity in the future. The latter accent discloses the close link of injunctions with the future¹², even if normally remedies should only look to the past.¹³ By their very specific nature, injunctions arise as atypical legal remedies in the field of consumer law - until 1998 not even recognised at the EU level and only recognised to a limited extent at the national level. This is the reason why

¹¹ Judgment of Court of Palermo of 2 June 1998, *Adiconsum v Soc. Aeroviaggi*, 2077/1998.

¹² Prohibition and inhibition as defined in Cambridge Dictionary, <<http://dictionary.cambridge.org/dictionary/british/ban>> accessed on June 5, 2014.

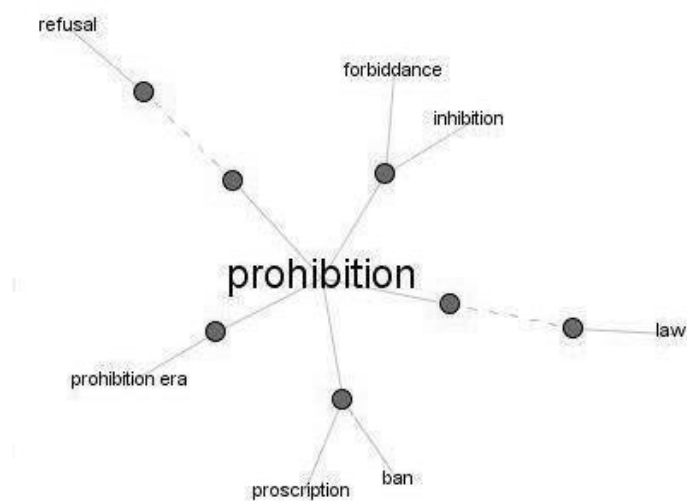
¹³ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.06.1998, p. 51-55) has been substantially revised several times because new directives on consumer protection have been added to the Annex to the Injunction Directive. For reasons of clarity and rationality, the Injunction Directive has been codified in the form of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 01.05.2009, p. 30–36).

the remedy of injunction in the field of consumer protection has a rather narrow history.¹⁴ Nevertheless, since the Injunctions Directive of 1998, the process of Europeanization commenced and led to the development of the remedy of injunction in consumer law in all the Member States. It is submitted here that the process of Europeanization of the remedy of injunction is often bound with distortions in the national legal orders of the Member States.

1. 4. Semantic Scope of Notions

The distinction between prohibition and inhibition, although theoretically seemingly clear, leads in reality to many practical problems. “*Prohibition*” and “*inhibition*” belong to the same semantic family. They are often used interchangeably. However, this is not the correct way to read the wording of the Injunction Directive in the legal context of its remedial nature.

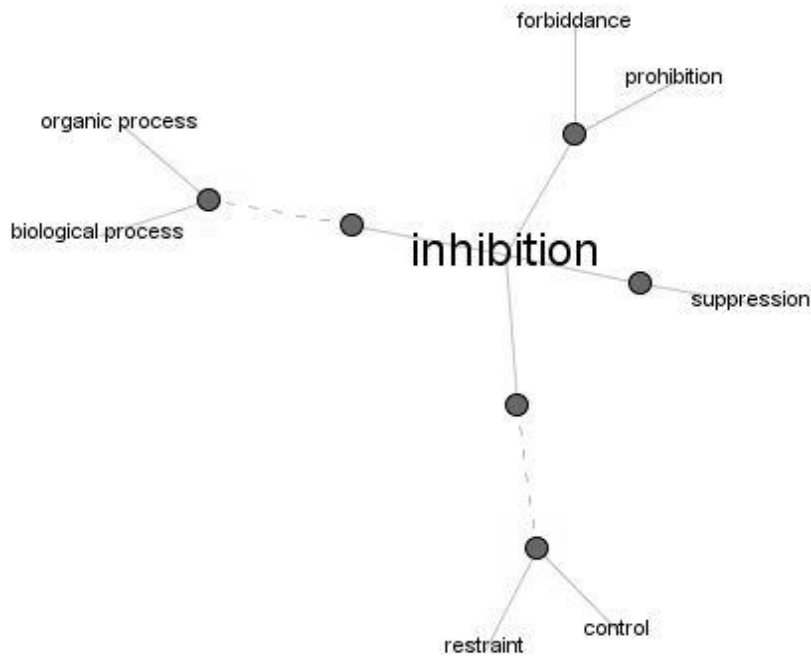
The proximity means that the two concepts are subject to mutual linguistic penetration and interlinks. Indeed, it is a source of “*legal irritation*”¹⁵ which has led to an opaque picture in terms of the action for an injunction in Europe. The Graphs below illustrate the mutual connections of the wording used in definitions of injunction operating across Europe.



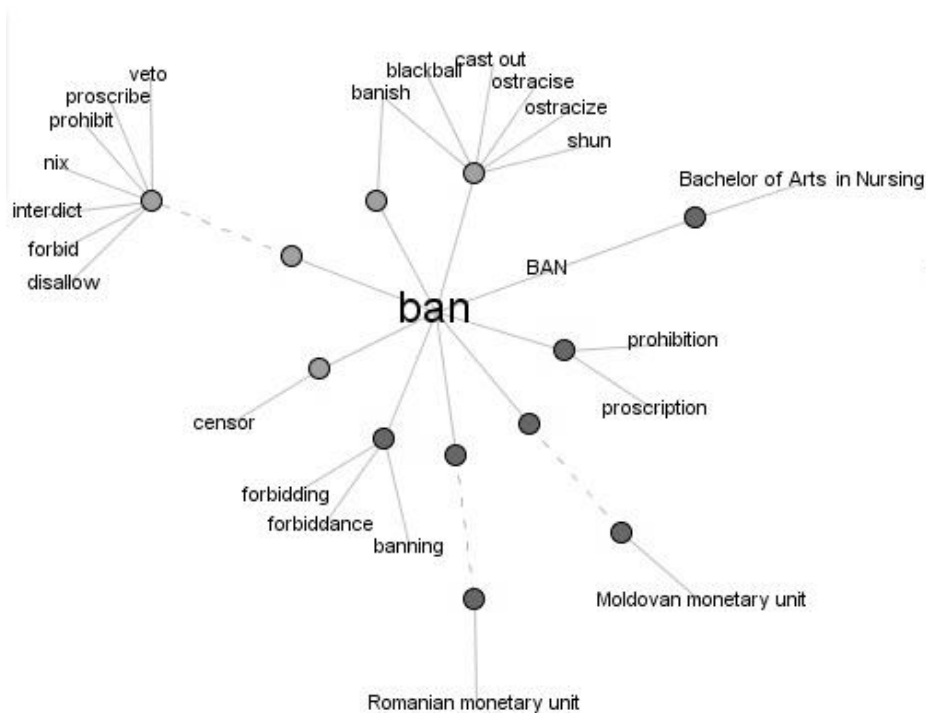
Graph Nr 2 - a language family for the word “*prohibition*” (according to Visual Thesaurus Cambridge Dictionary Online)

¹⁴ Although the remedy of injunction in the field of consumer protection has been introduced in 1998, before the time the Injunction Directive issued,“(…) a notion of injunction has existed in all the Member States”, Vide: The Proposal for the Injunction Directive, page 5 section: The problem, para. 2. It does not mean, however, that all the Member States had a regime comparable to these brought by the Injunction Directive; Schulte-Nölke/Twigg-Flesner/Ebers (2007), *The Consumer Acquis and its Transposition in the Member States*, EC Consumer Law Compendium, p. 386.

¹⁵ Teubner (1998), *Legal Irritants: Good Faith in British Law or How Unifying Law Ends in New Divergences*, *The Modern Law Review*, Vol. 61(1).



Graph Nr 3 - a language family word for the “*inhibition*” (according to Visual Thesaurus Cambridge Dictionary Online)



Graph Nr 4 - a language family for the word “*ban*” (according to Visual Thesaurus Cambridge Dictionary Online)

1. 5. Inhibitory vs. Prohibitory

There are two general injunctive models on which the scheme of the Injunction Directive rests: (1) an **inhibitory injunction**¹⁶, which is an injunction that forbids certain legal activity at the time the injunction order is granted¹⁷, the wrongful act is going to be brought to the end, it brings certain limits to wrongful behaviour¹⁸, referring to the legal text of the Injunction Directive defines it as a “*cessation order*”, in a more general sense it may be called “*stop order*”¹⁹; (2) a **prohibitory injunction**²⁰, which prohibits repetition of the wrongful activity in the future²¹, once it has been ceased once the injunction ordered issued²² the legal text of the Injunction Directive defines it as a “*prohibitory order*”, or in a more general sense it may be called “*a ban*”.

On the basis of a survey of the case law, it is easily visible that more attention and more focus is given to inhibitory than prohibitory injunctions²³ which often is recognized as a conjunction of the two elements.²⁴ Seemingly, the national definitions of injunctions focus more on the stop-order nature of the remedy of injunction than its cessation element. Courts normally stopped a practice, and upon Article 2(1)(b) of the Injunction Directive posed requirements upon which the effects of the infringements could be eliminated. Therefore, a judgment in the form of a stop order only applies to a present action. In the case of administrative bodies, both the cessation and prohibition of injunctions can be exercised since

¹⁶ Fiss (1978), *The Civil Right Injunction*, London, p. 23.

¹⁷ Judgment of the Polish Supreme Court of 26 January 2006, Case V CSK 83/2005.

¹⁸ Frignani (1974), *L’Injunction nella Common Law e L’inibitoria nell Diritto Italiano*, Pubblicazioni della Facoltà Giuridica dell’Università di Ferrara, Serie Seconda, p. 61; refers to injunction “(...) *che ha presupposti e limiti ben precisi ed il cui campo di applicazione è abbastanza ristretto*”.

¹⁹ The Injunction Directive is defined in the following manner in various linguistic versions of the Injunction Directive: in the English version of the Injunction Directive it is defined as “(...) *the cessation or prohibition of any infringement*”, in the French version “(...) *à faire cesser ou interdire toute infraction (...)*”, in Polish “(...) *zaprzeszania lub zakazu jakiegokolwiek szkodliwej praktyki (...)*”. It may also be defined as a modification order since in fact the cessation influences an individual’s future behaviour.

²⁰ Bean (1984), *Injunctions*, 3rd ed., London, p. 18-27; Judgment of the Polish Supreme Court of 2 November 2007, Case nr II CSK 289/2007 in comparison with the following judgments: I CK 358/2002, IV CKN 329/2001, I CKN 1319/2000.

²¹ Frignani (1974), *L’Injunction nella...*, p. 61; refers to injunction “(...) *la quale il giudice invece di ordinare al. Convegnuto di fare qualcosa, gli pribisce di tenere o di continuare a tenere un comportamento “omissivo”*”.

²² Rose (1992), *Pre-emptive Remedies in Europe*, Longman Law, Tax and Finance, p. 215; Fiss (1978), *The Civil...*, p. 6.

²³ Judgment of the Court of First Instance in Barcelona of 17 October 2003, *Asociación de Usuarios de Servicios Bancarios* (Ausbanc Consumo) v *Caixa d’Estalvis de Catalunya*, ECR I-4785.

²⁴ See the following cases: *Poland* - Judgment of the Polish Court of Competition and Consumer Protection of 1 January 2005, Case XVII Ama 93/2005; Judgment of the Court of Appeal in Warsaw of 20 December 2007, Case I ACa 905/2007; *Italy* - Judgment of the Supreme Court of Cassation of 11 July 1990, 650/1991; Judgment of the Supreme Court of Cassation of 27 April 1990, *Pieri Franco v l’Ente Ferrovie dello Stato*, 27/1991; Judgment of Court of Milan of 9 February 1976, 808/1976; Judgment of Court of Florence of 23 January 1996; Judgment of Court of Naples of 8 November 1996, 193/1997.

an administrative decision may tackle not only present issues, but also its future effectiveness. Once the abusive practice is stopped, the wrongful practice ceases. In order to eliminate the potential effect of infringements, the Injunction Directive gives also the authorized entity a right to describe the means to be used in order to exclude the practice and its negative effects. This right can be understood as a means to modify the parties' behaviour.²⁵ Indeed, the literal interpretation of Article 2(1)(b) of the Injunction Directive has introduced a “*modification order*”. The modification order does not exclude the practice immediately, but only indicates the manner in which the act contravenes the directive, which allows for cancelling the unlawful practice from the market. As a general rule, courts normally grant inhibitory injunctions which replies to a standard content of a judgment to be issued under national frames of legislation. Given this similarity to a standard judgment, injunctions become easier to enforce and more consumer friendly since they offer a clear cut solution once the injunctive order is made.²⁶

The implementation of the Injunction Directive in the Member States proves that a broad discretion is left to authorities in interpreting the action of injunction as a stop order or a modification order, depending and related to the concrete case at hand. This consequence may yield irritations and ambiguities and could be understood as an example of a disequilibrium in terms of legal remedies. There is an element of choice enshrined in the action of injunction, which discloses the real nature of injunction as an equitable remedy leaving a choice at both angles of prohibition or inhibition, *ex lege* “*cessation*” and “*prohibition*”, or perhaps giving some elements of modification of a wrongful activity. Indeed, the effectiveness of the injunction then depends on the national enforcement framework and the national role of judges and their reading and interpretation of the case at hand. It is submitted, that such a broad leeway should however be avoided in consumer policies since it makes consumer law remedies incoherent.

No matter how the implementation process occurs, the civil law remedies should be defined precisely with regard to their addressees and the potential effects. In reality the injunction procedure provides only for a framework, whilst it remains for the judge or

²⁵ Article 26 of the Polish Act on Competition and Consumer Protection 2007.

²⁶ See the following case: Judgment of the Polish Supreme Court in Warsaw of 22 May 2003, Case nr I CK 628/2003.

administrative authority in charge²⁷ to decide on the form and the entire content of injunction remedy.

1. 6. Differences among national Legal Systems

In the Member States injunctions differ significantly. Instead of coherency and unity of enforcement models based on EU law - which was the aim of the Directive on Injunctions as far as its cross-border context was concerned,²⁸ the reality is much better caught by the notion of “*united in diversity*”.²⁹ Although the scheme of injunction procedure upon the frame of the Injunction Directive should be the same “*for the effective and non-discriminatory application of the underlying Community law, the national modes of implementation among Member State vary since each of the Member State follows its own legal culture and tradition*”.³⁰ Injunctions at the national level differ regarding the wording used to describe the injunction order as well as the modes of implementation of the injunctions into national legal systems.

1. 6. 1. Wording Differences

The notion of injunctions does not straightforwardly translate from the English version of the Injunctions Directive, which describes, in Article 2, the remedy of injunction as “*an order (...) requiring the cessation or prohibition of any infringement*”. Member States have implemented the Injunction Directive in a huge variety of versions, models, applying different wordings as well as legal verbiage, which, given national linguistic differences causes divergence in interpretation of the scope and content of injunctions.³¹ In some Member States

²⁷ Cafaggi (2009), *The Great Transposition. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, Loyola Consumer Law Review, Vol. 21(4), p. 496-539. The UK model of injunction provides a proof of this.

²⁸ See Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers’ interests, Brussels, 24.01.1996, COM(95) 712 final 96/025 (COD), p. 7 (hereafter the Proposal for the Injunction Directive). “*In principle, appropriate means of redress should exist in the legal orders of each Member State and, in general, there would seem to be no need for harmonisation*”.

²⁹ <http://europa.eu/abc/symbols/motto/indec_en.htm>.

³⁰ Cafaggi/Micklitz (2007), *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community*, EUI Working Papers Law No. 2007/22, Florence, p. 10.

³¹ The Injunction Directive, Art. 2:

In Italy, the Injunction Directive was implemented in Article 140 of the Codice del Consumo, in the following manner:

“*I soggetti di cui all’art. 139 sono legittimato ad agire a tutela degli interessi collettivi dei consumatori o degli utenti richiedono all’Triunale:*

a) *di inibire gli atti e i comportamenti lesivi degli conosmatori e degli utenti,*

like Poland, the definition of injunction does not arise from a direct translation of the Injunction Directive. Injunction is understood as a “ban” and its legal meaning reduces the elements of cessation and inhibition to a single word. That is why the Polish model of injunction can hardly be understood as a concept related to the EU Directive. The definition can only be comprehended if one has full knowledge on the Polish law and how it is embedded and linked to the national understanding of injunctions – it does look like a standard judgment, with no specific links to protection as a future related-remedy.³²

The picture becomes even more blurred if one links different legal definitions operating in the various Member States as well as their different normative contexts to the variety of functions that injunctions might perform in the Member States. Taken this myriad of issues into consideration, it is no wonder that the action of injunction is mainly understood as a means of national law and not really related to European law.

1. 6. 2. Transposition Differences

The national differences are rooted in the scheme of the Injunction Directive which itself has been based on the principle of minimum harmonization.³³ Thus, Member States

*b) di adottare le misure idonee a correggere o ad eliminare gli effetti donosi delle violazioni accertate,
c) di ordinare la pubblicazione del provvedimento su uno o piu quotidiani a diffusione nazionale oppure locale nei casi in cui la pubblicita dell provvedimento puo contribuire o correggere o eliminare gli effetti della violazioni accertate”.*

In France, the Injunction Directive was implemented in Article L. 421-2 Code de la consommation, in the following manner: “*Les associations mentionees a l’article 421-1 et les organismes justifiant de leur inscription sur la liste liee(?) au Journal officiel des Consommateurs europannes en l’application de l’article 4 de la directive 98/27/CE du Parlement Européen et du Council relative aux actions en cessation ou interdire tout agissement illicite au regard des dispositions transposant des directives mentionées a l’article 1 ere et de la directive precite. Le juge peut a ces titres, le cas sous echeant sous astrainte, la suppression d’une clause illicite ou abusive dans tout contrat proposé ou destinée au consommateur”.*

In Poland, the Injunction Directive was implemented in Art. 23 a. 1. Act on Competition and Consumer Protection (Ustawa z dnia 5 lipca 2002 o zmianie ustawy o ochronie konkurencji i konsumentów, Ustawy Kodeks postępowania cywilnego oraz ustawy o zwalczaniu nieuczciwej konkurencji Dz.U. 2002, Issue 129, Item 1102), in „*1. Przez praktykę naruszającą zbiorowe interesy konsumentów rozumie się godzące w nie bezprawne działanie przedsiębiorcy. Nie jest zbiorowym interesem konsumentów suma indywidualnych interesów konsumentów”.* „*Art. 24. 1 Zakazane jest stosowanie praktyk naruszających zbiorowe interesy konsumentów”.* „*Art. 26. 1. Prezes Urzędu wydaje decyzję o uznaniu praktyk za naruszające zbiorowe interesy konsumentów i nakazujące zaniechanie jej stosowania, (...), 2. W decyzji, (...), Prezes może określić środki jej usunięcia trwających skutków naruszenia zbiorowych interesów konsumentów w celu wykonania nakazu, w szczególności zobowiązać przedsiębiorcę do złożenia jednokrotnego lub wielokrotnego oświadczenia o treści i w formie określonej w decyzji. Może również nakazać publikację decyzji w całości lub w części na koszt przedsiębiorcy”.*

³² As a general rule, Polish courts a distinction between cessation and prohibition is often made in protection of personal rights cases. This distinction depends on the legal interest to be protected by certain rules of law. In case of injunctions in the area of unfair contract terms, the courts adjudicate as to the future, while a qualified entity like as administrative body may issue a decision which links both the present and future elements.

³³ Micklitz/Weatherill (1993), *Consumer Policy in the European Community: Before and After Maastricht*, Journal of Consumer Policy, Vol. 16, p. 301–303.

remain free to shape their laws beyond the minimum level of harmonization. The result is incoherency if not chaos which cannot be in the interest of a consumer enforcement scheme aimed at efficiency and effectiveness. The following presentation of national implementation is by no means complete, rather it is meant to illustrate the broad variety of solutions and provide evidence to the argument brought forward that the Directive instead of promoting approximation if not coherency has even deepened the diversity of meanings.³⁴ It sketches out the major differences and should not be understood as a systematic comparison.³⁵

(i) Malta

The implementation of the Injunction Directive was realised in a particular way.³⁶ Malta did not adopt legislation that extends to all the directives listed in the Annex to the Injunction Directive. These gaps were to be filled by national legislative rules. Malta did not transpose Article 4(3) requiring the notification of qualified entities to the European Commission. The Consumer Affairs Act grants standing to non-Maltese entities to be recognised as qualified entities and permits them to act on an equal basis with domestic qualified entities. Hence, national and cross border entities are put on an equal footing.

Furthermore, Malta introduced more stringent provisions, for example permitting for the correction of unfair contract terms or allowing for more specific measures to be taken to ensure compliance.

(ii) Hungary

The Hungarian legislation introduced an additional threshold before the action or injunction is brought to court. Not all infringements suffice, only a “*substantial*” infringement. The requirement of substantiality insinuates that not each and every infringement triggers the stop order mechanism but only those of a higher importance, where higher values (health instead of loss of money) are at stake. In practice, the higher threshold might work as a barrier for the common use of action for injunction in the field of consumer law. Furthermore, the highest threshold is defined on the basis of national legislation, which

³⁴ Report on the application of Directive 2009/22/EC (COM(2012) 635 final), p. 3.

³⁵ Micklitz/Rott/Docekal/Kolba (2007), *Verbraucherschutz Durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten*, VIEW Schriftenreihe, Vol. 17; which however, turns out to be extremely technical and in the end of rather limited use.

³⁶ Parry/Nordhausen/Howells/Twigg-Flesner (2009), *The Yearbook of Consumer Law*, p. 136-137.

may give rise to ambiguities in relation to cross-border consumer relationships since the threshold is defined at the national level.

(iii) Lithuania

In Lithuania, there is no summary procedure available for qualified entities although the procedure is foreseen in Article 2(1)(a) of the Injunction Directive. Article 2(1)(b) and (c) were not implemented. Here Lithuania relies on established legal principles, a policy which is not in line with established case-law of the European Court of Justice (ECJ).³⁷

(iv) Germany

The Injunction Directive was integrated into the Gesetz über die Unterlassungsklage (Act on Injunctions), which defines a common legal ground for all actions of injunctions, be they tied to unfair commercial practice or to unfair contract terms, focused on national conflicts or bearing a transnational dimension. The difficulty is that the substance matter is regulated outside the Act – unfair terms in the Civil Code, unfair commercial practices in the Law on Unfair Commercial Practices, which sometimes contain particular procedural requirements or even remedies such as the skimming off procedure the applicability of which is bound to unfair commercial practices alone. Whilst there is a common understanding of what an action of injunction concerns, the laws and rules are diffuse, found in several distinct legal acts rendering it a field for specialists only.

(v) Poland

In Poland³⁸ the Injunction Directive was transposed in the Act on Competition and Consumer Protection 2002 (ACCP), which can be regarded as a “*supplement*” to the Code of Civil Procedure. The introduction of the concept of collective interest of consumers as well as standing for consumer organizations is a true novelty. The individual consumer has no right to ask for an action of injunction. Administrative entities cannot go to court out of their own

³⁷ Judgment of the Court (Fifth Chamber) of 10 May 2001, *Commission of the European Communities v Kingdom of the Netherlands*, Case C-144/99 (ECR 2001, p. I-03541).

³⁸ In Poland: Ustawa z dnia 5 lipca 2002 o zmianie ustawy o ochronie konkurencji i konsumentów, ustawy - Kodeks postępowania cywilnego oraz Ustawy o zwalczaniu nieuczciwej konkurencji (Dz. U. 2002, Issue 129, Item 1102).

motion. This turned out to be an empty rule, which was abolished in 2007. The new 2007 Act on Competition and Consumer Protection banned unfair commercial practices and laid the enforcement into the hands of administrative bodies and consumer organisations. Consumer organizations, the Ombudsman and the spokesman of the insurance policy holders etc.- but not the individual consumer are granted “*a right to flag/signal*” a suspicion of an infringement to be denounced administrative enforcement bodies.

In certain cases, like pharmaceutical law, the Injunction Directive has not led to the introduction of a new remedy. The national model maintained reliance on already established rules. There is a missing link in the process of implementation. Member States implement rules in a way that suits them and in many cases the *ratio legis* of the Injunction Directive derives from their legislative evidence.

(vi) Italy

The Injunction Directive was implemented through Decreto Legislativo 23 Aprile, 2001, n. 224. It brought about significant changes to the Code of Consumer Protection, which, in its Part V, includes specific regulations on consumer associations³⁹, lists formal requirements that consumer associations must meet in order to be recognised as qualified entities⁴⁰; provisions concerning the formal legitimation process to be adhered to when acting on behalf of a group of consumers⁴¹; the merit of an action for an injunction and the course of the procedure.

The Italian model relied since the very beginning on administrative enforcement.⁴² The administrative authority does not take action on its own but rather depends on complaints by consumers, consumer organizations, and others.⁴³ The Italian administrative enforcement authorities are playing a leading role in various fields of consumer law.⁴⁴ The Consumer Law

³⁹ Article 136 of the Codice del Consumo.

⁴⁰ Article 137 of The Codice del Consumo; Case Study: Judgment of the Regional Administrative Court of Lazio of 24 June 2006, *Adiconsum- Cisl v. Provincia di Latina A.T.O.*, 406/06; Judgment of Court of Palermo of 2 June 1998, *Adiconsum v. Soc. Aeroviaggi*, 2077/1998, Judgment of the Court of Lamezia Terme of 16 July 2006, *Associazione Consumatori Utenti Onlus v Trenitalia S.p.A, Legambiente Calabria*, 2438/06; Judgment of the Court of Latina of 13 July 2006, *Movimento Cittadinanza Onlus v. Acqualatina S.p.A.*, 2491/06.

⁴¹ Article 139 Codice del Consumo.

⁴² Autorità Garante della Concorrenza e del Mercato, for more details see < <http://www.agcm.it/normativa/4-prima-pagina/6871-sintesi-dei-principali-interventi-dellautorita-20132014.html>> accessed on June 8, 2014.

⁴³ For example: The implementation of the Directive 84/450/CEE with further amendments, leaving a enforcement power in the hand of Autorità Garante della Concorrenza e del Mercato.

⁴⁴ *Apple Case*. Ruling nr 23155 of ACGM of December 21, 2011, see Chapter III 7.3.

Code⁴⁵ in line with Directive 97/7 on distance contracts⁴⁶ and prior to the Injunction Directive granted consumer organisations legal standing: “(...) *associazioni dei consumatori e degli utenti sono legittimate ad agire a tutela degli interessi collettivi dei consumatori, ai sensi dell'articolo 3 della legge 30 luglio 1998, n. 281*”.⁴⁷ The two systems exist in parallel. Individual consumers are not compensated for damages they suffered from the infringements which lies behind the action of injunction.

(vii) France

France implemented the Injunction Directive by Ordonnance n°2001-741 du 23 août 2001 portant transposition de directives communautaires et adaptation au droit communautaire en matière de droit de la consommation.⁴⁸ The French counterpart to an action for an injunction, called “*action en cessation*”, has been drafted in Articles L 421-1 to L 421-6 of the Code of Consumer Law, which *ex lege* granted legal standing to consumer associations⁴⁹ in the form granted by the Injunction Directive.⁵⁰ The Ordonnance defines the requirements that consumer associations must meet if they wish to be granted legal standing. It also describes in detail the course of the injunction procedure.

Ordonnance Nr 2001-741 is applicable to the whole branch of consumer protection legislation, which includes the substantive law directives within one regulation - the French Consumer Code. Therefore, the implementation was executed within the scope of substantive

⁴⁵ Chiarloni (2008), *Il Nuovo Articolo 140 bis del Codice di Consumo: Azione di Classe o Azione Collettiva?* Analisi Giuridica dell'Economia, 01/2008, p. 107; Miller (2008), *Punti Cardine in Tema di “Class Action” Negli Stati Uniti e in Italia*, Analisi Giuridica dell'Economia, Vol. 1, p. 211.

⁴⁶ Decreto Legislativo 22 maggio 1999, n. 185, Attuazione della direttiva 97/7/CE relativa alla protezione dei consumatori in materia di contratti a distanza, G.U. n. 143 del 21/6/1999.

⁴⁷ Article 36.1. of Codice del Consumo: “*Le associazioni rappresentative dei consumatori, di cui all'articolo 137, le associazioni rappresentative dei professionisti e le camere di commercio, industria, artigianato e agricoltura, possono convenire in giudizio il professionista o l'associazione di professionisti che utilizzano, o che raccomandano l'utilizzo di condizioni generali di contratto e richiedere al giudice competente che inibisca l'uso delle condizioni di cui sia accertata l'abusività ai sensi del presente capo*”.

⁴⁸ Ordonnance nr 2001-741 du 23 août 2001 portant transposition de directives communautaires et adaptation au droit communautaire en matière de droit de la consommation JORF 196 du 25 août 2001 page 13645 - NOR ECOX0100083R (SG(2001)A/11576 du 22/10/2001 et 11790 du 25/10/2001), <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000590436> accessed on June 10, 2014.

⁴⁹ Valguarnera (2010), *Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action*, Global Jurist, 10(2), p. 1-45 (in part. 9-10).

⁵⁰ Article 421-6 of the French Consumer Code: “*Les associations mentionnées à l'article L. 421-1 et les organismes justifiant de leur inscription sur la liste publiée au Journal officiel des Communautés européennes en application de l'article 4 de la directive 98/27/CE du Parlement européen et du Conseil relative aux actions en cessation en matière de protection des consommateurs peuvent agir devant la juridiction civile pour faire cesser ou interdire tout agissement illicite au regard des dispositions transposant les directives mentionnées à l'article 1er de la directive précitée. Le juge peut à ce titre ordonner, le cas échéant sous astreinte, la suppression d'une clause illicite ou abusive dans tout contrat ou type de contrat proposé ou destiné au consommateur*”.

law pieces and as a general scheme of the civil code. Collective and individual redress stand side-by-side. Hence, the French system has kept a dualism of enforcement measures thanks to the implementation of the Injunction Directive.⁵¹ The previous enforcement mode based on “*l’action individuelle*” had been developed in the context of the substance related consumer protection directive. This path is directed to national rules of legislation covered by substance related consumer matters and adopted under the national laws. The extent of individual protection depends on the specific matter of regulation in its meaning given to it by European contract law directives.

The availability of injunctions as a legal remedy has provided for a significant improvement of the position of consumers evidenced by an increased amount of cases of a collective nature brought before the courts. The most active consumer associations “*Que Choisir*” had opened the possibility for consumers to bring claims on the basis of the substantive law directives in a way that individual enforcement mechanisms failed to do so.⁵²

(viii) United Kingdom

In the UK the Injunctions Directive has been partially implemented within the scheme of substantive law directives as well as in the scheme of the procedural legislation. These two built up a complex system of consumer protection. The Directive on unfair terms in consumer contracts (Directive 93/13/EEC) was implemented in the UK *via* the Unfair Terms in Consumer Contracts Regulations 1994. In order to implement the Injunction Directive the regulation was amended in 1999, in the form of Unfair Contract Term Regulation 1999 by a “*Schedule 1*” listing a number of “*qualifying bodies*”. The regulations were further amended in 2001 when the Financial Services Authority (FSA) was added to the list of qualified bodies. The system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms and changing contracting practice than *ex casu* actions.⁵³ It is, however, to be noted that in a pre-emptive challenge there is no direct link between the

⁵¹ Report on the application of Directive 2009/22/EC, p. 9.

⁵² *UFC Que Choisir* have brought many actions for an injunction so far: Judgment of La Cour De Cassation of 14 November 2006, *Que choisir v société Isère distribution automobiles, société Automobiles Citroën*,; 04-15890; Judgment of La Cour De Cassation of 14 November 2006, *UFC Que Choisir 38 v Société Asly 38, Société Daimler Chrysler France*, No. de pourvoi: 04-15646; Judgment of La Cour De Cassation of 1 February 2005, *UFC Que Choisir v Société Avenir Télécom, Société Net Up*, No. de pourvoi 03-16905; Judgment of La Cour De Cassation of 1 February 2005, *UFC 38 v Protection One France*, No. de pourvoi 03-16935; Judgment of La Cour De Cassation of 25 March 2010, *La société VGC distribution v l’association Union fédérale des consommateurs, Que choisir de l’Isère*, No. de pourvoi 09-12678.

⁵³ Bright (2000), *Winning the Battle Against Unfair Contract Terms*, Legal Studies, Vol. 20(3), 08/2000, p. 333-338.

consumer and the other contracting party. The Directive and the Regulations do not always distinguish between the two situations. This point is illustrated by the Article 4(1)(1) of the Directive and Article 4(2) of the Regulation on the relevance of particular circumstances affecting a contractual relationship. The Directive and the regulations must be enforced in a sensible and effective manner which can only be done by taking into account the effects of contemplated or typical relationships between the contracting parties. Inevitably, the primary focus of such a pre-emptive challenge is on issues of substantive unfairness.

Part 8 of the Enterprise Act had replaced Part III of the Fair Trading Act 1973 and the Stop Now Orders (EC Directive) Regulations 2001 promoting the collective scheme of consumer law enforcement remains in force side by side with the Unfair Contract Terms Regulation 1999⁵⁴ Although the Unfair Contract Terms Regulation 1999 is addressed as a protection for individual claims⁵⁵, the Stop Now Order enforcement regime as an implementation of the Injunction Directive includes a wider range of domestic consumer protection legislation. These orders, known as Enforcement Orders, are to be classified as injunctions. A breach of an Order is a contempt of court and can incur a fine or imprisonment. Under Part 8 of the Act, three types of enforcers can be identified:

- (i) **General Enforcers.** In addition to the Office of Fair Trading (OFT), the Trading Standards Service in Great Britain and Department of Enterprise, Trade and Investment (DETI) in Northern Ireland are specified in Part 8 as having the power to act as general enforcers,
- (ii) **Designated Enforcers.** A designated enforcer is any public or private body in the United Kingdom which the Secretary of State designates in a Statutory Instrument, having identified that the person or body has the protection of the collective interests of consumers as one of its purposes. The Secretary of State has designated the following bodies as Part 8 enforcers by a Statutory Instrument: The Civil Aviation Authority, The Director General of Electricity Supply for NI, The Director General of

⁵⁴ The Unfair Terms in Consumer Contracts Regulations 1999, No. 2083.

⁵⁵ On one hand, the Office of the Fair Trading shall be a sufficient body for protection of consumer rights, on the other hand - both the regulations like as Distance Selling and Consumer Contract Regulation 1999 are clearly designed as regulations to deal with individual consumer complaints. The situation is a very complicated and confusing because the Office of the Fair Trading is supposed to deal with systematic complaints, and according to its rules, individual consumer matters will be procedurally rejected and re-directed to Consumer Direct. For a lack of understanding of the dualism of enforcement measures Schulte-Nölke/Twigg- Flesner/Ebers (2007), *EC Consumer Law...*, p. 385, as follows “(...) *the threshold for taking action under [...] provisions [of the substance related consumer protection directive] is lower as it does not refer to “the collective interests of consumers”, but see at 385, Section - Conclusions and recommendations, bullet nr 3 in the following expression: “There is a difference in that the provisions in the specific Directives do not include the “collective interest” criterion, although, at a practical level, this may not matter hugely”.*

Gas for Northern Ireland, Ofcom, The Water Services Regulation Authority, The Gas and Electricity Markets Authority, The Information Commissioner, The Office of Rail Regulation, The Financial Services Authority, Consumers' Association (“Which?”). A public body will only be granted designated enforcement powers if it is independent.

By granting a public body designated enforcement powers, it is deemed that that body is conclusively identified as a public body for the purposes of Part 8. A private organisation may be designated as an enforcer only if it fulfils the criteria specified by the Secretary of State in a Statutory Instrument.

- (iii) **Community Enforcers.** Community enforcers are entities from other parts of the European Economic Area. Reference is made to consumer organizations as listed in the Official Journal of the European Communities. These enforcers may apply for injunctions in other Member States according to the implementation of the cross-border injunction procedure in the Injunction Directive.

Part 8 of the Enterprise Act can only be used in cases where harm has been caused to a group of consumers. Hence, Part 8 of the enforcement mechanism is not a means of pursuing individual redress. However, it should be emphasised that whether or not the trader is the subject of an Order, consumers can still exercise their rights to obtain individual redress, for example by suing the trader through the Small Claims Procedure in the county courts, or by applying the scheme of consumer protection which pre-empts the individual scheme of enforcement. Therefore, this dualism of consumer protection has been maintained by using procedural enforcement mechanisms which allows for both individual and collective protection of consumer rights. The choice of the enforcement route will also depend on the choice of the substantive law upon which the claim will be brought. One of the ways of enforcement is collective and is conducted *via* an injunction procedure in the form given by the Injunction Directive. The other route goes toward the individual dimension by the use of the small claims procedure, or a general remedy of injunction in the form given by the substantive law directives. Therefore, the Injunction Directive has not deprived individuals of other legal bases for their claims.

1. 7. Effect of Minimum Protection

This short summary of the implementation legislation in a selected few Member States demonstrates the difficulties which result from the attempt of the European Union to harmonise a single, seemingly targeted remedy. There are institutional differences between

Member States some of which have a consumer code where the temptation is high to simply integrate into the code any new measure. Other Member States have taken a piecemeal approach or draw a distinction between substantive and procedural rules. All variations are possible and identifiable. This renders it difficult to get a clearer picture on what the European law of injunctions is all about.

There are differences in the scope, *sedes personae* and *sedes materiae*. One of the battlefields is who should have standing, private bodies (such as consumer organizations) or public bodies. If the former are the correct addressees then the question is what kind of requirements should be requested for a consumer organization to be granted standing. How much representativity should be asked for? What are the legitimate interests? What are the collective interests? In the national legislation of Cyprus, Latvia and Malta a reference to collective interest is lacking without being clear whether this narrows or widens the scope of application?⁵⁶ In Germany and Austria competitors have the right to initiate an action for an injunction. But these countries are special in that they do not recognize public bodies enjoying standing in the field of consumer protection. This is the other side of enforcement. Here all variations are imaginable. The public enforcer can be a specialized agency, it can be a public agency dealing in between others with consumer protection, or it can be sectorial agencies. The Directive does not give any information whether and to what extent the two ways – public and private should be interlinked. Thus, the law is uncertain.

The substantive scope of application is equally subject to diversity. This is due to the fact that the Annex contains a limited list of consumer protection issues, mainly focusing on the protection of economic interests.⁵⁷

Since the transposition of the Annex is not required, various ways of dealing with the Annex arise and result in confusion as to the scope of application of the Injunction Directive. The vast majority of Member States have transposed the Annex into their domestic legislation.⁵⁸ Some others referred to it in the explanatory notes to their implementing legislation.⁵⁹ Other Member States have amended domestic law transposing the Directives

⁵⁶ Schulte-Nölke/Twigg- Flesner/Ebers (2007), *The Consumer Acquis...*, p. 388-389.

⁵⁷ Cafaggi/Micklitz (2007), *Administrative and Judicial...*, p. 34.

⁵⁸ For example: Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Malta, Portugal, Slovakia and the United Kingdom.

⁵⁹ The way in which the implementation occurred in Ireland and Spain, may be compared to the ECJ case regarding the Swedish implementation of the Unfair Contract Terms Directive 93/13/EEC; Judgment of the Court (Fifth Chamber) of 7 May 2002, *Commission of the European Communities v Kingdom of Sweden*, Case C-478/99 (ECR 2002, I-04147), followed by the Opinion of Advocate General Geelhoed (delivered on January 31, 2002). Member States enjoy considerable latitude as regards form and methods of implementing a directive (point 13 of the Judgment), See also: Schulte-Nölke/Twigg- Flesner/Ebers (2007), *The Consumer Acquis...*, p. 198.

listed in the Annex.⁶⁰ There are also numerous examples of Member States that have not transposed the Annex at all.⁶¹

Last but not least, the Directive does not spell out the details on how the injunction procedure should be organized and what kind of additional sanctions could be applied or not. Penalty payments have been transposed directly in many of the Member States, but in the United Kingdom and Cyprus, reference was made to the general law on contempt of court. At least one common denominator can be identified: since 1998 individual and collective enforcement stand side-by-side and complement each other.

1. 8. Field related Injunctions

The remedy of injunction has been assigned to specific fields of law and to specific types of infringements, referred to as field-related injunctions. The Injunction Directive is the first of the consumer law directives linking injunctions with specific fields of law; hence the specific types of infringements – to which a remedy of injunctions applies.

In fact, the choice of a remedy of injunction depends on the substantive law basis in which the infringement is rooted. The substantive law basis affects the choice of injunction as a legal remedy. The fields of consumer law to which injunctions applies are listed in the Annex to the Injunction Directive. That is why it is important to draw a distinction between injunctions in the field of consumer protection and those in competition law, in environmental law and labour law. Due to its sector-bound classification the injunction may bring about divergences in the general understanding of an overall cross-sector remedy within the European Community.⁶²

The common national understanding of injunction is in fact little more than a typical civil law concept. In most jurisdictions national judges may rely on a code of the procedure and on their respective national civil code. That is why the context of the injunction with its EU's origin yields frictions between the EU and the national legal systems. National courts may feel tempted to refer to established remedial solutions developed over the course of time within the framework of national law. In many cases the Europeanised action for an injunction is somehow substituted by well-known procedural solutions to be found under the

⁶⁰ For example: Cyprus, Luxemburg; In the case of these two Member States, the implementation of the Injunction Directive was made by amending the respective domestic law implementing the consumer directives concerned.

⁶¹ For example: Austria, Czech Republic, Italy, Latvia, Slovenia, Poland, the Netherlands.

⁶² Himsworth (1997), *Things Fall Apart: The Harmonization of Community Judicial Procedural Protection Revised*, European Law Review, Vol. 22(4), p. 291-311.

civil codes of national legislation, which have been given features of a remedy brought by the Injunction Directive.⁶³ Injunctions are a kind of familiar but distant remedy: on one hand – they have their origin in EU law, on the other hand – they have to be constructed so as to remain compatible with national jurisdictions.

The understanding of injunctions as a field related remedy can also be used to describe the scheme of substantive law directives of a specific nature to which the Injunction Directive will also apply. The unfair contract terms Directive 93/13 might serve as an example of this.⁶⁴ Since the potential effect of injunctions⁶⁵ is not defined in the Directive itself but has to be developed through the ECJ⁶⁶, the Directive 93/13 may be given a quite different effect from those related to the Directive on Injunction – theoretically at the EU level, but first and foremost at the national level. The unfair contract terms injunction may affect current as well future contracts; at least this was a presumption can be deduced from Art. 7 of the Directive. This seems to be the rule in most of the Member States, except Italy.⁶⁷ In France, national courts are granted a right to decide whether a certain clause shall be deleted and excluded from a contract.⁶⁸ This judicial discretion in the Member States goes further since unfair contract terms may also be deleted from the contract.⁶⁹

No matter which contract is considered there will always remain legal ambiguity as to the validity of a contract term which has been declared non-binding within the frame of the

⁶³ Although Howells (1996), *European Business Law*, Dartmouth, p. 19, states that “European laws are rarely completely new creations, mostly there are the result of comparative research which draws upon the experiences of Member States”, this is not a case for the Injunction Directive.

⁶⁴ Dickie (1996), *Article 7 of the Unfair Terms in Consumer Contracts Directive*, *Consumer Law Journal*, Vol. 4, p. 112-117.

⁶⁵ Report on the application of Directive 2009/22/EC, p. 9-10; Pollicino (2010), *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?* *Yearbook of European Law*, Vol. 29(1), p. 65-111; Craig/De Búrca (2011), *The Legal Effect of...*, p. 305-343.

⁶⁶ Tridimas (2005), *The General Principles of EU Law*, 2nd ed., Oxford, p. 18; Tridimas states that “(...) the EC Treaty is a *traité cadre*. It provides no more than a framework. It is rampant with provisions overpowering in their generality and uses vague terms and expression which are not defined. It bestows the Court with very broad powers to develop Community law. Furthermore, the Community law seeks to supplement rather than to substitute the national legal systems. It is logical for the Court, in filling any gaps which arise, to resort to and gain inspiration from the laws of Member States”. As of the judicial power and judicial activism see also: Tridimas (1996), *The European Court of Justice and Judicial Activism*, *European Law Review*, Vol. 21, p. 199; Van der Vleuten/De Waele (2013), *Judicial Activism in the European Court of Justice*, *Michigan State Journal of International Law*, Vol. 19(3), p. 639-666.

⁶⁷ Judgment of The Supreme Court of Cassation of 21 May 2008, 13051/08.

⁶⁸ Code de la Consommation (vers. con. 30 May 2014), L- 421-6 introduces such a possibility which is left in the hands of the judges: “The judge may order the deletion of the illegal or abusive clause from any contract or standard term offered to or intended for the consumer”.

⁶⁹ Judgment of Court of Appeal of 2 April 2009, *England OFT v Foxtons Limited*, (2009) EWCA Civ. 288; “Regulation 12(3) gives the Court a very wide discretion to the form of injunction. In an appropriate case, the court could, for example “carve out” a contract fulfilling a particular description” (speech by Lady Justice Arlen).

injunction procedure, and this ambiguity will remain in relation to all other individual contracts consumers might have concluded with the same user of the standard terms.

*Invitel*⁷⁰ provided the ECJ with the occasion to clarify the relationship between non-binding standard terms in the injunction procedure and non-binding effects in individual contracts. The ECJ insisted that the Member States must guarantee to extend *res judicata* under the injunction procedure to individual contracts. Setting aside how this can be achieved and setting aside the substantive differences in the Member States, Hungary and Poland have given non-binding contract terms an *erga omnes* effect, whilst most of the Member States struggle with *res judicata*. What matters is that the Injunction Directive does not provide for any guidance on the potential effect of an injunction order and therefore leaves it entirely to the national rules and the particularities of national jurisdictions.

2. Functions of Action for Injunction

The action for injunction is a remedy of a very complex legal nature. Its particular nature lies in the diversity of legal functions that injunctions perform in the field of consumer protection. In an attempt to circumvent the issues that arise concerning the fluid definitions of injunctions in Europe, injunctions have been defined through the prism of their legal functions. This must be understood as an attempt by the Member States to overcome the definitional problems the new remedy yielded in the implementation process. Most Member States, when faced with the choice between a pure translation of the definition contained in the Directive and the more descriptive function of “injunctions” chose the latter. This latter solution serves to simplify the general process of adaptation of injunctions with domestic legislative conditions and legal requirements. In reality, this solution has deepened the diversity between Member States because neither the definitions nor the functions turned out to be helpful in overcoming national divergences.

Considering the diversity and with a view to clarifying the different functional classification of injunctions, four of them can be distinguished: a behavioural function of injunctions, a restitutive or corrective function of an injunction as opposed to the typical compensatory function of civil law remedies, a deterrent function of injunctions understood through the prism of avoidability of certain unwanted behaviours through the mechanism of

⁷⁰ Judgment of the Court (First Chamber) of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10; discussed by Micklitz (2013), *A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms*, Conference Paper Durham.

injunction, a regulatory function of injunction upon which injunction is understood as a market cleaner, performing the role of a tool for *ex post* market control.

First of all, injunctions are considered to be and were designed as tools aimed to modify certain behaviour of a party against whom an injunction is granted. By prohibiting a certain behaviour, the injunction advocates change. Thus, injunctions should be used to correct unwanted behaviour that is harmful to the economy and society as a whole.⁷¹ This is an order that somehow “*puts*” pressure on an individual’s way of acting modifying an individual’s behaviour. Secondly, injunctions may be described according to their restitutive or corrective features. These legal features are characteristic of injunctions in consumer protection since injunctions in consumer law are not meant to satisfy consumers’ claims by compensation. Both these features should rather be recognised as equivalent to compensation.

Doubtless, injunctions cannot be classified among legal remedies providing for compensation, because the Injunctions Directive does not contain an action for damages. This element is often recognized as missing - by purpose - concerning the future dimension of the remedy of injunction.⁷² Although an injunction does not provide for compensation, it is supposed to restore the previous market structure, the previous “*infringed market nature*”, recalling a *status quo ante* before an abusive action or unlawful activity has taken place. Furthermore, injunctions are supposed to be corrective in shaping positive and proper behaviour. An injunction should then indicate what it considers to be positive behaviour in a given case.

Thirdly, the deterrent effect of injunctions pertains to businesses behaviour.⁷³ An injunction is a legal remedy aimed at halting the continuation of an unlawful activity. The message which injunctive relief directs to a business may be simplified to full avoidance of similar unlawful practice and unlawful behaviours in the future. The message behind this legal function is clear - business should not repeat the unlawful activity in the future.

Fourthly, we must consider the regulatory function of injunctions that is currently recognised as a key element of the EU debate on collective actions. The debate is mainly focused on the mutual relations and legal interplays between public and private bodies in

⁷¹ Fiss (1978), *The Civil Right...*, p. 8.

⁷² Report on the application of Directive 2009/22/EC, p. 7, “(...) *the impact [of injunctions] is projected more towards the future rather than being useful for correcting past damage, and it is very difficult to quantify in monetary terms*”.

⁷³ Report on the application of Directive 2009/22/EC, p. 7, “*Although injunctions do not, as such, provide a remedy for claiming damages for the past, the possibility of using injunctions can in itself be of value. As a governance tool, injunctions can be used as a deterrent without being applied to Court*”.

charge of actions for injunctions.⁷⁴ In this regard, there is significant diversity in Europe since some Member States rely only on public bodies and others rely on the activities of private bodies. Others employ a mixed solution linking together public and private measures. However, regarding an action for an injunction and the fact that consumer organisations have been granted legal standing under the Injunctions Directive, it is questionable how and by which measures consumer organisations might perform a regulatory function and whether they should be recognised as holders of the public interest. In other words, does their legal status among other bodies entitle them to be public interest holders? Therefore, we must question whether consumer organisations should be assigned the role of a trustee of the public interest. It could be argued that this role may be assigned to consumer organisations based on their statutory activities. However, if the action is available to “*qualified*” consumers organisations only, then this necessarily entails the exclusion of individual citizens who could also act in the public interest, at least theoretically.

2. 1. Behavioural Function

Injunctions are assumed to be stimulators of the parties’ behaviour. Injunctions always bring a certain type of behaviour modification for the parties to a case with a significant influence on the behaviour of an infringer, who will in some way be “*punished*” by the injunctive order. That is why an injunction affects both the economy, and the society as a whole.⁷⁵

Injunctions are meant to correct the unlawful activities and unwanted behaviours of the parties that are considered harmful to the economy and for society as a whole. The modification of the behaviour of the parties might be done easily through injunctive measures. Seeing as there are many different forms of injunctions in the field of consumer protection, this diversity is bound to affect the manner in which they modify a party’s behaviour. In this regard, a distinction is made between prohibitory and mandatory injunctions in the field of consumer protection. Such basic division concerning mandatory and prohibitory rules is a result of the fact that Europe, drawing from the experiences of the United States of America and following the path set by American jurisprudence, adopted such a basic and fundamental

⁷⁴ Cafaggi/Micklitz (2009), *New Frontiers of Consumer Protection - The Interplay Between Private and Public Enforcement*, Antwerp; Report on the application of Directive 2009/22/EC, p. 6.

⁷⁵ Kardes/Cronley/Cline (2008), *Social Influence and Behavioral Compliance in Consumer Behavior*, p. 303-304. In comparison to patent infringements injunctions see: Cotter (2013), *Comparative Legal Remedies: A Legal and Economic Analysis*, p. 342-344; Fiss (1978), *The Civil Right...*, p. 8.

distinction between: prohibitory injunctions that direct a party to refrain from acting in a certain manner, thus it is a prohibitory order to cease a certain practice, or simply an order that is supposed to stop a certain kind of unlawful activity; and affirmative injunctions, which direct a party to take a certain kind of affirmative action, mainly to provide for a modification. Hence, injunctions influence parties' behaviour but the way in which they do so largely depends on the injunction model applicable in any given case.

Injunctions stimulate a specific form of a party's behaviour. The injunctive order is supposed to sketch a path that will lead a party to correct his/her unlawful behaviour. Injunctions indicate how the future behaviour of the party should be and, by the nature of an injunction order, they give some hints on how to achieve this. In reality, injunctions are powerful remedial tools put in the hands of courts. Courts have been left discretion to decide the way in which the behaviour should be modified as well as the extent to which certain behaviour shall be modified. They also decide whether the injunction should be mandatory or prohibitory. The only limit on the power of the trial judge is that the remedy selected must be reasonably suited to abate the threatened harm and that the court be in position to enforce its own order and assess a party's compliance.

The behavioural element characterises the specific legal nature of the remedy of injunction in its collective dimension as it influences not only a consumer but rather a whole group of consumers. Currently, the European debate on collective redress is focused on a lack of a definition of "group" in terms of the injunctive procedure, which, in turn, influences the behaviour of the parties being involved in a collective action.

Within the injunction procedure at the European level however, consumers are not defined as a group. This is also true with regard to national procedures. Indeed, injunctions arise as unique collective enforcement measure among others civil law remedies.⁷⁶ The injunction procedure does not require a definition of a group and it does not even mention this issue in the text of the Injunction Directive. It should be stressed that an action for injunction is the only collective redress mechanism in the field of consumer law that does not provide

⁷⁶ Stuyck (2009), *Class Action in Europe? To Opt-in or Opt-out, that is the Question*, European Business Law Review, Vol. 20(4). Collective redress is a topic of interest in of British scholars; See: Hodges (2008), *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Studies of the OIECL, 2008; Green Paper on Consumer Collective Redress, COM(2008) 794 final, 27 November 2008; Mulheron (2004), *The Class Action in Common Law Systems: A Comparative Perspective*, Oxford; Mulheron (2007), *Justice Enhanced: Framing an Opt-Out Class Action for England*, Modern Law Review, Vol. 70(4), p. 550-580; Mulheron (2009), *The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis*, Columbia Journal of European Law, Vol. 15, p. 409-453; Mulheron (2011), *Recent Milestones in Class Actions Reform in England: A Critique and a Proposal*, The Law Quarterly Review, Vol. 127, p. 288-315.

any requirements as to the issue of the definition of group, an element which is *de facto* a basic requirement in most other collective redress schemes. Nevertheless, the lack of a definition of “group” in the Injunction Directive arises again as a problematic issue. It would seem from the Directive that there is no sense in and no need to indicate: how “the group” should be formed within the frame of an action for an injunction in terms of definition? What is the basic requirement of a group? With regard to the group definition which model shall be the most preferable? Should the US-class action model be considered as a prototype or should Europe at least partially consider the fundamentals of the American experiences?⁷⁷ Which option for a definition of the group would be most suitable as regards an action for an injunction in consumer law?

Concerning the overall scheme of consumer protection in Europe with its high standard, it would seem that injunctions and their effects broadly speaking will never be free from ideology. It would be desirable if each consumer would be prepared to declare before a court her/his intention to participate in an organised injunction procedure. Being fully aware of the consequences, he would be able to join a collective procedure suit if he so wishes. This however is not practical especially when one considers that the goal of the Injunction Directive is to provide an efficient remedy and to protect consumers from future inappropriate behaviour.

Currently we face a situation where there is a lack of precise rules concerning the definition of a “group” leading to further legal irritations in the area. The lack of precision yields a certain retraction on the part of consumers from relations of this kind as well as novel legal ambiguities. Currently, a judgment granted in the course of an injunction procedure, although directed against a concrete wrongdoer, because of the national effect of a judgment may be binding not only to the parties to a case at hand, but it may also be extended to

⁷⁷ It is always very risky to compare legal models coming from different continents and different legal cultures and traditions; See: Stadler (2013), *The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues*, Nederlands Internationaal Privaatrecht (NIPR), p. 483-488. Nevertheless, the US-reach experiences with regard the class action is often used as a point of reference for the EU-model of collective action, see for a US perspective: Hensler/Pace/Dombey-Moore/Giddens/Gross/Moller (2011), *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Corporation, Santa Monica, Calif., MR-969-ICJ, p. 10-11. For A European view: Hodges (2009), *What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We headed? The Globalisation of Class Actions*, The Annals of the American Academy, p. 330-345; Bober (2011), *National Judicial Collective Redress Models in the US and in the EU, Legal Aspects of Consumer Protection in the European Union, National*, Vilnius; Jasper (2005), *Your Rights in a Class Action Suit*, Oxford, p. 249; Mulheron (2004), *The Class Action...*, p. 167-169; Hodges (2010), *Collective Redress in Europe: The New Model*, Civil Justice Quarterly, Vol. 3, p. 370-395; Silvestri (2010), *The Difficult Art of Legal Transplants: The Case of Class Action*, Revista de Processo, Instituto Brasileiro de Direito Processual, p. 101-112.

potential consumers who may become parties of a certain legal relationship.⁷⁸ *Res judicata* of judgments would then be extended to the other entrepreneurs who intend to use continuously the clause in the abusive practices against consumers. This gives rise to a situation where consumers are not aware of a particular injunctive order that has already been granted. This may be due to one of the major problems of collective measures - the disclosure of information and information flow difficulties. Furthermore, consumers might become party to a case without having been informed and they can even be unaware that the case has been adjudicated. The *ex officio* doctrine developed by the ECJ in the field of unfair contract terms could be regarded as a means to overcome the information deficit, however, imposing the burden on the national court.⁷⁹ All consumers are automatically regarded as belonging to the group, unless they declare that they do not wish to participate.

⁷⁸ Judgment of the Court (First Chamber) of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (not yet published), discussed by Micklitz (2013), *A Common Approach...*

⁷⁹ (I) Judgment of the Court of 27 June 2000, *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), (ECR 2000, p. I-04941); discussed by Rutgers (2005), *Case note on Océano Grupo*, *European Review of Contract Law*, Vol., p. 87-96; Stuyck (2001), *Case note on Océano Grupo*, *Common Market Law Review*, Vol. 51, p. 719-737; Whittaker (2001), *Judicial Intervention and Consumer Contracts*, *The Law Quarterly Review*, Vol. 117, p. 215-220; Ebers (2010), *ECJ (First Chamber) 6 October 2009, Case C-40/08, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira – From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata*, *European Review of Private Law*, Vol. 18(4), p. 823–846; (II) Judgment of the Court (Fifth Chamber) of 21 November 2002, *Cofidis SA v Jean-Louis Fredout*, Case C-473/00 (ECR 2002), p. I-10875, discussed by Rott (2003), *Effektiver Rechtsschutz vor Missbräuchlichen AGB – Zum Codifis-Urteil des EuGH*, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 4, p. 5-9; Loos (2004), *ECJ 24 January 2002, Case C-372/99, Commission v. Italian Republic, Collective Action Under the Unfair Contract Terms Directive*, *European Review of Private Law*, Vol. 12(6), p. 701-707, (III) Judgment of the Court (First Chamber) of 26 October 2006, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05 (ECR 2006, p. I-10421); discussed by Graf/Appleton (2007) *Elisa María Mostaza Claro v Centro Móvil Milenium, EU Consumer Law as a Defence against Arbitral Awards, ECJ Case C-168/05*, *ASA Bulletin*, Vol. 1, p. 48-66; Loos (2007), *Case: ECJ– Mostaza Claro*, *European Review of Contract Law*, Vol. 4, p. 439-445; Liebscher (2008), *Case Note on C-168/05*, *European Review of Private Law*, Vol. 16, p. 454-557; Reich (2007), *More Clarity After “Claro”?* *European Review of Contract Law*, March, p. 42-619; (IV) Judgment of the Court (First Chamber) of 4 October 2007, *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS*, Case C-429/05 (ECR 2007, p. I-08017); (V) Judgment of the Court (Fourth Chamber) of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Gyórfi*, Case 243/08, (ECR 2009, I-04713); (VI) Judgment of the Court (First Chamber) of 17 December 2009, *Eva Martín Martín v EDP Editores SL*, Case C-227/08, (ECR 2009, p. I-1193); (VII) Judgment of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08, (ECR 2009, p. I-09579); The Court said that it is up to courts of Member States to protect consumers against unfair arbitration clauses. This lead, according to some authors, to so-called fragmentation of unfair contract terms in consumer contracts, See: Mak (2010), *Case: ECJ – Asturcom v Rodríguez Nogueira*, *European Review of Contract Law*, Vol. 4, p 444; Loos (2007), *Case: ECJ– Mostaza...*, p. 445; Nový (2014), *An Alternative View on the ECJ Asturcom Judgment*, <http://www.academia.edu/2898769/A_note_on_Asturcom_-_a_draft_version> accessed on April 10, 2014.

2. 2. “Restitutory” Function

The innovative nature of the remedy derives from the fact that an injunction looks only into the future and does not tackle any past events. Furthermore, it does not provide for compensation contrary to most legal remedies. Although compensation is one of the fundamental and most common civil law remedies, it has been excluded from the scope of the Injunction Directive. It provides neither an action for damages nor any other derivatives of actions for damages. Therefore, when an injunction is granted, a consumer cannot expect that he will be granted an amount of money to be paid as compensation in order to make good to a wrongful activity which infringes consumer rights. He may only count on “*reparation*”, meaning the improvement or modification of an unlawful behaviour.⁸⁰ Nevertheless, in some cases injunctions may be an insufficient remedy to deter conduct infringing consumer rights, while potential eventual awards of damages can remain under-compensatory.⁸¹

On one hand, the absence of the possibility to claim damages is one of the most glaring omissions in the Injunction Directive. On the other hand, it can be argued that consumers deserve a high level of protection and an element of compensation (if included in the Injunction Directive) would be recognized as added value to consumers. Therefore, it is highly questionable that this key element of compensation has been excluded from the whole injunction procedure, considering that the EU has a mandate⁸² to create any additional means to make any tool of consumer protection more compatible with consumer protection policy.

In order to ensure the proper functioning of the Internal Market, consumers must be highly confident in the market, especially when cross-border actions are concerned. Certainly, it is the role of the EU to protect consumers and ensure their confidence in the Internal Market.⁸³ Consumers should be afforded better protection at the European level as opposed to the national level upon the EC initiatives. A consumer should not be considered as a passive subject of legal protection and should also expect to be supported in terms of the possibility of legal aid for such enforcement actions. Moreover, consumers may definitely expect protection of their rights that – as a general rule – derive from civil law remedies. Therefore, from a consumer policy perspective the element of compensation should be integrated into the framework of an action for injunction. The situation becomes even more complicated if one

⁸⁰ Fiss (1978), *The Civil Right...*, p. 10-12.

⁸¹ Micklitz/Stadler (2006), *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, European Business Law Review, Vol. 17, 2006, p. 1473-1503.

⁸² Lindholm (2007), *State Procedure and Union Rights. A Comparison of the European Union and the United States*, p. 72-81, 240-249.

⁸³ EU Consumer Policy strategy 2007-2013, p. 7.

considers that the Injunction Directive does not provide for any guidelines as to the steps to be taken once an injunctive order is granted. Furthermore, it does not direct consumers in relation to further steps that can be taken, for instance, the legal measures a consumer could use to bring a separate claim for restitution or compensation. No indication as regards to possible compensatory measures is given. The silence of the injunction procedure may be an obstacle for consumers who have not been provided with a compensatory tool in EU law. It means that consumers are supposed to look for compensation measures under national law, if at all.

The Injunction Directive is designed to prevent damages. It stands opposite to actions for damages which are designed to “*make good*” the consequences. Although the Injunction Directive excludes provisions on compensation, it clearly provides for restitution.⁸⁴ It is understood as a “*reparation*” that is intended to provide a remedy for loss, damage or injury caused - restoration to the former original state or position. In other words, restitution means making good of or giving an equivalent for some injury, loss or damage. It aims to restore a certain harmony to the market that existed before the unlawful action took place. This is exactly what injunctions are all about. Although historically restitution has been considered appropriate where competitors were deceived through trade practices, the provision of similar reparations for deceived consumers is a fairly modern concept. Restitution for consumers supports a general principle that the buyer has a right to be an equal party to a transaction: since restitution is also accessible for a seller who is aggrieved, such restitution must also be available to the buyer.

2. 3. Deterrent Function

Injunctions perform many different legal functions one of which concerns the deterrent effect.⁸⁵ Injunctions are characterised by an element of collective redress and protection of the collective interest. The latter pertains to a group as a whole. Thus, the instrument employed to protect it focuses primarily on deterrence and prevention, definitely not compensation. This is exactly the case in the Injunction Directive. Currently, only a few civil law remedies can be said to have a deterrent effect due to the fact that deterrence is a dominant feature mainly in criminal law, and public law matters. That said there is certainly an element of deterrence attached to injunctions and as case law illustrates injunctive

⁸⁴ Report on the application of Directive 2009/22/EC, p. 9.

⁸⁵ Fiss (1978), *The Civil Right...*, p. 8-11.

measures strongly affect the behaviour of the parties to the case.⁸⁶ It is also true however that the deterrent function is often overestimated⁸⁷ as far as injunctions in the European context are concerned, if compared to damages.⁸⁸

Injunctions were initially designed for the protection of highly important goods and values, for example privacy⁸⁹, health and or personal rights.⁹⁰ This is generally considered the concern of public law. Over time, however, they have become tools for the protection of values of different legal nature not only non-substantive matters, but also and mainly economic interest of both individuals and the collective dimension. The phenomenon of sectorial specification promoted the protection of the economic interest. Historically at least with the exception of the common law injunctions were rooted in the public law area. The Injunction Directive although rooted in civil law and applicable to the civil law area, still performs a public law function – of deterrence for the potential subjects who infringe consumer rights. Therefore, the Injunction Directive draws a link between public and private law, since it performs the same function as previously issued injunctions addressed in the field of public law.

Formerly, injunctions were recognized as tools of punishment. Today their punitive function has been significantly weakened. The deterrent legal function has always been underestimated, mainly because the deterrent effect of injunction orders may modify the behaviour of only one party in the legal relationship.⁹¹ The deterrent function of an injunction is related more to injunctions that are considered in an administrative dimension; they are often less important in a typical judicial dimension of an action for an injunction. The deterrent aspect of injunctions arises in situations in which businesses are concerned with the issue of the publication of the judgment. Sometimes a public announcement of the fact that an order was granted may negatively affect the reputation of a business and as such representatives of a business try to avoid negative publicity as much as possible. Sometimes, to escape from an injunction procedure companies look for a substitute solution. This may

⁸⁶ Saraceno (2007), *Can Group of Litigation Improve Deterrence?* Working Paper Paolo Baffi Centre, Bocconi University, Milan, <<http://www.side-isle.it/ocs/viewpaper.php?id=12&cf=1>> accessed on April 14, 2014; Porrini/Ramello (2005), *Class Action for Financial Losses: Deterrence Effects from Ex Post Regulation*, Working Paper, Università del Piemonte Orientale, Alessandria.

⁸⁷ Green Paper on Collective Consumer Redress, 27.11.2008 final.

⁸⁸ Cafaggi (2009), *Great Transformation...*, p. 518-519.

⁸⁹ Busuttill/McCafferty (2010), *Interim Injunctions and the Overlap between Privacy and Libel*, *Journal of Media Law*, Vol. 2, p.1-13.

⁹⁰ In Poland, a remedy of injunction are recognised as a legal instrument for private rights' protection Injunction as a civil law remedy has been developed in the US-legal system. It was recognized as an effective instrument in terms of religious freedoms and sexual abuses, this was also previously used in the UK among equitable remedies, at the end the most common use of injunction was notified in practices in trespassing someone's land.

⁹¹ Report on the application of Directive 2009/22/EC, p. 7.

mean that a business in searching for a substitute solution may decide to choose an alternative scheme of dispute resolution instead of an injunction order. These alternative dispute resolution schemes allow the business to circumvent an injunctive order in a developed form, in order to avoid the risk to business reputation. The Injunction Directive includes an out-of-court procedure that can be understood as providing the possibility for resolving the dispute with recourse to the courts.⁹² Since the prior consultation procedure is not a mandatory requirement of implementation of the Injunction Directive, in those Member States that have implemented the preliminary consultation procedure we find that businesses use it to escape the courtroom while for consumers it presents itself in business-to-consumer (b2c) conflicts as the simplest way to enforce their rights that have been infringed by unlawful activity. This escape from typical court litigation to a preliminary consultation procedure provides evidence of the deterrent effect of injunctions. This justifies introduction of the preliminary consultation procedure, as according to the scheme of the Injunction Directive. It would seem that the European legislator intentionally provided this escape route by including such a possibility in the Injunctions Directive.

An injunction order must be expressed in a clear and legible way, in so-called “*sharp words*”. This mode of expression boosts the deterrent nature of injunctions in that the clarity of the order highlights the exact nature and merit of the incriminated behaviour. As far as formal deterrent features of injunctions are concerned, courts awarding an injunction are not supposed to provide guidelines to the parties in indicating the way in which the injunction order should be carried out. The deterrent effect of an action for an injunction may be considered in different contexts.

First, it may protect consumers from further abusive actions and unlawful activities since the very fact that an injunctive order is granted limits the unlawful activity of a business. Secondly, the wrongful activity may be stopped; but litigation before courts is not only time-consuming and expensive but the nature of court measures are adversarial. This is why entrepreneurs may try to switch from court measures to out-of-court settlements including the choice of the prior consultation procedure.⁹³ Thirdly, the settlement of collective infringement outside courts affects individual enforcement of consumer rights. The settlement is not made

⁹² See Chapter IV 5.3.4.

⁹³ See Chapter IV 5.3.4. For example: Poland, France, Finland - no requirement of the prior consultation; Cyprus – the prior consultation used on voluntarily basis, Spain – prior consultation is used only optionally; Germany, United Kingdom, Italy, Ireland - it is a mandatory requirement of the injunction procedure. *Case Study: Judgment of the Provincial Court of Balearic Islands of 17 March 2003, Asociación de Usuarios de Banca (Ausbanc) v Banca March, 146/2003.*

public. Consumers will not know what has or has not been settled. They are on their own in defending their rights.

2. 4. Regulatory Function

Consumer protection has become a cornerstone of effective market regulation in Europe. It regulates both entry and exit of market goods, products and services. The Injunction Directive, as recognised as an important tool for the effective protection of consumer rights, is a powerful regulatory tool of a procedural dimension in consumer protection legislation. This regulatory function was necessary with regard to the consumers' economic interest, which is supposed to be protected by the Injunction Directive. Indeed, an injunction is supposed to protect single market relationships before infringements, which are commonly used in EU-wide transactions.

Injunctions can be an *ex post* regulatory measures aimed at the protection of consumer economic interest. Once an infringement practice appears the injunction is meant to protect the internal market as well as a consumer interest that should be shielded against misleading and unfair practices. Injunctions are meant to regulate the market.⁹⁴ They are aimed at cleansing the market before consumers suffer from infringements. Injunctions clean the market by preventing infringing behaviours. They point towards the future. Ideally the market is cleaned *ex ante*, before the consumer interests are affected. Therefore the Injunction Directive requires quick action since the effectiveness and success of market cleaning depends on timing and the action's speed. There is always the need for quick and dynamic reactions. Once the infringement has taken place and once consumer interests are already harmed, quick action is needed even more in order to stop similar actions in the future. In cases in which the economic interest is a subject of the legal protection, an *ex post* device is often the only one option which can seriously be considered.

The *ex ante* and *ex post* distinction, following Shavell's theory⁹⁵, means the choice of one or the other option depends on the balance and accessibility of information at the case at hand. Just to give an example, since the regulation was adopted, both product safety and

⁹⁴ In this line Rosenberg (2002), *The Regulatory Advantage of Mass Tort Class Action*, in Viscusi/Hahn/Litan (2002), *Regulation Through Litigation*, Washington, p. 244-309.

⁹⁵ Shavell (1983), *Liability from harm versus regulation of safety*, NBER Working Paper Series, Working Paper No. 1218, <<http://www.nber.org/papers/w1218.pdf>> accessed on April 13, 2014. Some ideas regarding the function of consumer law enforcement can be found in Shavell (1993), *The Optimal Structure of Law Enforcement*, Journal of Law and Economics, The University of Chicago Press, Vol. 36(1), 255-287; Shavell (2004), *The Advantage of Focusing Law Enforcement Effort*, International Review of Law and Economics, Vol. 24, p. 209-218; In this line see also: Cafaggi/Micklitz (2007), *Administrative and Judicial...*, p. 15-17.

quality have been left in the hands of administrative bodies that operate *ex ante*, which means that they carry out control before a dangerous product may be circulated on the market. In product safety, however, the nature of the interest to be protected is different.⁹⁶ It protects health and non-substantive values, while in consumer protection directives, which can be found in the Annex to the Injunction Directive, only the protection of the economic interest is at stake.⁹⁷ That is why, the timing scheme/device of the protection, while not useless and theoretically still possible, is much harder to realize within the scope of the Injunction Directive. In practice an injunction will often be issued only once the infringement has occurred and once consumers have been negatively affected. The Injunction Directive is a stop order mechanism, prohibiting certain unlawful practices – with regard to the future.

In concern to the regulatory function of injunction, in particular the distinction between inhibitory and prohibitory injunction as defined in “*cessation*” or “*prohibition*” order is illustrated, since the injunction stops the practice at the moment once the injunction order is issued, and with regard to the future effect stops repetition of the unlawful activities in the future. In order to achieve the goal, the Injunction Directive is a way of elimination of the continuing effect of infringements, hence poses a requirements for modification of the unlawful activity.

2. 4. 1. A final (perpetual) Injunction

A final (perpetual) injunction is granted after trial of the action in which the plaintiff has established the existence of the defendant’s duty and the fact that the defendant has breached that duty or is about to do so. A final injunction is usually made without any time limit conditions. A plaintiff seeking a final injunction must usually establish that a violation by the defendant of a legal or equitable right of the plaintiff has occurred or is threatened. An injunction ordering the defendant to do something is granted only when the plaintiff illustrates a strong probability that a grave damage has occurred and monetary compensation would be inadequate in the case. If a mandatory injunction is granted, the cost for the defendant in relation to the activity he is supposed to execute, shall be considered in deciding whether to make the order or not.

⁹⁶ The General Product Safety Directive (GPD) is not covered by the Annex to the Injunction Directive. The legislative process on the Injunction Directive was followed by a debate whether GPD shall be included in the frame of the Injunction Directive and by this – be listed within the Annex to the Injunction Directive. Some of the Member States, like as Italy and Greece, do so.

⁹⁷ Cafaggi/Micklitz (2007), *Administrative and Judicial...*, p. 34-35.

2. 4. 2. An interlocutory (interim) Injunction

An interlocutory (interim) injunction is sought quite often. Basically, a small number of cases adjudicated upon the injunction procedure, the interlocutory injunction was the basic form in which an action for an injunction was brought, for example *Factortame* case.⁹⁸ This case is one of the basic examples of injunctions that have been developed to follow as quickly as possible upon the issuing of claim or even precedes it in case of great urgency.

In the field of consumer protection, more and more problems arise as a matter of urgency thereby requiring speedy resolution. In these cases there can arise a need for interim measures. It directs the defendant to do something immediately or to refrain from doing something until the trial of the action or until some earlier specified date or until a future order is made. As with all forms of equitable relief, the granting of injunctions is a matter at the discretion of a court. All equitable remedies are discretionary. Although the discretion of a judge in the civil continental process should be avoided, it seems that the legal nature of injunctions simply allows them to use their discretionary power to a certain extent - as to the choice of a most suitable injunction to a specific case at hand. On the other hand, it may also be justified based on the loopholes existing in procedural regulations on consumer protection.

The court may by order grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. On application for an interlocutory injunction, the plaintiff must usually establish that there is a serious question to be tried as to whether a violation by the defendant of a legal or equitable right belonging to the plaintiff has occurred or is already threatened. The usual purpose of an interlocutory injunction is to preserve the *status quo* until the trial of an action, or for a shorter period if the injury to be restrained is so urgent it cannot wait. Interlocutory injunctions are commonly used by courts when a case is urgent and a court is not able to work effectively by issuing a judgment based on the merits of the case. It should be emphasised that this type of injunction can be combined with other types in one judgment in relation to the same party of the case. The court may grant a mandatory injunction in connection with one of the abusive behaviours and at the same time, considering another unfair or misleading practice, an interlocutory injunction can be granted as well.

⁹⁸ Judgment of the Court of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89, (ECR 1990, p. I-02433); See: Prechal (1995), *Directives in European Community Law: A Study on EC Directives and their Enforcement in National Courts*, Oxford, p. 184.

2. 4. 3. Interlocutory Injunction *ex parte*

It rarely occurs in the field of consumer law that a court grants an interlocutory injunction *ex parte*: also known as a one-side injunction. It is an injunction granted without the presence of the defendant in court. This means that a business does not have the opportunity to appear before the court in order to oppose the injunction. In effect, the court grants the injunction order without any notification to the defendant. An interlocutory injunction *ex parte* may be granted in cases of extreme urgency, and may be recognized as a kind of security measure. This is why, more often than in consumer cases, it is used in cases regarding personal injury or where significant damages are threatening a person or rather his/her property. Injunctions of this kind are often granted immediately if there is a need for secrecy so as to prevent the defendant from frustrating the injunction. Although the *ex parte* interlocutory injunction is a kind of supplement for an interlocutory injunction, *ex parte* interlocutory injunctions are not very common in consumer protection cases.

As legal practice shows, *ex parte* injunctions are appropriate only when the threatened harm is so immediate and so severe that even giving the other party notice of the application for the injunction and an opportunity to be heard in opposition is not practical. Although, this kind of injunction is used only exceptionally in the field of consumer protection, it may sometimes be appropriate. Specifically, when consumers need the court's protection immediately, sometimes within hours (for example in order to protect consumers of a harm to be suffered if an injunctive relief not issued). It can also be invoked in cases concerning misleading advertising, particularly where an advertisement may blacken a consumer's name or reputation. In certain situations there will also be a requirement of secrecy according to which the main reason for applying an *ex parte* injunction will be, not only urgency, but also the need to prevent a defendant from having any notice of the application. In some cases, secrecy is required in order to protect the consumer's interest particularly if there is a risk that the defendant could destroy documents or other evidence concerning his unlawful activity - by deletion of abusive clauses or their quick modification.

Nevertheless, it should be stressed that this type of injunction, if applicable, could be developed as a very useful tool for consumer protection in personal injury cases, especially those that are brought under the Directive on product liability, where timing and urgency are usually of the essence, because health or human dignity values may be infringed

irreversibly.⁹⁹ Since both the Directive 2001/95 on product safety¹⁰⁰ and the product liability Directive 85/374¹⁰¹ are excluded from the scope of the Injunctions Directive, an *ex parte* injunction can only be granted if the national legislation includes health and safety in the list of legislation aimed at the protection of the collective interest of consumers.¹⁰² The restrictive scope of the Directive is highly unsatisfactory, in particular as the European Union has devoted much attention to the protection of consumers against unsafe products and to some extent also to unsafe services. Here the European Union has set milestones in the development of the European consumer policy. The lack of an action of injunction in that field results in a severe gap of protection, as consumers are entirely dependent on whether the public authorities in charge of health protection are properly monitoring and observing the market. Some Member States have filled that gap, such as Italy.

2. 4. 4. *Quia timet* Injunction

In the field of consumer protection, especially in common law countries, there is one other form in which an action for an injunction can be granted, and which particularly fits to consumer protection cases, namely a *quia timet* injunction. Besides suing after an actionable wrong has occurred, a consumer as a plaintiff may bring an action when an actionable wrong is threatened or imminent but has not yet been committed.¹⁰³ The form of final *quia timet* injunction does not even require proof that damages would certainly occur. It is enough to prove that the action in question was calculated to infringe the plaintiff's rights. This kind of injunction has not been adopted in continental European legal systems. The tradition of granting *quia timet* injunction has only been maintained in Ireland and the UK. However, under UK law the plaintiff needs to show that damage to his business is certain and very likely. While in other Member States such an action may cause many doubts or may simply

⁹⁹ The Product Liability Directive is limited only to damages and does not provide for an injunction order. However, Directive 2001/95 (OJ L 11, 15.01.2002, p. 4) does contain injunctive types of remedies in the form of product recall and product withdrawal. In the Italian model, individuals are granted judicially related remedies, since they are entitled to seek product recall and withdrawal. See also: Judgment of the Court (Grand Chamber) of 17 April 2007, *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, Case C-470/03 (ECR 2007, p. I-02749); Cafaggi/Micklitz (2007), *Administrative and Judicial...*, p. 34-35.

¹⁰⁰ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.01.2002, p. 4-17).

¹⁰¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 07.08.1985, p. 29-33); Tulibacka (2009), *Product Liability Law in Transition: A Central European Perspective*.

¹⁰² In Lithuania, the legislation does not list the relevant measures as such, but rather includes a list of areas of consumer interest in respect of which an injunction is available. Schulte-Nölke/Twigg-Flesner/Ebers (2007), *The Consumer Acquis...*, p. 389.

¹⁰³ Sheridan (1999), *Injunctions and Similar Orders*, p. 115-118.

be disallowed according to the rules of law, the *quia timet* injunction could be employed as a powerful regulatory tool of market control as well as a potential eliminator of unlawful and abusive practices, covering those actions that have not even occurred yet. This kind of injunction would provide significant protection for consumers, while the abusive action continues, but before any serious damage occurs. Certainly, this type of injunction may be regarded as a highly preventive regulatory measure if adopted in a national legal system of the Member States.

2. 5. Variety of Form and Species in the European remedial landscape

The specific forms of injunctions have been developed to varying degrees in the Member States. The simple classification provides only a general idea on the conceptual framework of injunctions in consumer law. As soon as one delves into the national particularities of Member States it is very difficult to place an action for an injunction in any kind of theoretical framework. The mechanisms in place to effectuate injunctions differ from one Member State to another.¹⁰⁴ Their final shape very much depends on the way the consumer protection directives are implemented in the national legal orders. Indeed, the manner of implementation influences the way in which an action for an injunction is read in the national legal regime.¹⁰⁵ In the European Union all pieces of legislation and documents issued by the EU must be translated into the languages spoken in 28 Member States. The conjunction of possible and real obstacles may definitely facilitate misunderstandings as regards wording and understanding of the action for injunction. Open-ended spaces for legal misunderstandings are detrimental to the overall objective of increasing consumer protection throughout the EU. Any adaptation might work in a national context, but in the internal market environment, in cross-border transactions and applications¹⁰⁶, this national variety which conflicts with the overall objective enshrined in Art. 114 Treaty on the Functioning of the European Union (TFEU) that all consumer measures should achieve a “*high level of protection*”.

¹⁰⁴ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An Analysis and Evaluation...*; Schulte-Nölke/Twigg-Flesner/Ebers (2007), *The Consumer Acquis...*

¹⁰⁵ See Chapter I 1.6., 3.1.

¹⁰⁶ See Chapter III 4., IV 4.1.

One has to bear in mind that there are 28 different national legal systems in the European Union. Each one has its own traditions, principles of law and legal culture.¹⁰⁷ Each has rules concerning governance, the judicial system, procedural rules, remedies, enforcement measures, time limits. National judges have different interpretation methods and apply law based on national legal doctrines, constitutional principles and specific procedures, not to speak of language. Hence the operation of EU law is to large extent dominated by the national procedural environments. This diversity has the potential to conflict with the principle of uniform application of the law, which the ECJ constantly stresses in its judgments.¹⁰⁸ Correct enforcement and therefore effective protection of EU rights before national jurisdictions must be achieved sooner or later through the creation of adequate sanctions for affected individuals.

The Injunction Directive is simply a first step. Its complex nature demonstrates how difficult it is for the EU to achieve even a minimum level of collective protection *via* a stop order mechanism. Exactly the complexity and the diversity of the remedy of injunction opens the door for an autonomous genuinely European understanding of what should be understood by an injunction. At least in the field of consumer law, the Injunction Directive provides an authoritative ground to lay down the foundations of a European understanding, that cuts across the different national regimes and intricacies.

3. Definitions of Injunctions in the Injunction Directive

One way at the European level to clarify the concept of injunctions is to either focus on its procedural content in the text of the Directive or the substantive context enshrined in the Annex to the Injunction Directive.

3. 1. The procedural-related Context

In its procedural context, the Injunctions Directive is the first EU directive in the consumer law field and the first legal regulation of a procedural nature at the EU level to

¹⁰⁷ Van Dam (2009), *Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law*, Kentucky Law Journal, Vol. 20(1), p. 281-308.

¹⁰⁸ Tridimas (2006), *The General Principles...* p. 25, Frenz (2007), *Handbuch Europarecht: Beihilfe- und Vergaberecht*, Vol. 3, p. 536; Rinkevičiūtė (2005), *Ensuring of the Uniform Interpretation of the EU Law in the Judicial Practice of the Member States*, Jurisprudencija, Vilnius, Vol. 72(64), p. 81-89; Beck (2013), *The legal Reasoning of the Court of Justice of the EU*, Oxford.

include the legal definition of an injunction.¹⁰⁹ An action for an injunction as contained therein is recognised as legal remedy *sensu stricto*. It is the first consumer protection remedy, to have been granted *ex lege* a collective dimension.¹¹⁰ This is a reason why, the Injunction Directive has appeared as a significantly innovative element for the whole field of consumer law.¹¹¹ Thus far, a vast majority of consumer protection directives, even where they include an injunction mechanism, have only covered individual enforcement schemes. The situation changed once the Injunction Directive was issued, because the substantive law directives thanks to the Injunction Directive have brought about equality for collective and individual enforcement.¹¹²

3. 1. 1. The Meaning of the Notion of “Injunction”

Although the word injunction itself appeared in the title of the main procedural directive in the field of consumer protection called “*full title of the Injunction Directive*”, the notion *per se* has reappeared neither in the content of the Injunctions Directive nor in any other directives on consumer protection. Although it is mentioned in the title of the Injunction Directive, it is not mentioned in the text of the Directive onwards. If one examines the entire title of the Injunction Directive, the Directive as of its subject matter can be recognised as a misnomer.¹¹³ It clearly suggests that the Injunction Directive provides for a kind of enforcement procedure, so-called “*injunctive procedure*” applicable in the field of consumer protection. In reality, as it appears from the text only, the Injunction Directive essentially introduces a principle of mutual recognition of standing for consumer organizations which is a complete novelty in the field of consumer protection. The notion is unfamiliar, and because there is no collective injunction available in the national legal systems.

¹⁰⁹ Dougan (2004), *National Remedies Before the Court of Justice. Issues of Harmonization and Differentiation*, Modern Studies in European Law, Oxford and Portland, Oregon, p. 198-200.

¹¹⁰ Article 1.1 of the Injunction Directive and Recital (3) to the Injunction Directive.

¹¹¹ So-called “*extraordinary*” nature of injunction has been appreciated in various jurisdictions; See: Fiss (1978), *The Civil Rights...*, p. 1.

¹¹² In Italy, the history of injunction begins with the introduction of the remedy of injunction in the Article 7 of the Directive 93/13/CEE (OJ L 095, 21.04.1993, p. 29 – 34) recognized as ‘*remedio generale e preventivo*’ which includes the individual dimension. The Injunction Directive was implemented in Article 1469 sexies of the Italian Civil Code. They exist both in parallel, hence the injunction may be used either in individual or collective form.

¹¹³ Koch (2001), *Non-class Group Litigation Under EU and German Law*, Duke Journal of Comparative and International Law, Vol. 11, Spring/Summer, p. 355-367.

In the Explanatory Memorandum to the Injunction Directive there may be found a statement concerning the legal context of injunctions.¹¹⁴ The Memorandum does not explain the current existing situation regarding the remedy of injunction. It rather focuses on the remedy of injunction as being a mixture of substantial and procedural elements deepening the “mess” by introducing the remedy of injunction without providing a clear definition. Last but not least it underlines that although the notion of injunction exists in all Member States, it is mainly understood in a national-related context without many links with the EU concept. Therefore a general scheme of injunction may be found in national jurisdictions of all EU Member States, but its meaning depends mainly on the particularities of national legislation.

If one takes into consideration that the Injunction Directive and the few substance-related directives on consumer protection listed in the Annex to the Injunction Directive provide *de facto* for the same injunctions, even if the wording in the Injunction Directive and substance related directives slightly differs, the dimension of a developing common European concept comes abundantly clear. Article 7 of the unfair contract terms Directive might serve as a starter to understand what the problem is all about. It seems as if the legislator carefully avoided using the word injunction which might have created confusion and misunderstandings:

- (i) *Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.*
- (ii) *The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.*
- (iii) *With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.*

Provisions of this kind have been identified as substantive law/substance related rules on injunctions. Art. 7 makes sense only in the context of the control of unfair standard

¹¹⁴ The Proposal for the Injunction Directive states on page 5 that “The inventory shows that the notion of an action for an injunction exists in all the Member States”.

contract terms. The wording is so different that it is hard to identify whether a national concept actually represents an injunction according to the scheme of the Directive or not. One has to examine the national structures of injunctive mechanisms, so as to decipher whether the mechanisms in the unfair terms Directive complies with the national rules.¹¹⁵ In fact the first case decided by the ECJ - *Invitel*¹¹⁶ - demonstrates how the Advocate General and the Court struggle with the wording of Article 7 – even though *Invitel* strictly speaking does not provide much clarification of what should be understood by an injunction. Both are much more concerned with the potential effects of terms declared non-binding in injunction procedures related to other consumers having suffered from the same contract term.

3. 1. 2. A Legal Scheme of Action for Injunction

Article 2(1) of the Injunction Directive provides for at least some kind of a definition. *It verba legis* means “(...) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement”. The Article requires that the Member States designate a court or administrative authority that has the competence to deal with applications for an injunction.

The powers of the court or authority concerned must include the possibility:

- (i) to issue an order to stop the continuation, or prohibit an infringement;
- (ii) to initiate the publication of a decision in an appropriate format or/and of a corrective statement to deal with the continuing effects of the infringements; and
- (iii) to make an order for penalty payments for non-compliance, but only if it might be applicable in domestic legal system of the Member State.

The procedural definition of injunction clearly states that the order for the cessation or prohibition of an infringement is a basic element of an action for an injunction. If an order has been given in a form of cease or prohibitory order¹¹⁷ and leads to the termination of an illegal activity and provides for their prohibition in the future, this means that is exactly the main injunctive order in the sense of Article 2(1) of the Injunctions Directive. As mentioned previously, the inhibitory injunction draws the line for limitation of the certain wrongful activity, while the prohibitory injunction prohibits the repetition of the wrongful activity in

¹¹⁵ Micklitz (2005), *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith*, Cambridge.

¹¹⁶ Judgment of the Court (First Chamber) of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (not yet published); Micklitz (2013), *A Common Approach...*

¹¹⁷ Groussot (2003), *The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?* Legal Issues in Economic Integration, Vol. 30(3), p. 221-248.

the future. Both the species of injunction which modifies an individual's behaviour bringing the practice to an end and/or preventing from repetition of unlawful activities in the future.

Two other elements of the legal definition of injunctions, such as publication of the decision or an order providing for penalty payments for non-compliance into the public purse are understood as "*additional elements of an action for an injunction*", which demonstrates that the legislator was also concerned with the potential effects of the injunction and the behaviour of the addressee.¹¹⁸

Since the legislator was looking for a way out from a general "*cease and desist order*", somehow getting outside the basic model of injunction expressed in Article 2(1)(a) - the basic model of injunction has been supplemented, and somewhat strengthened by the additional elements included in Article 2(1)(b) providing an order for publication of decision, and Article 2(1)(c) providing an order for payment into the public purse.¹¹⁹ The order for publication of the decision, or corrective statement although adopted by all Member States, does not introduce a major innovation in the national enforcement frameworks of the Member States.

The order for publication has not been recognised as a novelty in national procedures of Member States, because most of the Member States recognize in their national legal models corresponding elements of legislation providing for the same legal tools. National decisions and judgments are usually published in national newspapers, regional, local, daily newspapers or regular journals published by courts, and today also *via* the Internet. Although a vast majority of the Member States directly implemented Article 2(1)(b) of the Injunction Directive, there is also a minority of the Member States¹²⁰ in which there was no need for implementation because of a general principle deriving from national legislation stating that decisions by a court are available publicly.

The situation differs in terms of the order of payments into the public purse or any beneficiary designed under national legislation according to Article 2(1)(c) of the Injunction Directive. Although the order for payments has been adopted by all Member States¹²¹ with a

¹¹⁸ Bogdan (1998), *Some Reflections Regarding the New EU Directive on Injunctions for the Protection of Consumers' Interests*, Consumer Law Journal, p. 369.

¹¹⁹ See: Schulte-Nölke/Twigg-Flesner/Ebers (2007), *The Consumer Acquis...*, p. 391.

¹²⁰ A single exception of the lack of implementation comes from Lithuania, where court decisions must be publically available.

¹²¹ Legislation based on the provision has been adopted in Belgium, Czech Republic, France, Germany, Greece, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Spain and Sweden.

single exception¹²², the procedural requirements posed for the order depends on the various Member States.¹²³

The third element of the legal definition of an injunction, which is indicated in Article 2 (1)(c), concerns an order for payments to be made to the public purse or any other beneficiary designed under national legislation. This element of a remedy of injunction may be permitted under the national law of Member States, if a national enforcement scheme requires such a supplementary measure. An order of this kind may include daily penalty payments that must be identified as typical penalty fines. The order may be also granted if the defendant defaults on payment to the public purse in the sense that he fails to meet the deadline for compliance with the injunctive order. These elements in the form of payment orders are not a path breaking innovation. They are found in the major part of national legislation (for example French astraints) as well as in the 1980 Brussels Convention¹²⁴, respectively the Regulation 44/2001.¹²⁵

Even in European law, there is a predecessor, Directive 84/450/EEC on misleading advertising, now replaced *via* Directive 2006/114/EC.¹²⁶ Both publication and corrective statements are common means in the control of unfair and misleading advertising. However, the Injunction Directive has a much broader scope. A long list of directives are included, not only commercial practices but also standard contract terms. There is no attempt to discuss the potential impact of the two new elements with regard, for example, to standard contract terms. For example, what is a corrective action in the control of standard terms? Does it mean that the user has to publish a note in a newspaper or on his website that this and that term has been found “*non-binding*” (to stay within the legal framework of Directive 93/13/EEC) or does it mean that the user has to publish the new version of the standard term which is meant to replace the incriminated version. So much has been written in the field of commercial practices on the notion of corrective statement¹²⁷ and in particular consumer organisations

¹²² A single exception comes from Cyprus, where Article 2(1)(c) there is no provision akin to as Article 2(1)(c) of the Injunction Directive.

¹²³ The situation varies, e.g.: (I) In Italy a court has a right to set up a deadline to comply with the order. If the defendant fails to meet the deadline, the court can require the payment of a lump sum into the public purse, or impose a periodic penalty payments per diem as long as the infringement continues. The money is paid to the State funds, and allocated accordingly within a Ministry of Productive Activities, (II) In Poland the fine oscillates between 500 and 10,000 EU for each day.

¹²⁴ Convention in jurisdiction and the enforcement of judgments, Title III Recognition and Enforcement, Section 2 Enforcement, Article 43.

¹²⁵ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.01.2001, p. 1-23), Article 49.

¹²⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21–27).

¹²⁷ Howells (2007), *Unfair Commercial Practices Directive*, The Yearbook of Consumer Law, p. 375-376.

have placed hope on the impact of potential corrections.¹²⁸ It is somewhat disappointing that none of this reached the EU level, neither during nor after the legislative process.

The true innovation results from the model of injunction in Article 2(1)(a) as a “*cease and desist order*”. This constitutes the foundational basis of the EU instrument. It suffices to compare the wording with the rather opaque reading of Art. 7 of the unfair terms Directive. Art. 2 (1)(a). The other two elements of the Injunction Directive shall rather be regarded as supplements, or additional security tools alongside the basic scheme of order, but they do not enjoy equal legal value.

3. 1. 3. Injunction as *sui generis* Legal Remedy

The action for injunction does not fit into the general classification of remedies. Injunctions differ significantly among the Member States and at the EU level. This is a reason why injunctions shall be classified as a *sui generis* legal remedy.¹²⁹ Four reasons can be given for the here-promoted understanding. Firstly, they can be classified as in-between as they contain procedural and substantive law elements. Secondly, injunctions may impact both the individual and general, namely collective consumer interest. Thirdly, injunctions affect both individual and collective enforcement mechanisms. Fourthly, the legal effect of injunctions can be *inter partes*, *erga omnes* or extended to third parties. Such mixture provides evidence that injunctions are somehow outside the scope of the general rules on classification of civil law remedies. Injunctions simply do not stick to the rules of jurisprudence upon which legal notions are defined. Hence, the framework for injunctions as per the Directive requires new answers.

Civil remedies are in place so as to either protect individuals or a general consumer interest. Injunctions are equipped to protect both providing a peculiar innovation in the field of consumer protection since they are recognized as enforceable remedies addressed to both individual and collective schemes. Any classification of injunctions in the abstract sense leads to a risky generalization of injunctions. Specific and characteristic features of injunctions may only be caught by a case-by-case analysis. The flexibility of injunction as a legal remedy may be considered both as a weakness and as a strength. The extent of the limits depends on the

¹²⁸ Report on the application of the Unfair Commercial Practices Directive, BEUC position paper, Ref.: X/2013/049, 24 June 2013, <<http://www.beuc.eu/publications/2013-00457-01-e.pdf>> accessed on April 17, 2014.

¹²⁹ Nowacki/Tobor (2012), *Wstęp do Prawoznawstwa*, Warszawa, p. 167-178; Micklitz (2013), *A Common Approach...*

particularities and nuances of injunctions, which are rooted in national laws, as the EU directive gives only the legal framework that shall be developed in the national scheme of enforcement.¹³⁰ This leads to a certain level of uncertainty behind the injunction mechanism. An effective consumer policy would require a clearer indication of what the merit of an action for an injunction is, how the remedy operates and what real the final effect could be. In order to properly analyse injunctions, one would be forced to search for the “*hints*” and “*stimuli*” in interpretation and in legal practice. In case of the remedy of injunctions, only the practical experiences may demonstrate the real context and the real merit of an action for an injunction in the consumer law area. This kind of analysis provides evidence of the huge diversity of understanding of the content of an action for an injunction. Although Member States have chosen different implementation techniques¹³¹, the theoretical basis and the legal construction of the remedy remains always the same.¹³² This sounds like a contradiction but it is not. The overall idea which holds the remedy together is the “*cease and desist*” logic, but behind this broad concept a myriad of solutions show up if one digs into the transposition and the application of the injunction in the Member States. Member States are united in their diversity. The remedy of an action is a perfect example for this overall philosophy that ties the whole Union together.

3. 1. 4. Binding Effect of Injunctions

The *sui generis* nature of the remedy of injunction becomes clear in its legal effects. It breaches the principle of *res judicata*. An injunctive order does not only apply to the potential parties to a case, but also - quite exceptionally¹³³ - may bind third parties, namely the parties not related to the case at hand. The binding effect of injunctions may also differ among sectors or subjects. Thus far *res judicata* is heavily discussed in the field of standard contracts, less so in commercial practices.¹³⁴ The binding effect of injunction varies in each Member

¹³⁰ Prechal (1995), *Directives in European Community...*, p. 49-61.

¹³¹ Schulte-Nölke/Twigg-Flesner/Ebers (2007), *The Consumer Acquis...*, p. 403-405.

¹³² Judgment of the Court of Court of Appeal in Warsaw of 21 May 2004, *Miejski i Powiatowy Rzecznik Praw Konsumentów w L. v „U” Polska Spółka z o.o. w Warszawie*, Case VI ACa 843/2003; Judgment of the Court of Competition and Consumer Protection of 10 October 2004, *Stefania W. v Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie*, Case XVII Amc 56/2004; Judgment of the Polish Supreme Court of 3 February 2006, *Miejski i Powiatowy Rzecznik Konsumentów v UPC Polska Spółce z o.o.*, Case I CK 297/05.

¹³³ Micklitz (2010), *The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts*, EUI Working Paper LAW 2010/12, Florence; Cafaggi/Micklitz (2009), *New Frontiers of Consumer...*, p. 171-200.

¹³⁴ Micklitz (2007), in Van Boom/Loos, *Collective Enforcement of Consumer Law: Securing Compliance in Europe Through Private Group Action and Public Authority Intervention*, European Studies in Private Law.

State¹³⁵ since it is grounded in the particularities of national procedural laws. Three forms have to be distinguished *inter partes*, *erga omnes* and third party effect.

EU law does not provide for a clear indication, setting aside *Invitel*¹³⁶ where the ECJ for the first time had to deal with the binding effects of an injunction in the field of unfair contract terms. As a rule, a judgment has effects only *inter partes*. Hungary and Poland have granted injunction orders *erga omnes* effects¹³⁷, while in Italy *inter partes* effect dominates. Germany is to be located somewhere in the middle as a certain extension to third parties is possible, under restrictive conditions.

(i) *INTER PARTES*

As a general rule, injunctions orders issued by courts bind the parties to the case only. These depend on who has standing, public agencies, consumer organisations or business organisations on the side of the plaintiff and the defendant, normally a company, or a business or in the field of standard contract terms, also the business organization which recommends the use of a standardized model of contracts, usually bound to a particular sector. *Inter partes* effect is a general rule of adjudication in most of the Member States, as spelt out in the Report on Implementation of the Injunction Directive¹³⁸ “(...) [*injunction*] it is mandatory only with respect to the case and the parties in question” [emphasised added MO].

The Injunction Directive itself does not give any indications as to the binding effect of judgments given upon the scheme of the Injunction Directive. No hints can be found in the Directive 2005/29/EC on unfair commercial practices (UCPD) which has introduced the action of injunction in b2c advertising relations. Somewhat more specific is Directive 93/13/EEC on unfair terms in consumer contracts. The above quoted Article 7 of the Directive must be read in combination with Article 6(1): “*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 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*”.

¹³⁵ Cafaggi (2009), *The Great Transposition...*, p. 116.

¹³⁶ Judgment of the Court (First Chamber) of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10 (not yet published). Further discussed by Micklitz (2013), *A Common Approach...*

¹³⁷ Micklitz (2010), *Reforming European Unfair Terms Legislation in Consumer Contracts*, *European Review of Contract Law*, Vol. 6(4), p. 348-383.

¹³⁸ Report from the Commission concerning the application of Directive 98/27 of the European parliament and the Council on injunctions for the protection of consumers of 18 November 2008, COM(2008) 756 final at para. 25.

This implies that Article 6 sets standards for the action of injunction. This was the gateway for the ECJ in *Invitel* to lay down basic European standards for the potential binding effect of the injunction order on individual contracts. However, just like the Injunction Directive, the unfair terms Directive provides for minimum standards only. There remains much leeway for the Member States concerning how to implement the EU requirements into the national law and how to render it compatible with the existing national procedural laws. In Poland this leeway led to a lively discussion of *Invitel*¹³⁹, in relation to the necessity of adjusting the existing regime of injunctions to guarantee consumer protection whilst at the same time complying with national market needs.

(ii) *ERGA OMNES*

Two of the Member States - namely Poland and Hungary - have granted *erga omnes* effect to injunctions in the field of unfair contract terms. The *erga omnes* approach states that the effect of the injunction is not limited to the parties involved in litigation since it extends to all consumers, who in the future may be bound by the terms which have been declared non-binding in the injunction procedure, and all other future entrepreneurs¹⁴⁰, who while using the unfair terms, may be stopped automatically by the injunction order issued previously in a given case.¹⁴¹

In Poland, *erga omnes* effect of a judgment comes into being once it is inserted into the Court National Register of Unfair Contract Terms.¹⁴² Therefore, those cases addressed to the specific field of Unfair Contract Terms breach *res judicata*. In practice the National Unfair Terms Register is ineffective, and the quality of registration of clauses rather doubtful. The clauses in the Register are defined *ad casum*. They *de facto* fit the case at hand. The excerpt of the case may, however, not have the same meaning for overall similar cases. The use of the judgment may be misleading and confusing in some cases, in others simply irrelevant. *Erga omnes* effect, so impressive in nature, is in practice a failure. To give an example: in the Register there are many clauses like “*the indication of the jurisdiction of the Court in Poznan is not allowed in consumer relationships*”. The *erga omnes* effect refers only to business

¹³⁹ Currently, the Government Legislation Centre is working on a proposal introducing the third party effect instead of the criticised *erga omnes* effect of judgments.

¹⁴⁰ Judgment of the Court of Appeal in Warsaw of 2 December 2005, Case VI ACa 705/05.

¹⁴¹ Judgment of the Court of Appeal in Warsaw of 27 November 2012, Case VI A Ca 342/12; Judgment of the Polish Supreme Court of 11 October 2010, Case III SK 19/2007; Judgment of the Polish Supreme Court of 5 June 2007, Case CSK 117/2007; Judgment of the Polish Supreme Court of 20 June 2006, Case III SK 7/2006.

¹⁴² Resolution of the Polish Supreme Court of 19 December 2003 r. (II I CZP 95/03, OSCN 2005, nr 2, poz. 25).

activities to in Poznan, and the clause does not bind third parties, for example, in the area of Gdańsk or Warsaw. This results in a sort of territorially limited *erga omnes* effect. This is certainly not the *erga omnes* effect in the meaning of the code of civil procedure. Secondly and equally important, the National Register of Unfair Clauses quite often contains only the excerpts of judgments, hence they are disclosed in the Register with no explanation. The unlawful term is taken out of the context of the judgment, thus it can easily be misinterpreted.

In Poland *Invitel* triggered a long standing useful political discussion on how to make *erga omnes* effects more operational, which might lead to the abolition of *erga omnes* effective and its replacement by a more limited concept.

(iii) **THIRD PARTY**

Injunctions “*affect*” third party rights. In the simplest question is whether a consumer who is party to a contract that contains a contract term which has been subject to an action of injunction in which exactly that term – and to make it even more striking – with exactly the same user of the term - may be legally bound. *Invitel*¹⁴³ deals with a collective action of the Hungarian National Consumer Protection Office against a telecommunications services provider which used a unilateral price amendment clause without a valid reason and without explicitly describing the method by which prices could vary. In her Opinion, the Advocate General argued: “*These terms are therefore intended for use in a large number of consumer contracts. They can therefore be combated effectively only if the decision of the national court finding a particular term to be unfair is accorded fairly wide applicability*” (para 51). And the ECJ decided: “*These terms (...) are not binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same GBC apply*” (para 38).

The Advocate General focused on *the effect utile* of the Directive, which requires an extension of *res judicata*. Without further discussion the ECJ limits the effects to “*those who have concluded with that seller or supplier a contract*”. The submission of the Hungarian court does not require a distinction to be drawn between the two forms of extension of *res judicata* as the relevant Hungarian law does not include third parties. The addressee of the extension of *res judicata* is a consumer in whose contract the same term can be found. It is the

¹⁴³ *Invitel*, cited supra note 43; See also for a comment: Bottino (2012), *Arrêt Invitel: L’Effet ultra Parties des Clauses Déclarées Abusive*, *Revue européenne du droit de la consommation*, Vol. 1, p. 587, 590; See also: Micklitz/Reich (2014), *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, *Common Market Law Review*, Vol. 51(3).

term itself, which has been declared illegal, even though the contract is applied identically by another business. Are Member States now obliged to introduce a principle of *erga omnes*? One might therefore question whether further clarification is needed in order to decide on the mandatory character of the extension to third parties. Even if Member States are obliged to introduce an extension of *res judicata*, they have substantial leeway in shaping the extension. This goes together with the principle of procedural autonomy as stressed by the Advocate General (Opinion in *Invitel*, para 28).

As far as the Polish example is considered, the EU scheme of third party effect is taken as an instance of how the future solution may look like. Since it is a procedural matter, the Member States benefit from a large measure of discretion. The Polish proposal opts for a solution under which a judicial injunctive order made in the context of the unfair contract terms legislation will be binding on all consumers who are recognized as parties to unlawful legal relations, and all those who may potentially be bound, provide the contract is concluded with the same entrepreneur.¹⁴⁴ Therefore, the extension of judgments understands the consumers as a group that should be particularly protected; however, the extension will not cover other entrepreneurs who are using the same unlawful term. The judgment will be binding only against the party who had infringed consumer rights. Third parties such as entrepreneurs who infringe consumer rights, even if on the same legal basis as the case at hand and even if the contract term is identical, require a new judgment. This seems to be in line with what the Advocate General in *Invitel* proposed. However, it has to be recalled that the ECJ carefully avoided that distinction - meaning that it is unclear whether the Directive bans unlawful contract terms independent of the user, or whether the Directive bans only unlawful contract terms in which the user is always the same, and only the consumers as contract holders might differ. It remains to be seen what happens in Poland and maybe also in Hungary. At least the Polish proposal found support in the professional environment because the *erga omnes* effect has often been criticised as going too far.

3. 2. The Hybrid Nature

The hybrid - procedural and substantive - nature of the remedy of injunction has brought about a dualism of definitions. This partially substantial and partially procedural

¹⁴⁴ Micklitz (2010), *Reforming European Unfair...*, p. 352-354.

dimension is a characteristic feature of the Injunctions Directive. In this respect, the Injunction Directive is unique.

The Injunctions Directive was the first and most pioneering directive in the field of consumer law with a directly expressed procedural dimension. However, the Injunction Directive is not limited to a purely procedural dimension because of the complex legal nature of the Annex to the Injunction Directive. The Annex to the Directive lists material-related consumer protection directives that are concerned with substantive law matters.

Thus, the overall legal nature of the Injunction Directive cannot be characterized as either procedural or material-related giving rise to its hybrid nature. Again, the injunction stands at the junction of two different currents, which the Injunction Directive has bound in one legal act. The hybrid nature of the Injunction Directive may cause uncertainty because in fact the whole legal context of injunctions becomes ambiguous. Injunctions as per the Directive are applicable to those actions arising under the consumer protection directives enumerated in the Annex. Three of the directives listed in the Annex, Directive 93/13/EEC on unfair contract terms¹⁴⁵, Directive 97/7/EC on distant selling¹⁴⁶ (today Directive 2011/83/EU)¹⁴⁷ and Directive 2005/29/EC on unfair commercial practices¹⁴⁸ (replacing Directive 84/450/EEC on misleading advertising¹⁴⁹ in b2c relationships combine substance and procedure, substantive protection and the action of injunction. The procedural nature of the Injunctions Directive is expressed in a way that touches upon the issue the legal standing of the potential actors to an injunction action.

- (i) Art. 2(1)(c) delineates that the Member States can impose monetary damages in cases where violators fail to comply with the orders.
- (ii) Art. 4 of the Injunction Directive introduces mutual recognition of legal standing for consumer organisations in cross-border litigation within the EU. Thanks to the Injunction Directive, the Member States courts have to accept standing of non-national “*entities*” subject only to a screening of potential abuse (see Chapter IV).

¹⁴⁵ Unfair Contract Terms Directive 93/13/EEC of 5 April 1993 (OJ L 95, 21.04.1993, p. 29–34).

¹⁴⁶ Previous version: Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent, (OJ L 144, 04.06.1997, p. 19–27).

¹⁴⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64–88).

¹⁴⁸ Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22–39).

¹⁴⁹ Previous version: Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, (OJ L 250, 19.09.1984, p. 17 – 20).

- (iii) Art. 5(1) of the Injunction Directive lays down time limits concerning the procedure in that it gives a limited window for infringers to resolve the issue at stake before an injunction is to be issued. Article 5 last sentence and Recital (15) of the Injunction Directive permits concerned parties to bring an action for an injunction if the wrongdoer does not cease infringement within two weeks after being notified of the violation.

The Injunctions Directive has been designed as a procedural piece of legislation, as a kind of code of procedure that has been dedicated specifically to the injunctive procedure. The overall structure appears as a code of civil procedure with all its particularities regarding its matter of regulation. It includes provisions concerning the scope of regulation and assigns roles to those entities qualified to bring an action for an injunction. It outlines an innovative definition of intra-community infringements to which the Directive applies, the existence of a prior consultation procedure, which by itself is identified as a procedural measure of specific nature, and an obligation to report the infringement alongside provisions on a wider action.

However, there are two important elements of a purely procedural nature that have not specifically been provided for. The Injunction Directive remains silent on costs.¹⁵⁰ The question concerning the cost-bearer of an action for an injunction is crucial for the success or failure of a remedy.¹⁵¹ Such a provision has been quite arbitrarily excluded from the scope of the Directive, and the matter was left to the discretion of the Member States. It is up to them to decide the issue of costs according to domestic legislation, for example whether the loser pays principle should apply. The second issue, on which the Directive is silent, is the decision on which law applies in transborder injunction litigation.¹⁵² The current uncertainty leads to an open-ended discussion on whether the substantive infringement at issue shall be judged on the basis of the law of the Member State where the infringement has its origin¹⁵³ or based on

¹⁵⁰ The “*loser-pays*” principle is the predominant legal rule in vast majority of Member States. Austria, Bulgaria, Denmark, England, Wales, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Poland, Spain and Sweden. Poland, Portugal, France, Italy and Spain require evidence. For a deeper analysis: Hodges/Vogenauer/Tulibacka (2009), *Costs and Funding of Civil Litigation: A Comparative Study*, Oxford Legal Research, Paper No. 55; Hodges/Vogenauer/Tulibacka (2010), *Costs and Funding of...*; Reimann (2012), *Cost and Fee Allocation in Civil Procedure: A Comparative Study (Ius Gentium: Comparative Perspectives on Law and Justice)*, p. 151-127.

¹⁵¹ Report on the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interest, Brussels, November 18, 2008, COM(2008) 756 final, p. 11, 15-16, para 4.1.

¹⁵² Report on the application of Directive 98/27/EC, p. 7; Report on the application of Directive 2009/29/EC, p. 6.

¹⁵³ Article 6 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.07.2007, p. 40-49).

the law of the Member State where the impact of the infringement is felt.¹⁵⁴ The decision is thus fundamental in all instances where there is a choice between two different bodies of legislation offering different degrees of protection. The revised version of the Injunction Directive did not provide for any changes although there is ample evidence of the limited importance of the injunction order in cross-border litigation.

3. 3. The Substantive Context

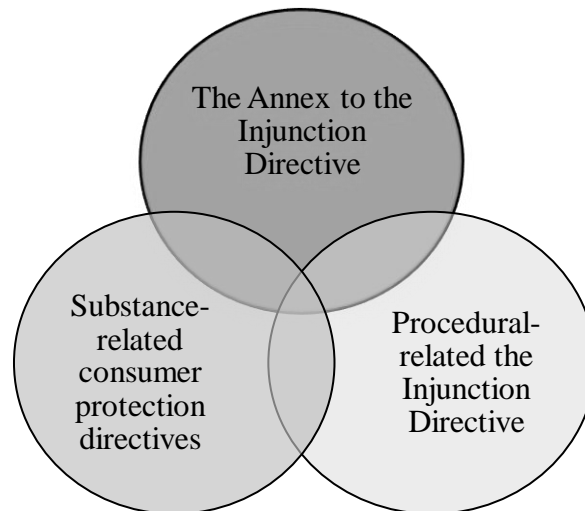
The substantive law enshrined constitutes an integral part of the Injunction Directive. It includes a non-exhaustive list of substantive law directives on consumer protection, some of which contain specific procedures on injunctions. This kind of dualism is likely to add uncertainty as to the relationship between these two separate sets of rules. It is quite troublesome in terms of practical use of the Directive - let alone that the legislator does not make any effort to clarify the relationship between the Injunction Directive and, for instance, Directive 93/13/EEC on unfair contract terms. One may assume that the substantive law related provisions on enforcement in Directive 93/13/EEC were introduced on the basis of an urgent need to provide a normative background on which that particular directive could be based. It was the best solution for the EU legislator allowing it to compensate for the deficit of enforcement measures in the field of consumer law, especially considering the fact that the Injunction Directive came into existence only 5 years later (1998).

Neither the recitals nor the legislative history provide a deeper understanding behind the choice of the substantive law directives and their legal classification within the scope of the Annex. Most of the Member States understand it as a mere minimum requirement and make injunctive actions applicable according to all laws and regulations that aim at the collective protection of the consumer. In such circumstances, it is left to the national courts to decide whether the purpose of national laws is to protect the collective interests of consumers or not.¹⁵⁵ Here it might be difficult to figure out what kind of legal solution has been adopted

¹⁵⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.01.2001, p. 1-23).

¹⁵⁵ Hungary is referring to illegal activities causing substantial harm to a wide range of consumers or illegal activities affecting the wide range of consumers. Cyprus has not established any specific reference to “*collective interests*”. Portugal goes even further than the EU scheme, because the notion of collective interest covers „*individual*” and „*diffuse*” interests of consumers, similarly in Spain: Judgment of the Court of First Instance in Barcelona of 17 October 2003, *Asociación de Usuarios de Servicios Bancarios* (“*Ausbanc Consumo*) v *Caixa d’Estalvis de Catalunya*, ECR I-4785. No coherence of enforcement mechanisms in this regard is to be recognized in the Member States.

in other Member States. Indeed, considering that there are 28 Member States, both parties to the contract would technically need to be aware of 28 different enforcement options.



Graph Nr 4 - The relationship between the Injunction Directive and substantive law directives in the field of consumer protection.

Graph Nr 4 illustrates the mutual dependence and interrelationships between different schemes of substantive and procedural measures bound by the scope of the Injunction Directive. Enforcement provisions, included in the substantive law directives have been *de facto* given a procedurally related nature. For this reason, an injunction can be classified as a substance-related remedy. Although they are delegated in completely different pieces of legislations, differently defined and they appear in a completely different context, substantive law injunctions are identical in content with the strictly procedural injunctions defined in the Injunction Directive.¹⁵⁶ Moreover, this kind of dual-solution has brought a situation in which two sets of rules on injunction operate in parallel and are simultaneously in use. No legal indication is given as regards the relationship between them. Neither the Injunction Directive nor substantive law directives which are listed in the Annex to the Injunction Directive indicate which legislation prevails.

Although the Annex to the Injunction Directive circumscribes in a rather precise way the scope *sedes materie* of the Injunctions Directive, the list of substantive law directives included in the Annex is not exhaustive. The Directive has only listed those directives concerned with the collective protection of economic consumers and does not refer to health and safety related Directives.¹⁵⁷ Positively speaking the list of directives makes up a

¹⁵⁶ Micklitz (2005), *The Politics of Judicial...*, p. 229-230.

¹⁵⁷ See Chapter II 2.1., 4.5.

significant part of the European *corpus iuris consumentis* on the economical non-subjective spectrum of consumer protection of the Internal Market as a whole.

The substance-related directives on consumer protection include a kind of descriptive definition of procedural mechanisms that can certainly be understood as an action for an injunction. However, substance-related directives do not specify the precise word “*injunction*”.¹⁵⁸ The notion “*injunction*” does not appear in the substance-related regulations at all, even if consumer law directives include a remedy of injunction in so-called substance-related form. These remedies are exactly the same if their context is taken into consideration. Therefore, to make a distinction and to compare injunction mechanisms included in both sets of regulations, it might be possible to draw a distinction between constellations where the Injunction Directive provides for the collective dimension and where the Directives in the Annex provides only for the substantive context, whereas on the edge we find those Directives in the Annex where the substance-procedure related context existed already before Directive 98/27/EC, but where the Injunction Directive inserted a particular procedural layer.

As a rule, legal definitions should be formulated in the same manner where they regulate exactly the same legal issue.¹⁵⁹ This rule, however, does not apply to the Injunction Directive; although it has to be recalled that the explicit purpose of Directive 2011/83 was to establish more consistency and coherence in consumer contract law.¹⁶⁰ However, the situation is different in the Directive on Injunctions, exactly because of the combination between substance and procedure. It gives way to a kind of a hybrid of substantive and procedural law elements settled simultaneously upon the Injunction Directive. More than this, their parallel validity and applicability gives rise to confusion. The opinion of the Advocate General in *Invitel*¹⁶¹ can be understood as a serious attempt to streamline the meaning of an injunction within the scope of Directive 93/13/EC.¹⁶² In combination with the Injunction Directive the task would have even been greater.

¹⁵⁸ See Chapter I 3.1.1.

¹⁵⁹ Wronkowska/Zieliński (2012), *Komentarz do Zasad Techniki Prawodawczej*, p. 16, 188. With a reference to the Polish legal language see also: Malinowski (2006), *Polski język prawny. Wybrane zagadnienia*, Warszawa, p. 156.

¹⁶⁰ Directive 2011/83/EU on Consumer Rights (OJ L 304 z 22.11.2011, p. 64-88).

¹⁶¹ Opinion of Advocate General Trstenjak delivered on 6 December 2011 to Case C-472/2010, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=115981&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=176282>>.

¹⁶² Micklitz/Kas (2014), *Overview of Cases Before the CJEU on European Consumer Contract Law (2008-2013)*, Part I, European Review of Contract Law, Vol. 10(1), p. 1-63.

4. National Design of Injunctions

At first sight, it appears that there is nothing substantial to compare between Member States since Member States have in most of the cases recast action for an injunction into a domestic pattern. The prevailing dualism therefore exists at the national but also at the European level. Most of the definitions are based on a direct translation of the Injunction Directive. Therefore, definitions of an action for an injunction differ from one Member States to another including translation differences and potential linguistic mistakes, though they contain a common European “core”.

Many different legal and non-legal factors have played a role in establishing this conceptual diversity within the European Union. The phenomenon shall be considered through different prisms, ranking from simple translation mistakes, to the leeway granted to Member States on the basis of the principle of procedural autonomy. This diversification of injunctive schemes is often influenced by the different normative frameworks of the Member States and their various legal cultures and histories.¹⁶³ Other differences emanate from variations in legal cultures and legal traditions present in each of the Member States. In fact, the European enforcement map presents a patchwork of enforcement schemes of action for an injunction. This patchwork and diversity of injunctions is grounded in the variety of definitions and a diversity of the legal contexts of injunctions as well as diversity of implementation of the remedy of injunction into national frameworks of the Member States. This enforcement patchwork looks even more fragmented and complex if the enforcement mechanisms for injunctions are considered, since many different enforcement models are developed in various Member States.

Until now, no clear theory has been advanced to explain the differentiation of wording that has occurred with regard to injunctions. Apparently, there is no sense to invoke the principle of procedural autonomy or *de minimis* nature of the Injunction Directive as the only explanation of the differentiation of injunctions which has arisen in Europe. No clear answer for the mishmash of wordings can be found either in the EU's documentation on collective redress, or in documents strictly referring to the Injunction Directive.

There remains a difficulty in understanding the concept of injunctions by both lawyers and non-lawyers. Only lawyers and professionals tend to explain nuances and particularities of the injunction order; still - only a few of them - heard about the Injunction Directive and

¹⁶³ Van Dam (2009), *Who is Afraid of Diversity...*, p. 281-308.

only some of them recognize the injunction as a particular tool of consumer protection, mainly by indication of its collective dimension.¹⁶⁴ In case of consumers, most might feel disappointed and disorientated, as the concept has no clear meaning. Addressees of the Injunction Directive have been left without any normative guidelines on how to deal with procedures and how to face the potential problems regarding injunctions in the field of consumer protection, and further, how to handle its complexity.

5. From Diversity to Convergence

Is there a way out of the diversity? A short summary might highlight this diversity:

- (i) There is no common understanding of what an injunction is,
- (ii) There are no common European procedural standards for collective enforcement, except the minimum standards,
- (iii) There is no common understanding of the collective interest,
- (iv) There are consumer matters, which demonstrate a collective dimension, for example unfair terms, whereas others do not for example the Directive on consumer sales¹⁶⁵,
- (v) There are different collective enforcement mechanisms, *via* organisations with the help of the judiciary, and *via* administrative agencies,
- (vi) There is an unclear relationship between directives providing for individual remedies and those providing for individual and collective remedies, and those providing for collective remedies alone,
- (vii) There are 28 different national variations,
- (viii) There is the cross-border dimension, which adds a further three layers: jurisdiction, applicable law, and execution.

In the following section I will propose a concept which is deeply, though not openly, enshrined into the European enforcement scheme. I have termed it the dualism of enforcement, the fusion of individual and collective enforcement.¹⁶⁶ This modest concept,

¹⁶⁴ Authors personal communication to lawyers and legal counsels in Kraków, Gdańsk and Warsaw, Florence and Brussels which proved that around 80% of lawyers in Poland never practice injunctions, and only heard about it. The remedy of injunction is known to members of consumer organizations, in particular Federacja Konsumentcka, Warsaw, and is more often a subject of academic discourse than practical use. The judges interviewed are familiar with a remedy of injunction, but they do not regard it as necessary procedural instrument of consumer protection. They prefer traditional civil law remedies.

¹⁶⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 07.07.1999, p. 12–16).

¹⁶⁶ Report on the application of Directive 2009/22/EC, p. 9, stating that “(...) consumers whose rights have been infringed have to enforce their rights by bringing an action before ordinary Court, either individually or collectively, in those Member States where collective redress mechanisms exists”.

which is anchored in the Injunction Directive opens up new avenues for debate and for a stronger interaction between individual and collective enforcement schemes cutting across the boundaries of national and European consumer laws, of maximum and minimum harmonization.

5. 1. The Thesis of Dualism of Enforcement Measures

The concept of dualistic enforcement measures answers the question concerning the lack of clarity with regard to the relationship between enforcement provisions that have been included in the substantive and procedural laws on injunction. In the Injunction Directive, the dualism of enforcement measures arises as a kind of hidden aim of the Injunction Directive, which causes the Injunction Directive to be used as a tool for both individual and collective enforcement. This aim, however, has not been openly addressed in the Injunction Directive itself, but is signalled by what I call “*the mark of reference*”¹⁶⁷ in the Annex to the Injunction Directive, which must be understood as the deeper layer of the scheme of individual and collective enforcement measures. Unfortunately, most of the Member States have concentrated on a literal interpretation of the Injunction Directive or any other directive related to the Injunction Directive *via* the Annex, without attempting to understand the deeper meaning of dualism enshrined in it.

The Injunction Directive does not exclude individual enforcement schemes within its scope of application. Currently in Europe different enforcement modes exist and are used in parallel. The message behind the Injunction Directive has been over-simplified. This is why the real the aim of the Injunction Directive has not been discovered. Indeed, most of the Member States gave more attention to *locus standi* of consumer associations. In fact, this was not the only aim of the Injunction Directive, although the mutual recognition of standing is triggered by the adoption of the Directive.¹⁶⁸

Obviously, the mutual recognition of standing is an important issue, but it also paves the way for a new understanding of the bundle of the individual and collective enforcement methods, substantive and procedural matters, and last but not least of combining the

¹⁶⁷ By “*a mark of reference*” I mean footnote (1) to be found in the Annex to the Injunction Directive. This footnote refers to points 5, 6, 9 and 11 listed in the Annex to the Injunction Directive, which include specific provisions on injunctions.

¹⁶⁸ Micklitz (1993), *Cross-Border Consumer Conflicts – A French-German Experience*, JCP, Vol. 16(3), 411-434.

individual rights of consumers with ADR schemes.¹⁶⁹ The latter, in the entire scheme of substance related consumer directives, is only addressed to individuals.¹⁷⁰ ADR¹⁷¹ and ODR¹⁷² do not deal with collective enforcement.¹⁷³ The legal scheme of the Injunction Directive brings together consumer rights in a collective and individual manner. It draws links between individual rights and ADR and ODR schemes *via* the substance related directives in the Annex to the Directive which always refer to some form of ADR.

The thesis of dualism of consumer protection enforcement looks at injunctions as a remedial mechanism from a holistic perspective. An injunction is not only a tool, which is meant to lead to an approximation of an injunction in the collective dimension, but also a tool, which is aimed at merging different elements of an individual and collective nature, a tool which advocates for a combination of substance and procedure, for individual and collective, public and private element. Therefore, injunctions in European law have two faces leading to an intersection of elements differing in nature, which have not been merged so far. There are arguments needed which underpin this thesis. I find evidence for this proposition in the particular meaning of the Annex of the Directive and in the history of the Directive, the socio-political environment in which collective enforcement was discussed prior to the adoption of Directive 98/27 and in the discussion on collective redress¹⁷⁴ after the Directive has been adopted. The starting point of the analysis is the search for an answer to the following questions: why has the EU legislator issued the Injunction Directive at all? Why does the regulation leave so many options open? How does it fit to the field of consumer law enforcement? To answer these questions one has to locate the Injunction Directive into the overall structure of EU policies. The catalyst for this investigation is the absence of any reasonable explanation of the legal remedy. Thanks to the “*mark of reference*” the dualism of the enforcement measure has turned into a basis for the literal interpretation of the

¹⁶⁹ C. Hodges refers to so-called “*CADR*” - Consumer ADR in order to describe the entire frame of alternative disputes resolution frames, in this regard: Hodges (2012), *New Modes of Redress for Consumers: ADR and Regulation*, Oxford Legal Studies Research Centre, Vol. 57, p. 1-14.

¹⁷⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, (OJ L 165, 18.06.2013, p. 63–79).

¹⁷¹ Directive on consumer ADR 2013/11/EU (OJ L 165, 18.06.2013, p. 63–79).

¹⁷² Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (also called ‘Regulation on consumer ODR’ (OJ L 165, 18.06.2013, p. 1–12).

¹⁷³ See Chapter I 5.3.

¹⁷⁴ Communication from the Commission and of the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them [SEC (2007)321, 322, 323], <http://ec.europa.eu/consumers/overview/cons_policy/EN%2099.pdf> accessed on April 17, 2014.

enforcement in consumer protection legislation. The EU legislator has established an enforcement mechanism of consumer rights on two parallel levels.

5. 2. The Role of the Mark of Reference in the Thesis of Dualism of Enforcement Measures

The mark of reference is the tool to overcome the existing diversity. It is aimed not only technically to stress a distinction between injunctions in line with the body of the Directive and injunctions in line with the specific provisions covered by the substance related directives, listed in the Annex to the Injunction Directive. The mark of reference has a much higher legal value since it marks a shift from diversity to convergence. It changes the reading of the Injunction Directive and clarifies the ambiguities caused by the Directive.

One may wonder why the mark of reference makes this distinction, and what is the reason for such a procedure. The answer to this enquiry cannot be found in the Injunction Directive or in the working documentation and reports on implementation of the Injunction Directive. The mark of reference should be treated as one of the key elements in interpreting the relationship between substantive law and procedure in the Injunction Directive. The EU legislator by linking the procedural rules in the Directive to the Annex construed a new relationship and a new understanding of the collective side as enshrined in the first series of articles and the substantive side, as enshrined in the Annex. They are not regarded as being separate but as being interlinked. Previously, the action for injunction existed only in a few substance related fields, such as unfair terms and unfair commercial practices. But now, we find a long list of directives where the prime addressee is the individual consumer, who in addition has standing in Directive 93/13/EEC on unfair contract terms in consumer contracts¹⁷⁵, Directive 97/7/EC on the protection of consumers in respect of distance contracts¹⁷⁶, Directive 2001/83/EC relating for medicinal products for human use¹⁷⁷, Directive 2005/29/EC concerning unfair-b2c practices.¹⁷⁸ The integration of all these directives makes sense only if the decisive step forward is fully realized and the link between the collective and the individual is noted. This link has also been discovered in Recommendation 2013/396,

¹⁷⁵ Unfair Contract Terms Directive 93/13/EEC (OJ L 95, 21.04.1993, p. 29).

¹⁷⁶ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 171, 7.07. 1999, p.12).

¹⁷⁷ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating the medicinal products for human use: Article 86 to 100 (OJ L 311, 28.12.2001, p. 67).

¹⁷⁸ Unfair Commercial Practices Directive 2005/29/EC (OJ L 149 z 11.06.2005, p. 22-39).

which is the first document from the Commission to affirm the parallel existence of various means of redress - either individual or collective.

The mark of reference stresses the distinction between the substantive law and procedural law, between action for an injunction deriving from the substantive law and that deriving from the Injunction Directive itself. The Member States have adjusted or amended their national understanding of an action for an injunction without paying particular attention to the mark of reference, which has not been mentioned in any of the explanatory notes on implementation of the Injunction Directive either at the EU or national level.

5. 3. Historical, Legal and Political Background for the Thesis Dualism of Enforcement Measures

EU directives are always a response to a certain policy of the EU toward its plan or a strategy. Considering the working documentation prepared prior to the publication of the Injunction Directive, it seemed at first sight that the Injunction Directive was adopted in a speedy procedure¹⁷⁹, somewhat *ad hoc* without an analysis of the need for the introduction of such a measure. However, the Injunction Directive in a manner similar to most of the directives on consumer protection had to undergo a rigorous consultation process. Therefore, it is unlikely that the dualism of enforcement measures might be a result of a neglected legislative technique, a legislative mistake or a kind of oversight on the side of the EU legislator. The dualist emphasis was perhaps this – discovered by chance, since there is no single word in the EU documents regarding any line of dualism. Was that a missing point of the Injunction Directive? An oversight of the legislator? Among the various EU activities, already the Commission has shed a light on thesis of dualism very latterly after the implementation of the Injunction Directive, while national legal models and the modes of implementation of the Injunction Directive paved the way for dualism creating an issue itself.

It seems that the overall scheme of the remedy gave the background for the idea of enforcement in the field of consumer law. This kind of legislative technique must have been used in a certain sense; however, a more profound legal analysis of the issue shall be conducted. It can be excluded that the particular structure of the Injunction Directive was not introduced without conveying a message. However, it is difficult to “*decode*” the intention of

¹⁷⁹ An Injunction is often characterised as a remedial instrument for which timing matters. As Recommendation 2013/96 states injunction procedure shall be defined “(...) where appropriate by way of summary proceedings (...)”, (Article 1(1)).

the EU legislator in this regard.¹⁸⁰ No explanation for the mark of reference is given either in the legal documents or in the EU position papers.

Let us assume that the existence of the dual purpose is the sheer result of a slow and “*patch-work-character*” of the legislative process on the part of the EU during the course of its work on the procedural aspects of consumer law. There was no experience with regard to the legislative technique that should have been employed in creating a complex and coherent framework of consumer protection legislation of a procedural nature. Certainly, the structure of the Injunction Directive and the fact that both the Directive and the substantive laws provide for actions for an injunction cannot be regarded as a pyramidal legislation according to which some pieces of legislation may be randomly duplicated. It would seem that the EU legislator supported the structure of the Injunction Directive and maintained the double set of actions for injunctions so as to realise EU policies and strategies that aim at a high level of consumer protection in the internal market. The Injunction Directive constitutes an important element of the more complex EU plan.

The Injunction Directive was one of the elements of the EU’s policies and strategies that were meant to provide for important innovations and changes in consumer protection policy at both EU and national level. It represented the missing link in the overall structure of enforcement schemes, which previously did not provide for collective actions and did not include collective measures. In consideration of the growing interest in collective enforcement ideas imported from the US, the EU instigated a policy focusing on the development and improvement of collective redress measures within the European Union. The Injunction Directive, being a minimum harmonisation directive, like most of the consumer protection directives with the exception of the unfair commercial practices Directive¹⁸¹, does not prevent Member States from adopting, or maintaining, more favourable provisions to protect consumers. Member States have relied extensively on this minimum harmonisation measure, which to a certain extent also affected the diversity of injunctions within the EU. However, regardless of the level of harmonisation, the Injunction Directive has led to important innovation in the field of consumer protection, which is simply overlooked when constantly stressing its minimum character.

The need for the development of collective redress measures was expressed, for the first time, by Ms. Maglena Kuneva, the then European Union Commissioner for Consumer

¹⁸⁰ No indications have been provided by the Report on Implementation of the Directive 98/27/EC COM(2006) 744 final.

¹⁸¹ Unfair Commercial Practices Directive 2005/29/EC (O.J. L 149 z 11/06/2005, p. 22-39).

Protection, at a conference on collective redress held in Lisbon at the end of 2007. While stressing “*how important it is to ensure that consumers can confidently enforce their rights across the European Union*”¹⁸², the Commissioner acknowledged that “*collective redress, both judicial and non-judicial, could be an effective means to address this problem*”.¹⁸³ Although the Injunction Directive has confirmed moves to tackle this issue, its effectiveness leaves much to be desired. In her speech, the Commissioner took a very categorical and severe stand against class actions, but she did not express any opinion as regards actions for an injunction, which although classified as part of collective redress measures, has always been separated from other collective redress measures. The Commissioner did not explain the diversity of the action for injunction, but only stresses its diversity without giving any further explanation of this how the injunction varies among other civil law remedies. Although the Commissioner has criticised class actions as a model of collective enforcement that could be applicable in Europe, she did not mention at all the quite ambiguous nature of an action for an injunction among other collective tools of consumer protection.

Further attempts to improve consumer enforcement schemes regarding collective redress measures are expressed in the EU Consumer Protection Strategy 2007-2013.¹⁸⁴ Although the Strategy lists many different priorities as regards consumer protection policy, it is often concerned with a high level of consumer protection and pressure to strengthen the enforcement of consumer protection rules. First of all, the EU considers it necessary for better monitoring of the national enforcement regimes through surveys, national reports and other monitoring tools. It has announced the creation of collective redress mechanisms for eventual breaches of the EU rules. Although the Commission seriously considers collective redress schemes in the Strategy, the action for an injunction does not appear throughout the text. The European Commission adopted in 2012 the European Consumer Agenda - the new consumer policy programme - with its strategic vision for EU consumer policy, for the years to come. The Consumer Agenda aims to maximise consumer participation and trust in the market and is very much in line with the previous one in that it puts ever more emphasis on enforcement.

A chronical lack of attention to actions for an injunction may be understood as flowing from two issues: (i) the injunction is employed in Europe in a proper manner, so that there is

¹⁸² Silvestri (2010), *The Difficult Art of...*, p. 101-112.

¹⁸³ Kuneva (2007), *Healthy Markets Need Effective Redress*, Speech - Saturday 10 November 2007, <www.ec.europa.eu/commission_barroso/kuneva/speeches/speech_10112007_en.pdf> accessed on April 22, 2014.

¹⁸⁴ Communication from the Commission and of the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them.

no need to make any comments on this at the European level, the nature of remedy is clear and understandable or rather that (ii) the Injunction Directive explores a scheme of collective enforcement that can be recognized as a pattern for overall collective enforcement schemes to be implemented in the European Member States. The break through, however, came with the adoption of Recommendation 2013/396 in 2013.¹⁸⁵ Whilst not binding, it underpins and confirms the understanding of the Injunction Directive as a tool which could only be understood correctly if the parallelism of collective and individual enforcement is taken into consideration. For the first time, the EU undertakes concrete steps and took a view on collective redress mechanisms, with a particular focus on remedy of injunction which has finally been settled into the entire framework of European collective redress measures.¹⁸⁶ Without doubt as to the coverage of injunction by collective redress measures, a remedy of injunction has been covered by the scope of collective redress. This is a sign that injunctions shall be governed - as the rest of collective redress measures - by the common principles on collective action mechanisms indicated by the Recommendation 2013/396, and even going further a remedy of injunction gives a pattern for the entire framework of collective redress measures to be governed by common principles on enforcement.

The Recommendation 2013/396 provides some basic principles on collective redress enforcement instruments to be taken into account by the Member States when implementing collective injunction and a mechanism of compensation in the framework of collective redress mechanisms. However, the Member States have no obligation to implement the instruments of a collective nature since it can only be obligatory if passed either through a directive or regulation. The EU legislator accepts a heterogeneous, patchwork-structure to the European enforcement map, or recognises some missing issues affecting enforcement gaps as far as collective redress concerned.¹⁸⁷ In the remarks of the Recommendation 2013/396¹⁸⁸ attention is given to the national legal traditions, following that requirement – also to legal cultures of the Member States. Finally, by the EU documentation and in the literature, the injunction mechanism was recognized as a one of the most important tools for collective redress.

¹⁸⁵ Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against claims for damages caused by violation of EU rights, COM(2013) 396/EU (OJ L 2013, L 201/60, p. 60-65; hereafter Recommendation 2013/396).

¹⁸⁶ A remedy of injunction is already mentioned in the title of the Recommendation 2013/396, and in Section III and Section IV.

¹⁸⁷ Stadler (2013), *The Commission's Recommendation on...*, p. 483-488.

¹⁸⁸ Article 1(1) of the Recommendation 2013/396; European Parliament Resolution of 2 February 2012 on Toward a Coherent European Approach to Collective Redress (2011/2089/(INI)).

Injunction as a remedy constitutes a definition of “*collective redress*”¹⁸⁹, which is crucial for the entire Recommendation 2013/396. The injunction appears as a pattern for the collective framework of redress to be used as an example for the rest of the species of the collective redress mechanisms. It suffices to say, injunction exists, but it is quite risky to say that injunction is already developed in the national frames. First of all, the definition of collective redress refers to injunctive collective redress, as a matter of fact this collective dimension introduced by the Recommendation 2013/396 leads to the conclusion that previously established injunction were also given an individual dimension. In the preamble to the Recommendation 2013/396, the EU legislator also refers to the individual form of enforcement which exists side by side with collective models of enforcement, and in no stage of implementation of collective measures, individual redress enforcement mechanisms lose their legal force - since they are standing side by side.¹⁹⁰ The choice of the enforcement path either individual or collective depends on the nature of claim, and of the case at hand - whether it is, or it is not, addressed to “*mass harm situations*”.¹⁹¹ If not, a choice of the individual frame is also possible. This appears clearly to be a proof of confirmation for the thesis of dualism of enforcement schemes. It has been stressed in para. 14 of the Preamble to the Recommendation 2013/396, which states that the EU legislator introduces the injunction and compensatory collective aspect, but “*(...) It is without prejudice to the existing sectorial mechanisms of injunctive relief provided for by Union law*”. Hence, the individual frames of injunction remedies introduced by the consumer protection directives are not excluded because of the introduction of the collective compensatory measures. That would mean that the individual and collective measures are kept side by side, and the two enforcement modes are used to realised different goals, so they do not interfere with.

A remedy of injunction has finally been recognized, however, the Recommendation 2013/396 does not provide for any specific and technical details of the remedy in comparison to the Injunction Directive, except some new matters regarding the costs, funding or the law applicable¹⁹², and issues which in particular would refer to collective redress schemes.¹⁹³ The Recommendation 2013/396 helps to clarify the general understanding of the remedy of injunctions among other consumer remedies and re-define the scope of the remedy of

¹⁸⁹ Recommendation 2013/396 Section II, 1 (I) definition of “*collective redress*”.

¹⁹⁰ Recommendation 2013/396 – para. (8) and (9) of the Preamble.

¹⁹¹ As defined in Recommendation 2013/396 Section II, 3(c).

¹⁹² See Chapter III 5.4, 5.6.

¹⁹³ Recommendation 2013 focuses on the opt-in principle to be applicable in collective redress frames.

injunction and introduce specific principles relating to injunctive collective redress.¹⁹⁴ A collective remedy of injunction is defined as a judicial or administrative order, aimed at cessation or prohibition of consumer rights granted by European Law. The definition stresses a requirement of procedural speed of the injunction procedure, and its future effect focuses on prevention of certain infringements. The second of the provisions addressed exclusively to the injunction order is focused on efficient enforcement of injunction orders – on this basis, the Member States are supposed to introduce a measures as previewed in Article 2(1)(b) and (c) of the Injunction Directive, which in the Recommendation 2013/396 are called “*sanctions*”, which in fact are aimed at ensuring effective compliance with the injunction order.

Although the Recommendation 2013/396 does not provide for a significant innovation as to the new modes of enforcement, it definitely strengthens the meaning and the position of the remedy of injunction among other civil law enforcement frameworks.

6. Individual and Collective Enforcement Side by Side

There is no doubt that the substance related regulations/as listed in the Annex to the Injunction Directive are dominated by individual enforcement mechanisms. Indeed, before the Injunction Directive was issued, for a long time the question of whether “*consumer organisations*” should be granted legal standing at all was on the table for discussion and they were not allowed to take any kind of legal action on behalf of consumers.¹⁹⁵ Although consumer organisations have still not been granted legal standing *ex lege* on the basis of the substantive law directives, they have been trying to establish confirmation of their legal standing in civil procedure. Their efforts were rewarded with the Injunction Directive in that they have finally been granted legal standing therein. This has been recognised as important in improving the position of consumer organisations in Europe.

As a result of this, the Injunction Directive has simplified cases to which consumer associations are party in that it has done away with the need for extensive interpretation as to the legal standing of consumer organisations on the basis of the substantive law directives. Their standing has finally been confirmed according to rules as opposed to extensive

¹⁹⁴ Recommendation 2013/396 – Section IV, para. 19.

¹⁹⁵ Dickie (1996), *Article 7 of the Unfair...*, p. 112-117, Cases : Judgment of Spanish Supreme Court of 4 November 2010, *AUSBANC v Caja Provincial de Ahorros de Jaén*, 663/2010, Rec. 982/2007; Judgment of the Court of First Instance in Barcelona of 17 October 2003, *Asociación de Usuarios de Servicios Bancarios* (“*Ausbanc Consumo*) v *Caixa d’Estalvis de Catalunya*, ECR I-4785; Judgment of the Provincial Court of Balearic Islands of 17 March 2003, *Asociación de Usuarios de Banca (Ausbanc) v Banca*; March, 146/2003; Judgment of Court of Palermo of 2 June 1998, *Adiconsum v. Soc. Aeroviaggi*, 2077/1998.

interpretation and legal analysis conducted by the European Union Court of Justice. However, in granting the specific right to legal standing to consumer organisations the EU legislator may deprive individual consumers a right of action. In fact, this right has already been provided for in the substantive law directives. For this reason, the EU legislator has left both sets of rules intact leading to a parallel development of individual and collective enforcement mechanisms.

The thesis of dualism is underpinned by a literal interpretation of the Injunction Directive and directives listed in its Annex. The fact that these two series of rules have been kept on an equal footing might be recognized as a sign that the EU has intentionally enforced the dualist nature of injunctive measures in consumer law. The thesis of dualism assumes that the EU legislator with the introduction of the Injunctions Directive decided to create a parallel enforcement model of consumer protection. A consumer may be protected on the basis of the substantive law through means of collective enforcement measures that derive from the Injunction Directive or by individual enforcement means that are included as specific provisions on enforcement in the substantive law directives on consumer protection. The choice of the enforcement model depends on the qualification of the interest that is to be protected and this element – a justified legal interest of consumer - affects the choice of one of the enforcement models. Therefore, the EU legislator aimed at strengthening consumer protection *via* a parallel model of enforcement that depends on the interest to be protected.

It is arguable whether the substantive law directives on unfair terms in consumer contracts and unfair commercial practices should be recognised as supplementary measures with regard to the Injunctions Directive. This significant diversification of substantive law is caused by the fact that most of the directives are minimum harmonisation measures and are therefore implemented differently from one Member State to another. Therefore, different implementation of substantive law will influence the final shape of the national legislation. This is inclusive of procedural schemes and even more so since the Member States have been left a certain leeway in this regards so they may design procedural rules according to the needs of legal practice and national particularities. This may be regulated in the substantive law, as in case of an individual consumer who is granted standing in the Directives enlisted in the Annex to the Injunctions Directive (as far as subject related directives are concerned legal standing is granted to “*organisations*” only in exceptional circumstances), or may be put in the framework of the procedural regulations like the Injunctions Directive, which is only concerned with collective enforcement. The EU has offered the consumer a double-track

enforcement mechanism aiming at the protection of the consumer interests, be they individual or collective.

Such dualism of enforcement of consumer rights is justified in the consumer protection policy of the EU that is aimed at strengthening the position of consumers to render them active and confident internal market players. The enforcement path should be chosen to protect the justified legal interest of consumers either individual or collective. The fact that the Injunction Directive, is more of a procedural nature should not be understood in the sense that the EU legislator wanted to add procedural provisions, intended to resolve the problem of mutual recognition of legal standing with the Community alone, to the framework of consumer protection regulations. Although the Injunctions Directive helped to improve some procedural aspects of consumer protection regulation, this was not the only reason for which the Injunction Directive has been added to other items of consumer protection legislation.

Individual judicial enforcement has always played a strong role as the ECJ instrumentalised private individuals to foster the European integration process by granting individuals rights and even particular remedies.¹⁹⁶ The same has never been true with regard to collective private enforcement. However, from the same substantive law basis two different enforcement models can be depicted as the substantive law on consumer protection may serve as a basis for the legal framework for the collective enforcement of consumer rights. This is the decisive step forward in the Injunction Directive. Both collective and individual interests must be protected in parallel and their legal protection may also be exercised in parallel.

Most of the Member States allow for the legal interpretation of substantive law regulations in the field of consumer protection in a manner that has led me to confirm this thesis in relation to legal practice. Although regulations do not introduce restrictions as regards the competition between both sets of rules, in some of the Member States, for example Poland, the fact that a consumer can join a collective suit, automatically closes the consumer's path to an individual claim. Nevertheless, if a consumer does not join a collective suit, the consumer has a right to act on the basis of the rules of the individual enforcement. We have a situation by which the same substantive law may be enforced in two different ways. The criterion of demarcation for my classification is the particular interest to be protected. Whose interest deserves for the protection? Whose interest has been infringed? Is it an interest of an individual consumer? Or is it an interest of a group of consumers whose interest has been collectively infringed? The choice of the enforcement path depends on a

¹⁹⁶ Cafaggi/Micklitz (2007), *Administrative and Judicial...*

certain interest that deserves protection. This is an element that will certainly influence the choice of enforcement path.

Therefore, it might be argued that an action for an injunction is a kind of new remedy in the field of consumer protection law. As a remedy, it is not completely new although it has always been recognised as a specific and extraordinary legal remedy. Its extraordinary nature derives from the fact that it is a remedy of a hybrid nature, a combination of different remedial solutions deriving from both the EU and Member States levels. Through the suggested parallel protection, the EU legislator has managed to avoid a disharmony concerning the substantive law regulations that to a significant extent create the shape of national legal orders while simultaneously securing the same level of consumer protection in both collective and individual instances.

Chapter II Procedural and Substantive Dimensions of Injunctions

1. Overview

The Injunction Directive combines for the first time two different schemes of enforcement: individual and collective. Until the Injunction Directive came into force, in consumer law matters individual enforcement has been presented *versus*, but never in conjunction with, collective enforcement. The Injunction Directive considers them both at the same level, and interlinked. Moreover, it builds links between individual and collective enforcement, in particular the Injunction Directive covers the relationship between substantive law and procedure. These two spheres of law have been interlinked in a very particular manner, which has not been exemplified so far in other consumer protection directives. Indeed, the Injunction Directive is the first of consumer law directives, which presents the atypical phenomenon of a joint approach to substantive and procedural law. The key to the understanding is the Annex.

The substantive law directives listed in the Annex have been bound to the procedurally related scheme of the body of the Injunction Directive which are tightened by a mark of reference.¹⁹⁷ In light of the therein proposed concept of dualism of enforcement measures¹⁹⁸, the Annex brings together substantive law and procedure, individual and collective enforcement.¹⁹⁹ The ambiguous relationship between substance and procedural cannot be explained other than through the prism of possible links between these two spheres of laws.

Therefore - and this is the aim of Chapter II - in a search for an explanation of this ambiguous relationship, I will look into theoretical and, where possible, practical aspects of the relationship between the substantive law and procedural law. The purpose is to analyse the interrelationship more deeply, starting from the dominant and traditional understanding of a clear-cut separation between substantive and procedure law, which however, does not fully cover the way in which the Injunction Directive has been conceived. More sophisticated and more practical models are needed²⁰⁰ to cover the particularities of the new regulatory device.

¹⁹⁷ See Chapter I 5.2., II 2.

¹⁹⁸ See Chapter I 5.1.

¹⁹⁹ Thus far, no one pays attention to the rule of the Annex and the mark of reference. Cafaggi has reached the following conclusion that “(...) both substantive and procedural rules (...) give claimants the choice between the two models of enforcement of the possibility of using them both, simultaneously or sequentially”. Cafaggi (2009), *The Great Transposition...*, p. 510.

²⁰⁰ There only a few cases on the Injunction Directive, <http://www.eu-consumer-law.org/casedetails1_en.cfm> accessed on May 10, 2014.

My overall hypothesis is one of complementarity between procedural and substantive law.²⁰¹ I will spell out the concept of complementarity after having discussed various doctrinal and theoretical concepts on the relationship between general and special laws which all turn out to be insufficient.

2. A Mixture of Spheres of Material and Procedural Law

Although the Injunction Directive touches upon both procedural and substantive law issues, the extent to which these two spheres interpenetrate each other remains unexplained in the EU documentation and papers, in the implementation of the Injunction Directive, as well as in the Injunction Directive.²⁰² This indeed may be a source of “*legal irritation*”²⁰³, because the mere fact of merging two separate areas of law in one single piece of EU regulation remains unexplained, legally unjustified and certainly under-theorised. The bold mix of procedural and substantive rules may be the consequence of the way in which European integration in the field of procedural law is going to happen, *ad hoc* in reaction to a concrete problem. Take distant shopping - a test case promoted and even financed by the European Union attempt to reveal the deficiencies of cross-border enforcement²⁰⁴ - unsystematic in that the EU has no competence to harmonise or legislate on procedural matters²⁰⁵, hidden in that the EU is not disclosing the full dimensions behind the Injunction Directive and experimental in that the EU is just trying out new avenues which are legally opened-ended and where only the ECJ can provide shape to an unfinished and incomplete legislative approach.²⁰⁶

Considering the different nature of both strands of the Directive: (i) the body, which is a procedurally related piece of legislation, and (ii) the Annex, which because of its content is related to substantive law, the Injunction Directives in its entire shape is not free from ambiguities, and incoherencies. Although it is difficult to assess the extent of the relationship

²⁰¹ The argument was been tackled by Caffagi/Micklitz (2007), *Administrative and Judicial...*, p. 20-21.

²⁰² Report on the application of Directive 2009/22/EC.

²⁰³ Teubner (1998), *Legal Irritants: Good Faith in British Law or How Unifying Law Ends in New Divergences*, *The Modern Law Review*, Vol. 61(1), p. 11-32. The notion of “*legal irritations*” was coined by Gunther Teubner. The transfer of a legal concept from one system to another will have unpredictable effects and will cause legal ambiguities.

²⁰⁴ See in more detail Chapter III 5.6.

²⁰⁵ Stuyck (2009), *Public and Private Enforcement in Consumer Protection: General Comparison EU-USA. Enforcement of Consumer Rights and Legal Redress for Consumers in the EU: An Institutional Model*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 65-69; Craig (2008), *The Institutional Balance Between EU Competence and Member State Autonomy*, Discussion Paper for Workshop The European Court of Justice and the Autonomy of the Member States, Ws RSCAS/LAW/2008-2009, p. 1-35.

²⁰⁶ Tridimas (2005), *The General Principles...*, p. 18-20, Tridimas (1996), *The European Court of...*, p. 199, De Waele/Van der Vleuten (2013), *Judicial Activism in...*, p. 639-666.

perhaps better described as the mutual interpenetration, there can be no doubt that the Directive differs from other consumer protection directives²⁰⁷, and *inter alia* is a unique one in terms of the structure and of the content. Concerning its double nature - binding in substantive and procedural law matters - the Directive for Injunction shall be classified according its substantive and procedural-related framework.²⁰⁸ This means that the Injunction Directive remains outside the scope of already existing classifications of remedies. The overall concept of a clear-cut distinction of rules of laws, although still existing in the civil law area²⁰⁹, appears outdated.

Article 1 of the Injunction Directive describes the scope of application of the Directive bringing a legal reference to the Annex of the Injunction Directive; therefore linking the scope of the Injunction Directive with the substantive law directives which determine the scope of its application, since the Annex to the Injunction Directive covers the substantive law directives to a large extent.²¹⁰

Therefore, already in its Article 1 of the Injunction Directives, the substantive and procedural law matters are bound to a single scheme of a single piece of legislation.²¹¹ Although the Annex to the Injunction Directive slightly differs from the general structure of the Injunction Directive, the Annex constitutes an integral part of the Injunction Directive. This is an extraordinary regulatory technique: the Annex enshrines the substance of consumer law but it constitutes part of a procedurally-related piece of legislation. The Annex enumerates a list of substantive related consumer protection directives, which have been selected according to the nature of the interests to be protected. The choice of and the limitation to consumer economic interests, however, follows only implicitly from the text of the enlisted Directives.²¹² The Commission has remained silent on this matter because none of the Reports of the Commission on application of the Injunction Directive²¹³ considered the legal nature of the substantive law directives, neither in its collective content nor the nature of the interest protected within their frame. Nevertheless, it is quite clear that all those substantive law directives, which are listed in the Annex aim at the protection of the economic

²⁰⁷ See Chapter I 3.2.

²⁰⁸ Sinaniotis (2005), *The Interim Protection of Individuals Before the European and National Courts*, p. 52.

²⁰⁹ Micklitz (2005), *The politics of Judicial...*, p. 298 as quoted "Usually, the two limbs of civil law substantive law and procedural law are kept separate".

²¹⁰ Schwartz (2000), *Loose Teeth in European Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, Georgia International and Comparative Law Journal, Vol. 28(1), p. 527-554.

²¹¹ Micklitz/Reich/Rott/Tonner (2014), *European Consumer Law*, 2nd edition, p. 355.

²¹² Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (OJ C 92, 25.4.1975, p. 1).

²¹³ Report on the application of Directive 98/27/EC; Report on the application of Directive 2009/29/EC.

interest of consumers since they all refer only to the protection of the consumer's economic interest. It is consistent with a legal basis for the Injunction Directive, which hardly focuses on protection of the economic interests in terms of “*a high level of consumer protection*” (see Article 114 TFEU)²¹⁴, and which is the most important legal value at stake.²¹⁵ The protection of health and safety and the protection of economic interests for consumers are not put at an equal footing.²¹⁶

The result is a quite uncommon combination since the criterion of consumer protection in the Injunction Directive was shifted, downgraded, reduced and lately replaced by the criterion of the protection of economic interests. It has to be recalled that both objectives form the core of European policy and both range equally high. There is little hope in leaving space for Member States to fill the gap and to add health and safety issues to the list. Health and safety is a subject of EU legislation for decades, from a consumer perspective mainly enshrined in Directive 85/374/EEC on product liability²¹⁷ and Directive 2001/95/EC on general product safety.²¹⁸ There was discussion during the legislative process and the public official of the European Commission, Dieter Hofmann²¹⁹, who represented the Commission in the negotiations with the Parliament and the Council, strongly advocated for the integration of these Directives into the Annex (at that time consumer safety was covered by Directive 92/59/EC - later replaced by Directive 2001/94/EC). Hofmann's proposal would have considerably enlarged the scope of the action for injunction but also created new areas of conflict between public enforcement of product safety and private enforcement.²²⁰

The substance related directives in the Annex have been selected according to the criterion of protection of consumer economic interest, with the focus on consumer contract

²¹⁴ As to the role and function of Article 114 TFEU see Chapter IV.

²¹⁵ On the fundamental right dimension, Benöhr (2013), *EU Consumer Law and Human Rights*, Oxford Studies in European Law.

²¹⁶ See Chapter II 2., II 4.5.

²¹⁷ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, (OJ L 210, 07/08/1985, p. 29–33).

²¹⁸ Directive 2001/95/EC on general product safety (OJ L 11, 15/01/2002, p. 4-17).

²¹⁹ By the time Head of Unit of DG Sanco, on the basis of the personal communication to the author.

²²⁰ The issue of private enforcement in the Area of Consumer Product Safety was taken into consideration by the Commission already in a new consumer policy strategy for 2007-2013 aimed at, inter alia, at boosting „*in terms of practice, quality and product safety*”. In the Consumer Policy Strategy for 2007-2013, the Commission planned, inter alia, the introduction of ‘collective redress mechanism’ for consumers. The Commission considered that private enforcement of product safety standards is necessary and appropriate complementary to the public enforcement regime. For more information to the pros and cons of private enforcement in the area of consumer product safety see: Bundesverband der Deutschen Industrie e. V. and Freshfields Bruckhaus Deringer, BDI Law and public procurement, *Private Enforcement in the European Union – Pitfalls and Opportunities. An analysis of existing mechanisms and instruments in the area of antitrust law, environmental law, consumer product safety and capital market law*, Section C – Private Enforcement in the Area of Consumer Product Safety, accessed on May 13, 2014, p. 35-49.

law matters, as well as those where the injunction procedure existed already - unfair commercial practices and unfair contract terms.²²¹ Formerly, the substantive law consumer protection directives have protected individual economic interests, but thanks to the Annex to the injunction Directive, which ties substantive and procedural law matters together, they cover both individual and collective enforcement elements. Since the Injunction Directive itself was not designed as a contract law measure in terms of the substantive law consumer protection directives, but rather as a procedural piece of legislation, what is at stake is of a different nature than all the rest of the consumer protection directives. It covers technical elements of the procedure for an action of injunction, such as the explicitly given legal standing of consumer organizations in the collective scheme of injunctions.²²² One might, therefore, wonder whether the Injunction Directive, which is full of technical and procedural details should not have been adopted in the form of the EC regulation. Even more so, as the Directive does not provide for a holistic view on the overall injunction procedure, but limits itself to some basic elements of the procedure. Whilst this might have been an unusual step in the mid-nineties, the transformation of the Brussels²²³ and Rome Conventions²²⁴ into Regulations²²⁵ opened up a new understanding of the regulatory technique. In theory the – consolidation Directive in 2009/22 – would have provided an opportunity. However, such an opportunity remained a hypothetical possibility, as the European Commission did not introduce such a proposal.²²⁶ The reason might very well have been that the Member States could have raised the argument that the scope of application should be limited to trans-border issues and that Article 81 instead of Article 114 would be the appropriate competence rule in the Treaty.²²⁷

The specific procedural nature of the Injunction Directive has been expressed by putting the mark of reference at the very end of the Injunction Directive - in the Annex. The mark of reference serves as a bridge between the substantive law related body to the Injunction Directive and the strictly procedural part based upon the Injunction Directive.

²²¹ Schulte-Nölke/Twigg-Flesner/Ebers (2007), *EC Consumer Law...*, p. 5-9.

²²² For more details as of the procedural aspects of the Injunction Directive.

²²³ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968 (OJ C 27, 26.1.1998, p. 1-27).

²²⁴ Rome I (OJ L 266, 09.10.1980, p. 1-19).

²²⁵ Accordingly: Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.01.2001, p. 1-23) and Rome I (OJ L 266, 09.10.1980, p. 1-19).

²²⁶ Nevertheless, a supplementary act to the Injunction Directive in the form of the Regulation 2006/2004 has changed the Commission view as of the form in which procedurally related piece of legislation could have been issued.

²²⁷ See Chapter IV 4.1.

There are various legal theories based on the assumption that²²⁸ a legal mark of reference included in a piece of legislation shall be understood as a linkage between two sets of rules of different legal nature.²²⁹ The mark of reference binds them together.

Nevertheless, the legal nature of the Annex to the Injunction Directive gives rise to questions concerning the close relation of the Annex to the substantive law directives. The legal nature of the Annex which introduces a substantive law dimension is - in theory- incompatible with the procedural dimension of the entire frame of the Injunction Directive.²³⁰ The two frames of substantive and procedural law matters simply vary to the extent that – at least in theory - they should not be bound together. It is not clear, why the EU legislator has shifted from using a previously developed legislative technique aimed at maintaining a clear-cut distinction between substantive law and procedure in the field of consumer protection to opting for a joint approach. A substantive and procedural conjunction was the only solution for combining the two spheres of law, which in fact tie individual and collective enforcement schemes. The specific legislative structure of the Injunction Directive has provided evidence for a thesis of dualism of enforcement measures in the area of consumer law.

Concerning the specific technical structure and untypical content of the Injunction Directive, the Directive itself is a complete novelty and can definitely be recognized as a *sui generis* remedy in the area of consumer protection. It is a piece of legislation which binds various schemes of laws, and matters upon a single scheme of consumer protection legislation, it shifts the focus from diversity of enforcement models to their convergence. It was possible thanks to the dualism of enforcement inbuilt within the scheme combining substantive and procedural law matters, which allows consumers to benefit from either individual or collective enforcement.

2. 1. Practical Implications of the Mixture for National Legal Orders

The Injunction Directive is a piece of legislation that was supposed to respond to the needs of legal practice as well as filling existing enforcement gaps in the scheme of the enforcement of consumer law. The combination of substantive and procedural law matters

²²⁸ Morawski (2002), *Wstęp do prawoznawstwa*, Toruń, p. 123-127. The Author discussed a rule of general mark of reference in civil codes regulations.

²²⁹ Tobor/Nowacki (2003), *Prawoznawstwo*, Kraków, p. 234-235.

²³⁰ The substance-related nature of the substantive law directive is expressed in their titles, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59), Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67), and others.

within the single scheme of the Injunction Directive was recognized as a way to fill the enforcement gaps in the national legal systems of the Member States, also *via* the development of the dualism of consumer law enforcement. Since the Injunction Directive was sketched as a flexible and a kind of “one suit fits all” enforcement instrument, it can be, depending on the situation, used either in individual or collective form.

The “*two-layer legal nature*” combining the individual and collective schemes of enforcement cannot be put into question by the Member States. In the process of implementation of the Injunction Directive, Member States amended both procedural and substantive laws schemes and they have introduced enforcement frameworks of a collective dimension²³¹ without giving much attention to a potential conjunction of individual and collective enforcement. It seems that the legal consequences of the mark of reference were underestimated. Member States implemented the Injunction Directive as a collective enforcement tool, stressing that the collective element emerged as crucial in a vast majority of the Member States. No attention was given to the individual frame of enforcement, which has already existed in the Member States. Furthermore, neither the Injunction Directive nor the working documents of the European Commission considered the interrelationship existing between individual and collective enforcement. The dualism of enforcement, and the possible links between individual and collective enforcement has become evident in Recommendation 2013/396²³², which for the first time pays more attention to individual enforcement²³³ in terms of the entire frame of collective remedies to be available in the field of consumer protection.²³⁴

2. 2. The Rule of Mark of Reference in the Mixture of Spheres

The mark of the reference serves as a tool to “*rescue*” individual enforcement and to put it side-by-side with the collective scheme introduced by the Injunction Directive. The implementation of EU laws has required a revision and amendments to both substantive law and procedural-related law in most Member States.²³⁵ Although all of the Member States have

²³¹ See Chapter I 1.6.2.

²³² Recommendation 2013/396 (OJ L 201, p. 60-65).

²³³ Recital 9 and 14 of the Recommendation 2013/396 in particular directly refers to individual enforcement measures which shall be accessible for consumers at equal footing. Their choice however may be determined by the nature of the legal interest to be protected, and the incentives related to that.

²³⁴ Recommendation 2013/396 (OJ L 201, p. 60-65).

²³⁵ Docekal/Kolba/Micklitz/Rott (2005), *The Implementation of the Directive 98/27/EC in the Member States. Study of the Institute for European Business and Consumer Law in Cooperation with the Consumer Protection*

met the general requirements of implementation provided for by *de minimis* nature of the Injunction Directive, the techniques of implementation vary since they are based on the national prerequisites dedicated to the particularities of each of the Member State. This is why the process of implementation of the injunction procedure in the Member States has increased diversity within the European Union, at least in the short term.²³⁶

Some Member States had already enacted special consumer protection laws and they have chosen a combination of the substantive and procedural law provisions in the single act of the Injunction Directive. Other Member States have implemented the Directive within the general legislative framework either a code of consumer law²³⁷ or as purely separate procedural pieces of legislation.²³⁸ There is no evidence to suggest that this diversity will become more coherent any time soon. Suffice it to say, the current scene represents a patchwork of many different legal solutions deriving from, among other things, variations in legal implementation.²³⁹ This diversity is, however, driving towards convergence, for the simple reason that the scheme of the Injunction Directive allows for a parallel, non-adversarial existence of substantive and procedural law, of public and private enforcement, and finally of individual and collective enforcement measures to be read together.

The introduction of the Injunction Directive into national legal orders led to increased attention on the procedural aspects of consumer matters. Until the Injunction Directive came into force/was enacted, collective enforcement was not afforded much importance - at least at the EU level - setting aside the two exceptions of the Directive on unfair contract terms (93/13/EEC)²⁴⁰ and on unfair commercial practices (2005/29/EC).²⁴¹ The Commission focused its policy on the production of substantive consumer law directives leaving the enforcement to the Member States and relying in line with the original design of the Treaty on the existence and the effectiveness of national enforcement schemes. The added value of strong substantive law provisions is downgraded without proper enforcement rules "(...) *although a sound consumer protection system requires well-conceived and strong*

Association Commissioned by the Austrian Federal Ministry for Social Security, Generations and Consumer Protection. Summary of the Results. Bamberg/Vienna.

²³⁶ As to minimum harmonization, see Chapter IV 4.4.

²³⁷ For example: Italy and France.

²³⁸ For example Germany and Austria.

²³⁹ Van Dam (2009), *Who is Afraid of...*, p. 281–308.

²⁴⁰ Unfair Contract Terms Directive 93/13/EEC (OJ L 95, 21.04.1993, p. 29–34).

²⁴¹ Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22–39).

*(substantive) consumer rights, it should be noted that even 'best' substantive rights cannot benefit the consumer if their enforcement is not reasonable or possible".*²⁴²

The Injunction Directive has not brought a standardisation of implementation since it differs from other pieces of legislation on consumer matters in various aspects. By its diversity, the Injunction Directive has inspired Member States to consider a new structure of EU consumer protection law as well as new modes of enforcement and implementation. The new structure of the Injunction Directive aimed at increasing effectiveness of the consumer law enforcement tools.²⁴³

The goal of the Injunction Directive was to provide for important changes in relation to the enforcement procedures applicable in the substantive law directives on consumer protection, and to introduce a scheme for parallel use for the individual and collective enforcement frames. In fact the injunction procedure was supposed to introduce a swift procedure²⁴⁴ and to increase the effectiveness of consumer protection remedies.²⁴⁵ Essentially, this premise constitutes the response of the EU legislator to the need for a timely and effective enforcement procedure capable of protecting consumers in both national and cross-border relations.²⁴⁶ The intention was to accelerate a process of revival of the substantive law directives that lacked procedural underpinnings. However, without the procedural measures the substantive law matters have no particular legal value, because substantive law, in order to be used, requires a tool in the form of procedural legislation.

3. Structuring the Relationship of Material and Procedural Mixture

The combination of procedural and substantive law aspects in the Injunctions Directive has opened up many legal questions. The fact that the Directive does not fit neatly into the substantive or procedural classification gives rise to questions that have until now remained unanswered. On which side of the classification is the injunction? Shall it be

²⁴² Wrbka (2012) *European Consumer Protection Law: Quo Vadis?* – thoughts on the compensatory collective redress debate in Wrbka/Van Uytsel/Siems (2012), *Collective Actions? Enhancing Access to Justice and Reconciling Multilayer Interests?* Cambridge, p. 32.

²⁴³ The Commission on various occasions pointed out the problem of the lack of the sufficient and effective consumer law enforcement, Viviane Reding - Vice-President of the European Commission, EU Commissioner for Justice, dates on March 19, 2013, "*Towards a more coherent enforcement of EU consumer rules*", SPEECH/13/237.

²⁴⁴ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An Analysis and Evaluation...*, p. 329.

²⁴⁵ Green Paper on Consumer Collective Redress, COM(2008) 794 final, Brussels, 27 November 2008.

²⁴⁶ Hodges (2007) *Europeanization of Civil Justice: Trends and issues*, Civil Justice Quarterly, Vol. 26(1), p. 98-123.

classified both in terms of substance and as of procedure; does it fall outside these classifications?

The distinction between substantive law and procedural law fits to an archaic and a very classical and academic interpretation of law. In fact this distinction has lost its former relevance in legal practice and remained only a matter of academic discourse.²⁴⁷ This came to light in conducting a number of interviews with judges at various occasions. Judges tend to avoid complicated academic discourses in the course of adjudication of consumer law cases.²⁴⁸ This is all the more true considering the complex mixture of substantive and procedural law that the Injunction directive brings about not to forget the interplay between national and the European law. In the common opinion of judges²⁴⁹, purely dogmatic constructions and somehow schematic classifications of rules - if applicable to the legal practice at all - may produce false outcomes²⁵⁰ in the practical reading of EU law. Although traditional classifications may assist judges in understanding the general theoretical structure of civil law, the classic clear-cut distinction between substantive law, which operates in sharp separation from procedural law, should not be used before and in the courts. In legal practice - substantive and procedural law are inseparably linked. They constitute a kind of connected vessel that cannot exist separately. All the clear-cut distinction schemes regarding these legal classifications are irrelevant and completely outdated.

3. 1. Separation of Substance and Procedure or Conjunction and Interrelation

From a theoretical point of view, injunctions within the scope of the Directive lie somewhere between the two spheres of law. Although these spheres need to be interpreted jointly, they rather fall under two completely different legal classifications.²⁵¹ These two spheres significantly differ concerning the factors of their differentiation, qualification of

²⁴⁷ Smits (2002), *The Making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerp, p. 145. The author discusses the long awaited processes of formulation of the fundamentals for substantive law and procedure, and examines Roman law sources.

²⁴⁸ On the basis of the empirical research - according to the results of interviews conducted with judges, Mgr Robert Fonfara, a judge at District Court in Kielce, Poland (interviewed on the 14th of January, 2011) states as follows: *“At the stage of application of law and adjudication, there is no time and no space for a investigation whether a certain norm has a material or rather procedural legal nature, the rule has to be applicable no matter how it is classified due to meet requirements and the needs of a specific case at hand”*.

²⁴⁹ The conclusion is made on the basis of the interviews with judges from Warsaw and Kielce at various occasions.

²⁵⁰ An interview on the 20 of December 2008 in Trier with Mgr Łukasz Piebiak judge at the Court of Competition and Consumer Protection in Warsaw and participation in discussion of the judges in Academy of European Law in Trier, Germany.

²⁵¹ Smits (2002), *The Making of European...*, p. 156.

rules and general legislative frameworks because they perform quite different legal functions and they perform different legal goals. No matter how the distinction between substance and procedure is made these two spheres are closely interlinked. Although it is quite difficult to assess precisely the nature of this relationship identified in the Injunction Directive, the relationship linking them may be recognized as complementarity.²⁵²

The explanation is quite simple since substantive law cannot exist without civil procedure, and *vice versa*. Seen through the prism of practical experiences, procedural rules hang in the air if they do not have a substantive law basis.²⁵³ According to the fundamentals of legal theory, procedural law is given a certain kind of precedence over substantive law rules.²⁵⁴ Although procedural law serves to enforce substantive law, without procedural measures substantive law is rendered useless.²⁵⁵ Substantive law cannot be exercised without a procedural scheme upon which the substantive law can be governed. From a theoretical point of view, the procedural and substantive law never collide.²⁵⁶ Procedural rules allow for the substantive law to be applied.²⁵⁷ They draw the limits within which substantive laws can be exercised in order to assure their proper execution. It suffices to recall procedural instruments, such as limitation periods and the time of their expiry, legal admissibility of procedural instruments or recognition of pre-trial bodies.

The “*clear-cut distinction*” theory cannot provide an explanation for the ambiguous relationship between substance and procedure in the Injunction Directive. The Injunction Directive does not stick to the general framework of this scholarly classification because it is of a more practical as opposed to theoretical nature. A mixture of substantive law and procedural elements shall now be regarded as “*the new legal spirit*” of consumer protection law arising at the junction of both. Therefore, it seems that the “*clear-cut distinction*” theory, recognised as academic/scholarly, has no relevance in legal practice.

Given the above, it will be useful to rely on a more practical understanding of the interrelation of the substantive and procedural law. The model combining substantive law and procedural law seems to better fit the current structure of consumer protection legislation, which does not maintain a clear-cut separation of substantive and procedural law. In fact, this classification is deprived of practical relevance. The theory concerning the clear-cut

²⁵² Cafaggi/Micklitz (2007), *Administrative and Judicial...*

²⁵³ Tobor (2002), *Prawoznawstwo a Praktyka Stosowania Prawa*, Warszawa.

²⁵⁴ Morawski (2002), *Wstęp do...*, p. 156-167; Tobor/Nowacki (2003), *Prawoznawstwo...*, p. 235-236; Pałeczki (2003), *Prawoznawstwo. Zarys wykładu. Prawo w porządku społecznym*, Warszawa, p. 256-289.

²⁵⁵ Micklitz/Reich/Rott/Tonner, *European Consumer...*, p. 378.

²⁵⁶ Pałeczki (2003), *Prawoznawstwo...*, p. 234-239.

²⁵⁷ Wrška (2012), *European Consumer Protection...*, in Wrška/Van Uytsel/Siems (2012), *Collective Actions...*, p. 32-33.

distinction of substance and procedure does not fit the Injunction Directive. There is no need to argue that procedural regulations serve to enforce substantive law regulations, because this is a core issue of each theory concerning the practical use of procedural norms. Procedural norms advance the performance of substantive law norms. It is a dogmatic statement, which finds confirmation in each of the theories concerning the relationship between substance and procedure in the civil law. Even if the distinction is treated as a flexible one²⁵⁸, it must nevertheless be introduced into the overall scheme of the Injunction Directive in a way that will assist with the construction of the form and delineate precisely the particulars.

Although the clear-cut distinction theory has led to the conviction that substantive law is the basis for procedural law, this statement has been falsified through the theory of the interrelation of procedural and substantive matters. In particular cases, procedural rules may constitute the legal basis for a claim. In other words, they can suffice as the starting point for any claim.²⁵⁹ It should be underlined that a procedural rule²⁶⁰ may also be given a specific function as it may be used to sketch the scope of a particular substantive law in practical terms. The issue of *res judicata* of judgments is a good example of this correlation.²⁶¹

A clear-cut distinction concerning the procedural body of the Injunction Directive and substantive law-related Annex has been brought together and combined through the mark of reference. Therefore the Injunction Directive has yielded a novel legislative technique. This element allows this author to classify the Injunction Directive somewhere in the middle of substantive law and procedural law. The Injunction Directive is a unique example of consumer law legislation of this kind tackling both the spheres of substance and procedure. Therefore, the thesis of interrelation serves as a key to explaining the atypical nature of the Injunction Directive.

The lack of clear rules on the legal classification of injunctions allows for an understanding of this remedy as a kind of *sui generis* legal remedy. As the injunction fits no

²⁵⁸ In many of the codes of civil procedure and codes of civil law that have been adopted in Europe so far, there is no *ex lege* distinction of norms on substantive and procedural law. It is not a rule that a civil code includes only substantive law rules, while a code of civil procedure includes only procedural related rules. Just to give an example of the flexibility of norms: the fundamental rule of the Polish Code of the Civil Procedure – the burden of proof, which concerns the nature of the whole code has been included in Article 6 of the Civil Code which states as follows “Article 6. The burden of proof relating to a fact shall rest on the person who attributes legal effects to that fact”; (translation taken from private sources of Marek Safjan).

²⁵⁹ Just to give an example: In the Polish procedure on unfair contract terms has introduced a separate scheme for unfair contract terms. Although this procedure has been given a kind of administrative nature, it has been integrated into the civil code.

²⁶⁰ Osuchowski (1968), *Rzeczne Prawo Prywatne. Zarys Wykładu*, Warszawa, p. 456-458.

²⁶¹ See Chapter I 1.8.

extant typology nor to any other commonly accepted classification of civil law remedies²⁶², its different and extraordinary nature among other civil law remedies invites a different frame of classification. This is why the remedy of injunction opens up a new classification of remedies in the field of consumer law putting itself in the middle of substantive law and procedural matters.

The action for injunction has been given a quite specific form as a civil law remedy. It is often treated as an alien mechanism in-between civil procedure and substantive law. The fact that it has such a specific nature, particularly in relation to its merit and legal construction, is certainly one of the reasons why it is treated in isolation from other remedies in the field of consumer law. Injunctions do not meet the requirements of any schematic classification and therefore do not fit anywhere in commonly sketched legal schedules of classification of legal remedies. In addition, neither the Commission nor the Member States have conducted much legal research in the field and expertise concerning the specific nature of injunctions differs in relation to other means of redress. Although injunctions have been recognised as quite innovative, and at the same time unclear and ambiguous, professionals and scholars rarely discuss them. In fact, a profound silence surrounds the issue which means that it will continue to cause confusion and “*irritation*”.

The EU and the Member States have never attempted to confirm the *sui generis* nature of injunctions. Neither the First Report²⁶³ nor the Second Report on implementation²⁶⁴ brought any clarification. Indeed, the practical use of injunctions within the European Community is limited. The EU has never posed the question why this was the case? Perhaps the limited practical effectiveness of the Injunction Directive derives from its extraordinary nature, which made it too complicated. Perhaps the increase of interest in injunctions is only a matter of time, because sooner or later they will find their own place in the national legal classification of remedies. This, in itself, raises the problematic issue of how to assess the best place for an injunction mechanism within national legal orders and the classification features that ought to be taken into consideration so as to place the remedy in the most suitable place in a given national legal order.

²⁶² Zakrzewski (2005), *Remedies Reclassified*, Oxford, p. 189; Kilpatrick/Novitz/Skidmore (2000), *The Future of Remedies in Europe*, Oxford.

²⁶³ Report on the application of Directive 98/27/EC.

²⁶⁴ Report on the application of Directive 2009/29/EC.

3. 2. General Principles on the Relationship between Conflicting Laws

In search for an explanation concerning the distinction between the substantive and procedural elements in the Injunction Directive, one of the ways to interpret the interrelationship between procedure and substance in the Injunction Directive lies in an in-depth interpretation of the Latin maxim *lex posterior generali non derogat legi priori speciali*.²⁶⁵ This type of interpretation fits well with the concept in the theory of complementarity advanced by Micklitz and Cafaggi.²⁶⁶ It serves to (i) advance reasons with a view to explaining the relationship between substantive and procedural law that will be discussed in detail below in the context of a thesis of dualism of enforcement measures in the field of consumer protection, and (ii) it may serve as a counter-argument against the theory of derogation.²⁶⁷

The European legal order - since it is rooted in Roman legal culture²⁶⁸ - allows the transferring of the old Roman principles to the current EU related national legal systems.²⁶⁹ The application of Roman maxims/principles into domestic legal orders brings for a smooth and systematic interpretation and analysis of rules of law, since the classification of the rules of law has introduced more coherence and predictability in overcoming established national rules of law.

Recently, the focus changed from the old rules and principles, including the Roman law basis as established in the Roman law schools, toward a casuistic legal interpretation which is based on the developments of national judiciaries, the European Union Court of Justice and on the legal rules and principles created as a result of “*judge made laws rule*”.²⁷⁰

²⁶⁵ The Latin maxim has been *expressis verbis* transposed in Article 15 of the Italian Civil Code in its Art. 15 that states: “*Abrogazione delle leggi. Le leggi non sono abrogate che da leggi posteriori per dichiarazione espressa del legislatore, o per incompatibilità tra le nuove disposizioni e le precedenti o perché la nuova legge regola l'intera materia già regolata dalla legge anteriore*”.

²⁶⁶ Cafaggi/Micklitz (2008), *Administrative and Judicial...*

²⁶⁷ Schulte-Nölke/Twigg-Flesner/Ebers (2007), *EC Consumer Law...*, p. 404. The authors claim that too much discretion has been left to the domestic courts, which will make it more difficult to apply these rules effectively (p. 612).

²⁶⁸ For such an interpretation, Zimmermann (1993), *Heard Melodies Are Sweet, But Those Unheard Are Sweeter... – Condicio Tacita, Implied Condition und die Fortbildung des Europäischen Vertragsrechts*, *Archiv für die civilistische Praxis*, Vol. 193, p. 121 – 173.

²⁶⁹ Osuchowski (1968), *Rzyskie Prawo Prywatne...*, p. 456-458.

²⁷⁰ The shift from the Roman rules to the more casuistic interpretation of law is to be observed in the Polish judicature as far as consumer law cases concerned. Before accession to the European Union judgments were always based on the principles and rules which derive from the Roman rules of interpretation of law. After the accession of the Republic of Poland to the European Union, the interpretation is more often based on the similar case judgment lines that have been developed across the Community. For more information as of the judicial power and judicial activism in the context of law-making activity see also: Tridimas (1996), *The European Court of...*, p. 199; De Waele/Van der Vleuten (2013), *Judicial Activism in...*, p. 639-666.

In this new frame, general rules have been left aside, and they do not perform the same role they once assumed.

3. 2. 1. *Lex Specialis Derogat Legi Generali*

The first principle that springs to mind regarding the relationship between substantive law and procedural matters is the rule of *lex specialis* and *lex generalis*. It is one of the most commonly used principles which could determine the relationship between procedural and substance related issues in the Injunction Directive. For that reason, there is a need to classify the rules contained in the Injunction Directive into either *lex specialis* or *legi generalis* groups. It should be underlined that a theoretical distinction based on specific and general rules of law should not be mixed up with a classification based on general and specific actions for injunctions, which has been done on the basis of definitional differences identified in both sets of regulations as one of the definitions is described in a more specific manner and the another one - in more general way. Although the definition of injunctions, according to both the body of the Directive and that contained in the Annex arises as identical as to their content²⁷¹, their wording and scope does not give way to an easy classification as to what might be considered *lex specialis* and *lex generalis*.

The general or specific nature of legal rules essentially permits classification of them as either *lex specialis* or *lex generalis*. For our purposes, the rules pertaining to injunctions shall be identified through the prism of the specific field of law to which certain pieces of law apply and the overall legal nature of regulation. Indeed, in the case of the Injunction Directive, on a first reading the apparent definitional nuances may give rise to confusing results. Only with a more profound analysis of the issue can one demonstrate that a common understanding of the rules does not correspond to their general theoretical value. Differences between definitions cannot be taken as distinctive factors of legal classification because in actual fact in-depth interpretation brings about the opposite effect such that general definitions included in the substantive law are treated as *lex specialis*, while the specific and more detailed definition of injunction included in the Injunction Directive is recognized as a *lex generalis*. It must be emphasized that substantive law related provisions have only sketched a general enforcement scheme for injunctions without giving any further details as to the subject matter of this legal remedy. Since the enactment of the Injunction Directive, injunctive

²⁷¹ Micklitz (2005), *The politics of Judicial...*, p. 229-230.

measures have become more transparent since the whole regulation has been designed to be very specific and comprehensive.

Thus, in the current European scenario the application of this principle would be unreasonable since the provisions of the Directive (bearing in mind its scope, for example, to provide for a holistically understood scope of the law on consumer protection) cannot be derogated by the provisions on enforcement included in the substantive law regulations already in force. If this reasoning is switched to the frames of provisions, its collective and individual dimension is now at stake; what in fact would lead to the understanding of injunction of rules through the thesis of dualism of enforcement measures.

3. 2. 2. Lex Posterior Generalis, Non Derogat Legi Priori Speciali

The analysis may be continued by examining the relationship between the two spheres of law according to another Latin principle, perhaps an even more suitable one, the principle of *lex posterior generalis, non derogat legi priori speciali*. The Injunction Directive understood as a *lex posterior generalis* brings about a derogation of specific rules of law issued previously. Thus, it cannot be recognized as a legal tool leading to the cancellation of the enforcement provisions included in the substantive law regulations covered by the Annex. This legal maxim may represent a strong argument on behalf of the thesis of dualism of enforcement measures in the field of consumer protection. It provides a justification for the mark of reference that has been inserted at the end of the Directive that emphasizes the co-existence of both enforcements means side-by-side. This also goes a long way towards explaining the intentions of the legislator, who, by inserting a mark of reference, has sought to substantiate the existence of both sets of rules.²⁷² Moreover, by the mark of references it is clear that a distinction concerning the substantive and procedural related actions for injunctions must be maintained. Thus, the EU legislator upholds the double path action provided for by both procedural and substantive law related measures. The theory is one of the first steps that could assist in advancing an explanation of the nature of the relationship between the procedural and the substantive in the Injunction Directive.

²⁷² That would be a counter-argument for a theory of derogation and against the negligence of the EU in the law making activity discussed in details in Chapter II 5.

3. 2. 3. “Axis Concept”

The idea is to treat the Injunction Directive as an “*axis*” - a kind of skeleton providing a procedural framework for substantive law regulations on consumer protection. According to this understanding, the Injunction Directive should be understood as a procedural foundation or a kind of framework for the consumer protection legislation listed in the Annex to the Injunction Directive.

Therefore, it should be treated as the dominant regulation concerning the consumer protection legislation therein, which somehow leads to “*a substitution*” of substantive law rules by procedural measures or their supplementation by the frame of the Injunction Directive due to their general and only descriptive nature. Such a reading basically purports that the Injunction Directive as a procedural mechanism was aimed at supplementing the provisions on injunctions that had been included in the substantive law directives. For this reason, it understands the Injunction Directive as a kind of procedural skeleton that has given rise to a way of partial legal derogation, in case of a potential substitution or a supplement in terms subject related provisions on injunctions.

It has brought about a more specific regulation concerning actions for injunctions that aims to be much more detailed and specific in comparison to previous provisions on enforcement. Accordingly, the Injunction Directive ought to be treated as a kind of procedural regulation that could somehow be regarded as a building block for a procedural code on consumer protection aimed at perhaps replacing the general provisions on enforcement introduced by the substantive law directives. The “*axis concept*” is based on the assumption that the Injunction Directive should be treated as a kind of “*code of civil procedure*”, while the substantive law directives enlisted therein ought to be regarded as “*a civil code*” of consumer protection regulations. Therefore, the Injunction Directive is a frame that introduces procedure for substantive law directives on consumer protection. Therefore, the theory envisages a cancellation of provisions of a procedural nature to be covered by substantive law directives. The detailed and more specific provisions on enforcement in the Injunction Directive should serve to substitute the general provisions on enforcement included in the consumer protection directives. Such an understanding explains the ambiguous relationship between the rules of the Directive. These theoretical and conceptual divagations provide guidelines on how to interpret the relationship between the Annex with the consumer substance related directives, and the body of the Injunction Directive.

The axis theory may also be developed in a way that maintains the procedural frame of individual and collective enforcement together with no interference. The fact that the Injunction Directive has introduced a collective dimension in consumer protection does not harm the rights of individuals who can claim individually upon the scope of the substantive law directives. In this sense, the axis theory would be a very convenient tool of consumer protection which additionally is consistent with the thesis of dualism in enforcement measures.

3. 2. 4. Complementarity

The thesis of dualism of enforcement measures reinforces the concept of complementarity pioneered by Micklitz' and Cafaggi.²⁷³ When this concept was proposed, no evidence concerning the practical effects of the Injunction Directive was available. For this reason, the legal scholars based their considerations on theoretical assumptions as to the relationship between substantive and procedural law in the area of consumer protection on the ground of their knowledge on consumer protection. Legal scholars, since they are open to novelties and future development, initially believed that their statement would be verified or falsified by the practical experience of the Member States or by research and reporting from the Commission *via* Reports on the Implementation of Injunction Directive.²⁷⁴

However the first Commission report on implementation of the Injunction Directive has failed to explain many of the questions and ambiguities raised when the Injunction Directive was issued even though it was supposed to clarify the relationship between the Injunction Directive and subject related directives. The Second Report on Implementation has provided us with no more information in this regard and only few clarifications.²⁷⁵ The latter has focused on the issue of the different legal nature of injunctions, which was compared to the other legal remedies dedicated to the field of consumer protection. Nevertheless, the Report remains silent as to the mutual relationship between procedural and substantive law matters.

In terms of complementarity, the main focus is given to the principle of mutual recognition of standing. The legitimisation of legal standing, which was formally granted to consumer organisations as qualified entities, was one of the primary goals of the Commission

²⁷³ Cafaggi/Micklitz (2007), *Administrative and Judicial...*

²⁷⁴ Report on the application of Directive 2009/22/EC; Report on the application of Directive 98/27/EC.

²⁷⁵ Report on the application of Directive 2009/22/EC.

as to the Injunctions Directive.²⁷⁶ It goes back to the test case before French and German courts on so-called sweepstakes.²⁷⁷ The Injunction Directive has finally sanctioned legalized standing of consumer organizations²⁷⁸, and for a vast majority of the Member States this was a main focus of interest since it was unclear for a long time whether consumer organisations are granted the legal power to represent consumers.

Secondly, the Injunction Directive provides a mixture of substantive and procedural measures. This leads to a conjunction of individual and collective enforcement in the area of consumer law. These two spheres – both substantive law and procedural matters as well as individual and collective enforcement are inseparably linked in the Injunction Directive, even if legal scholars investigating the issue of complementarity in the theoretical frame have not given much attention to the mark of reference, and do not provide for a legal analysis in terms of its value for consumer law enforcement based on injunctions.²⁷⁹ It is, however, clear that the EU legislator has put more emphasis on the procedural related aspects of the Directive illustrated by the legislative technique used in designing the Directive, which does not, in fact, reflect the content of the Injunction Directive. One could certainly deduce the procedural nature of the Injunction Directive from its title, especially if the title is compared to the previously issued directives on consumer protection. Furthermore, the procedural dimension is expressed through the legislative scheme of the Injunction Directive, for example the body encompassing the procedural elements with the Annex enlisting the substantive law to which the Annex applies.

Thirdly, the mark of reference can be highlighted as an element proving a procedural nature to the Injunction Directive. It has additionally emphasized the specific nature of the directives listed in the Annex including those provisions providing for actions for an injunction. The mark of reference can be described and characterized as a procedural related element. It is often used in procedural regulations in different fields in that it assists to provide for a reference to different branches of law; allowing for an extension of the scope of the directive to certain areas and branches of law. In the overall context of the Directive,

²⁷⁶ Schwartz (2000), *Loose Teeth in...*, p. 527-554.

²⁷⁷ See Chapter III 5.6.

²⁷⁸ Consumer organizations have become active players action for injunctions; for example: Judgment of Spanish Supreme Court of 4 November 2010, *AUSBANC v Caja Provincial de Ahorros de Jaén*, 663/2010; Judgment of the Regional Administrative Court of Lazio of 24 June 2006, *Adiconsum- Cisl v. Provincia di Latina A.T.O.*, 406/06; Judgment of the Court of Palermo of 24 February 2006, *Adiconsum v Banco di Sicilia*, 2491/06; Judgment of Court of Palermo of 2 June 1998 *Adiconsum v. Soc. Aeroviaggi*, 2077/1998 ; The Judgment of the Supreme Court, *Magyar Köztársaság Legfelsőbb Bíróság*, Legf. Bír. Pf. IV. 21.980/2002.

²⁷⁹ The Polish implementation of Act on grants a legal standing for both consumer organizations, and other legal entities as well as a single individual consumer, who is directly granted a legal standing in Article 12 of the Combating Unfair Commercial Practices explicitly refers to a single individual consumer.

especially concerning the lack of clarification regarding the relationship between the body and the subject related consumer protection directives, the mark of reference yields one more element of the Directive that constitutes its ambiguous legal nature. The mark of reference and the position it has been given in the Injunction Directive may be explained in two ways: (i) through theoretical conceptions of the legal theories, or (ii) pragmatically, through the prism of legal practice of the Member States to be developed in the course of years; in particular in terms of rules that they have employed in order to intensify the effectiveness of the Injunction Directive in legal practice.

3. 2. 5. Silent Derogation/Cancellation of Specific Provisions on Collective Enforcement

One of the theoretical explanations as to the relation between the specific enforcement provisions and the Injunction Directive can be found in the theory of so-called silent derogation of the enforcement provisions from the substantive law directive, which could have been replaced by a new remedy of collective dimension of injunctions introduced by the Injunction Directive. That theory is based on the assumption that the substance related injunctions in the substantive law directives will somehow be replaced, by the more specific provisions of the Injunction Directive introducing a collective dimension instead of an exclusively individual one.

This theory would indeed deprive the individual consumer a possibility of claiming upon the frame of the Injunction Directive. Obviously, the claim of the individual may be passed to consumer organizations, but per se, individuals will not be given a right to claim. Hence, consumer organizations, as representatives of a group of consumers, or other qualified entities will be entitled to act in the place of single individual consumers. This is one of the possible scenarios regarding the use and the reading of the Injunction Directive. The underlying message of the Injunction Directive in the Member States varies to a significant extent, demonstrated via the implementation of the Injunction Directive in the Member States for example most of the legal orders gave a legal standing to consumer organization while individual consumers have rather been excluded from the list of legal entities, with some exceptions.²⁸⁰ Nevertheless, this again begs the question of whether the legislator, by way of introducing the collective tools of enforcement, intended to deprive the individual of her legal

²⁸⁰ For example: Belgium, the Czech Republic, Denmark, Slovakia, Slovenia.

protection? Is it a goal of EU legislation to place limits on consumer protection? If so, why has the mark of reference appeared in the Annex of the Injunction Directive? And how shall it be interpreted in the collective context of the Injunction Directive?

In theory, it seems that it is quite possible to make such a substitution of norms. But this would be a sign that the EU legislator wishes to limit the scope of consumer protection.

Practical experience of the Injunction Directive in the Member States shows a variety of scenarios. In the vast majority of Member States, the Injunction Directive is identified as a collective redress instrument that brought about the legal standing of consumer organisations. It is worth stressing that only a few Member States granted legal standing to individuals, who can bring parallel actions to consumer organizations²⁸¹, and who are not registered in the list of qualified entities side by side with consumer organizations.

The national enforcement models vary significantly. It seems that only time will tell which of the implementation theories – as presented below – adequately explains the interrelation between individual and collective enforcement in the field of consumer protection.

Thus far, even though the Injunction Directive was passed in 1998, the Member States have not granted much attention to the mark of reference and it has not been recognized as indicting any specific enforcement mode. In terms of the development of the thesis of dualism of enforcement measures, this may be one of the reasons why the implementation of the Injunction Directive varies so significantly and why the adoption of the Injunction Directive seems to awaken or even exclude individual enforcement from the scope of the Injunction Directive.

Since Recommendation 2013/396 was passed, it appears that the Commission is indifferent as to the choice of individual and collective enforcement in the Injunction Directive and the reading of the mark of reference and its role in the entire enforcement scheme goes in the right direction.²⁸² It is true that the Injunction Directive in the process of its development has encouraged the blossoming of collective enforcement schemes within the national models of enforcement. Nevertheless, owing to the mark of reference - which in my view is a core element in understanding of the Injunction Directive, which in fact has been

²⁸¹ In Poland, in the Unfair Commercial Practices an individual consumer is given a standing side by side with consumer organizations, and the Act on Competition and Consumer Protection. The implementation of the Unfair Contract Terms Directive in Poland brought a fragmentary implementation of the Injunction Directive, which was divided between the Code of Civil Procedure and the Civil Code, both individual consumer and consumer organizations have a right to injunction.

²⁸² Indeed, the adoption of the Recommendation 2013/396, the Commission has considered the mutual existence of individual and collective enforcement frames. Thus far, this approach which links the individual and collective frame of enforcement was unknown for the Commission.

missing in most of the national jurisdictions - it is not possible to speak about a profound understanding of the intricate nature of the Directive and its implementation in accordance with the spirit of the Injunction Directive. The spirit, as this analysis provides, was a dualistic one.

Individual enforcement upon a common collective reading of the Injunction Directive loses its intrinsic value; it becomes an instrument of minor value. The derogation is understood in a broader sense as partially taking away effectiveness of law from substantive law directives and passing it toward the collective scope of enforcement. If the replacement of substantive law is conducted *via* the legislative activity of the Member States, the national rules of law will be amended toward the collective measures. This brings a risk that substantive law rules will lose their practical usefulness. This may occur because of the Injunction Directive, which can deprive individual enforcement of its practical relevance.

The Injunction Directive - if implemented in line with the theory of derogation, has provided a derogation of rules since the substantive law provisions have been substituted by the new procedural provisions of the Injunction Directive. Therefore, the individual enforcement, which has been a crucial issue in the substantive law directives loses its relevance and is substituted by the collective dimension. However, in some of the Member States the substance related provisions on injunctions may become, or may be treated as dead letter within the framework of the substantive law regulations and may have been left without any legal significance due to the so-called “implicit, or silent derogation” by the collective scope of the Injunction Directive. The substantive law frame of enforcement may be excluded from application in legal practice.²⁸³

First of all, in some of the Member States, for example in Poland²⁸⁴ a general concept of injunction was partially transposed in the Code of Civil Procedure and partially *via* a supplementary piece of legislation like the Act on Competition and Consumer Protection, which directly refers to the standing of consumer organizations. As the research evidence provides, in most of the Member States, like France, Italy²⁸⁵ and Poland, procedural rules include an explicit legitimation of the legal standing of consumer organizations, which, due to

²⁸³ This is also the case with the Polish implementation of the Injunction Directive which has introduced a general conviction of a purely collective nature of injunction frame developed upon the Injunction Directive.

²⁸⁴ In Poland: Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego (Dz.U. nr 43, poz. 296 ze zm.); Ustawa o ochronie konkurencji i konsumentów (Dz.U. 2000 nr 122 poz. 1319).

²⁸⁵ Caponi (2009), *L'azione collettiva...*; Finocchiaro (2008), *Class action: una chance...*

procedural laws, have become active players in the framework of the Injunction Directive. Their legal standing has also been confirmed by sector specific legislation.²⁸⁶

4. Dualism and the Conjunctions between Substantive and Procedural Matters

Until the 1990s actions for injunctions were recognized as effective enforcement measures for the protection of consumers in the field of competition law and the field of the intellectual property rights. In the 90s, the remedy of injunction was largely absent in the field of consumer law. The added value of the injunctive mechanisms has only become clear for the majority of the Member States after the adoption of the Injunction Directive. Although the Injunction Directive has not created any new or specific remedies, it has definitely brought about a new scheme within the civil law remedies.

The action for injunction has finally brought a new quality to procedural law regarding the legal remedies, in particular in its collective context and quite innovative *pro future* dimension. However, although the Injunction Directive has introduced a powerful and quite flexible enforcement measure, it has led to new legal irritations due to the lack of provision providing for monetary compensation. This lack affects the popularity of the action for injunction, since it does not offer comprehensive protection. An expected increase of consumer law cases has not been achieved upon the frame of the Injunction Directive. There has been no specific signs of a growing importance of injunctions before national courts either.

The current legal situation has demonstrated that in the majority of Member States the Injunctions Directive has somehow silently derogated the substance related provisions on enforcement and substituted them with specific procedural means implemented in the various codes of civil procedure, codes of consumer protection or separately included in the subject related provisions on injunction. From the general reading of injunction it appears that the provisions on injunction shall simply substitute the material related - indeed, not very successfully formulated - provisions through the “*new*” action for an injunction based on the Injunction Directive. This seems incongruous with the “*mark of reference*”.²⁸⁷

In light of this observation, the role and function of the mark of reference is still not entirely clear. In light of the theory of derogation, the mark of reference gives rise to many questions, such as how, in light of the theory of silent derogation, should we interpret the

²⁸⁶ The Polish implementation of Unfair Contract Terms and Unfair Commercial Practices.

²⁸⁷ See Chapter I 1.7., 5.1.

mark of reference and its inclusion at the end of the Injunctions Directive? Have the Member States properly considered the rule of the mark of reference in their overall legislative structures? It is rather unclear what the mark of reference actually is all about, and what it was intended to be. On the one hand, the theory of derogation of rules could be promoted on the basis of the various experiences of legal practice in the Member States. On the other hand, it seems that the Member States did not consider the legal role and value of the mark of reference.

4. 1. Legislative Structure and Normative Technique

The nature of injunctions as per the Directive, for example balancing both substantive law and civil procedure, becomes clear in the specific legislative technique used in the legal drafting of the Injunction Directive. The specific nature of the remedy is rooted in the fact that injunctions are *sui generis* civil remedies. The injunctive concept does not neatly fit into ready-made classifications of civil law remedies. As stated in Article 1, there are two spheres of the Injunction Directive:

- (i) “*the body of the Injunction Directive*”, which is of procedural nature as it includes a whole list of provisions that specifies the action for injunction. The Injunction Directive begins with a recital, and it is followed by the description of the scope of the Directive and is concluded by the Annex linking the body of the Injunction Directive with the Annex. The body of the Injunction Directive defines an action for an injunction, it delineates the rules of legal standing, defines the crucial notion of intra-community infringements, outlines a requirement of prior consultation as a form of procedural alternative dispute resolution frame, introduces a requirement to report on implementation - hence it defines all the procedural-related issues to be necessarily found in each procedural-related legislation; and
- (ii) the Annex to the Injunction Directive, which delineates a huge portion of the Community consumer protection legislation in the form of substantive law directives on consumer protection. Although the Injunction Directive is a piece of legislation of procedural – related nature, the Annex to the Injunction Directive covers only substantive law directives. This is why the Annex has been recognized as a conjunction between procedural and substantive law matters since it brings coherence between the procedural and substantive-law elements covered by the frame of the Injunction Directive.

Although the list of substantive law directives listed in the Annex seems to be quite long, it is not exhaustive.²⁸⁸ The list may be permanently updated by adding new consumer protection directives, and if suitable within the frame of the rest of the directives.²⁸⁹ The Directives listed in the Annex, however, must meet certain requirements such as (i) they shall be focused on protection of the collective interest of consumers²⁹⁰, and (ii) they shall protect economic consumer interests.²⁹¹

Since the Injunction Directive does not provide for any explanation of the existing interrelations and explanatory notes from the EU legislator are missing, it is up to the national legislator and legal practice to give shape to the relationship. They have to decide how to deal with the problem of interrelation, whether it is to be regarded as a problem understood in a negative sense, or perhaps in its positive sense in that it can be recognized as an added value to the Injunction Directive. One might think that the regulatory technique is just an example of legal overlapping, and in line with this, some have concluded that the substantive law provisions covered by the scheme of the Injunction Directive should be set to one side. On the other hand, the combination of the two, the procedural and substantive, indicate the need to look for a deeper meaning behind the link. Since one should start from the premise that the EU legislator operates rationally, that we are not dealing with a legislative mistake or error, it seems fair to conclude that it is the dualism of enforcement which serves as the background for keeping both sets of rules.

The provisions of the procedural and substantive law nature differ in terms of wording but are identical in merit.²⁹² If one compares the substance related provisions with the provisions provided for in the body of the Directive, it is noticeable that the Directive provides for much more detailed procedural-related and more forceful enforcement provisions as opposed to those included in the directives listed in the Annex which have been formulated in a general and descriptive manner. The content of the remedy remains the same, whilst the definition differs. There is, however, the factor of collective interest, which distinguishes the two parts of the Directive from each other. Although the collective dimension is present in the Injunction Directive itself, it does not appear in the directives included in the Annex to the Injunction Directive. The mark of reference links the individual dimension enshrined in the

²⁸⁸ Schwartz (2000), *Loose Teeth in...*, p. 527- 554.

²⁸⁹ Apparently, neither the Injunction Directive nor the working documentation on the Injunction Directive provides any indications as to the choice and selection of the pieces of legislation to be covered by the eventually extended version of the Annex.

²⁹⁰ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis and evaluation...*, p. 329.

²⁹¹ Docekal/Kolba/Micklitz/Rott (2005), *The Implementation of...*; Micklitz (2005), *The politics of Judicial...*; Schwartz (2000), *Loose Teeth in...*, p. 527-554.

²⁹² Micklitz (2005), *The politics of Judicial...*, p. 229-230.

consumer law directives with the collective dimension.²⁹³ While the injunction procedure has been given a collective dimension, the substantive law directives listed in the Annex read in separation from the Injunction Directive have been given an individual dimension, and the two frames have been bound upon the single scheme of the Injunction Directive.²⁹⁴ This two different tracks and enforcement layers read in conjunction provides the background for the thesis of dualism of enforcement. The Directive has tracked a path for both individual and collective schemes of enforcement that exist in a parallel level, so that they can be used as a tool either for individual or collective enforcement. In sum:

- (i) There is the Injunction Directive, which stands alone as a collective piece of legislation, which introduces for the first time a detailed model of injunction procedure of cross-border collective dimension,
- (ii) The substantive law directives in the frame of the Annex to the Injunction Directive have been given either an individual or collective dimension since the injunction procedure can be performed either as a collective or individual tool of enforcement depending on the legal interest to be protected, which in turn implies a choice in relation to the enforcement mode. Hence, depending on the case at hand and on the nature of interest to be protected, the Injunction Directive may serve to enforce rights toward individual or collective enforcement. This is only possible, because two of the elements – the Annex and the procedural body of the Directive - are inseparably interlinked, which causes the Injunction Directive as a whole to be read through the prism of two different layers: individual and collective. However, the extent of the interrelation between the two elements and the deep infiltration of both spheres cannot be assessed without taking into account the implementation of consumer protection directives in the national legal orders of Member States as well as the available case law regarding the issue.²⁹⁵

4. 2. The Idea behind the Distinction

The relationship between substantive law and procedural law becomes even more difficult if one considers that two different definitions of injunctions in the substantive law

²⁹³ EU Consumer Policy strategy 2007-2013, COM(2007) 99 final.

²⁹⁴ This is notable that a mark of reference appeared in the Injunction Directive 98/27/EC and it was also repeated in the amended version of the Injunction Directive, Directive 2009/27/EEC, so the latter scheme allows to conclude that the EU legislator intentionally posed a mark of reference in the frame of the amended version of the Injunction Directive.

²⁹⁵ See Chapter I 1.6.2.

and procedural law context have been introduced by the EU legislator. Surprisingly, the doubling of the definitions has not attracted the attention of the European Commission, neither within the legislative procedure nor with regard to the process of its implementation. The reason might simply be that the rules on injunctions remain rudimentary and far beyond the more sophisticated procedural requirements of the Directive of Injunctions. This has to be spelt out.

The Commission's focus on substantive law did not match the ideal model of enforcement of consumer rights. Thanks to the Injunction Directive two schemes exist in the form of individual and collective enforcement. Although many of the substance related directives have included provisions on enforcement of a more general nature – Member States have to take measures to ensure that the EU directives can be properly enforced - these provisions were too general to elaborate a more sophisticated enforcement scheme apt to the particular contextual requirements. Until now, not much has changed, at least not with regard to individual enforcement. It is more and more the ECJ, which is giving shape to the general rule of effectiveness.²⁹⁶ The collective dimension required a particular legislative intervention. That is what happened in unfair contract terms and unfair commercial practices. The decisive step forward, however, comprised the adoption of the Injunction Directive. The specific and detailed schemes of collective enforcement in the frame of the Injunction Directive do not deprive the general contract law directives of their added value in individual enforcement. Individual and collective enforcement have to be understood as two strains of procedural schemes, as alternatives.

With regard to individual enforcement measures, Member States while exercising their procedural autonomy, have designed procedural schemes of consumer protection, which at the national level fit best to domestic conditions and which are suitable considering the particularities of their national legal models.²⁹⁷ They designed national models of enforcement of consumer rights with regard the individual enforcement scheme – upon implementation of the consumer protection directives, and seemingly – in line with Injunction Directive providing a frame of collective enforcement which again had to meet the national conditions and legal requirements.

²⁹⁶ See: Micklitz/Reich (2014), *The Court and the Sleeping...*

²⁹⁷ Craig/Burca (2008), *EU law...*

Considering that enforcement provisions in substance related directives are rather general and do not lay down specific requirements as to their implementation²⁹⁸, Member States did not devote too much attention to the fact whether and to what extent the directives in question require an adjustment of the enforcement schemes. If it turned out that there was a problem, quite often Member States escaped into the adoption of new models without discussing the compatibility with the old scheme.²⁹⁹ The situation does not differ much in cases of collective enforcement schemes brought by the Injunction Directive. Since it is a minimum harmonisation directive³⁰⁰, Member States were allowed to design it nationally in the frame most suitable to national conditions and requirements. However, contrary to the substantive law directives, the Injunction Directive formulates detailed procedural requirements that narrow the leeway of Member States.

The EU legal frame produced an obviously unintended diversity in the area of enforcement. Substantive law rules provide for subject related legal remedies, but usually do not contain procedural rules in line with the constitutional architecture of the EU, which the Injunction Directive provided. This has led to the often-criticized phenomenon that one and the same remedy has been given different shape in different substantive law directives and has been implemented in various manners in the national jurisdictions of the Member States facilitated through minimum harmonisation. Insofar as EU requirements are missing, the rules on individual enforcement have to be taken from national law. Their European character may often remain invisible if it is implemented within a national remedial enforcement scheme. A similar phenomenon can be observed in the two substantive directives, which provide for collective redress. Besides from the fact that they introduce an action for injunction, there is not much that can be taken from the text of the directives. All this dramatically changed with the Directive on Injunctions. Here quite detailed procedure rules³⁰¹ compel the Member States to adjust their procedural rules. It is fair to say that the Directive on Injunctions introduces elements and opportunities of convergence.

It is highly unlikely that the European Commission expected such significant differentiation in relation to enforcement measures. In fact, nobody could have predicted that

²⁹⁸ Unfair Terms Directive 93/13/EEC (OJ L 95, 21.04.1993, p. 29); Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ L 144, 4.06.1997, p. 19); Directive 2001/83/EC on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67); Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22).

²⁹⁹ Miller (2011), *The Emergence of EU Contract Law: Exploring Europeanization*, Oxford Studies in European Law, p. 71-103; provides for the evidence how the encounter between European and domestic law may have “disintegrative effects” at the national level, what does not bode well for harmonization.

³⁰⁰ See Chapter IV 4.4.

³⁰¹ See Chapter I 3.2.

the Injunction Directive would in fact increase the level of confusion in the consumer law enforcement. The contrary seemed to have been the intention. This is even more so as the Directive on Injunction applies to national and transborder litigation. It seems that the European Commission has by and large accepted the incoherencies as unexpected side effects of different implementation strategies. The strategy to overcome divergences and to promote convergence was further harmonization. For years, the idea of collective enforcement in consumer law remained present in various policies of the European Commission.³⁰² Cautiously but also steadily the Commission moved ahead in order to improve collective redress. At some point in time it seemed as if the new plan of enforcement policy development³⁰³ and the temporary interest of DG Sanco³⁰⁴ would lead to further EU regulation. However, with Recommendation 2013/396 on consumer redress and the draft proposal on anti-trust injuries³⁰⁵ the situation has come to a halt, at least for the time being.³⁰⁶ It has to be recalled that the emphasis laid on the search for an appropriate collective compensation scheme, either by way of an opt-out or an opt-in solution. The intricacies of the action for injunction did not attract much attention.

In particular, consumer organizations very much promoted a US type of class action, advocating for the introduction of a collective redress scheme at the EU level, to compensate for what they could not get at home. As the experience has shown, all the attempts of the European Commission to shape a policy on collective redress remained half-hearted³⁰⁷ the most decisive factor being the resistance in the Member States against the US-style class action. It is often overlooked that the European Commission pursued a parallel strategy to improve individual enforcement in terms of alternative dispute resolution schemes. At first glance, it seems as if ADR does not fit the collective dimension of the Injunction Directive,

³⁰² The Consumer Protection Strategy 2007-2013 - underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers; Portuguese Presidency Conference on Collective Redress - Lisbon on the 9th and 10th of November 2007; The Leuven brainstorming event; Three Workshops on Collective Redress Issues on 21 May 2008, 29 May 2008 and 6 June 2008 in Brussels; Consultation Paper for Discussion on the follow-up to the Green Paper on Collective Consumer Redress, the Commission's initiative on Collective Redress of 11 June 2013 called Recommendation 2013/396, which is a final document regarding collective redress matter in the area consumer law.

³⁰³ Green Paper on Collective Consumer Redress, COM(2008) 794 final; Consumer Protection strategy 2007-2013, COM(2007)99. *Empowering consumer, enhancing their welfare, effectively protecting them*; Report on the application of Directive 98/27/EC.

³⁰⁴ Kuneva (2007), *Healthy Markets Need...*

³⁰⁵ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Strasburg, June 11, 2013, 2013/0185 (COD). On April 17, 2014, the European Parliament adopted a text of the Directive on antitrust damages actions which was agreed between the European Parliament and the Council during the ordinary legislative procedure.

³⁰⁶ See Chapter I 5.2.

³⁰⁷ See Chapter I 5.3.

but it must be understood as a return to the safe harbour of individual enforcement, as reflected in consumer protection directives listed in the Annex to the Injunction Directive.³⁰⁸

Indeed, shortly after the implementation of the Injunction Directive, the Commission had expressed and started a new initiative in a policy development towards the general attention to the procedural aspect of law on consumer protection, shifting the focus from individual enforcement *via* courts to individual enforcement *via* alternative dispute resolution schemes. All the alternative dispute resolution frames established by the Commission in the aftermath of its new policy, can only be linked *via* the Annex of the Directive on Injunction to the individual side of enforcement. SOLVIT, FIN-NET and others provide only for individual enforcement frames. They do not build links to collective enforcement measures, at least not explicitly.

There are two ways to bring the dualist nature of consumer enforcement back to the fore. The first results from the existence of an ADR scheme in Directive 2005/29³⁰⁹ as a tool Member States are requested to install prior to the initiation of an action for injunction.³¹⁰ Similar rules exist in Directive 93/13³¹¹ at least if read together with *Factortame*.³¹² The other and more promising variant results from the idea that individual and collective enforcement exist in parallel, but are interlinked. This concept requires granting ADR/ODR a status in the action for an injunction. The collective stop order mechanism and the individual redress schemes could be combined to compensate the consumer for the harm they suffered through the unlawful market practices.³¹³

4. 3. Reasons for the Differentiation

The Injunction Directive has triggered a quick and dynamic change in the enforcement schemes of consumer law. The Commission put more pressure on the purely procedural effectiveness of the Injunction Directive than on individual aspects of enforcement or the mixed zone of procedural and material injunctions as reflected in the Annex to the Directive. Concerning the practical relevance of the Injunction Directive, the Commission tried to place the piece of consumer protection legislation as quickly as possible in the framework of

³⁰⁸ Hodges (2012), *New Modes of Redress...*

³⁰⁹ Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11/06/2005, p. 22–39).

³¹⁰ For details Chapter IV 5.3.4.

³¹¹ Unfair Contract Terms Directive 93/13/EEC (OJ L 95, 21/04/1993, p. 29–34).

³¹² Judgment of the Court of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89, (ECR 1990, p. I-02433).

³¹³ See: Viitaanen (2007), *Enforcement of Consumer Collective Interests by Regulatory Agencies in the Nordic Countries*, in Van Boom/Loose (2007), *Collective Enforcement of...*, p. 83.

European consumer law, in order to combat the lack of effective enforcement measures which had been recognized as one of the basic stumbling blocks to access to justice for consumers.³¹⁴ Consumer law, perhaps more so than other fields, ought to be an area of particular importance with regard to accessibility.³¹⁵

As practical experience shows, clear-cut distinctions and classifications hamper the applicability of the law. Once the Injunction Directive was passed, there was no need to draw a distinction between individual and collective dimensions. They can exist both as they stand in the frame of the Injunction Directive. That was the reason why the Commission finally realised that there is need to increase access to justice on the basis of both individual and collective enforcement measures. Thereby the Commission has increased the effectiveness of substantive law³¹⁶ in the field of consumer protection. This was an element missing so far, which effectively hampered consumer confidence in the Internal Market and blocked the development of consumer policies.³¹⁷

The Commission intended to secure the confidence of consumers by strengthening of laws on consumer protection. The idea behind this was the following: the EU consumer must be protected from economic and financial harms that could arise as a result of transnational purchases within the European Union. The main focus was however given to cross-border transactions. The fundamental premise justifying the need for consumer protection within the law of the European Community and its Member States concerns the lack of sufficient knowledge, awareness and other socio-economic obstacles³¹⁸ to be faced by consumers³¹⁹ as regards their rights and the means of enforcement of these rights.³²⁰ The injunctive relief provided for by the Directive represents one of the important elements in the attempt to

³¹⁴ Green Paper on Review of Consumer Acquis (2007); Consumer Policy Strategy 2007-2013; Green Paper on Collective Consumer Redress (2008); Report on the application of the Injunction Directive (2008); Evaluation of the effectiveness of collective redress measures (2009); Eurobarometer – Consumer Redress in European Union: consumer experiences, perceptions and choices (2009); Public Consultation – Toward a Coherent Approach to Collective Redress (2010).

³¹⁵ Uff (1996), *Incorporating the Unfair Terms in Consumer Contracts Directive into English law*, in Lonbay (1996), *Enhancing the Legal Position of the European Consumer*, The British Institute of International and Comparative Law, London, p. 172.

³¹⁶ Wrška (2012), *European Consumer Protection...*, in Wrška/Van Uytsel/Siems (2012), *Collective Actions...*, p. 31-32.

³¹⁷ Consumer confidence is necessary for the harmonious functioning of the single market and “*the interest of consumer must be taken into account in the same way as those of other economic actors*” (Draft Proposal for a Decision of the European Parliament and the Council Establishing a General Framework of Community Activities in favour of Consumers, COM(97)684 final at 2).

³¹⁸ Wrška (2012), *European Consumer Protection...*, in Wrška/Van Uytsel/Siems (2012), *Collective Actions...*, p. 32; “*Reasons for insufficient enforcement can be manifold, reaching from financial obstacles to psychological barriers, from social customs to a lack of knowledge of substantive and procedural rights*”.

³¹⁹ Łętowska (1999), *Prawo Umów Konsumentkich*, Warszawa.

³²⁰ Wrška (2012), *European Consumer Protection...*, in Wrška/Van Uytsel/Siems (2012), *Collective Actions...*, p. 31-32.

bolster both consumer protection and consumer confidence.³²¹ The Injunction Directive was aimed at strengthening the enforcement measures in the area of consumer protection. This goal can only be achieved as a combination of a two levels of enforcement measures based at individual and collective enforcement, which have been inbuilt in one scheme of the Injunction Directive which accord to the thesis of dualism of enforcement measures.

These joint schemes are apt to coexist within the scheme provided by the Injunction Directive, especially concerning the fact it is based on the principle/policy of minimum harmonisation.³²² In fact, it is unsurprising that different combinations have been made available in the Member States since it was never expected that the level of protection and in correlation to this the level of confidence of consumers would be consistent in all Member States.³²³ Furthermore, legal solutions and modes of implementation differ across Europe and therefore enforcement will always be far from coherent. That said, this lack of coherence in combination with an unclear relationship between the substance and procedure has given rise to double-sided problems. According to Dougan³²⁴ consumer protection directives, which in the vast majority of cases are implemented according to the principle of minimum harmonisation are characterised by a lesser need for uniformity as to national remedies and procedures. This would justify the confusion and patchwork structure of national enforcement frames built into the frame of the Injunction Directive. Therefore, as far as the Injunction Directive is considered, more attention should be given to it as a procedural tool. On the other hand, incoherence surely negatively affects consumer confidence and rather results in consumer reluctance to enter into cross-border relationships.

Furthermore, “(...) *the problem of effectively enforcing consumer protection legislation is aggravated by sector-specific factors*”, for example, many consumers are unaware of their rights in certain fields or they have little incentives to pursue them.³²⁵ In order to achieve coherence and confidence in consumer law as a whole, Dougan argues that one may demand a high level of Community intervention in the domestic judicial legal

³²¹ Schwartz (2000), *Loose Teeth in...*, p. 527-554.

³²² The reasoning was quite obvious: “(...) *there is no ‘best’ concept existing at the national level; no model has proven to be flawless or has turned out to be far most successful and satisfactory one yet*” to be quoted in Wrška (2012), *European Consumer Protection...*, in Wrška/Van Uytsel/Siems (2012), *Collective Actions...*, p. 45-46.

³²³ Priore (2008), *Il Cammino verso L’Attuazione della Tutela Inibitoria Collettiva in Italia e Gran Bretagna*, *Contratto e impresa Europa*, Vol. 13(1).

³²⁴ Dougan (2004), *National Remedies before the...*; Fitzpatrick/Szyszczak (1995), *Remedies and Effective Judicial Protection in Community Law*, *Modern Law Review*, Vol. 57(3).

³²⁵ See also a legal reasoning for the following judgments: Judgment of the Court of 27 June 2000, *Océano Grupo and others* (ECR 2000, p. I-04941), in which the ECJ has justified the same argument.

systems.³²⁶ So as to achieve the best possible result and to convince the consumer that he is well protected by both substantive law and procedure, more work must be conducted in the field of law enforcement. Even if substantive law in the field does not necessarily require complete harmonisation to increase its effectiveness³²⁷, procedural legislation does, at least partially need to be harmonised to ensure the effectiveness of the Directive.

These concerns have also been taken into consideration by the ECJ in *Océano*³²⁸ and *Claro*.³²⁹ The final outcomes resemble each other. Basically, in *Claro* the ECJ followed the opinion Advocate General Saggio had given in *Océano*.³³⁰ Both concern the enforceability of consumer rights - *Océano* jurisdiction clauses, *Claro* arbitration clauses - as opposed to the clarification of substantive elements of substantive law. The Injunction Directive illustrates not only the current policy and plans of the Commission, but also serves to illustrate the political and methodological approach of the ECJ. The approach of the Court is perfectly in line with the EU's policy on consumer law. It is clear from these two cases that the ECJ is more concerned with the effectiveness and uniformity of procedure as opposed to the substantive law aspects of the consumer protection directives. Thus, it would seem from the judgments that more focus should be given to procedural rules since substantive law directives are not recognised as the only tools of market integration any more. This goes hand in hand with the policy of the EU that has clearly been expressed in the Injunction Directive. A basic conclusion to be drawn then is that in order to ensure consumer protection, effectiveness and uniformity of remedies are far more important than the uniformity of the substantive context.³³¹

4. 4. The Impact of Dualism of Enforcement Measures on Consumer Law Enforcement

With the adoption of the Injunction Directive, the EU has finally provided an effective means of enforcement in the field of consumer protection. The scheme, which binds

³²⁶ Nebbia (2007), *Unfair Contract Terms in European Law: A study in Comparative and EC Law*, Oxford, p. 171.

³²⁷ Similar statement was made by Wrбка (2012), *European Consumer Protection...*, in Wrбка/Van Uytsel/Siems (2012), *Collective Actions...*, p. 31-32, p. 45-46.

³²⁸ Judgment of the Court of 27 June 2000, *Océano Grupo and others* (ECR 2000, p. I-04941).

³²⁹ Judgment of the Court (First Chamber) of 26 October 2006, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05, (ECR 2006, p. I-10421), discussed by Graf/Appleton (2007), *Elisa María Mostaza Claro...*

³³⁰ Judgment of the Court of 27 June 2000, *Océano Grupo and others* (ECR 2000, p. I-04941), Opinion of the Advocate General Saggio of 16 December 2012.

³³¹ Nebbia (2007), *Unfair Contract Terms...*, p. 171.

individual and collective enforcement of consumer law, provides for a quite complex scheme of remedial consumer protection. The collective scheme of enforcement is, however, highly innovative especially considering that the previously existing procedural mechanisms of enforcement were based on individual enforcement only.³³² In sum, the Directive led to real innovation in the form of dualism of enforcement measures since the Injunction Directive entitles consumers to:

- (i) Claim on the basis of the regime of individual enforcement; in this scheme an injunction can be brought on the basis of the substance related directives on consumer protection, which offer an injunctive relief for “*a consumer*” understood as a natural “*individual*”. This scheme is based on enforcement measures rooted in national enforcement schemes, which are based on substantive law consumer protection directives. Indeed, consumer protection substantive law directives have been listed in the Annex to the Injunction Directive, which illustrates the link between individual and collective enforcement schemes of enforcement and provides a linkage between the two modes of enforcement.
- (ii) Claim on the basis of the collective enforcement regime, which appears with the Injunction Directive upon which enforcement measures have been made available for groups of consumers who have been affected by collective harm or have suffered as a result of a collective infringement. The claim may be brought by a group of consumers whose rights have been infringed by the unlawful activity of an entrepreneur/business. Obviously, the choice of the enforcement path depends on the nature of the legal interest to be protected - whether it is individual or collective - therefore the nature of the legal interest influences the choice of the enforcement path - individual or collective. Thanks to the mark of reference individual enforcement rooted in substantive law directives on consumer protection is not deprived of its legal value upon introduction of collective redress mechanisms. In fact, the construction of the Injunction Directive is sketched in a way that allows consumers to benefit from both in terms of the choice of mode of enforcement since it is the consumer who is the crucial subject of consumer law protection measures.³³³

This “*double path*” recognized as a dualism of enforcement measures simplifies the enforcement of consumer rights and is one of the crucial elements truly ensuring a higher

³³² See: Howells/Weatherill (1995), *Consumer Protection Law...*, p. 331-332; Werlauff (1999), *Common European Procedural Law. European Law Requirements Imposed on National Administration of Justice*, DJØF, Copenhagen, p. 276.

³³³ See Chapter I 5.2., II 4.1.

level of consumer protection. Consumers can be protected at both sides from the individual and collective perspective, and the choice of the nature of the protection will depend on the case at hand. That said, the option introduced by the Injunction Directive is not in line with the implementation practice of the Member States. Not all the Member States have maintained the dualism of enforcement means.³³⁴ The dualism of enforcement means has strengthened the position of the consumers in the Internal Market, but most of the progress remains on paper only.

4. 5. Injunction as a Conjunction between Economic and Health and Safety Issues

One may have expected that such a procedural enforcement tool would be more indicative as regards its position with other consumer protection regulations. One may also have expected that the Injunction Directive would be more comprehensive in relation to other pieces of legislation already in force. The Annex to the Directive includes only a limited group of directives dealing with consumer protection leaving aside a number of important - at least from the consumer's point of view - pieces of legislation, which have remained outside the scope of protection of the Injunction Directive. However, this exclusion aims deliberately at the general protection of economic interest which derives from the Injunction Directive. Although these directives touch upon specific fields of law, although they do not protect consumers' economic interest, they are nonetheless of significant importance to consumers.

In searching for an explanation, the preparatory documentation concerning the Injunction Directive may be relevant. In the Opinion of the Economic and Social Committee on the Injunction Directive³³⁵, the following statement can be found: “(...) *there should be a right to bring the Injunction action for violation of any provisions that is designed either directly or indirectly to protect consumers, if an injunction would be an effective redress for such violation*”. That would mean that injunctions could be used to cover all violations that either directly or indirectly infringe consumer rights. Therefore, we can infer from the Opinion that the Annex is only supposed to reflect the general scope of the Directive especially since the list of directives indicated in the Annex is not exhaustive and may be extended to these consumer law directives to which a remedy of injunction would be suitable

³³⁴ Some of the authors question the individualization of claims deriving from the substantive law on consumer protection; Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer...*, p. 203.

³³⁵ Opinion of the Economic and Social Committee on the Amended Proposal for a Directive of the Parliament and of the Council on injunctions of the protection of consumers', COM(2006) 692 final - 2003/0099 (COD), Brussels, 14 March 2007.

because of the nature of the substantive law rights covered by its protection. If an injunction is supposed to be an effective redress for consumer law violations, it has been given an individual and collective dimension to secure more complex protection of consumer rights. Nevertheless, this does not answer the question as to what is included and excluded from the scope of protection offered by injunctions. The Opinion provides for a vague statement that allows us only to sketch a general idea that can only partially justify the exclusion of the regulation on the product safety.³³⁶ On the other hand, this exclusion may be justified by referring to the very specific nature of the legal interest to be protected.

There are more radical theories that aim to explain the exclusion of these specific directives. Brandy argues³³⁷ that the industry groups have considerable clout in affecting community legislation, in particular in the case of the Injunction Directive this clout is said to have presented a threat to the strength of consumer protection legislation. This is quite a radical and a rather suspicious statement that the policy agenda of the Injunctive Directive has been undermined by “*capture*”.³³⁸ Since Brandy’s conclusion seems vague and is not justified by strong arguments or empirical evidence, it seems that the activity of lobby groups should not be taken as a point of reference in explanation of the legal issue. Indeed, in light of the Opinion of the Committee one might argue that in the excluded pieces of legislation an action for an injunction might not necessarily increase effective redress. Such specific matters need to be enforced through health and safety related enforcement measures. There is no need for a remedy for an injunction that *de facto* has a future effect and does not allow a consumer to be granted compensation.

Therefore, concerning the relationship between consumers and businesses, especially in the field of consumer protection, it is worth considering whether consumer protection legislation is really taking into account the economic interest of consumer as a priority. The activity of the EU, which aims to ascertain a high level of consumer protection, although it has a consumer protection at stake, aims to ensure that a business is not affected in a negative way, by which a business may suffer for any harms or inconveniences. Simply speaking a protection of one interest cannot damage another interest of different nature. The protection offered by the Commission on the one hand, cannot cause harm on the other for example to

³³⁶ See Chapter I 2, II 4.5.

³³⁷ Brandy (1997), *Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?* North Carolina Journal of International Law and Commercial Regulation, Vol. 23(1), p. 155-200.

³³⁸ At various occasions it is only briefly mentioned that the Injunction Directive has been designed under a strong influence of business; Schwartz (2000), *Loose Teeth in...*, p. 527-554.

the business. EU looks for a balance between consumers' interests no matter of the nature of the interest protected.

On the one hand, it is easy to note that all matters excluded from the Annex of the Injunctions Directive are focused on protection of the consumer economic interest. The injunction as a remedy fits well into substantive law directives, which protect consumer economic values, and is not definitely addressed to be a tool of protection of other non-economic values.³³⁹ This leads to the conclusion that a remedy of injunction is not recognized as a sufficient remedy in those situations in which health and safety issues are at stake. To the issue of non-economic values, the remedy of injunction is an insufficient tool of enforcement. Therefore, in terms of the extension of the scope of the Injunction Directive for new consumer protection directives, it seems that a rational reasoning goes toward extension of the Annex only to those directives which protect consumer economic values.

5. Explanations and Solutions for the Doubling of Injunctions

Rules governing an action for an injunction have been included in both the Injunction Directive and other substance related consumer protection directives, mainly Directive 93/13/EC³⁴⁰, Directive 97/7/EC³⁴¹ and Directive 2005/29/EC.³⁴² Academics have delineated a sense of legal overlapping³⁴³ requiring further explanation. The fact that the provisions are set down in two branches of law might be regarded as the result of mere negligence on the part of the EU legislator or may also be recognized as being done purposely. The latter explanation seems hardly convincing. The Legal Services of the Commission and all the bodies involved in legislative process would not have brought the question to the fore. Therefore, there is the need to discover the message behind the Injunction Directive and to disclose its particular legal context.

The obvious reasons might very well be that splitting the consumer substantive law directives into substance and procedure would have triggered complicated political discussions on whether, and to what extent, the European Commission has competence at all

³³⁹ The comment on product safety and product liability has been made further in the text of Chapter II.

³⁴⁰ Unfair Contract Terms Directive 93/13/EEC (OJ L 95, 21.04.1993, p. 29-34).

³⁴¹ Directive 97/7/EC on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent (OJ L 144, 04.06.1997, p. 19-27).

³⁴² Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22-39).

³⁴³ Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer Law*, p. 406.

to regulate enforcement.³⁴⁴ It should be recalled that the ECJ had accepted the integration of enforcement mechanisms only in cases where substance and procedure were together.³⁴⁵ In the literature on this topic, it has simply been proposed to delete the substantive law provisions concerning injunctions contained in the substantive law directives³⁴⁶ and recognized them as a sign of the negligence of the EU legislator. In practice, the issue can be solved the other way round. If a certain group of legal provisions become extinct, they will be derogated in the frame of time, because they have lost their practical value and relevance. Derogation, however, requires much more time, and only the flow of the time will prove any real practical relevance of the legal acts. In order to bring a proof of derogation, more time and more experience is needed; therefore, the EU could have used much more relevant instruments than simply expect for the effluxion of time in order to provide for a derogation.

Setting aside the importance of the Directive on Injunction in cross-border cases³⁴⁷, this statement undermines the key role of the Annex in the shaping of the dualistic character of the Directive, which has been used as a counterargument against the suspicion of negligence undertaken if the Commission's negligence becomes a real argument. By placing the mark of reference as a footnote to the Injunction Directive, the EU legislator has intentionally emphasized that the provisions for an action for an injunction also refer to substantive law regulations. Otherwise, the mark of reference does not make much sense in the overall context of the Injunction Directive.

The fact that there are two sets of norms providing an action for an injunction in existence has led to questions concerning a struggle of norms understood as a form of a hidden competition of legal norms, of which norm prevails over the other. Although these two sets of rules are characterised by quite different legal natures, they should not collide. Rather, they should be understood as incompatible with each other.³⁴⁸ They cannot be juxtaposed as inconsistent rules. In such circumstances, theories have advanced the concept of silent derogation, or of typical implicit derogation. The procedural parts in the subject related legal norms would then be substituted by the respective rules in the Injunction Directive. The problem would be that the procedural rules in the Injunction Directive are not fully covered in

³⁴⁴ See Chapter IV 4.

³⁴⁵ Judgment of the Court of 9 August 1994, *Federal Republic of Germany v Council of the European Union*, Case C-359/92, (ECR 1994, page I-03681).

³⁴⁶ Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer Law...*, p. 404. The authors suggested a cancellation of substantive law provisions on injunctions included in the substantive law directives since they rise as a typical legal overlapping (p. 613).

³⁴⁷ See Chapter III 5.

³⁴⁸ Brouwer/Hol/Soeteman/Van den Welden/Di Wild (1992), *Legal collisions of norms and moral considerations*, in *Coherence and Conflict in Law*, p. 177-200.

its counterparts, let us say in Art. 7 of Directive 93/13/EC.³⁴⁹ The reasons is that Art. 7 refers to the substantive part, as the ECJ in line with the Advocate General has made abundantly clear in *Invitel*.³⁵⁰

The relationship remains quite a problematic issue since no single and comprehensive theory has been advanced thus far as to how to handle this type of conflict. In addition, no inspiration can be drawn from the Member States, either practical or theoretical; especially since modes of implementation of the regulations in both spheres of law slightly differ among Member States. No clear answer can be discerned from the legal analysis of both sources of regulations or from an analysis of the materials and reports on injunctions passed by the Commission, or coming from a legal research.

Obviously, the legislative technique of doubling introduces a kind of double-track definition of an action for an injunction. Therefore, we are faced with two sources of definitions that operate in parallel within the market irritations in relations to:

- (i) the choice of injunction, and in which kind of case which injunction shall apply,
- (ii) whether these double-track norms collide in practice as some doctrinal discussion has assumed³⁵¹,
- (iii) if so, what kind of collision would that be,
- (iv) whether an action for an injunction may build up a new classification of rules recognized as *sui generis* legal remedies.

The Injunction Directive itself neither provides for indicative details to clarify the relationship nor introduces any regularity. That would mean legal practice has to clarify. From a theoretical perspective, the relationship between substantive law and procedure causes many ambiguities. Under the general scheme of the Injunction Directive it is not possible to theoretically explain in a clear and reasonable manner how the relationship is to look like. At

³⁴⁹ Unfair Contract Terms Directive 93/13/EEC (OJ L 095, 21.04.1993, p. 29-34) in the Article 7 stating as follows:

“1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. 2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms. 3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms”.

³⁵⁰ Judgment of the Court (First Chamber) of 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, Case C-472/10.

³⁵¹ Silvestri (2009), *Injunctions as Tools for Consumer Protection*, Workshop paper presented in the framework of workshop on “Public and private enforcement” at the European University Institute in Florence of March, 6, 2009 (the paper has not been published).

first glance, the relationship is defined as neither complementary nor substitutionary. The current frame of injunction may be rather described through the prism of links of the procedural and substantive law-related provisions.

In addition, it is purported that the extent of their interrelation varies according to the specific case at hand and one strand may dominate the other at any given time. The extent of this interrelation can only be assessed on the basis of the analysis of the specific case at hand. Hence the analysis of the Injunction Directive requires a casuistic interpretation. As a matter of fact, only legal practice can provide us with hints as regards the nuances between these two spheres of law. The situation becomes even more complicated when one realises that the Injunction Directive is not solely rooted in theoretical divagations, according to which the extent of the interrelation may be measurable, but is intended to serve as a tool of practical value used for the enforcement of consumer rights.

6. Interim Conclusion

The position of the mark of reference, and various methods of implementation found in the Member States which allows either for individual or collective enforcement measures has led to the development of the thesis of dualism of enforcement measures. The thesis is a novelty, because thus far no links have been made between individual and collective enforcement in this field of law. In particular, the background of the mark of reference is a crucial element in reading and understating of the Injunction Directive.

Although the Injunction Directive has introduced significant changes and improvements as regards the collective enforcement rights of consumer rights³⁵², by the dominant focus given to the collective element, it has deprived individual consumers of individual enforcement rights granted *via* substantive law under the substance related directives on consumer protection. Since the Injunction Directive was issued, the main focus was given to collective enforcement, and basically the shift was made from individual to collective schemes, which have never been read in conjunction, but always side-by-side and no links have been discovered between them. This does not mean, however, that the provisions on individual enforcement have been deleted and repealed from national legal models. Individual enforcement has simply been given a lesser value and they simply becomes less important in consumer protection. With the introduction of the Injunction

³⁵² See Chapter III 5.

Directive, more focus was given to mechanisms of collective enforcement, which have been introduced with this line into the national models of enforcement within the Member States.

Although the consumer is still protected in national law, all the Member States with the implementation of the Injunction Directive have given more focus to collective redress. Collective redress has been recognized as quicker, cheaper and most effective than individual redress measures, which protect a single consumer and have not been given a group, or collective effect. The thesis of dualism has been given light in the reasoning of Wilhelmsson³⁵³, who tackled the issue of the links between individual and collective enforcement, and who argues that the unfair commercial practices Directive remains silent on individual claims and therefore does not impose any obligations on the Member States to harmonise this specific area. In Wilhelmsson's view, the silence of the UCPD as regards individual cases does not prejudice that the context of the UCPD cannot be used in individual cases. By adoption of the collective scheme, the individual enforcement is not deprived its practical and legal relevance. Wilhelmsson's statement proves a thesis of dualism, which goes toward a concept of linkage between individual and collective schemes of enforcement. Wilhelmsson argues that it cannot be a purpose of the Directive - especially in the field of consumer protection to eliminate the right of individuals to take an injunctive action. The assumption that the UCPD is not directly meant to cover such private rules on individual protection should not be read a scheme, which deprives a single individual her protection.³⁵⁴ Wilhelmsson's conclusion, although they are not based on the linkage of individual and collective enforcement made on the basis of the mark of reference, also make a link between individual and collective frame of enforcement and is in line with the thesis of dualism of enforcement measures as elaborated in this thesis/chapter. Following the theory of Wilhelmsson, the UCPD is definitely "*without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice*"³⁵⁵ and "*the preliminary focus shall be on unfair practices that cause detriment to the interests of consumers as a whole, rather than individual cases*".³⁵⁶ Therefore, although the UCPD is meant to solve collective matters it should not be interpreted as a legal measure aimed at exclusion of individual claims. This limitation of the scope of the UCPD, albeit an indirect one, nonetheless means the harmonising obligations of Member States in relation to individual

³⁵³ Wilhelmsson (2006), *Scope of the Directive*, in Howells/Micklitz/Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practice Directive*, Dartmouth, p. 51-54.

³⁵⁴ Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer Law...*, p. 88.

³⁵⁵ Recital 9 of the Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22-39).

³⁵⁶ Follow-up Communication to the Green Paper on EU Consumer Protection, COM(2002) 289 final 9, Brussels, 11 June 2002.

claims are limited. As Wilhelmsson claims, if the UCPD is “*without prejudice*” to such actions it must mean that Member States are free to adopt, and their courts are free to develop stricter rules on unfair commercial practices as long as the only sanctions available are related to individual actions. Furthermore, nothing prevents Member States from using the UCPD and to implement the UCPD in a way which justifies individual claims, nor does anything prevent member states from reading UCPD in both an individual and a collective enforcement scheme.

Therefore, it is a questionable issue whether the EU legislator intended to shift from individual to collective enforcement and by doing so increasing the protection offered to individuals. As the thesis of dualism of enforcement measures shows the EU legislator does not intend to shift from individual to collective enforcement, but to combine them both to the benefit of consumers. Considering the new plans and strategies at the EU level, it would seem a little unreasonable that the EU legislator intended to only introduce collective measures leaving individual enforcement to member states law. However, as the process of implementation of the Injunction Directive demonstrates, most of the Member States implemented the Directive in a way that does not deprive individual enforcement from its importance and meaning. Both individuals as well as groups of consumers are entitled to bring a claim in consumer matters.

The lack of consideration in regards to individual claims was not the real aim of the Injunction Directive and the exclusion of individual way of enforcement from the scope of the Directive was not intended by the legislator. This is more the effect of different implementation methods in the national legal orders which have understand the remedy of injunction as individual or collective, with more focus as of the latter. This way of thinking may be wrong, because the modes of enforcement should be read in parallel, and because consumer protection should provide complex solutions. Since collective enforcement was the only missing link in the framework of consumer protection enforcement measures, the Injunction Directive is a supplement in the area of consumer law enforcement which in order to be complex enforcement tool it has envisaged the individual and collective scope of enforcement lined together. The EU legislator intended to increase and extend consumer protection through the development of all possible enforcement means in order to increase consumer confidence such that the EU legislator cannot limit the consumer protection by excluding individuals from the basic legislative framework. The reading shall be conducted in consideration of a deeper sense of consumer protection policy, and not to be based on the

literal meaning of provisions on enforcement included in both sets of regulations, but keeping in mind the overall scheme of the injunction procedure.

In the thesis of dualism of enforcement measure a crucial role is given to the mark of reference binding the sphere of substantive law and procedural issues. The mark of reference plays a role of a paper clip holding together substantive and procedural law spheres, as a conjunction of individual and collective enforcement means as well as public and private devices. This is a unique solution among other consumer law directives, which has not been used and developed so far. Member States present a variety of enforcement models, and a variety of injunction procedures. However, they are united in diversity since they have adopted the EU scheme of injunction and implemented the Injunction Directive in ways always in accordance with the EU requirements of the Injunction Directive and particularities of their national enforcement schemes. The Injunction Directive in view of its atypical structure and atypical nature allowed for implementation of dualism of enforcement measures. The dualism strives for convergence of enforcement models, and allows for using the injunction procedure accordingly to the procedural schemes settled by each of the Member States.

The silence of the EU, and the lack of explanation for the overall situation have yielded a variety of modes of implementation of the Injunction Directive within the national enforcement schemes. This was a kind of a vicious circle, because on the one hand the Injunction Directive was aimed at bringing coherence, at least partial coherence of enforcement models in Europe. On the other hand, its flexibility and ambiguous frame and structure have left many questions opened and not entirely clarified, so that the Member States were somehow pushed to develop an enforcement model that would fit, and that would not be against the scheme brought by the Injunction Directive. Member States have designed the enforcement schemes in line with their national traditions and their national legal cultures.³⁵⁷ The Injunction Directive brought about the flexibility of a choice between the public and private enforcement models, brought a conjunction of substantive and procedural law matters, and in the final effect, a dualism of enforcement models as a conjunction of individual and collective enforcement measures. All those have been implemented and generally adopted by the Member States in variety of modes and a patchwork of enforcement models within the European Union.

³⁵⁷ Micklitz (2005), *The Politics of Judicial...*, p. 292; „Private law is tied up with national traditions and cultures. Any attempt to subject private law to EC law would therefore be fraught with difficulties and would meet opposition”.

The promised coherence in fact is “a one size fits all solution”. This made the Injunction Directive feasible within the overall national legal schemes in Europe. It is not the imposition of a fully-fledge enforcement scheme, but a broad frame which opens the path towards convergence. Although the Injunction Directive does not bring a unique and unified pattern of injunction, at least it laid down basic requirements towards convergence and coherence within diversity and provided for a conjunction of individual and collective frames of enforcement.

Chapter III Cross-border Context of the Injunction Directive

1. Overview

The Injunction Directive protects consumers against intra-Community infringements. Contrary to the national dimension the entire scheme does not leave any doubts that the protection of consumers in cross-border matters was a crucial issue to be considered in the Injunction Directive. In chapter II the Injunction Directive has been conceptualised – based on evidence obtained from a study of national jurisdictions – as including individual enforcement, though mainly in the national environment. To date, however, a very limited number of collective cross-border disputes have reached the courts since its adoption in 1998.³⁵⁸ In light of this, integrating the ambitious objective into member state legal orders this cannot be regarded as a success.

Although in the national enforcement frame, the Injunction Directive introduces and binds both individuals and collective enforcement actors, links the substantive law and procedural law matters, it will be shown that similar convergence has not been achieved in cross-border litigation. In this context, it follows an either/or, collective or individual pattern; neither are interlinked – they stand side-by-side, separated from each other. As a matter of fact, more attention is given to individual cross-border measures, a result of practical experience in the Member States.

European collective cross-border enforcement requires a different reading to national scheme of enforcement. The dualism of enforcement measures in consumer law, however, as regard the cross-border scheme of the Injunction Directive shall be analysed in light of the existing diversity of enforcement measures, even if the cross-border scheme does not provide for specific links and conjunctions between individual and collective scheme of enforcement or substantive law and procedural law matters. Cross-border collective consumer transactions are, for quite a long time, of interest to various influential groups. EU consumers while crossing borders cannot/do not fully benefit from the dualism of enforcement measures. Their interests are not protected at all. The collective scheme of enforcement suffers, it turns out, from significant inconsistencies and complexity lack of comprehensiveness. These inconsistency and the mal-functioning of the collective enforcement element in cross-border

³⁵⁸ Report on the application of Directive 98/27/EC, p. 5 - only one case concerning the use of injunctions with a collective cross-border dimension has been brought; Report on the application of Directive 2009/29/EC, p. 3 – Germany: 20 cases; Austria reported: 8 cases.

litigation promoted the development of new tools of enforcement addressed to cross-border measures, namely, the adoption of Regulation 2006/2004 on consumer protection cooperation. The new modes and enforcement measures were supposed to improve the EU cross-border enforcement scenario and to handle the complexity of cross-border conflicts in a more suitable way. However, the new tools were not co-ordinated with the Injunction Directive. Due to the insufficiency of and the poor results achieved by the Injunction Directive and of Regulation 2006/2004, consumer organisations and national enforcement authorities look for a new design for fighting unfair commercial behaviour which affects consumers in the Internal market by way of co-ordinated action. Here consumer organisations and national enforcement bodies do not engage into complex collective cross-border issues, but co-ordinate their collective strategies on the basis of the action for injunction at the national level against the same or similar wrongdoers.³⁵⁹

Finally the design for individual cross-border litigation has been developed *via* extra-judicial measures, such as ODR and ADR frames with a cross-border dimension, which are addressed to individuals only. The two acts adopted in 2013, on ADR Directive 2013/11³⁶⁰ and on ODR Regulation 524/2013³⁶¹, have boosted the establishment of Europe-wide out-of-court dispute settlement schemes.³⁶² Both the “*invention*” of co-ordinated actions and the strong promotion of ADR/ORD serve as a substitute for weaknesses of both the Injunction Directive and of Regulation 2006/2004. In light of the thesis of dualism of enforcement measures, cross-border enforcement shall be considered in the following contexts:

- (i) collective cross-border enforcement as introduced by the Injunction Directive 98/27/EC;
- (ii) collective cross-border enforcement under the regime of Regulation 2006/2004;
- (iii) co-ordinated action at the national level operated under the regime of the action for injunction, not necessarily the Injunction Directive;
- (iv) individual enforcement *via* non-judicial measures as now provided for by Directive 2013/11/EU on ADR and Regulation 2013/524/EU on ODR.

³⁵⁹ See Chapter III 7.

³⁶⁰ Directive on Consumer ADR Directive 2013/11/EU (OJ L 165, 18.06.2013, p. 63–79).

³⁶¹ Regulation on Consumer ODR (OJ L 165, 18.06.2013, p. 1–12).

³⁶² See Chapter III; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “*Toward a European Horizontal Framework for Collective Redress*”, Strasbourg, 11 June 2013, COM(2013) 401 final, p. 3.

2. Dualism of Enforcement Measures in Cross-border Context of the Injunction Directive

The dualism of enforcement measures has been identified as a link between collective and individual enforcement which at national level can exist and operate on an equal footing, which in parallel ties individual and collective elements. At the national level consumers are offered a choice of individual and collective enforcement measures within the scheme of the Injunction Directive paving the way from diversity to convergence of injunctions. Although dualism plays an important role in promoting coherence of enforcement schemes, the theory does not fit with cross-border enforcement. In the cross-border context the phenomenon of dualism of enforcement does no longer serves as a way to obtain reasonable solutions for overcoming inconsistencies in the Injunction Directive in binding different spheres of laws and enforcement. In the cross-border context the Injunction Directive does not establish a parallel basis for the possible coexistence of individual and collective enforcement methods. Practical experience shows that individual claims are predominant in cross border enforcement, while the collective dimension is missing. Consumer cross-border collective actions are legally too complex, too expensive, too time consuming and the effect of rulings is always limited.³⁶³ It will be shown that the Directive despite its ambitious character has done little to overcome all these foreseeable insufficiencies. In cross-border matters, the collective dimension of the Injunction Directive requires a co-ordination of different fields of laws, jurisdiction, applicable laws, and co-ordination of a number of bodies entitled to protect the collective interests of consumers.

The Injunction Directive as well as the supplementary Regulation 2006/2004 bear a strong procedural flavour, though tied to substantive law issues. Both pieces of legislation are intended to ensure a smooth functioning of the Internal Market, to protect (collective) consumers' interests and both are focused on the protection of the economic interests of consumers.³⁶⁴ The Injunction Directive aims at fighting intra-Community infringements *ex lege*, though it covers purely national litigation as well, while Regulation 2006/2004 covers only cross-border infringements. The scenario is less colourful and less structured once the cross-border element is taken into account. In cross-border EU enforcement, there is no linkage between the individual and the collective dimension of injunctions. It suffices to recall

³⁶³ Report on the application of Directive 98/27/EC, p. 6-8.

³⁶⁴ See Chapter IV 4.1.

that both Directive 2013/11/EU on ADR³⁶⁵ and Regulation 524/2013/EU on ODR³⁶⁶ are in no way integrated into either Directive 98/27/EC nor Regulation 2006/2004. Therefore, in the cross-border context the thesis of dualism of enforcement finds little support in the existing body of EU law. Since the two spheres of enforcement stand alone, the cross-border dimension of the Injunction Directive as well as of Regulation 2006/2004 divides the collective and the individual dimensions. Schemes such as SOLVIT, EEC-Net or the new ADR/ODR set of rules do not provide for links to the collective issues.³⁶⁷ Only individuals are the addressees of out-of-court enforcement measures. Hence, the current cross-border scenario presents itself as a parallel scheme of individual and collective enforcement measures, grounded in a variety of enforcement schemes from the Injunction Directive, through Regulation 2006/2004 up to the out-of-court measures of enforcement of consumer laws. Contrary to the national litigation, Member States have neither been able nor willing to fill the conceptual gap between collective and individual cross-border enforcement. It remains to be seen whether and to what extent Member States are willing to use the ongoing implementation of the ADR Directive 2013/11/EU³⁶⁸ and the ODR Regulation 524/2013/EU³⁶⁹ as an opportunity to remedy this deficiency.

3. Cross-border Matters in Consumer Law

The first generation of consumer protection directives did not deal with the cross-border dimension. This is true for the Directive 93/13/EC on unfair contract terms as well as for Directive 84/450/EEC on misleading advertising and later Directive 2005/29/EC on unfair commercial practices. All substance-related consumer protection directives cover only the national dimension of consumer cases. The cross-border aspect had been left aside until 1998 when the Injunction Directive was adopted.³⁷⁰ The growing interest in cross-border relationships in the field of consumer law is related to the swift development of new methods of communication and the availability of efficient and affordable means of transport, which enable products to cross borders easily and in a short period of time. In the last few decades, European consumers are being offered more goods and services - both business and

³⁶⁵ Regulation on Consumer ODR Regulation (OJ L 165, 18.06.2013, p. 1–12).

³⁶⁶ Directive on consumer ADR (OJ L 165, 18.06.2013, p. 63–79).

³⁶⁷ See below Chapter III 8.

³⁶⁸ Directive on consumer ADR Directive (OJ L 165, 18.06.2013, p. 63–79).

³⁶⁹ Regulation on consumer ODR (OJ L 165, 18.06.2013, p. 1–12).

³⁷⁰ Green Paper on Consumer Collective Redress, COM(2008) 794 final.

professional - throughout the European Union.³⁷¹ There is a vast array of choice and huge opportunities for traders, meaning that consumers can decide where to buy goods, using several methods of purchasing and payment. Consumers have gained access to a much greater diversity of goods and services of different nature than a decade ago. Although the Internal Market is undergoing rapid change and although the position of the consumer has improved considerably in recent years, consumers still have to face many different obstacles when it comes to the cross-border purchase of goods and services.³⁷² Cross-border trade requires appropriate redress means. Consumers must deal with complicated technical, legal and cultural problems in the enforcement of their rights when a product or service turns out to be defective or even dangerous.³⁷³ The cost of the various legal proceedings to rectify the matter might be significantly higher than any compensation that a consumer could ever reasonably be granted. These high administrative costs can result in a decrease of consumer confidence, who become reluctant Euro-shoppers. The enforcement of cross-border claims not only depends on the quality and accessibility of enforcement measures, but also and most often on language barriers³⁷⁴ or of deeper cultural differences in national enforcement patterns.³⁷⁵ All these factors deepen and multiply the difficulties for consumers entering into retail transactions across borders. They may cause various problems that strongly influence the national enforcement schemes in Europe. The growing cross-border transactions yield the need to develop and design particular enforcement methods, including those dedicated to specific fields of laws, or specific sales methods, like e-commerce.

Since the Internal Market has become more open, consumers from different Member States increasingly encounter unfair and ambiguous practices when purchasing cross-border.

³⁷¹ Documents in which the Commission has indicated the legal and socio-legal value of cross-border relationships in particular with respect to collective cross-border redress can be found in various documents that have built up a coherent scheme of Commission policy in cross-border matters, for example: Green Paper on Consumer Collective Redress, COM(2008) 794 final; Consumer Policy strategy 2007-2013 {SEC(2007) 321}, {SEC(2007) 322}, {SEC(2007) 323}.

³⁷² For a description of the obstacles consumers currently face in cross-border relationships see: “*Evaluation of effectiveness and efficiency of collective redress mechanisms in the European Union*”, Final Report, A study submitted to the European Commission, DG SANCO by Civic Consulting (Lead) and Oxford Economics, <http://www.civic-consulting.de/reports/collective%20redress_study.pdf> accessed on June 2, 2012.

³⁷³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 07.08.1985, p. 29–33) and the Directive 2001/95/EC on general product safety (OJ L 11, 15.01.2002, p. 4-17).

³⁷⁴ Storme (2009), *The Foundation of Private Law in a Multi-level Structure: Balancing, Distribution of Lawmaking Power and other Constitutional Issues*, A paper at the Conference “*The Foundations of European private law*”, EUI Fiesole/Firenze 28-30 September, in Brownsword/Micklitz/Niglia/Weatherill (2011), *The Foundations of European Private Law*; Micklitz (1993), *Cross-Border Consumer...*, p. 411-434.

³⁷⁵ Reich (1998), *Jurisdiction and Law Applicable in Cross-Border Consumer Complaints, Socio-Legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union*, Journal of Consumer Policy, Vol. 21(3), p. 315-337.

Therefore, consumers require a stronger and more complex legal protection. The creation of the Internal Market meant that consumers, who buy more goods and products need to be equipped to face diverse problems. Consumers question the accessibility and effectiveness of enforcement measures, which are currently at their disposal in Europe.³⁷⁶ In light of the deficient legal design of cross-border enforcement³⁷⁷, it seems questionable whether the path paved by the Injunction Directive, Regulation 2006/2004 and the ADR/ODR tools allows consumers to effectively enforce their rights.

These pieces of legislation have to be read conjointly. They focus on assuring a high level of consumer protection and on improvement of cross-border relationships. Both the Injunction Directive and Regulation 2006/2004 are aimed at the protection of collective consumers' interests³⁷⁸; in other words, they were not aimed at handling individual consumer complaints at least in theory when one considers the legislative technique used to sketch them within the EU level enforcement frame.³⁷⁹ The introduction of the Injunction Directive and Regulation 2006/2004 as means of enforcement has enhanced the equal protection of consumers with regard to intra-Community infringements, which is recognized as one of the main factor for a proper functioning of the EU Internal Market³⁸⁰ - but this protection exists largely on paper.

In reality, the Injunction Directive has mainly yielded positive effects as a remedy addressed to national enforcement issues.³⁸¹ The national methods for its implementation have left no doubt as to the possibility of application of the Injunction Directive to domestic matters.³⁸² The practical experiences of Member States demonstrate that injunctions have been successfully developed, mainly by consumer associations as enforcement tools to combat national infringements.³⁸³ However, the argument that the Injunction Directive is equally applicable to cross-border situations still requires proof.³⁸⁴ The experience gained

³⁷⁶ Final Report to DG SANCO, Part I: Main Report, Submitted by Civic Consulting (Lead) and Oxford Economics; Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

³⁷⁷ See Chapter II 3., 4.3.

³⁷⁸ In the Injunction Directive uses: "*the collective interest of consumers*", the Regulation 2006/2004, "the consumer economic interests".

³⁷⁹ Report on the application of Directive 2009/29/EC, p. 6.

³⁸⁰ The issue was discussed in the High Level Meeting during the Belgian Presidency of the EU, held in Brussels on the 22 September 2010, by Henrik Saugmandsgaard Øe, Consumer Ombudsman of Denmark, in the presentation entitled "*Which Tools to Enforce the Consumer Acquis?*", at slide 2.

³⁸¹ Report on the application of Directive 2009/29/EC, p. 3.

³⁸² Report on the application of Directive 2009/29/EC, p. 3. The vast majority of actions for injunction reported by the Member States came from the national level.

³⁸³ Report from on the application of Directive 98/27/EC, COM(2008) 756 final.

³⁸⁴ Hodges (2008), *The Reform of Class...*, p.108; The same sentiment has been expressed by Betlem (2007), *Public and Private Transnational Enforcement of EU Consumer Law*, in Van Boom/Loos (2007), *Effective Enforcement of Consumer Law in Europe*, Groningen: Europa Law Publishing, p. 39-41, 44-45.

from the application of Regulation 2006/2004 is equally not very promising.³⁸⁵ Within the space of a few years, the European Commission was preparing a revision of the original design of the enforcement frame so as to improve its efficiency and to overcome existing gaps.³⁸⁶

These research findings are somewhat concerning in light of an Internal Market, which sets aside the distinction between domestic and cross-border situations. Nowadays, ever more national transactions end up having cross-border dimensions. Currently, it is quite difficult to imagine a consumer law-relation with a purely domestic dimension or to find a consumer, who has never crossed a border, especially in the era of the Internet communication, when the border is crossed virtually, setting aside the delivery of the product and the financial transactions. The same is true for collective consumer redress. Beforehand, these matters bore only a national dimension, but increasingly they have a cross-border dimension, as market misbehaviour and unfair commercial practices are not tied to a Member States territory only. These two examples show that a distinction between the national and cross-border element within the current market structure no longer makes sense. Restricting the scope of EU law to cross-border and/or national cases might prove impossible, most visible in collective actions where the plaintiff acts for a group of consumers, which could reside anywhere in the EU or it would at least be inefficient to emphasise national or cross-border dimensions only.

The same argument applies to the distinction between collective and individual enforcement. Breaking down consumer conflicts into individual disputes before national courts or *via* ADR/ODR in cross-border transactions quite often hides the fact that the problem the litigating consumer tries to solve is of a collective dimension. That is why the latest shift of the EU enforcement policy, first from the Injunctions Directive to the Regulation 2006/2004 – means a move from a common scheme for national and trans-border issues in which consumer organisations play a key role, to a mechanism which relies on statutory agencies bound to transborder transactions and secondly, to a transborder litigation scheme where the individual plays a key role, does not really demonstrate how the promised land of effective individual and collective, national and cross-border enforcement of consumer rights could be achieved.

³⁸⁵ Report on the application of Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), Brussels, <http://ec.europa.eu/consumers/enforcement/biennial_national_reports_en.htm#biennial> accessed on March 12, 2014.

³⁸⁶ See Chapter III 6.

4. Different Models of Cross-border Injunctions

The cross-border model of the Injunction Directive starts from the following constellations:

- (i) the Injunction Directive requires that a *qualified entity*³⁸⁷ from a Member State A can sue a business operator from Member State B, if the business operator in Member States B while trading with consumers in Member State A breaches consumer rights;
- (ii) the Injunction Directive serves as a legal basis for a situation in which the trader of Member State B operates within Member State A, and a qualified entity in Member States B can bring a case before a court of Member State A or any other Member State, to which he has directed his activity;

A third category has emerged from legal practice:

- (iii) “*cross-border co-ordinated procedure*” – “*a co-ordinated action*” of consumers organizations.³⁸⁸ The co-ordinated action rises as a novel and quite atypical solution, so far unknown in the European scenario, but its practical relevance may be appreciated in various areas and fields of law. In the pioneering “*aircraft case*”, all judgments were delivered in Belgium.³⁸⁹ They obliged simultaneously three airlines to stop using a number of contract terms, which have been regarded as unfair in those Member States, which participated in the co-ordinated action. The cross-border procedure has been overridden by national enforcement schemes which tied together have yielded a spectacular effect close to a cross-border procedure.

Although the definition provided by the Injunction Directive leaves no doubt that the Directive applies to cross-border cases, it does not explicitly exclude either domestic matters from its scope.³⁹⁰ Actions for injunctions as trans-border measures of consumer protection have been implemented in all Member States. However, in the majority of Member States, the cross-border element of injunctions has been overlooked and under-conceptualised. There are various reasons for the lack of interest of Member States in the cross-border dimension of the

³⁸⁷ See Chapter III 5.

³⁸⁸ A particular kind of cross-border action started in May 2009 in Portugal, France, Belgium; See: Judgment of La Cour De Cassation of 25 March 2010, *La société VGC distribution v l'association Union fédérale des consommateurs, Que choisir de l'Isère*, No. de pourvoi 09-12678; Judgment of The Namur Commercial Court (Tribunal de Commerce de Namur) of March 10, 2010, The consumer association *Test-Achats v Brussels Airlines, Ryanair and EasyJet*, Répertoire 784.

³⁸⁹ See Chapter III 7.3.

³⁹⁰ Although the definition of cross-border infringement applies to both the Injunction Directive and Regulation 2006/2004, there is a difference between Article 4 of the Injunction Directive and Article 3b) of Regulation 2006/2004.

injunction mechanism.³⁹¹ The national legal orders tend to use measures related to the national sphere. They have not recognised the need to introduce mechanisms of innovative nature reaching beyond national enforcement scenarios.

5. Collective Cross-border Enforcement via the Injunction Directive³⁹²

The Injunction Directive was adopted due to the insufficiency or/and the “*deficit*” of cross-border enforcement mechanisms and the lack of speedy procedures³⁹³ in the field of consumer protection.³⁹⁴ The Injunction Directive was intended to be a “*panacea*” for cross-border consumer problems. The injunction mechanism applies, where unlawful practices produce effects outside the country they originated in and in cases of this kind Community legislative action is required.

With regard to the legal context of the Injunction Directive its title is a misnomer³⁹⁵, because it does not illustrate the real content of the Injunction Directive and does not focus on what was the really important element of the Injunction Directive. The title of the Directive focuses on a consumer interest rather than on a scheme of procedural protection and it does not draw any particular attention to its collective cross-border dimension, which arises as one of the crucial elements of the Injunction Directive. Furthermore, the title does not refer to the mutual recognition of legal standing of the qualified entities, which indeed is a crucial and quite untypical issue related to the Injunction Directive. Surprisingly, the Injunction Directive in the title did not indicate that (i) an injunction procedure is a form of group action, and should be considered in the same manner as other forms of collective redress at the EU level, and (ii) that the Injunction Directive is a measure addressed to cross-border collective relationships. In theory, one would expect that the title of a legislative act provides for a description of the content of the legal act. As far as the Injunction Directive is concerned the title does not make clear what the content of the Injunction Directive.

The collective nature of the Injunction Directive is not reflected in the use of action of injunction. The content of the Injunction Directive provides evidence that it is a collective redress instrument, which is classified amongst other mechanisms of collective redress. The

³⁹¹ Report on the application of Directive 2009/29/EC.

³⁹² Directive 2009/22/EC of the European Parliament and the Council of April 23, 2009 for the protection of consumers’ interests (OJ L 110, 1.05.2009, p. 30-36).

³⁹³ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*, p. 326.

³⁹⁴ Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009 for the protection of consumers’ interests (OJ L 110, 1.05.2009, p. 30), Recital 2.

³⁹⁵ Koch (2001), *Non-class Group...*, p. 355-367.

collective dimension of the Directive cannot be questioned, even if not all the pieces of legislation listed in the Annex can be classified as protecting collective interests.³⁹⁶ The Injunction Directive should perhaps be titled in a more precise manner, and given its legal value that would be desirable to make it define injunctions as “*associations’ suit*” according to a proposal made by proposed by H. Koch.³⁹⁷

In order to make the Injunction Directive a flexible tool for consumer law enforcement, it contains both public and private enforcement. The Injunction Directive was supposed to function as “*one suit fits all*” enforcement solution. This approach leaves a large margin of discretion to Member States. It is up to them to decide which option fits best their national enforcement schemes. The injunctive procedure then becomes applicable to consumer cases of a various nature, thereby, however, it allows for differentiation since the Member States are left the choice of the preferred enforcement path, which may be purely public, purely private, or may also be a mixture of both.³⁹⁸

The way in which the Injunction Directive handles the complicated issue of “*legal standing*” is of paradigmatic importance.³⁹⁹ The Directive does not clearly indicate who should be granted legal standing, the reasons for which legal standing may be claimed, or whether or not the entitled party may be an individual or exclusively a consumer association. It simply contains a reference to the right to take action and the legitimate interest to which the action is tied. That is why it is necessary to draw a distinction between the right of action and the standing to sue. It seems as if the European legislature has borrowed this distinction from French law, the right of action⁴⁰⁰ (in French “*qualité d’agir*”) and the legitimate interest in taking a legal action (in French “*intérêt pour agir*”), the standing to sue.⁴⁰¹ While the right to bring a legal action is a key issue in the Injunction Directive, the standing to sue has been touched upon by the Directive, but the very same Directive has left a number of issues open.⁴⁰² In relation to this issue, the Injunction Directive remains clear, since it introduced *ex lege* confirmation of a mutual recognition of the legal standing of consumer organisations,

³⁹⁶ See Chapter I 3.3., 6.

³⁹⁷ *Ibidem*.

³⁹⁸ See Chapter III 5., 6.

³⁹⁹ Koch (2001), *Non-class Group...*, p. 355-367.

⁴⁰⁰ The right of action (*qualité d’agir*) that determines which *lex fori* applies, also brings much more clarity by providing a mutual recognition of the standing of national consumer organizations.

⁴⁰¹ The legitimate interest to take legal action (*intérêt pour agir*) is determined by *lex fori delicti*, given the nature of an injunctive order – delict, perhaps a *quasi-delict*. See: Micklitz/Reich/Rott/Tonner (2014), *European Consumer...*, p. 313.

⁴⁰² In Weatherill/Bernitz (2007), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, Studies of the Oxford Institute of European & Comparative Law, p. 239-240.

while with regard to standing to sue, also known as legitimate interest to take a legal action, its delictual and *quasi-delictual* nature through the *lex loci delicti* rule is to be considered.

5. 1. Right of Action

The mutual recognition of standing is meant to significantly improve cross-border consumer relationships. The key instrument to establish mutual recognition of standing is the establishment of an EU wide list of registered qualified entities.

Article 4(2) of the Injunction Directive:

*“For the purposes of intra-Community infringements, and without prejudice to the rights granted to other entities under national legislation, the Member States shall, at the request of their qualified entities, communicate to the Commission that these entities are qualified to bring an action under Article 2. **The Member States shall inform the Commission of the name and purpose of these qualified entities.** [emphasis added MO] (3) The Commission shall draw up a list of the qualified entities referred to in paragraph 2, with the specification of their purpose. This list shall be published in the Official Journal of the European Union; changes to this list shall be published without delay and the updated list shall be published every six months”.*

In order to be registered, each Member State has to notify to the European Commission the name and purpose of the particular qualified entities, which can be public or private, on their request.⁴⁰³ All what qualified entities are required to do in order to be recognized is to provide relevant evidence of their *“purpose”*. This can only be understood as the capacity to act on behalf of the collective interests of consumers along the line of the spirit of the Annex. Once enrolled on the list published in the Official Journal, the entities are formally and automatically granted the legal standing to sue. The administration and the management of the list lie in the hands of the European Commission. The Commission lists the qualified entities meant to be established for intra-community infringements. All qualified entities are published in the Official Journal of the European Union. The list shall be *“frequently”* updated. In practice, it is updated twice yearly with certain possible delays of an administrative and technical nature. Delays in updating the list in the Official Journal could potentially prevent a qualified entity from one Member State from taking action in another Member State. It is questionable whether the list is sufficiently up-to-date, considering the

⁴⁰³ See Chapter III 5., 6, IV 4.4.

multitude of consumer organisations still being established at the national level and the potential of each of these to be notified to the Commission.⁴⁰⁴

Article 4 of the Injunction Directive requires Member States to take all measures necessary to ensure that, in event of an infringement originating in that Member State, any qualified entity from another Member State, in circumstances where the interests protected by the qualified entity are affected by the infringement, have the legal standing to make a claim in the Member State in which the infringement took place. The Injunction Directive established a general framework for the mutual recognition of standing of qualified entities. It formulates only minimal standards on the requirements a qualified entity had to fulfil to represent the collective consumer interest.⁴⁰⁵ Concerning the requirements posed by the Injunction Directive, it is highly debatable whether the minimum standards can provide for a proper solution and can be regarded as an adequate “*filter*” for qualified entities. This is all the more so as the Injunction Directive gives no clear indication as to how mutual recognition should be applied in practice and it does not establish any requirements in this regard.⁴⁰⁶ Legal standing is limited to those consumer entities indicated in the list published by the European Commission. This means that cross-border consumer cases may be brought only by qualified entities, which have been recognised and registered in the list of the Commission. Unregistered consumer organisations not recognised as qualified entities cannot act as qualified entities in cross-border cases. Therefore they cannot be identified as qualified entities in the form of consumer organizations established upon the frame of the Injunction Directive. This legislative technique should help to develop a properly working scheme of who is responsible for what, and where. If a consumer organisation has been included in the list, Member States have lost their powers evaluate this registration within the EU run list.⁴⁰⁷ The registration is definitive and cannot be questioned.

Although Member States have no right to verify a listed entity *ex post*, they are granted input in the choice of qualified entities which should be included on the list of qualified entities. It is up to Member States to notify a particular consumer organization to be covered by the list. The entities may request notification. Here, discretion should not be confounded with arbitrariness, because the Member States have to respect the European

⁴⁰⁴ Micklitz/Reich/Rott/Tonner (2014), *European Consumer...*, p. 386.

⁴⁰⁵ Muir Watt (2010), *Brussels I and Aggregate Litigation of the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation*, IPRAx, Praxis des Internationalen Privat- und Verfahrensrechts, Vol. 2, p. 111-116.

⁴⁰⁶ Micklitz (2008), in Krüger/Rauscher, *Münchener Kommentar zur Zivilprozessordnung*, Band 3: §§ 946-1086 EGZPO - GVG - EGGVG - UklaG Internationales Zivilprozessrecht (in English translation made by Alicja Sozańska), p. 1279-1282.

⁴⁰⁷ Weatherill/Bernitz (2007), *The Regulation of...*, p. 239-244.

minimum standards. It would be interesting to know whether and to what extent a national consumer organization which has not been notified to the European Commission may go to a national court claiming that they have indeed met the minimum requirements. Thus far this has not happened, perhaps because most of the Member States have turned out to be quite generous in nominating the qualified entities and proposing them to be registered. The deeper reason why Member States enjoy discretion can be found in the broad variations on what may be called a qualified entity legitimized to represent the collective interests of consumers in courts.⁴⁰⁸ Indirectly the Injunctions Directive imposes on the Member States the obligation to lay down standards which if met allow for taking legal action before a national court in another country than the home country. However, this obligation covers cross-border standing only. The Injunction Directive does not oblige Member States to introduce a register for purely national litigation. That is why today's national landscape of registered qualified entities looks quite different with regards to national and cross-border standing. Nationally, there might be no list, only the national requirements have to be met. They may be examined by national administrations and national courts. Shifting to cross-border issues, the picture changes dramatically. Here the Official Journal of the EU informs any judge in charge of a cross-border dispute based on action for injunction, whether the claimant consumer organization has been registered, what means that it has been granted standing.

Most of the Member States seized the opportunity to define common standards for national and trans-border infringements. The Injunction Directive does not include *ex lege* exclusion for domestic cases, which means that there are no obstacles to prevent the Member States from extending the scope of application of the Directive to national matters. It should be stressed that consumer organisations that play a role under the Injunction Directive may not focus exclusively on cross-border infringements. Quite the contrary is true. Most consumer organizations limit their activities to the national level.⁴⁰⁹ It will be shown that consumer organisations are rarely involved in cross-border conflicts.⁴¹⁰

⁴⁰⁸ Ireland, Latvia, Lithuania – only one consumer association, the Netherlands, Romania and Sweden more than 15 established, and Spain, Italy and France less than 30 consumer associations established, Germany and Greece – more than 70 established consumer associations.

⁴⁰⁹ Report on the application of Directive 2009/22/EC, p. 3-4.

⁴¹⁰ Report on the application of Directive 2009/22/EC, p. 3.

5. 2. Abuse of the Right to take Action

The only way to stop an EU registered qualified entity before a national court or before a national consumer agencies is to argue that the registered entity is misusing its power. The Injunction Directive expresses this reservation in the following language:

Article 4 (1) of the Injunction Directive:

*“Each Member State shall take the measures necessary to ensure that, in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may apply to the court or administrative authority referred to in Article 2, on presentation of the list provided for in paragraph 3 of this Article. **The courts or administrative authorities shall accept this list as proof of the legal capacity of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case**”* [emphasis added MO].

Member States, in dealing with a particular qualified entity, can assess whether the entity in question has met the minimum standards under the Injunction Directive, and whether - based on these minimum standards - the consumer organisation should be allowed to take an action in the case-at-hand. However, the power is limited to test the “*use*” of the right sue in that particular case, under that particular circumstances.⁴¹¹ Doubts may result from the fact that the qualified entity has lost legal capacity or is pursuing purposes that are not covered by the statute or are not in the interest of consumers. Certain kinds of cases may require a certain profile of competence and activity. Therefore, the particular profile of the consumer protection activity might fit, but equally, might not fit at all.⁴¹² The threshold for such an intervention is therefore high.⁴¹³ Any other interpretation would run counter to the spirit of the Injunction Directive which deliberately aims at preventing national administrations and courts from second guessing the national criteria. Admittedly, the borderline between a second control of the national registration standards and the abuse of the power in a concrete case is a

⁴¹¹ Weatherill/Bernitz (2007), *The Regulation of...*, p. 239.

⁴¹² Some consumer organizations, in particular from new Member States use only experts in the areas of consumer guarantee and product liability cases while specialist as of the e-commerce area are highly sought after on the market.

⁴¹³ In a similar direction the German Supreme Court, *Monatszeitschrift für Deutsches Recht* 2010, 1339.

rather than one. It is for the national courts of Member States to carefully handle that distinction.⁴¹⁴

Therefore Article 4(1) sent. 2 of the Injunction Directive, provide courts and administrative bodies with the capacity to verify whether the aim of a qualified entity justifies its legal action in a particular case. Nevertheless, it is up to national enforcement bodies - these being actively involved in the injunction procedure - to verify and juxtapose the aim of the qualified entity in relation to the subject of its complaint. This would resolve a problem that could arise when an entity has a limited scope of activity. EC guidelines limit the activity of the national legislator and national courts to control of abuses in this regard. However, the control of abuses of certain rights cannot be extended to include control of qualified entities already on the list, or of the requirements of qualified entities which act before national courts. This may be called a limited verification of legal interest. Despite these uncertainties, the Injunction Directive leaves no doubt that a “*double control*” of the standing to sue of an EU wide registered qualified entities included is not allowed.

5. 3. Legitimate Interest to take Legal Action

Although all procedural rules and principles are applicable to the Injunction Directive, quite surprisingly, the Directive remains silent on the key issue of the legitimate interest to take a legal action. The Injunction Directive provides for no specific rules in respect of standing to sue. It neither provides a full and exhaustive list of requirements for standing to sue, nor provides a single example of an applicable law in cross-border transactions. The guidance given is limited:

Article 3 of the Injunction Directive:

*“For the purposes of this Directive, a ‘qualified entity’ means any body or organisation which, being properly constituted according to the law of a Member State, **has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with** [emphasis added MO], in particular:*

(a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or

⁴¹⁴ Judgment of the Court of 3 June 1992, *Alberto Paletta and others v Brennet AG.*, Case C-45/90 (ECR 1992, p. I-03423); Judgment of the Court of 2 May 1996, *Brennet AG v Vittorio Paletta*, Case C-206/94 (ECR 1996, p. I-02357), 427 final.

(b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by the national law”.

All what the Injunction Directive provides for is a reference to the legitimate interest, with a reference to Article 1 of the Injunction Directive, which means that the interest must be a collective one and this it is bound under the minimum standards to the protection of economic interests. One may read the formula such that the Directive leaves the issue of providing substance to “*legitimate interest*” in taking legal action to the Member States to decide. This is only partly correct. Already the wording draws a distinction between the qualified entity properly constituted according to the law of a Member State and the legitimate interests to take legal action in the collective interests of consumers.⁴¹⁵ Two arguments matter: the scope of application is not bound to cross-border cases alone. So the reference to legitimate interests turns into the EU concept even for purely national cases. Secondly in cross-border cases the Injunction Directive ties the mutual recognition of legal standing to qualified bodies acting in the legitimate interest of consumers. That is why the notion of “*legitimate interest*” opens the way for an autonomous interpretation. To be sure, these requirements can only be of a minimum nature. Public qualified entities must be “*independent*” this would mean for consumer organisations being free from business membership. A stable organizational structure, an office, a certain minimum size, a long-term activity and a concretisation of the envisaged activities in the field of consumer policy would equally fit into that category. Funding is a particular difficult issue.⁴¹⁶ However, it is not possible to derive from EU law a particular Member States obligation to provide for the necessary resources.

The cross border nature of the Injunction Directive provides for particular intricacies, due to the hybrid nature of the action for injunction which combines procedural and substantive issues.

Article 2 (2) of the Injunction Directive states:

“2. This Directive shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.”

⁴¹⁵ Micklitz/Reich/Rott/Tonner (2014), *European Consumer...*, p. 387.

⁴¹⁶ Report on the application of Directive 98/27/EC.

There is a significant difference between the German, Italian, Polish, English⁴¹⁷ and French versions.⁴¹⁸ The German version refers *to international private law and international procedural law*.⁴¹⁹ The Polish version made a reference *to the international private law* and the Italian version⁴²⁰ refers to *delle regole di diritto internazionale privato*. As has been previously established, an injunction order compels someone to refrain from doing something, or to modify certain behaviour. This specific nature has led to its classification as a legal remedy, located somewhere between tort or delict and a *quasi*-delict, combining substance and procedure. The fact that the action for an injunction is of quite undetermined nature is of great relevance to the choice of law applicable to the case-at-hand.

The nature of an action for an injunction procedure paves the way for the application of the Rome II regulation.⁴²¹ The choice of law in the case is determined by the *lex loci delicti*, which is typically the place where the infringement has taken place. This is known as the market rule.⁴²² The alternative is the country of origin principle which was brought forward in particular in transborder advertising and sales promotion.⁴²³ In Reich's opinion⁴²⁴ the country of origin principle must ensure that no risks originate in the territory of Member State A which could endanger citizens in Member State B. However, Rome II ended to the debate. However, the market rule has to comply with the particular substantive issues at stake. Here the picture might slightly differ according to the subject matter concerned.

⁴¹⁷ Article 2(2) of the Polish version: „*Niniejsza dyrektywa pozostaje bez uszczerbku dla zasad prawa prywatnego międzynarodowego odnoszących się do właściwego prawa, prowadzących zazwyczaj do stosowania bądź prawa Państwa Członkowskiego, z którego pochodzi szkodliwa praktyka, bądź prawa Państwa Członkowskiego, w którym wystąpiły skutki szkodliwej praktyki*”.

⁴¹⁸ Article 2(2) in the French version: “*La présente directive est sans préjudice des règles de droit international privé en ce qui concerne le droit applicable, qui devrait donc normalement être, soit le droit de l'État membre où l'infraction a son origine, soit celui de l'État membre où l'infraction produit ses effets*”.

⁴¹⁹ Article 2 (2) in the German version: „*Diese Richtlinie läßt die Vorschriften des Internationalen Privatrechts und des Internationalen Zivilprozeßrechts hinsichtlich des anzuwendenden Rechts unberührt, so daß normalerweise entweder das Recht des Mitgliedstaats, in dem der Verstoß seinen Ursprung hat, oder das Recht des Mitgliedstaats, in dem sich der Verstoß auswirkt, angewendet wird*”.

⁴²⁰ Article 2(2) in the Italian version: „*La presente direttiva non osta all'applicazione delle regole di diritto internazionale privato sulla legge applicabile e comporta, di norma, l'applicazione della legge dello Stato membro in cui ha origine la violazione o della legge dello Stato membro in cui la violazione produce i suoi effetti*”.

⁴²¹ Rome II (OJ L 199, 31.07.2007, p. 40–49).

⁴²² Reich (2014), *Cross-border Consumer Protection*, in Reich/Micklitz/Rott/Tonner (2014), *European Consumer...*, p. 313-314.

⁴²³ The European Court of Justice made a clear point concerning this issue in: Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case C-120/78, ECR 1979, p. 649.

⁴²⁴ Howells/Micklitz/Wilhelmsson (2006), *European Fair Trading...*, p. 235, 509.

5. 4. Consumer Organisations in Cross-border Injunctions

The Injunction Directive grants legal standing to consumer organisations, which are supposed to deal with cross-border cases. Although it has for a long time been questionable as to whether consumer organisations are granted legal standing and whether they are recognised as of equivalent standing to that of an individual⁴²⁵, the Injunction Directive has brought about the long expected clarification. Since the Injunction Directive was issued, consumer organizations are allowed to act on behalf of consumers all over Europe. It has simplified cross-border enforcement and thereby cross-border trade. An analysis of the current use of remedy of injunction in terms of cross-border relationship demonstrates however a quite cloudy picture.⁴²⁶ In most Member States consumer organisations do not really engage in litigation. However, recently the evolution of the consumer movement is becoming more transparent⁴²⁷ and consumer organizations more often try to assist plaintiffs in individual disputes, in terms of expertise, sharing experiences, which supports the argument above.⁴²⁸ Essentially, this is a relic of the public enforcement tradition, which is particularly strong in Europe and even more so in the new Member States. Public enforcement still appears as the most common form of enforcement. This explains the rather limited role and function of consumer associations in cross-border enforcement.

Another potential obstacles are human resources⁴²⁹ and funding for consumer organisations.⁴³⁰ No funding means no case.⁴³¹ The success or failure of activities of consumer organisations also depends on the financial risk of the proceedings, length of the proceedings, complexity of the procedure, the limited effect of the rulings and their enforcement.⁴³² If these aspects remain underdeveloped, no one can expect the injunction procedure to work properly. It is one thing to grant consumer organisations legal standing,

⁴²⁵ On agencies and NGOs empowered by legislation to enforce particular areas of private contract law see: *Duke Journal of Comparative and International Law* (2011), Vol. 11(2), *Debates over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*; Hensler (2010), *Using Class Actions to Enforce Consumer Protection Law*, in Howells/Ramsay/Wilhelmsson/Kraft, *Handbook of Research on International Consumer Law*, p. 515.

⁴²⁶ Caponi (2009), *The Collective Redress...*

⁴²⁷ Poncibò (2009), *The Reform of Directive 98/27/EC*, in Cafaggi/Micklitz, *New Frontiers of...*, p. 283-303.

⁴²⁸ Personal communication of the author with consumer association representatives at the occasion of TRACE training held in Brussels at BEUC premises. Consumer organizations face a problem of not being able to pass the threshold of the strict bureaucratic control usually managed by the ministries or governmental bodies which check the threshold in terms of the number of consumer organization members, their presence in the relevant territory, the internal organization, and others.

⁴²⁹ BEUC, training materials *Collective Consumer Redress Course*, <www.beuc.eu> accessed on September 14, 2011.

⁴³⁰ Hodges/Tulibacka/Vogenhauer (2010), *The Costs and Funding...*, p. 489-492.

⁴³¹ Hodges (2008), *The Reform of...*, p. 46-47.

⁴³² Report on the application of Directive 98/27/EC; Report on the application of Directive 2009/29/EC.

and another to equip them with a certain degree of power, which would entitle them to monitor infringements and violations and to open up room for the proper selection of cases to be brought before a court. In the majority of Member States consumer organisations have neither the legal power to monitor the market, nor sufficient funding to properly organise a monitoring process, nor funding for selection the appropriate cases, which would be necessary in order to take a case to the court. All these issues are already complicated in a national legal and cultural environment and in a cross-border dimension the difficulties multiply. The reaction of consumer associations to all these difficulties was, and is, to rely on co-ordinated enforcement as a more successful alternative to cross-border litigation. Here they can at least frame the litigation in the national context, within the national network, including media support, more often attention of consumers and governmental bodies to consumer organization activity, last but the least the issue of funding.

The shift from cross-border litigation to co-ordinated action, however, reveals the differences between the role and function of consumer organisations in the old *versus* the new Member States. As a rule of thumb one might say that consumer associations play a more significant role in the old Member States. In the new Member States they are often downgraded to mere puppets and they are certainly not regarded as serious societal actors.⁴³³ This is both indicative and in consumer policy terms problematic. It is indicative in that only a strong civil society may yield social activities and the formation of associations. Despite all the rhetoric on civil society building, it seems as if there is still an imbalance between the “old” and the “new”. It is problematic in that consumer organisations from the new Member States are under-represented in co-ordinated actions, which means that the old Member States dominate the selection of the appropriate cases.

5. 5. Public Bodies in Cross-border Injunctions

The Injunction Directive is rooted in public and private enforcement. Under Regulation 2006/2004, the main focus is given to public enforcement since Member States were obligated to nominate public authorities which manage cross-border conflicts and which are - at least as a means of last resource - equipped with the necessary powers to initiate an action for injunction.

⁴³³ Bakardijeva-Engelbrekt (2009), *Public and Private...and Safjan/Gorywoda/Janczuk (2009), Taking the Collective Interest of Consumers Seriously: A View from Poland*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 91-138, 171-200.

Member States are free to decide on the institutional structure of the empowered public body as an integral part of their procedural autonomy.⁴³⁴ The qualified entity can be a part of a ministry⁴³⁵, it can be an agency⁴³⁶, which is in charge of other market surveillance activities⁴³⁷ – here cross-border injunctions is just another field – or they can establish a particular public entity which has the competence to look after consumer matters alone.⁴³⁸ Needless to say, the large leeway given leads to all sorts of institutional arrangements, which are not necessarily beneficial for the building of a European enforcement regime. The intended revision of Regulation 2006/2004 might improve and streamline the future institutional design.⁴³⁹ The move towards public bodies is potentially more valuable than private enforcement.⁴⁴⁰

It might suffice to contrast the United Kingdom, the Nordic countries and the former post-Communist countries. For decades the Office of Fair Trading, as an independent public agency in charge of matters of trade and consumer policy, operated rather successfully in the protection of the collective interests of consumers. Typically various fields of policies are merged in one public body. The Nordic model looks different.⁴⁴¹ Here consumer policy matters are bundled in the hands of a Consumer Ombudsman, which has to monitor and supervise⁴⁴² the market and to take legal action where appropriate. As the name indicates, the Consumer Ombudsman focuses on consumer matters alone. However, the situation is currently in flux. The Office of Fair Trading has been dissolved and re-established under a new design with less focus on consumer protection issues. In Finland the Consumer Ombudsman is merged with the competition authorities, which reflects a general trend in the

⁴³⁴ In the certain systems such as in Scandinavia and Central and Eastern European Member States the role of public bodies is predominant.

⁴³⁵ For example: Belgium.

⁴³⁶ For example: the Netherlands.

⁴³⁷ For example: Sweden.

⁴³⁸ For example: Lithuania.

⁴³⁹ The European Commission roadmap regarding the Review of the Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, <http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2014_sanco_001_consumer_protection_cooperation_review_en.pdf> accessed on June 10, 2014. <http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2014_sanco_001_consumer_protection_cooperation_review_en.pdf> accessed on May 29, 2014; proves a direction of potential changes in order to increase effectiveness and sufficiency of the EU net.

⁴⁴⁰ In the UK - the Office of Fair Trading has been very active in policing unfair terms. Over 6,000 contract terms have been deleted or amended after 1000 cases. This was stressed in a speech by G. Monti, *The Revision of the Consumer Acquis from a Competition Law Perspective*, speech at the conference: The Common Frame of Reference and the Future of European Contract Law, Amsterdam June 1-2, 2007, p. 5.

⁴⁴¹ Hodges (2008), *The Reform of...*, p. 27, Vitanen, K. (2007), Enforcement of consumers' collective interests by regulatory agencies in the Nordic countries Argomenti, Consumatori, Diritti, Mercato, 2007, p. 79-101.

⁴⁴² Vitanen (2007), *Enforcement of consumers' collective interests by regulatory agencies in the Nordic countries* Argomenti, Consumatori, Diritti, Mercato, 2007, p. 79-101, at. 82.

EU of what might be called “*institutional merger*”.⁴⁴³ In the new Member States the institution of the ombudsman or public enforcement bodies such as the former Office of Fair Trading⁴⁴⁴ are largely unknown. Here specific ministerial units are supposed to deal with enforcement issues. In post-Communist countries there is still a deep reliance in the power of administrative bodies and the public sphere of enforcement⁴⁴⁵, which are used once consumers’ interests are infringed by any kind of unlawful activity on the business side.

In the Czech Republic, although both judicial and administrative measures exist side-by-side, administrative instruments have been developed in a consumer-friendly manner. They made injunction procedure easily accessible. Both consumer organizations as well as individual consumers may file administrative motions. The Czech Republic injunction procedure has three features:

- (i) Courts⁴⁴⁶, which are not specialist and governed by special rules on consumer protection, are still underdeveloped which implies that “(...) *the judicial system does not deem enforcement of collective interest desirable*”. Due to the expenses and the long procedure this variant is of minor importance,
- (ii) Ombudsman activity - with specific rule in the area of consumer law. the Ombudsman intervenes only in case of failures between a consumer and the public administration,
- (iii) Governmental administrative bodies, which do not have links to the judiciary and which are governed by administrative procedural law.⁴⁴⁷ It is a common sense that agencies make a part of governmental structure creating more societal respect for the administrative procedures.

In Poland, the action for injunction has been introduced through the Act on Competition and Consumer Protection. It provides, as in most of the new Member States, for a mix of judicial and administrative measures. The administrative scheme, the Office of Competition and Consumer Protection, decides on practices infringing the collective

⁴⁴³ Ottow (2014), *Erosion or Innovation? The Institutional Design of Competition Agencies - A Dutch Case Study*, Journal of Antitrust Enforcement, p. 25-43. A similar trend is observed with regard to the Office of Fair Trading which since 1973 was responsible for protecting consumer interests throughout the UK. It closed on 1 April 2014, with its responsibilities passing to a number of different organizations including the Competition and Markets Authority (CMA) and the Financial Conduct Authority.

⁴⁴⁴ More details with regard to the issue analysis can be found in: Howells/Weatherill (2005), *EU Consumer...; Ramsay (2007), Consumer Law and Policy*, p. 327.

⁴⁴⁵ Kmiecik (2005), *Postępowanie Administracyjne w Europie*, Kraków, p. 329.

⁴⁴⁶ Tichy/Balarin (2009), *Efficiency of the Protection of Collective Interest: Judicial and Administrative Enforcement in the Czech Republic*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 79.

⁴⁴⁷ The Administrative Procedure Act No. 500/2004, < <http://www.zakonyanglicky.cz/?documentation=act-no-5002004-coll-administrative-procedure-code>> accessed on May 29, 2014.

consumer interest. The decision is subject to judicial review.⁴⁴⁸ The Office of the Competition and Consumer Protection will initiate regulatory action only if the infringement is harmful to the public interest of consumers. Standing in the administrative procedure is given to the Ombudsman, the consumers' spokesman, consumer organizations, including those recognized as qualified under the Injunction Directive excluding a consumer, who may claim upon rules of civil law and civil procedure in the procedures dedicated to specific legal fields. As Bakardjieva states "(...) *public enforcement was recognized as indispensable element of the overall institutional framework of consumer protection in all CEE*"⁴⁴⁹ [Central and Eastern European Countries].

5. 6. Practical Use of Collective Cross-border Mechanisms in *Duchèsne*

Although the collective cross-border consumer element was already established in 1998, its practical value and relevance is more appreciated in the national context than the cross-border one.⁴⁵⁰ All in all, the picture is not very promising. Only a few cases⁴⁵¹ have been adjudicated on the basis of the Injunction Directive. *Duchèsne* remains a flagship for cross-border collective use of the Injunctions Directive.⁴⁵² This is why *Duchèsne* is also recognized as a test case upon which pros and cons of the cross-border aspect of the Injunction Directive may be considered, and what kind of obstacles can be faced in this regard. It also illustrates how the rules on legal standing can and should be exercised in legal practice, and what kind of legal obstacles can arise, and last but not the least prove how the rule of law applicable imply ambiguity and uncertainty and how it can dramatically change the final judgment.

This case was brought to court by the Office of Fair Trading, which is a public body, precisely a non-profit and non-ministerial government department in the United Kingdom, which sued a Belgium company - *Duchèsne* by Dutch company, named Best Sales BV. The two bodies had been engaged in sweepstakes activity. *Duchèsne* was engaged in retail-by-

⁴⁴⁸ Stefaniuk (2010), *Sądowa Kontrola Decyzji Administracyjnych Wydawanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów w Sprawach Ochorny Konkurencji na Podstawie Przepisów Ustawy z Dnia 16 lutego 2007 R. o Ochronie Konkurencji i Konsumentów*, Teka Kom. Praw. OL PAN, 192–206

⁴⁴⁹ Bakardjieva-Engelbrekt (2009) *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 101-104.

⁴⁵⁰ Chiarloni/Fiorio (2005), *Consumatori e Processo, La Tutela degli Interessi Collettivi dei Consumatori*; regarding the use of the Injunction Directive in the national and cross-border context, including statistical data see: Report on the application of Directive 2009/29/EC.

⁴⁵¹ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials and Text on Consumer Law*, Oxford, p. 573.

⁴⁵² Since *Duchèsne* there is little progress; Report from the Commission on the application of Directive 2009/29/EC.

correspondence and sent unsolicited mail-order catalogues including advertisements for household goods, decorations, leisure and Do-It-Yourself products to residents of the United Kingdom. The goods were promoted through the notification the addressees were recognized as a prize's winners of a lump sum of 10.000£. The company offering this cross-border sweepstake operated in a number of Member States, in particular France, the United Kingdom and the Netherlands. A participant in the promotional game was automatically recognized as price winner. The tickets were circulated with the catalogues. Each person, who received a catalogue was only supposed to indicate necessary details, then to contact the game organizer, and to find out whether the ticket he had received together with the catalogue was a winning one, prior to a deadline that had been drawn for this lottery.⁴⁵³

Since this practice was obviously harmful to consumers, the OFT has initiated the first cross-border procedure for an action for an injunction. The first truly cross-border collective action took place in Belgium before the Court d'appel de Bruxelles. The legal standing of the OFT was not put into question. The OFT acted on its own initiative. The case, which from the beginning was very particular had been very carefully prepared by the different departments of the OFT. One of the crucial elements of the investigation on *Duchèsne* was monitoring of the catalogue campaign in the relevant Member States, as listed below, where different regulatory actions had been taken afterward. Such methodology allows to consider the OFT as a national regulatory body acting in the collective interest of consumers not only those in the UK consumers, but also consumers from other EU-states as far as they the sales promotion campaign could have affected their rights.

The OFT recognized the practice as a breach of the Fair Trade Practices Act⁴⁵⁴ and of the English law of 23 May 1988 on consumer protection.⁴⁵⁵ The OFT argued that consumers were misled by the company since they believed that they only had to make a purchase in order to secure a prize, while in practice the winners were selected in advance and only a very few recipients would actually receive a prize. According to the Court of Appeal in Brussels, the company had received about 4. 000 orders each day with a reference to the sweepstake in the catalogue. Many of the consumers complained. Although the judgment of the Court of Appeal in Brussels relied on the cross-border injunction, it seems that the basic elements of

⁴⁵³ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials...*, p. 573; Hodges (2008), *The Reform of...*, p. 107-108.

⁴⁵⁴ Referring to the Fair Trade Practices Act of the 14 July 1991 with reference to Article 23.1, 23.2, 23.4, 23.10, 23.14 and 94.

⁴⁵⁵ The Control of Misleading Advertising Regulation 1988 – Statutory Instrument 1998 No. 915.

the judgments and its innovative nature did not gain much public attention. More interest than the judgment itself was given to the amount of the penalty payments imposed on *Duchèsne*.

The penalty payments remained a subject of controversy. At first instance, the Court ordered that the company had to pay 25.000 Euro for each infringement of the cessation order. In the final result, the Court found this penalty to be exaggerated and reduced it to 2.500 Euro per folder, limiting the total aggregate penalty to 1.000.000 Euro. The Court of Appeal in Belgium had exercised its judicial power and independence and managed to apply a role on “*effective, proportionate and dissuasive*” sanctions. The Court indeed calculated a penalty upon the frame of the national legal requirements and sanctions. The Court was allowed to do so since EU law leaves it up to the discretion of national legal systems.

The costs resulting from the preparatory phase of the procedure were a crucial issue since the preparatory phase for *Duchèsne* was very lengthy, expensive and time-consuming. The preliminary stage was begun by the OFT long before the case was brought to court. The OFT acting by various departments had started a lengthy and detailed investigation, searching case-by-case, literally catalogue-by-catalogue. This investigation was very costly, because of the necessity of to translate documents, which was necessary not only for the OFT but also for the Court of Appeal in Belgium.

Although the OFT brought a claim for the reimbursement of the costs of translation of the documents in the preparatory phase, the claim for reimbursement was rejected by the Court. The Court classified these items as expenses, which are not essential to proceedings. The Belgian judge did not consider that the court procedure could not be started without the set of documents giving a basis for the claim. A decision in favour of OFT would have had a deterrent effect for potential repetitions of this kind of activity, since the widespread strategy of using sweepstakes to promote the sale of products and services have become very common and their popularity among business has significantly increased.

Although the Injunction Directive is always identified with potential problems regarding the legal standing of the qualified entities, in *Duchèsne* it was never put into question whether the OFT can sue a company from Belgium. The Court in Brussels did not even consider whether or not to grant a standing to sue to the OFT. Such a statement of the Belgian Court may be recognized as a great success of mutual recognition of standing. The mechanisms of the Injunction Directive really works in practice. *Duchèsne* may also be recognized as a sign that public bodies, in particular the OFT, enjoy a good reputation even beyond its borders. In terms of common perception that public bodies are more powerful than

private actors, this demonstrates the power of public bodies in the area of consumer law enforcement.

The OFT, a public body from the United Kingdom, had filed the action in Belgium. This was the way to circumvent eventual problems German and French consumers' organisations faced in direct shopping. French consumers' organisation wanted to protect French consumers against German-based unfair commercial practices in France, and German based consumer organisations became involved in protecting not only German consumers in Germany, but also French consumers in France against strategies which had their origin in Germany.⁴⁵⁶ Although the case demonstrates that OFT, a public organization, enjoys legal standing according to the principle of mutual recognition of standing, the situation might have looked quite different if the standing had been in the hand of consumer organisations.

The Court has given special attention to the decision on the applicable law. Both the court of first instance and the court of appeal were actively engaged in a debate on whether Belgian or English law applies, since the activity of the company could have been recognized as a breach of either the UK or Belgian law. The Court of first instance argued in favour of the applicability of English law, whereas the Court of Appeal came to the contrary conclusion and applied the Belgian rules of law. Hence, the courts have developed reasoning afterward adopted, and which is consistent with the Rome II Regulation.⁴⁵⁷ Commercial practices have been classified as extra-contractual obligations. Furthermore, claims made under unfair competition law are influencing the competitive relations or the collective interest of consumers. This was further codified as a "market rule" in Rome II.⁴⁵⁸ This means the law applicable is the law of the country in which due to the competitive relations a collective consumer interest is affected.⁴⁵⁹ Therefore, the Court of Appeal intended to stop unfair commercial practices in the place of their origin. The law of the state affected by the advertising has completely no influence on the applicable law. In that case only the state of origin of the unlawful practice matters.

The provisions of the UCPD are very much in line with the general message behind Rome II indicating the applicable law on the basis of *lex loci delicti commissi*. This means that the law has to be chosen where the damage has arisen or is likely to occur; in practice, this means it is usually the victim's place of residence. Although *Duchèsne* raises many

⁴⁵⁶ Micklitz (1993), *Cross-Border Consumer...*, p. 411-434.

⁴⁵⁷ Weatherill/Bernitz (2007), *The Regulation of...*, p. 238-240.

⁴⁵⁸ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials...*, p. 575.

⁴⁵⁹ Cafaggi (2006), *The Institutional Framework of European Private Law*, Oxford, p. 191. It should be added that Article 3 of the Regulation Rome II acknowledges the *lex loci delicti commissi*, such as situations in which the damage arises or is likely to arise. In a majority of situations it is the place where the victim is a resident.

different and interesting procedural aspects, the Court somehow disregarded the issues that could have shed light on the innovative potential of the Injunction Directive. Apart from the issue of the applicable law, *Duchèsne* has caused commentators to underline that UK consumers are recognized as robust consumers⁴⁶⁰ in comparison with the EU consumer who falls into a more continental tradition. The Court, however, did not provide any tangible argument for this. The argumentation of the *OFT* went in the complete opposite direction since advertising measures undertaken by *Duchèsne* were recognized as particularly dangerous for vulnerable consumers.⁴⁶¹ Considering the blurry picture and ambiguous nature of both concepts of the definition of a consumer⁴⁶², the Court rejected the arguments of both parties, because neither of them provided extensive and relevant proof in terms of the case complexity. This has opened up a discussion of whether EU legislation really needs to differentiate on the basis of vulnerable and robust consumers, as these notions have brought a massive amount of ambiguity into the case-law of the Member States since they introduce conceptual description rather than precisely formulated definitions. The Court decided to check the merit of the catalogues, and concluded that the catalogues were supposed to mislead consumers by affecting consumers sincerely and leading consumers to believe that they had really won a prize, which was the amount of money on the cheque mentioned in the catalogue. Overall *Duchèsne* blatantly demonstrated the difficulties and barriers in the application of the Injunction Directive.

6. Collective cross-border enforcement via Regulation 2006/2004

Due to various problems that had been identified in relation to the cross-border dimension of the Injunction Directive, including its complexity, the broad variety of Member States solutions, lack of funding and lack human resources in particular of consumer organisations, the Commission as a kind of rescue tool decided to issue Regulation 2006/2004. Regulation 2006/2004 was supposed to bring about improvement consumer law

⁴⁶⁰ The Court has come back to the concept of the robust consumer which was developed in the United Kingdom in early '90; Collins (2000), *White and Green and not much Re(a)d: The 1988 White Paper on Broadcasting Policy*, Television, Policy & Culture, 2000, p. 81-82.

⁴⁶¹ Burden (1998), *The Office of Fair Trading, Vulnerable Consumer Groups: Quantification and Analysis*, Research Paper of the Office of Fair Trading, Vol. 1; Scott/Black (2000), *Cranstons' Consumers and the Law*, Cambridge, p. 4-5.

⁴⁶² See: Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?* European Review of Private Law, Vol. 3, p. 323-348.

enforcement as far as a remedy of injunction was concerned.⁴⁶³ The enforcement mechanism introduced by Regulation 2006/2004 complements the scheme of the Injunction Directive – the two pieces of legislation follow the same rationale and they are focused on achievement of the same goals.

In Article 1, the Regulation 2006/2004 describes its objectives: “*This Regulation lays down the conditions under which the competent authorities in the Member States designated as responsible for the enforcement of the laws that protect consumers' interests shall cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.*” Hence, the Regulation 2006/2004 is meant to enhance Internal Market building through cooperation between public authorities. Regulation 2006/2004 does not address individual claims. It is notable that neither during the legislative process nor in the recitals is there any effort to connect the two pieces of cross border rules. This is all the more important as the Regulation 2006/2004 tilts the carefully established balance between the individual and the collective towards the collective, administrative side.

Regulation 2006/2004 is meant to create a network of national public authorities, which are responsible for the enforcement of EU consumer law, and are equipped with a minimum of common investigation and enforcement powers. Public authorities in the network are (i) obliged to work together and, (ii) cooperate with the Commission in order to share information about enforcement problems and in order to work on development of new effective enforcement solutions for consumer collective enforcement problems. Regulation 2006/2004 stresses the value of the “*mutual assistance*” between national authorities and the Commission. Mutual assistance is based on an exchange of information on request⁴⁶⁴ and without request⁴⁶⁵, on requests for enforcement measures⁴⁶⁶, co-ordination of market surveillance⁴⁶⁷ and technical side of the enforcement activities like as the maintenance of secure databases available only to national authorities involved in the public enforcement scheme sketched under Regulation 2006/2004.⁴⁶⁸ Enforcement activity of the public bodies includes also enforcement co-ordination in terms of training and exchange of officials, development of existing communications tools, or collection and classification of consumer

⁴⁶³ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Brussels, 3.01.2011, COM(2010) 791 final.

⁴⁶⁴ Article 6 of the Regulation 2006/2004.

⁴⁶⁵ Article 7 of the Regulation 2006/2004.

⁴⁶⁶ Article 8 of the Regulation 2006/2004.

⁴⁶⁷ Article 9 of the Regulation 2006/2004.

⁴⁶⁸ Article 10 of the Regulation 2006/2004.

complaints⁴⁶⁹, and others. Although the exchange of information takes place with the participation of the Commission, the Commission is not formally a member of Consumer Cooperation Network. Although it does not form part of the Consumer Cooperation Network, it participates in the activities of the network. The Commission is in charge of technical issues such as the processing and storing of information circulated within the network rather than *sensu stricto* activity in the course of procedure and action. The public bodies transpose the EC consumer *acquis communautaire* as listed in the Annex to the Regulation 2006/2004. Therefore, Regulation 2006/2004 provides for cross-border enforcement of 18 designated measures comprising *corpus iuris consummentis*.⁴⁷⁰ It is worth stressing that Regulation 2006/2004 following the legislative technique of the Injunction Directive introduced a mark of reference in the Annex to the Regulation 2006/2004, which lists the pieces of legislation to which Regulation 2006/2004 applies. It only repeats what was already said in the mark of reference to the Injunction Directive Regulation 2006/2004 is rather straightforward and does not allow much for interpretation.

Regulation 2006/2004 is a kind of “*a sister act*”⁴⁷¹ to the Injunction Directive. Both pieces of legislation have been designed to improve the position of the consumer in cross-border consumer law enforcement and are aimed at the protection of consumers’ economic interest. The two pieces of legislation are compatible enforcement measures used to combat cross-border consumer rights violations. Although they have are directed at realising a common aim, they are completely different regarding their procedural content procedure and their normative structures. On the one hand, there is the idea of mutual recognition of standing to promote and increase enforcement on the other there is the concept of co-operation between regulatory agencies. Although the goal of protection provided by the two legal acts are common, it does not mean that the two pieces are not interlinked. The opposite conclusion comes from the Report on implementation of the Injunction Directive.⁴⁷² I indicated the significant impact of Regulation 2006/2004 on the use of injunctions, in particular in terms of their more frequent use. This impact is said to result from the fact that most of the public authorities have opted to use co-operation mechanisms when combating an illegal practice by a trader in another Member State, instead of directly seeking an injunction before the courts of the Member State.

⁴⁶⁹ Article 16(1) of the Regulation 2006/2004.

⁴⁷⁰ Hodges (2008), *The Reform of*, p.109.

⁴⁷¹ Betlem (2007), *Public and Private...*, in Van Boom/Loos (2007), *Effective Enforcement of...*, p. 39-45, Micklitz/Styuck/Terryn (2010), *Case, Materials...*, p. 578.

⁴⁷² Report on the application of Directive 2009/22/EC, p. 8-9.

In essence, the new Regulation 2006/2004 realizes the idea of networking.⁴⁷³ Cross-border enforcement depends on the flow and speed of information, which paves the way for taking collective actions, as foreseen in the Injunction Directive.⁴⁷⁴ Regulation 2006/2004 secures a mutual exchange of experiences within the network of authorised bodies, which can be mutually supportive. The cooperation is based on the principle of confidentiality.⁴⁷⁵ Although authorities do not go cross-border, they may ask for assistance from authorities, which are familiar with procedures in the state of the wrongdoer.⁴⁷⁶ Regulation 2006/2004 is aimed at development of mutual cooperation in the use of standing among the Member States, but only if this is the result of networking.⁴⁷⁷

The key to understanding the Regulation 2006/2004 is the shift towards public enforcement. The Commission promoted the establishment of a network of public authorities as a net into which and on which an eventual action for injunction could be based. The European Commission and the Member States are united in the idea that it is much easier to organise cross-border enforcement *via* public bodies.⁴⁷⁸ Regulation 2006/2004 shifts from the free choice between private and public enforcement measures – the model of Injunction Directive, - to the EU obligation to nominate and appoint public enforcement authorities.⁴⁷⁹ However, this shift does not mean that consumer organisations are fully excluded from the new cooperation procedure. They may still – but only indirectly – be recognised as participants in this network. This provides, however, for a decision of the respective Member States to delegate the enforcement in cross-border issues to consumer organisations. The key addressee of Regulation 2006/2004 remains, however, the national public authority as precisely indicated in the Regulation 2006/2004. Consumer associations become part of the network only through the delegation *via* a public authority.⁴⁸⁰ They may cooperate and assist

⁴⁷³ Hodges (2008), *The Reform of...*, p.109-110.

⁴⁷⁴ II Report on implementation of the Injunction Directive, p. 6.

⁴⁷⁵ Howells/Micklitz/Wilhelmsson (2006), *European Fair Trading...*, p.238.

⁴⁷⁶ Presentations by E. Terryn and M. Bober (March, 2011) on collective consumer redress <www.beuc.eu> for Consumer Redress Training, BEUC.

⁴⁷⁷ The model of the network designed on the basis of the Consumer Protection Cooperation was taken from the formerly established International Marketing Supervision Network, as founded by the OECD, and which has been lately renamed as the International Consumer Protection and Enforcement Network (ICEN). Rules of their activities and manners of working were the same as those that had been adopted when the Consumer Cooperation Network was created. Although it has been an informal body for more than 20 years, it meets twice a year to discuss problems which arise in connection with unfair commercial practices. See for more information at website of ICEN, <<https://icpen.org/>> accessed on May, 11 2011.

⁴⁷⁸ Micklitz/Reich/Rott/Tonner (2014), *European Consumer...*, p. 389.

⁴⁷⁹ Van Boom/Loos (2007), *Effective Enforcement of...*, p. 24.

⁴⁸⁰ This solution was found under pressure from Austria and Germany where no consumer enforcement authority exist.

public bodies.⁴⁸¹ Regulation 2006/2004 moves consumer organisations away from the enforcement scheme, but their indirect activity is described in Recital (14) of Regulation 2006/2004 which states as follows: "*Consumer organizations play an essential role in terms of consumer information and education and in the protection of consumer interests, including in the settlements of consumer disputes, and should be encouraged to cooperate with competent authorities to enhance the application of the Regulation*".⁴⁸² Although consumer organisations do not play direct enforcement role in the consumer law enforcement, they have are placed on an ancillary position in respect of the aim and message behind Regulation 2006/2004 with is focused on networking and cooperation of national enforcement.

The strong reliance on public enforcement sits uneasily with Member States with no public enforcement tradition, such as Austria, Germany and Slovenia. These, basically, were expected to establish public bodies in order to meet requirements of Regulation 2006/2004. This change appears to be quite difficult both in practical and theoretical terms, since a newly established public enforcement body does not necessarily fit into already established enforcement frameworks.⁴⁸³ The major conceptual change and novelty of Regulation 2006/2004 results from the shift from private towards public enforcement. Possible resistance and frictions between public/private and public-only enforcement systems will probably be overcome by using a regulation as a measure instead of a directive, because the regulation would be directly applicable such that it would be a much more rigid instrument than the Injunction Directive with its flexibility based on minimum harmonisation.⁴⁸⁴ The content of Regulation 2006/2004 provides for quick and direct steps which will definitely help to adjust consumer enforcement under the frame of the Injunction Directive. The new European enforcement policy based on the Regulation 2006/2004 was supposed to provide for more clarity and for more coherence in the complex and difficult field of transborder consumer enforcement.

However, there was a price to pay for the immediate shift from private to public enforcement, hence from a Directive to a Regulation since Regulation 2006/2004 is exclusively addressed to cross-border matters. National enforcement matters have not been covered by the scope of the Regulation 2006/2004.⁴⁸⁵ The EU was simply looking for a basis

⁴⁸¹ Micklitz/Reich/Rott/Tonner (2014), *European Consumer...*, p. 389.

⁴⁸² Regulation 2006/2004 Recital (14) to the Regulation.

⁴⁸³ Report pursuant Article 21 of Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for enforcement of consumer protection laws, <http://ec.europa.eu/consumers/enforcement/docs/austria_report_en.pdf> accessed on September 6, 2011.

⁴⁸⁴ The issue was already discussed in Chapter II 2.

⁴⁸⁵ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials...*, p. 578-580.

to derive its competence for posing an obligation on Member States to introduce a public enforcement body in consumer matters. In other words, Regulation 2006/2004 may be understood as an attempt to achieve through the backdoor – meaning *via* the regulation of cross-border co-operation – what is impossible to achieve *via* the front door – the introduction of a network of competent public authorities including a competence for national enforcement issues. The implicit “*hope*” at least of the European Commission as the instigator of the whole exercise seems to have been that there is a spillover effect from the cross-border to the national dimension and that Member States, now obligated to nominate a national public enforcement authority, will be ready to introduce a clear cut solution, the most favoured public authority.

Given the above, domestic matters remain the exclusive competence of the Member States⁴⁸⁶, which remains a major difference, indeed a conceptual one, between the Injunction Directive and Regulation 2006/2004. The former introduces a procedural scheme for the use of the action for injunction for national and cross-borders matters, and which is in fact designed for the promotion of consumer associations - the later relies on co-operation and soft enforcement mechanisms through public authorities. This is a bit confusing since Regulation 2006/2004 and the Injunction Directive were meant to be sister acts. Indeed, Regulation 2006/2004 should rather be recognized as a supplement.⁴⁸⁷

6. 1. A Net of “Public Watchdogs”

Regulation 2006/2004 is based on the activity of public bodies which are established to form a network of Member States’ public bodies dealing with infringements in consumer cases. These bodies are allowed to use so-called “*reprimand procedures*”. Thanks to the mutual assistance mechanisms⁴⁸⁸ created by this Regulation 2006/2004, a public authority in one Member State may, at the request of a public authority in another Member State, bring an injunction in its own jurisdiction to stop an illegal practice against consumers from the Member State of the requesting authority.⁴⁸⁹ In line with the more general discussion on enforcement schemes in Europe these public authorities are called “*watchdogs*”. Although this notion seems to have a somewhat pejorative meaning, it *per se* expresses the way in

⁴⁸⁶ Hodges (2008), *The Reform of...*, p.109.

⁴⁸⁷ Styuck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 79.

⁴⁸⁸ Goyens/Vos (2005), *Handling on Cross-border Consumers Disputes*, European Consumer Law Journal, Vol. 3.

⁴⁸⁹ Report on the application of Directive 98/27/EC.

which public law forces are commonly understood in the context of the European enforcement framework.⁴⁹⁰ However, Regulation 2006/2004 does not envisage a harmonisation of administrative, civil and criminal causes of action as such. Its major purpose is to enhance the role and function of public enforcement authorities.⁴⁹¹ Thus, only public watchdogs have been significantly distinguished and somehow privileged by Regulation 2006/2004.

Watchdogs are defined as public bodies empowered and obliged to take actions against traders committing intra-Community infringements. Non-governmental bodies⁴⁹² designated by the Member States are not put on an equal footing with public bodies. They are empowered *via* delegation by the Member States but they are *not* obliged to exercise enforcement under the Regulation 2006/2004. Any non-governmental organisation entrusted with public authorities' tasks must seek civil redress. These are “(...) *bodies having a legitimate interest in cessation and prohibition of any intra-Community infringements (...)*”.⁴⁹³ This definition includes non-governmental consumer associations and self-regulatory bodies, but is not limited thereto. Member States may pass enforcement power to business organisations, supervisors of certain sectors, standardisation authorities, and many others. The notion is quite extensive and may be extended even further to include other, different bodies, located on the boundaries of public and private enforcement bodies. All what is needed is the power granted to these entities to enforce consumer law as laid down and concretised in the Annex to Regulation 2006/2004.

The logic, however, also works the other way round. Not each and every Member State had a public body in place, which could have been included in the network of authorities. In these Member States - mainly Austria, Germany, Slovenia, to some extent the Netherlands - a public body must be established. The leeway left to Member States in designing their national watchdogs relates to the different enforcement cultures and traditions. There are Member States in which the public enforcement of consumer law has existed for a long time, for example the United Kingdom, and there are Member States where such a tradition never existed, where private law enforcement has always been dominant, for example Germany, France and the Netherlands. Here Regulation 2006/2004 has opened room up to make choices - in designing the public law enforcement structure in a way which is a

⁴⁹⁰ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials...*, p. 578-579; Betlem (2007), *Public and Private...*, p. 41-45.

⁴⁹¹ Micklitz/Stuyck/Terryn/Droshout (2010), *Cases, Materials...*, p. 578-579; Betlem (2007), *Public and Private...*, p. 41-45.

⁴⁹² Article 4 of the Regulation 2006/2004.

⁴⁹³ Article 4(2) of the Regulation 2006/2004.

suitable and proper one for the national legal conditions, in accordance with existing private law schemes within the general consumer enforcement structure, while at the same time, meeting the requirements outlined in Regulation 2006/2004.

The public bodies are involved in a mutual assistance procedure in situations where there are intra-Community infringements of national laws of Member States transposing the EC consumer *acquis communautaire* as listed in the Annex to Regulation 2006/2004. Thus, Regulation 2006/2004 provides for cross-border enforcement of 18 designated measures comprising *corpus iuris*. Regulation 2006/2004 grants specific powers to the public enforcers, *verba legis* “*competent authorities*”.⁴⁹⁴ They have the power to investigate and the enforcement powers necessary to apply Regulation 2006/2004. This power should be exercised in conformity with rules of national legislation. Regulation 2006/2004 draws a clear-cut distinction between public bodies’ powers of enforcement and the power of investigation. Investigation and enforcement power may be given only to public bodies. This may be a justification for the exclusion of private enforcers from the scheme of Regulation 2006/2004. Private bodies may, if the power is delegated to them, exercise enforcement power, but there is no reference to investigation power. The latter is traditionally and functionally left in the hands of public bodies. Therefore, private actors may become involved in procedures based on Regulation 2006/2004, but their involvement is only of a subsidiary and supportive nature. They may assist and be useful in terms of collective information, but they are not entitled to exercise investigative power of their own motion.

It is up to the Member States to decide whether public authorities are able to exercise their power in a direct or indirect way. Competent authorities may act directly under the discretion of their own authority or indirectly by seeking a judicial order. Article 4(4) lit. (a) and (b) seems to indicate way that are compatible with the Regulation 2006/2004.⁴⁹⁵ A literal reading of the provisions shows that the freedom to choose is not addressed to the legislature, but to the watchdogs themselves. They are given the option. Thus, the choice shall be made based upon the practical experiences of the national legislatures.

Article 4(6) of the Regulation 2006/2004 lists specific powers, which can be exercised by competent authorities once “(...) *there is reasonable suspicion of an intra-Community infringements*”.⁴⁹⁶ Although the list of powers is quite long, it is non-exhaustive and may be adjusted by new measures, or new powers if exercised in the legal practice of Member States.

⁴⁹⁴ Article 4 of the Regulation 2006/2004.

⁴⁹⁵ Van Boom/Loos (2007), *Effective Enforcement of...*, p. 45.

⁴⁹⁶ Article 4(6) of the Regulation 2006/2004.

The list includes the right of competent authorities (i) to have an access to any relevant documents, in any form, related to intra-Community infringements, (ii) to require the provision of relevant information related to the intra-Community infringement by any person, (iii) to carry out necessary on-site inspections, (iv) to request in writing that the seller or supplier concerned cease the intra-Community infringement, (v) to obtain from the seller or supplier responsible for the intra-Community infringements an undertaking to cease the intra-Community infringement; and where appropriate, to publish the resulting undertaking, (vi) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish the resulting decisions, (vii) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.

Although most of the rights are typically of technical and administrative measures, such as the seizure of documents and entry to premises, there is also a group of rights that meet the requirements of an injunction order.⁴⁹⁷ These rights may be exercised directly by competent authorities under public law rules, or indirectly by a civil court, which brings an action for injunction. This provision demonstrates that injunctions are one of the instruments on which Regulation 2006/2004 is supposed to be based, particularly to protect collective consumer interest under the enforcement scheme adopted by Regulation 2006/2004. However, injunctions are not the only instruments of consumer protection that can be used in order to fulfil the requirements of Regulation 2006/2004. Injunctions are recognised as the “*main enforcement tools*” for consumer protection, but due to the existence of other, different measures, they may be substituted by other means. The Explanatory Memorandum⁴⁹⁸ to Regulation 2006/2004 recognised the action for injunction as the only possible tool to be used. However, in the final version the scope of the respective provision was changed in a way which allows for more extensive interpretation in terms that not only injunction can be used as a remedy to be used upon the frame of Regulation 2006/2004.

Article 4(6)(g) makes a reference to lack of compliance with “*the decision*” and should be considered in its injunction-related context. By “*decision*” the EU legislator understands both (1) “*a court order*” requiring the defendant to discontinuation of the infringing practice and (2) “*an administrative order*” passed by the competent authority on the basis of national legislation. In a wider understanding, a “*decision*” also includes a

⁴⁹⁷ Article 4(f) of the Regulation 2006/2004.

⁴⁹⁸ Explanatory Memorandum to Regulation (EC) No. 2006/2004, 18.07.2003, COM(2003) 443 final, No. 39.

trader's undertaking to cease intra-Community infringements, understood as a kind of sanction for non-compliance with the undertakings.

On the one hand, Regulation 2006/2004 detracts from existing authorities' investigation and enforcement powers, which had been granted to these bodies by the general rules of international law, Community law and national law. The extent of this detraction depends on the particularities of competent authorities that act in the Member States under consideration. On the other hand, the rules of Regulation 2006/2004 are supposed to complement the existing tools of public and private law regulation. It could be contended that by passing a regulation of this kind, the EU attempts to realise a plan which concentrates on strengthening the power of consumer law remedies. Certainly, Regulation 2006/2004 is a tool for strengthening them. However, in the EU's view, it was only viable to do so by way of passing enforcement power into the hands of competent authorities based in the public law sphere. It is still questionable as to why the EU has identified the public authority as a stronger alternative. Matters become even more complicated as the enforcement power was put into the hands of Member States, which were intended to organise an enforcement structure and enforcement measures at the national level and apply Regulation 2006/2004 in a direct (based on public law) or indirect way (by courts based on a private law model).

6. 2. The Role of the European Commission

The Commission based the envisaged improvement of enforcement structure of consumer law on the idea of networking.⁴⁹⁹ The idea of networking in the field of consumer law is not new. It was also present in the general product safety Directive (GPD). For the purpose of this Directive the Commission has a right to take action only in case of emergency.⁵⁰⁰ This role of "*the emergency guard of the Commission*" is however missing in Regulation 2006/2004. This may be recognized as one of the basic reasons why the extensive Annex to the Regulation 2006/2004 is not covered by the scope of Regulation 2006/2004. If the two were integrated, the interplay between the GPD and Regulation 2006/2004 would have required more in-depth and detailed clarification. The extension of the action of injunction to matters of product safety may cause ambiguities in Regulation 2006/2004.

⁴⁹⁹ For the first time networking was codified in the general product safety Directive which established a networking of enforcement bodies; See also: Howells/Weatherill (2005), *EU Consumer...*; Ramsay (2007), *Consumer Law...*, p. 488.

⁵⁰⁰ Article 13 of the GPD.

Although the two sets of rules are aimed at the promotion of networking, they follow completely different paths.⁵⁰¹

Although Regulation 2006/2004 promotes the idea of networking of public bodies it does not indicate any details as to their establishment and procedural scheme. There is no obligation for Member States to establish new bodies; it is sufficient to adjust existing systems in order to meet the requirements of Regulation 2006/2004. New enforcement bodies are required only for those jurisdictions in which enforcement was left in the hands of private bodies. Therefore, Regulation 2006/2006 does not replace the old enforcement structure of public bodies by introducing new enforcement bodies. Nor does it pass the enforcement power to the Commission. The Commission in the enforcement scheme of Regulation 2006/2004 is deprived of enforcement power and it performs only a very limited role in terms of administrative tasks. For example, its participation in the enforcement network is required only to the extent to which information is smoothly communicated by Consumer Protection Cooperation Network to the Commission. This, however, is only half the truth.

Since the Commission is deprived of any regulatory power, it plays a role as a monitoring and controlling body besides the network in terms of monitoring or controlling of the consumer cooperation network. This main function is realized by chairing the Consumer Protection Cooperation Committee. This Consumer Protection Cooperation Committee main task is to implement the rules on cooperation and secondly, it plays the role of a forum for analysis and monitoring of network activities and controlling for non-legislative actions. The crucial tasks of the Committee lies in the interpretation of rules based on certain directives on consumer protection⁵⁰², like the unfair commercial practices Directive and the unfair contract terms Directive, as well as clarifying the understanding of certain elements of consumer protection regulations and legal instruments in the context of the linkage of the substantive law directives with the procedural scope of Regulation 2006/2004.

Under the umbrella of the European Commission the national public authorities are obliged to cooperate in sharing information about current enforcement problems and employed enforcement solutions and to exchange them in the network, which is stored in the Commission database. Formally, Regulation 2006/2004 does not leave the Commission any power based on controlling or monitoring how the network works. In practice the

⁵⁰¹ Perrin (2006), *Challenges Facing the EU Network of Competition Authorities: Insights from a Comparative Criminal Law Perspective*, European Law Review, Vol. 540(31), p. 540.

⁵⁰² Speech of the 23 February 2011, European Commissioner for Health and Consumer Policy, prepared for Consumer Protection Co-operation Meeting, Brussels, <http://ec.europa.eu/commission_20102014/dalli/docs/speech_cpc_committee_23022011.pdf> accessed on May 11, 2011.

Commission plays a role of “*the spider in the cobweb*”.⁵⁰³ This expression captures the role the Commission plays in the consumer cooperation framework. Formally, the Commission is not a member of the consumer protection cooperation network, but only participates within it to the extent that information must be communicated to the Commission by national public bodies. The Commission crucial task is database maintenance, storing and processing information collected under Articles 7-9 of Regulation 2006/2004.⁵⁰⁴ In practice the Commission monitors and controls the flow of information, it gains knowledge about all information movements within the network. However, the Commission does not monitor the enforcement activities of the Member States. Member States are supposed to submit a report to the Commission. This report is made available to the public by the Commission in order to show the working progress of members of the network.⁵⁰⁵

6. 3. The Role of Courts

Article 4(4) of Regulation 2006/2004 clearly indicates two methods for its application within national enforcement regimes, direct and indirect ones. Direct application thus far has not caused any major legal ambiguity, while indirect application has raised many. There is always a question about which court of which Member States on the basis of which rule may be in charge of the application in a concrete case. None of these questions is explicitly regulated.⁵⁰⁶

The powers granted to competent authorities, which are listed in Article 4(5), (a) to (g), include a mechanism for an action of injunction - which is a court-measure of collective enforcement of a cross-border dimension - that additionally raise a question on jurisdiction and of the applicable law.⁵⁰⁷ In this case, an injunction will be granted as an effect of the cooperation between the competent authorities of different Member States. Therefore, the interpretation of Art. 4(4)(b) granting investigation and enforcement powers to watchdogs by application to courts, competent to grant a necessary decision’ remains ambiguous. Obviously, Regulation 2006/2004 refers to an action for injunction, but it does not make

⁵⁰³ Howells/Micklitz/Wilhelmsson (2006), *European Fair...*, p. 239.

⁵⁰⁴ The Commission is responsible for information that is collected within the information deriving from obligatory mutual assistance, so as Article 6 – exchange of information on request, Article 7 – exchange of information without request, Article 8 – enforcement measures upon request *as well as* or a co-ordination of market surveillance and enforcement actions (Article 9).

⁵⁰⁵ Report on the application of Regulation (EC) No. 2006/2004.

⁵⁰⁶ Van Boom/Loos (2007), *Effective Enforcement of...*, p. 49.

⁵⁰⁷ Judgment of the Court of Appeal Bruxelles (Cour d’appel de Bruxelles) of 8 December 2005, *Duchesne v L’Office of Fair Trading*, 8 December 2005, RG: 2005, KR/38.

explicit links to the Injunction Directive. Hence, the injunction is a procedure which swiftly brings a case to an end, but only where it is used properly in the network envisaged by Regulation 2006/2004.⁵⁰⁸

Article 4(4) of Regulation 2006/2004 may raise ambiguity since it indicates the application of Regulation 2006/2004 within the national legal orders of Member States *via* courts. This issue deserves a closer look: (i) the competence of civil courts which are supposed to deal with a case where the defendant is based in the state of the competent authority, and (ii) whether the competent authority is given a right to turn to the courts of a Member State other than its own, and what legal basis it will have. The Injunction Directive, similarly, leaves these issues open.⁵⁰⁹ Article 3(b) of Regulation 2006/2004 refers to situations in which the trader is based in member state A and the harm has occurred in member state B. According to Regulation 2006/2004, a competent authority established in member state A is entitled to take legal action against a trader only if the trader is based in its own territory. This may be either in response to a request from the other competent authority, or may be a result of its own enforcement initiative. Furthermore, since Regulation 2006/2004 applies without prejudice to the Brussels I Regulation⁵¹⁰, in situations where the defendant is based in a Member State other than the watchdog's territory, the case is better brought before the court of the Member State of the watchdog's establishment.

From the literal meaning of provision Article 4(4) of Regulation 2006/2004, we may conclude that there is no exclusion of the competence to access courts, which are outside the home state of the competent authority. However, in practical terms, it seems that a watchdog which wants to initiate proceedings for an injunction established in Member State A will ask the relevant competent authorities in Member State B or C to involve their own courts. That would mean that Regulation 2006/2004 has introduced a solution, which differs from the one in the Injunction Directive. While Regulation 2006/2004 does not, *verba legis*, confer standing on a watchdog before foreign courts, the Injunction Directive does so directly.⁵¹¹ However, it should be stressed that most of the "*qualified entities*" granted legal standing under the Injunction Directive have been included in the lists of competent authorities according to Article 5 of Regulation 2006/2004.

Article 4(5) seems to be a sort of empty rule. This is a kind of reminder addressed to Member States in order to make them sure that watchdogs which bring consumer cases before

⁵⁰⁸ Van Boom/Loos (2007), *Effective Enforcement of...*, p. 48-49.

⁵⁰⁹ See Chapter III 5.3, 5.6.

⁵¹⁰ Article 2(2) of the Regulation 2006/2004.

⁵¹¹ Standing for qualified entities as in Article 3 of the Injunction Directive.

the relevant court are empowered to meet the requirements of Regulation 2006/2004. Considering that all European courts have judicial powers, the rule is quite ambiguous. Perhaps this provision represents a form of overregulation having in mind that all courts in all the Member States have their own standards and principles of adjudication. Competent authorities should be enabled to make a choice as to the appropriate court of jurisdiction, taking into account both the position of watchdogs and defendants.

Another issue of high cross-border relevance which causes many ambiguities results from Article 4(6)g Regulation 2006/2004, which introduced - similar as the Injunction Directive - financial penalty payments. Regulation 2006/2004 as well as the Injunction Directive envisage financial penalties either in the event of non-compliance with a watchdog's decisions or a failure to execute a court order. It is up to the Member States to decide about the form of penalty payments which will be granted, whether is a fine of a kind of astrainte for each day of non-compliance with an injunction order or whether it takes the form of a civil law penalty.

6. 4. The Concept of “Networking”

One of the crucial obstacles identified by the Commission in cross-border enforcement in consumer law was a lack of its effectiveness.⁵¹² The Commission, while looking for enforcement modes and solutions to increase effectiveness has developed the concept of networking which has much in common with the thesis of dualism of enforcement measures. Networking is neutral as to the choice of collective or individual enforcement. Once the deficiencies of the Injunction Directive became evident, the EU legislator searched for ways to improve the enforcement structure of consumer protection. The traditional mode of enforcement, grounded on both public and private enforcement responsible for consumer law faces difficulties, when it comes to cross-border litigation. Enforcement authorities cannot cross borders, and can only ask for the assistance of the authorities of another state.

This unsatisfactory situation came to an end with the adoption of Regulation 2006/2004. Since then, there were no further doubts as to whether public authorities are entitled to protect the interest of consumers based outside of their own state. Public bodies have the right to act on behalf of consumers in their own country.⁵¹³ This can be read as

⁵¹² Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576 final.

⁵¹³ Article II (I) Regulation 2006/2004.

meaning that restrictions in national laws are no longer applicable within the scope of Regulation 2006/2004.⁵¹⁴ Although obviously addressed to improve cross-border relations, the Regulation 2006/2004 does not make its cross-border purpose explicit. The cross-border issues and competences are defined by a reference to national measures. This is not an ideal situation. Explicit and clear cross-border consumer protection measures would be more than welcome under the given legal uncertainties. It is unclear why the EU neglects the position of consumers in the multilevel structure, which yields the need to handle both domestic and cross-border issues.

The dualistic design of enforcement constituted the hidden aim of the general construction of the Injunction Directive. The EU legislator had identified the problem and even provided for an instrument, the action for injunction, meant to remedy the enforcement deficit. The lack of clarity reduced the effectiveness of the Injunction Directive and paved the way for the adoption of Regulation 2006/2004. The EU's response touches upon the effectiveness of public and/or private enforcement in the field of consumer law. It addresses administrative and/or judicial enforcement, as well as the (thus far) rather negative experiences with the Injunction Directive. The latter has left too many options in the hands of the Member States. That is why the EU decided in Regulation 2006/2004 to reduce the choice the enforcement options to be used in cross-border enforcement. Regulation 2006/2004 expresses an explicit preference for public enforcement of consumer protection law as far as trans-border consumer relations are concerned. By doing so, the EU has stressed the predominant position of public enforcement in the protection of cross-border relations. Private enforcement bodies, no matter in what way and to what extent they are developed, cannot adequately substitute public enforcement measures. Both enforcement regimes may exist alongside one another, but private enforcement can only have a complementary nature in relation to the stronger and more powerful public enforcement tools.

Regulation 2006/2004 was not supposed to bring about an optimal enforcement mechanism within the Member States. The shift from a choice between public or private enforcement towards public enforcement is not sufficient to improve the EU consumer law enforcement. However, how the EU has decided to allocate powers is the public enforcement scheme which was recognized as more efficient in consumer law enforcement. Since the changes were swiftly introduced, it was obvious that they would not fully fit to the previously adopted mechanism. It should be stressed that although this is a single change, it tackles a

⁵¹⁴ Van Boom/Loos (2007), *Effective Enforcement of...*, p. 52.

crucial issue of the choice of the enforcement path, which in fact depends much on the national enforcement structure. The European Commission imposed a single solution and this one size fits all solution was claimed to be suitable for all the Member States. This is virtually impossible, both practical and technical terms. The best the Commission could hope for is a general pattern, which could be implemented in all other Member States and which would, at least partially, streamline an injunction procedure applicable in all national legal orders.

The Commission was aware of the fact that the taken choice of enforcement power indicated in Regulation 2006/2004 could raise doubts and ambiguities. This, however, goes hand in hand with the overall enforcement policy of the Commission. The Regulation 2006/2004 aims at the organisation of a European enforcement structure, which would help to achieve at least partially coherence of the enforcement structure in the field of consumer law. This is a straight indication of public enforcement as the ideal as far as intra-Community infringements are considered. More importantly, it has also introduced evolutionary changes introducing public enforcement measures to Member States with a purely private enforcement culture.

Regulation 2006/2004 brought about improvements and became the standard tool, in particular in concern to its public enforcement dimension.⁵¹⁵ Public bodies often have more legal capacity to get access the necessary information for dealing with consumer law cases. *Duchèsne* might also be read as a case, which demonstrates the incapacity of private actors - consumer organisations to properly handle cross-border litigation. Public bodies might enhance social exchange and identity building across borders to a higher degree than consumer associations, which vary across Europe. They often do not enjoy institutional stability and respect unlike public bodies. In theory, although private enforcement bodies have more possibilities to get the right information before an infringement occurs or they may simply engage in cross-border social exchange with other consumer associations, they often react ex post once a consumer has already suffered a loss. A small loss suffered by an individual consumer multiplied by all those who are concerned may however bring about market distortions. The question becomes who should look after these collective damages? One might expect consumer organisations to initiate of this sort of complaints, in particular in cross-border litigation. The civil society in which consumer organizations enjoy a common respect is much more open for exchange of information than a society which relies on public bodies for information. Hence, there are tasks, which may be better executed or more swiftly

⁵¹⁵ Hodges (2008), *The Reform of...*

executed by public bodies, while there is a group of tasks, which perfectly fit to role played by private bodies. With all respect for sectoral differences and sectoral gradation of effectiveness, the Commission opted for public enforcement with no special exceptions for Member States, which never used public bodies for law enforcement. The Commission introduced a public scheme to some fields of law, which for many years have been in the hand of private bodies. The Commission has recognized public enforcement through information exchange and co-operation as the better option especially in light of the deficiencies resulting from the Injunction Directive which affected this radical change in the EC consumer policy.⁵¹⁶

The Injunction Directive creates a link between divergent practices and legal solutions that have been developed by the Member States. Although the cross-border element of consumer law has at least been partially harmonised, the Injunction Directive has also shed light on a considerable number of practices, incompatible in both their merit and their effect.⁵¹⁷ The dark side of all these efforts can be condensed in the formula that cross-border litigation through consumer associations are still not entirely accepted as qualified entities in some Member States. The idea of cooperation between public bodies in charge of consumer rights protection constitutes a way out of this dead end and would definitely help to boost consumer confidence in the Internal Market. Networking looks like a promising concept, an equivalent of Eurojust.⁵¹⁸ The Eurojust network has been successfully established in the field of criminal law. Eurojust fits well into most legal systems. Its activities are quite effective, as proved by statistics provided.⁵¹⁹ The network of consumer protection public bodies was supposed to play a similar role. But the idea failed at an early stage.

Regulation 2006/2004 has not been a source of any of the ECJ decisions. Some aspects of the Regulation 2006/2004 have been subject of queries, but the queries have been answered already by the Commission Legal Services and DGs opinions, and the legal issues raised mainly focused on issue of the applicable law or technical elements of public authority cooperation. Studying the practice of cross-border consumer conflicts means embarking on mainly administrative, but also judicial practice, on reports and on formal and also informal information. The few cases, which have been brought to national courts do not provide a comprehensive account of the consumer conflicts, neither in number nor in quality. The future

⁵¹⁶ Micklitz (2008), *Collective Enforcement of...*, p. 391-425.

⁵¹⁷ Crifò (2005), *First Steps Towards the Harmonization of Civil Procedure: The Regulation Creating a European Enforcement Order for Uncontested Claims*, *Civil Journal Quarterly*, Vol. 24, p. 200-223.

⁵¹⁸ A structure of "EuroJuste" <<http://www.euro-justice.com/>> accessed on 4 June 2012.

⁵¹⁹ Eurojust Annual Report <<http://eurojust.europa.eu/doclibrary/corporate/Pages/annual-reports.aspx>> accessed on June 9, 2014.

of solving cross-border consumer conflicts lies in networking between public agencies under the participation of consumer organisations.⁵²⁰ In its networking approach the European Union is very much following the well-established policy of the OECD. The 2011 OECD *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*⁵²¹ have put on paper the long standing practice of co-operation in one particular area of consumer policy which is particularly apt to cross borders.⁵²²

6. 5. The Annexes of Regulation 2006/2004 and Directive 98/27 Compared

The scope of the Annex to the Injunction Directive is not as extensive as in Regulation 2006/2004. The Injunction Directive covers 13 pieces of consumer protection legislation, while Regulation 2006/2004 covers 18 pieces. The Annex refers to the Directive 98/06 on price indication and the regulations on the rights of air transport⁵²³, sea and inland, and bus and coach transport passengers⁵²⁴, which are not included in the Annex to the Injunction Directive. The Annex to the Regulation 2006/2004 does not, however, refer to the Directive on Services, which is included in the Annex to the Injunction Directive. Harmonising the two Annexes, as has been proposed by certain Member States⁵²⁵, would call for both the Injunction Directive and Regulation 2006/2004 to be amended in parallel.

Although both pieces of legislation are complementary in nature, the fact that they differ concerning the form – directive *versus* regulation, the scopes – 13 vs 18 with overlapping subjects - cannot be explained alone *via* a detailed comparison of the two Annexes. One has to dig deeper and recall the different philosophies behind the two pieces of EU law. The Injunction Directive established a dualistic approach, combining collective enforcement with individual enforcement, promoting in particular the social role of consumer organisations in the establishment of the Internal Market or even more ambitiously in the emerging European Society (if there is one). Here the Annex to the Directive 98/27/EC played

⁵²⁰ Micklitz (2008), *Collective Enforcement of...*, p. 391-425.

⁵²¹ OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders, <<http://www.oecd.org/dataoecd/24/33/2956464.pdf>> accessed on December 14, 2011.

⁵²² Howells/Micklitz/Wilhelmsson (2006), *European Fair Trading...*, p. 219.

⁵²³ Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 (OJ L 46, 17.02.2004, p. 1–8; hereafter the Regulation 261/2004 on air passenger rights).

⁵²⁴ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance, OJ L 55, 28/02/2011, p. 1–12.

⁵²⁵ Report on the application of Directive 98/27/EC.

a key role in disclosing the parallelism of collective and individual enforcement. Put this way the Injunction Directive is strongly anchored in the established consumer policy since the 1980s with consumer organisations being involved in the defence of the collective interest of consumers and individual consumers looking after their ever better and ever more extended consumer rights, partially with the support of consumer organisations. The Regulation 2006/2004 while complementary in nature and while building on the experiences gained in cross-border litigation, shifts the focus from private to public enforcement. This has two implications – public bodies are needed in each Member States, consumer organisations are somewhat downgraded, - and these public bodies are integrated into a network that exchanges information and co-operates beyond the much promoted action for injunction. The latter is equally been side-lined and is not the key instrument as under the Injunction Directive. Regulation 2006/2004 initiates a policy change which goes deep and maybe much deeper than the one promoted by the Injunction Directive. Networking must be procedurally embedded, but once there is a mechanism in place and once the public bodies trust each other, the material scope of the activities becomes less important. Nobody prevents public agencies from exchanging information outside the list of the 18 pieces of law. If the network works successfully, there is not even a need to apply the action for injunction. This tool turns into an instrument of last resort. It is only at the very end when the question arises whether this and that practice is covered fully or partially in the Annex.

6. 6. Experience within the Network

The Commission's plans to develop the public enforcement structure and strengthen the network established by Regulation 2006/2004. It remains to be seen if and how these plans materialize. The recently published report of the European Commission on application of Regulation 2006/2004 reveals practical problems in the use of the Regulation 2006/2004.⁵²⁶

The Report states *"the Network is producing tangible results for consumers"*.⁵²⁷ Member States stress that Regulation 2006/2004 is a particularly valuable tool for managing misleading advertising⁵²⁸ and on-line commercial practices, EU-sweeps in communication and transportation. Nevertheless, Member States face technical and organizational shortcomings as well as discrepancies in the Annex to the Regulation 2006/2004 and the

⁵²⁶ Report on the application of Regulation (EC) No. 2006/2004.

⁵²⁷ Report on the application of Regulation (EC) No 2006/2004, p. 9.

⁵²⁸ Council Directive 84/450/EEC concerning misleading advertising was in force until the end of 2007, the Unfair Commercial Practices Directive 2005/29/EC now covers the misleading advertising area.

Injunction Directives. Hence, the shortcomings, which have been identified within the scope of Regulation 2006/2004 may be classified as follows:

- (i) There is a general problem with the software used – some of the authorities are not connected, or they cannot use the system due to technical obstacles;
- (ii) The complexity of cross-border cases implies long-lasting procedures on how to decide over the jurisdiction and the applicable law;
- (iii) National authorities are using IT system. The understanding of when and in what kind of situations they shall use it significantly differs. Some Member States send alerts and requests⁵²⁹, even if unnecessary just to make sure that nothing has been omitted; others do not notify all cases. A case rejected by one of the authority may be regarded as being legal another one;
- (iv) Speed and quality depends on human resources and their abilities, this depends on people who are more or less accurate, more or less educated, communicative or not. Uncertainties prolong the procedure;
- (v) There is still no common practice as to when the notifications should be deleted, what raises data protection issues; there are no deadlines for data transmission and potential feedback of summaries;
- (vi) There is a discrepancy between Regulation 2006/2004 and Regulation 261/2004 on air passenger rights⁵³⁰, which although covered by Regulation 2006/2004 introduces its own enforcement authorities.

The general idea and aim behind the Regulation 2006/2004 remains to be full realized. Despite all the practical experiences, the mutual learning process will over time improve the enforcement practice. It should not be forgotten that the record in comparison to the Injunction Directive is quite impressive. The envisaged amendment, although the details are not yet clear, might further improve cross-border enforcement.⁵³¹

7. Beyond Directive 98/27 and Regulation 2006/2004 – Co-ordinated Enforcement

Since the phenomenon of co-ordinated action has been only mentioned once by the Commission⁵³² it should be clarified at the beginning of an analysis of consumer

⁵²⁹ See Annex 1, The Regulation on consumer protection cooperation.

⁵³⁰ Regulation on Air Passenger Rights (EC) No. 261/2004 (OJ L 46, 17.02.2004, p. 1–8).

⁵³¹ The European Commission roadmap on cooperation between national authorities responsible for the enforcement of consumer protection laws.

⁵³² Report on the application of Directive 2009/22/EC, p. 6.

organizations' activity against carriers: what kind of action have consumer organizations initiated against carriers? Is it a joint action, a co-ordinated action or a cooperative action? This is all the more important as the consumer organisations have learnt their lessons from difficulties using cross-border litigation as the appropriate form of enforcement. They have used – co-ordinated action *via* BEUC⁵³³ – the more recent interest of the European Commission is to improve cross-border enforcement so as to apply for enforcement related projects, first the Consumer Law Enforcement Forum (CLEF)⁵³⁴, then the Consumer Justice Enforcement Forum (COJEF).⁵³⁵ These EU financed projects allows national consumer organisations to engage in enhanced enforcement activities, and although they are not be formally classified as regular cross-border litigation⁵³⁶ they can help consumer organizations to override shortcoming and obstacles identified in the frame of the Injunction Directive or Regulation 2006/2004.

The herein proposed distinction is a direct result of the practical experience gained. It combines a descriptive with a normative perspective.⁵³⁷ It uses the following parameters: organizing, staffing, directing and controlling. Based on these criteria the following typology could be built in terms of explanation of consumer organization activities held in consumer law enforcement area.

Typologies of actions by consumer organizations					
<i>Factors</i>	<i>Planning</i>	Organizing	Staffing	Directing	Controlling
Joint Action	X	X			
Co-operative Action	X	X	X		
Co-ordinated Action	X	X	X	X	X

This classification allows to describe and analyse the various activities of consumer organisations also within CLEF and COJEF projects, by now the most structured ways of cooperative efforts, which have been undertaken by consumer organizations in the last decade.

⁵³³ The European Consumer Organization profile, <<http://www.beuc.eu/>> accessed on June 2, 2014.

⁵³⁴ <<http://www.clef-project.eu/>> accessed on June 9, 2014.

⁵³⁵ <<http://www.cojef-project.eu/>> accessed on June 9, 2014.

⁵³⁶ Report on the application of Directive 2009/22/EC, p. 6.

⁵³⁷ The author of this PhD was actively involved in preparation of the meetings of the national consumer organizations for the TRACE programme held at BEUC in Brussels addressed to national consumer organizations acting as a trainer for a TRACE courses from 2009 until 2012. The author was invited as an internal speaker for CoJEF Programme presentation in Brussels at the occasion of the first forum meeting in Brussels 6-7 October 2011 which focused on the action for injunction in the field of consumer protection.

7. 1. Joint Action

Joint action is the simplest form of action through which consumer organization's activity can be managed. Consumer organizations plan a meeting and formulate a group which aims to achieve a particular goal common to all group members. The common goal could be achieved more effectively by taking joint action than by each of the consumer organizations acting individually. Joint action is useful both in national and cross-border activities of consumers organizations, although the main activities cross-border infringements. It is not necessary to establish an institutional structure for the group, or to monitor or control the activities. Common linkages between the consumer organizations suffice. It is also not necessary to develop common and long-term methods that could be used by all group members since they are autonomous. Important factors are planning the initial meeting and organizing a group of meeting participants. In doing so, consumer organizations continue to act within their previously established structures. The planning and organizing activity might end after one meeting if they have agreed on a common goal for their joint action.

The individual internal structures and general rules of activity of consumers organizations would be changed neither structurally nor instrumentally, as they would remain as they were before the action was taken. This means that internal structures, organization and strategies set up by each consumer organization differs, since a joint action does not provide any common denominator upon which organizations can bring action. Therefore, the joint action refers to an action in which other consumer organizations are engaged, without a need to indicate the extent to which they are engaged, or who is responsible for particular areas or who causes something to happen. Put simply, the goal is a single one, but the rules regarding how a group operates depends on individual decisions of each member of the group. In practical terms this means that consumer organizations agree on a quite general plan of action and clarify the goal of the joint activity, but they do not need to discuss in detail, the framework for the action.

A joint action may be described as an umbrella under which a group of individual actions can be brought individually and for each Member States separately by national consumer organizations. The only factors linking the organizations are a common goal and the organization of an initial meeting. Once a common goal has been identified, consumer organizations do not communicate with each other since they act on an individual basis. Their joint action is completed as soon as the common goal is established but not necessarily achieved, and since no other relationship between them exists, further decisions within the

framework of the case are undertaken on an individual basis. There is no facility for exchanging information or ideas, or discussing procedures, since each consumer organization operates independently. Activities initiated by joint actions continue, and are performed on an individual basis. Moreover, consumer organizations included under the umbrella of the case do not have to share any experiences or information with other organizations within the group, about the final outcome of the joint action. This scheme based on planning and organizing only would also fit to national activities of consumers organizations within a state. It is likewise the simplest form to fight cross-border infringements

7. 2. Co-operative Action

Co-operative action occurs when at least two consumer organizations decide to collaborate. This is recognized as a medium level of consumer organizations cross-border activity between joint action and co-ordinated action. Consumer organizations work together to discuss how to proceed toward their commonly established goal and what actions they need to take in order to achieve it.

CLEF puts the main focus on (i) development of strategies on how to engage in enforcement, both at national and European level, and (ii) on improvement of their knowledge of different enforcement tools, (iii) development of a role to be played by consumer organizations in the frame of public and private enforcement bodies. COJEF shifted the focus towards creation and maintenance of a strong network between European consumer associations in order facilitate and encourage their cooperation and co-ordination in cross-border issues: (ii) evaluation of the practicability of specific enforcement means for individual and collective redress judicial and out-of-court measures, (iii) development and support of consumer organisations in the Eastern and Central European Member States on their way of development of strategies for enforcement activities and empowerment them toward improvement of enforcement in their country.

Both reports are based on practical experiences of national consumer organizations. The meetings held for both CLEF and COJEF projects serve as a forum for consumer organizations in order to share their experiences, problems and difficulties. The most important for co-operative action is to agree on the “*subject*” of co-operation, hence its objectives must be defined. Ideally the definition of the subject would be resolved within the group. The group may also discuss a solution but do not necessarily need to discuss each single solution. Consumer organizations support each other in their current actions and

activities and discuss and share ideas relating to the common strategies regarding the achievement of the common objectives. Their co-operation might require education and training activities in which consumer organizations find temporary economic support within the group. This would help smaller consumer organizations and all those who cannot co-operate due to lack of resources.

Co-operation of consumer organizations requires mutual learning. Consumer organizations need to schedule workshop during which a current action is discussed and future plans are considered. A major benefit of the meetings is experience sharing. Planning and organizing are necessary elements in order to establish a mutual goal and to organize a structure within the group, which facilitates information exchange and ensure its smooth flow. Obviously, group meetings are desirable, to work on the agenda for their future activities and follow the plan development, establishment of information exchange procedures and improvement of information flow and mutual assistance requires information exchange until the final goal is achieved (or perhaps not achieved).

Group members need to communicate with each other, plan advisory meetings to help develop a common strategy and discuss the best ways in which cooperation can be established. The information exchange could be established on a frequent basis, therefore a cooperative proposal would require considerable human resources in order to keep the information flow. Staff members need to be assigned specific tasks, such as to lead and plan the common activities and discussions on goal achievement. The staff would need a leader or leaders in order to moderate the discussion.⁵³⁸ It is desirable to establish a network in order to ensure the information flow and to identify a person in charge of information exchange within each consumer organization, a team leader, the one who would be responsible for the reporting of consumer organizations' current activities and reporting the recent activities. Reports must outline the current stage of co-operative action.

The co-operative action shall be described as a kind of a network of suggestions and ideas, which identifies fields of cooperation between network members, somehow to build a skeleton plan of action, whilst all the individual points of the plan are fulfilled by organizations working independently. They assist each other until the common goal is achieved, or perhaps not achieved. The activity of consumer organizations within CLEF and COJEF projects may serve as a good example of how the co-operative action may be organized and how it works in practice. The empirical analysis of consumer enforcement

⁵³⁸ G. Howells and Professor H.-W. Micklitz were involved as legal advisors.

problems was reported for both the projects (i) CLEF Report “*Guidelines for Consumer Organisations on Enforcement and Collective Redress*” dated on September 2009⁵³⁹, and (ii) COJEF Report “*Guidelines for enforcement of consumers rights*” dated on May 2013 are both available online.⁵⁴⁰

7. 3. Co-ordinated Action

Co-ordinated action constitutes a more advanced model of cross-border action of consumer organizations in comparison to joint or cooperative action. In case of co-ordinated action organizations unify, integrate and synchronize their efforts so as to provide a unified action in the pursuit of a common goal and objectives common to the group.

Co-ordination can be described by the following elements: *planning* - planning facilitates co-ordination by integrating various plans through mutual discussion, exchange of ideas, workshops, meetings, and scheduling future plans; organizing – *co-ordination* is the very essence of organization; there is a need to build relationships between team members in order to provide a group with an effective flow of information and information exchange; to establish a team, and a network between national teams and lastly, to build a group structure at various levels; *staffing* - it would be necessary for a number of people to be in charge of the execution of the plan and strategies in order to achieve the common objectives.

Working on selected issues shall direct, control and monitor the procedure at every stage and report their findings to other group members. A more professional approach is needed. It is necessary to establish a project team from administrative advisors to legal and economic advisors; *directing* - it is necessary to identify a manager, to direct, lead, give instructions and guidance, to achieve a balance between the group members and supervise the network; *controlling/monitoring* - one of the staff members performs the role of team leader, ensures that there is co-ordination between the group’s activities and its members in order to achieve the common goal.

Co-ordinated action was highly appreciated by the EU Commission as practical experience demonstrating how consumer organizations from different Member States may co-operate within existing national enforcement structures across borders. The first co-ordinated

⁵³⁹ Consumer Law Enforcement Forum Project, Guidelines for Consumer Organizations on Enforcement and Collective Redress (2009), <http://www.cojef-project.eu/IMG/pdf/d_CLEFfinalguidelines_76647.pdf> accessed on June 2, 2014.

⁵⁴⁰ Consumer Justice Enforcement Forum, Guidelines for Enforcement of Consumers Rights (2013), <http://www.cojef-project.eu/IMG/pdf/Conclusions_document_cases__FINAL_8_May.pdf> accessed on June 9, 2014.

action was arranged by consumer organizations from Belgium, France and Portugal, which identified the vast number of consumer rights' infringements by carriers through the use of unfair contract terms and unfair commercial practices. The joint action resulted in injunctions against the most popular carriers in Europe, which ended successfully.⁵⁴¹ However, there was not much co-ordination outside the identification of a common goal.

The co-ordinated activity highlighted the significant relevance of consumer organizations *vis-à-vis* industry and emphasized their position in the protection of consumer rights. This action served as a deterrent to industry. The joint action enabled consumer organizations to demonstrate their strength and power, and how their strength could be enhanced by collaborating more closely and be used as an important weapon in the battle for the protection of consumer rights throughout Europe. The co-ordinated action may serve as a catalyst for future actions of this kind. Nevertheless, considering the reaction on the business side, it seems that although the co-ordinated action by consumer organizations was brought on behalf of consumers in order to protect consumer rights, in reality its success was rather limited. Whilst industry was monitoring the potential effects, the envisaged political solution, banning certain unfair terms European wide in air carrier regulation, was not achieved.

On the basis of experience gained, consumer organizations may specify the parameters for taking action and draft a schedule for future joint activities. This is what happened in the Apple case, where consumer organisations attacked Apple's commercial guarantee as violating consumer laws. The form in which co-ordinated action was undertaken shows its improvement and development in comparison to other existing forms of co-operation of consumer organizations. In 2011, the Italian Antitrust Authority issued a decision⁵⁴², which condemned Apple for a breach of provisions on unfair commercial practices of the Italian Consumer Code. Consumer organizations in Italy, Belgium, Portugal, Luxembourg, Germany, the Netherlands, Denmark, Poland, Spain, Slovenia, and Greece were part of the co-ordinated action organized by BEUC. The input for the co-ordinated action of consumer organization came from decision of the Regional Administrative Court of Lazio, which gave an incentive

⁵⁴¹ According to Ryanair's statistics 99,8% of bookings are made online [for details see: judgment *Test Achats/Ryanair*, 10 March 2010, Tribunal de Commerce de Namur, Belgium, page 12]. Other companies have a lower percentage of online bookings since they offer call centres booking and booking through their dedicated agents. Recently, also EasyJet, Brussels Airlines, Spainair and Vueling have begun on-line booking campaigns, including a possibility of booking by mobile applications.

⁵⁴² Decision of the Autorità Garante della Concorrenza e del Mercato of 21 December 2011, *Soc Apple Sales International v l'Autorita' Garante della Concorrenza e del Mercato – Antitrust*, AGCOM No. 23155 (caso PS/7256).

for “(...) *the commencement of a pan-European action against Apple throughout the European Union*”.⁵⁴³

Consumer organizations have co-ordinated their powers in order to undertake an action “*for an immediate halt to misleading practices by Apple in relation to consumers’ product guarantee rights*”.⁵⁴⁴ That was an objective for consumer organizations’ action, expressed in a common public statement of consumer organizations under the auspices of BEUC⁵⁴⁵ with a request of cessation of its unfair practices.⁵⁴⁶ Some of the consumer organizations started also a national battle toward modification of practices by *Apple*. That means that they have started a separate procedure before their national entities according to the same or similar reasoning and legal basis of the claims as the Italian Authority claimed. The result of a majority of claims is however still unknown.

All requirements of a co-ordinated action were met. Planning, organizing, staffing, directing and controlling appeared in the scheme of co-ordinated action toward *Apple*. One additional issue, which can be linked with controlling by an external body - the co-ordinated approach in *Apple* case gained support by the EU Commission.⁵⁴⁷ The media hype has drawn the attention of most consumers in the EU to the incriminated marketing practices of *Apple*. The penalties raised aware in the US and in China.⁵⁴⁸ The *Apple* case also disclosed weaknesses. Although the decision providing for action for injunction as requested by *Altroconsumo* stopped the unlawful marketing of the guarantee, a single consumer is still supposed to claim individually her compensation.⁵⁴⁹

⁵⁴³ Djurovic M. (2013), *The Apple Case: The Commencement of Pan-European Battle Against Unfair Commercial Practices*, European Review of Contract Law, Vol. 9(3), p. 253-266.

⁵⁴⁴ Press release: Quotation of the interview given by M. Perani from Altroconsumo, an Italian consumer organizations; Willan (2012), *Apple Loses First Appeal in Italian Warranty Case*, *Business Ready*, 2012, <http://www.pcworld.com/article/252508/apple_loses_first_appeal_in_italian_warranty_case.html> accessed on July 2, 2014.

⁵⁴⁵ A public statement of BEUC was published on March 19, 2012, <http://cojef-project.eu/IMG/pdf/BEUC_PR_Apple.pdf> accessed on June 2, 2014.

⁵⁴⁶ The public statement of BEUC acting on behalf of consumer organizations which joined the co-ordinated action has been disclosed in press release <<http://www.beuc.org/press-media/press-releases>> accessed on June 9, 2014.

⁵⁴⁷ On 21 September 2012, Ms V. Reading (Vice President of the EU Commission) sent a letter addressed to all EU Member States Ministries in charge of consumer protection with a request to check whether *Apple*’s practices regarding the consumers’ right to guarantee is a common standard in their respective countries. The feedback of this research was supposed to be sent to the Commission for final verification as a basis for an action plan in the Consumer Protection Cooperation Network. Full text of the letter can be found in ARES(2012) 1099756 as of 21 September 2012.

⁵⁴⁸ The decision of the Italian Antitrust Authority imposed a fine of 900. 000 EU and additional fine of 200. 000 EU for a lack of compliance with the previous decision of the Italian Antitrust Authority.

⁵⁴⁹ For example: Luxemburg – a contract concluded upon the unfair commercial practice is null and void, Belgium – in such a case a trader is supposed to refund consumers fully.

7. 4. A Future Potential of Consumer Organization Actions

The *Ryanair* case and the *Apple* case demonstrate the potential of co-ordinated activities.⁵⁵⁰ Consumer organizations gain popularity, turn into active players of consumer law enforcement and close the gap resulting for the difficulties in making use of the action for injunction in a cross-border dimension. No matter which of the actions is concerned, the joint one, co-operative or co-ordinative, consumer organizations have learnt by sharing experiences, identifying common goals and to fight even against global players. There is a major difference between the *Ryanair* case and the *Apple* case. First of all, the number of consumer organizations, which took part in the action had significantly increased. Secondly, in *Apple* BEUC had a leading role. Thirdly, the cross-border activity encouraged consumer organization to act not only in terms of cross-border cooperation, but also at national level - since national organizations initiated judicial proceedings and tried to litigate the core of the cross-border problem “*home*”. The increased value of co-ordinated action had already been stressed by the Report on application of the Injunction Directive, which in open words refers to co-ordinated action by consumer organizations as a form in which a collective enforcement in consumer matters can be exercised.

8. Out-of-court Enforcement Schemes in Cross-Border Consumer Cases

The new enforcement schemes upon the frame of the Injunction Directive and the Regulation 2006/2004 have turned out to be a very complex and too complicated for consumers to effectively enforce consumers’ rights.⁵⁵¹ Although the procedural cross-border tools for consumer law enforcement have been established on paper, the tools could not be effectively used in everyday consumer practice. There is potential but this potential has not yet really been utilised, despite all efforts established within and outside the regulatory schemes of the Injunction Directive and the Regulation 2006/2004. The difficulties in the use of these new enforcement tools might be one of the reasons why the European Commission put ever stronger emphasis on out-of-court enforcement measures. Currently out-of-court consumer measures like SOLVIT⁵⁵², FIN-NET⁵⁵³, and others⁵⁵⁴ are recognized as tools for

⁵⁵⁰ The shortcomings of the Injunction Directive have been discussed in the Chapter III 5.3, 5.6.

⁵⁵¹ Report on the application of Directive 2009/22/EC, p. 9.

⁵⁵² SOLVIT website, <www.ec.europa.eu/solvit/site/index_en.htm> accessed on May 31, 2014.

⁵⁵³ FIN-NET website, <www.ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm> accessed on May 31, 2014.

individual enforcement. These schemes have significantly helped in removing a relevant portion of consumer disputes from the judicial arena to out-of-court fora. It took, however, until 2013 before the European Union was able to develop a binding legal framework for out of court dispute settlement mechanisms. It is worth recalling that the Injunction Directive preceded the ADR/ODR Directive/Regulation by 15 years. In theory the time lag would have enabled the European Commission to propose models for combining collective enforcement strategies and individual enforcement, for instance *via* testing collective dispute settlement schemes. However, this did not happen. Conceptually the two bodies of law stand side-by-side, the Injunction Directive and Regulation 2006/2004 the ADR/ODR Directive/Regulation. Both remain interconnected *via* the Annexes and *via* what is termed here as the dualism of enforcement measures.⁵⁵⁵

By now it is not clear whether and to what extent the ADR/ODR set of rules⁵⁵⁶ will lead to a re-structuring of the out-of-court settlement schemes which have been established in the last decade. That is why it makes sense to introduce the existing sector-specific tools dedicated to particular fields of interest: Extra-Judicial Network (EEJ-Net)⁵⁵⁷, Financial Services Complaints Network (FIN-NET) and SOLVIT. It is against this background that the basics of the ADR/ODR Directive/Regulation are presented.

8. 1. EEJ-Net

The Extra-Judicial Network (EEJ-Net) helps consumers to settle cross-border disputes with companies that provide defective goods or services, by guiding them towards alternative dispute resolution mechanisms. EEJ-Net consists of various national contact point or “*clearing houses*”. It is exclusively built to assist consumers in cross-border relations.⁵⁵⁸ This network is based on out-of-court means only and in no extent it is aimed at promoting a traditional judicial enforcement method. The Council Resolution of 25 May 2000 on the Community-wide network of national bodies for the extra-judicial settlement of consumer disputes laid down a rather broad framework of what should be achieved. In order to bring

⁵⁵⁴ For example: EEJ-NET (the European Consumer Centres Network), <http://europa.eu/legislation_summaries/other/132043_en.htm> accessed on May 31, 2014.

⁵⁵⁵ See Chapter I.

⁵⁵⁶ Since the Directive on ADR and the Regulation on ODR are dated on May 2013, therefore currently there is no experience regarding its practical application.

⁵⁵⁷ Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (OJ C 155, 06.06.2000).

⁵⁵⁸ For more structural and institutional details see EEC-Net website, <www.ec.europa.eu/consumers/publications/factsheet-ECC-NETECC-NETen.pdf> accessed on May 31, 2014.

national extra-judicial dispute settlement bodies together as a network, each Member State is supposed to indicate a central point, so-called “*a clearing house*” to act as a point of contact for consumers wishing to settle a dispute out-of-court in another Member State. The contact points constitute an “*extra-judicial network*”, intended to make it easier to settle cross-border consumer disputes. The main activity of the EEJ-Net is focused on:

- (i) providing information for consumers of possibilities of recourse to alternative dispute resolutions mechanisms,
- (ii) facilitation of cross-border consumer complaints, mainly by helping the complainants to overcome language difficulties by providing practical assistance such as translations of consumer complaints forms,
- (iii) facilitation of lodging complaints using the appropriate standard forms for alternative dispute resolution mechanisms, and
- (iv) following-up the resolution of complaints and action taken involving the ADR within the network.

The EEJ-Net promotes the idea of close co-operation between bodies responsible for enforcement of consumer rights and professionals, companies, economic organisations, consumer groups, extra-judicial organisations, the Member States and the Commission. Once the Council noted that the out-of-court bodies falling outside the scope of Recommendation 98/257/EC started to play a useful role for the consumer, the Commission was invited and encouraged to develop in close cooperation with Member States common criteria for the assessment of bodies, which should ensure their quality, fairness and effectiveness.⁵⁵⁹ Recommendation 2001/310 has given a strong background to the EEC-Net and indicating these and establishing the rules of the co-operation between the EEC-Net and the Commission. The latter provides technical support for the creation and operation of the network and is in charge of making use of new communication technologies.⁵⁶⁰ Furthermore, the Commission has been given a supervisory role in the enforcement actions. This is what the Recommendation has in common with Regulation 2006/2004. Although it looks like a scheme, which is designed for both the Injunction Directive and Regulation 2006/2004, the EEJ-Net has never played a role in collective enforcement. If any, the EEJ-Net gained importance in the enforcement of individual rights, be it under the implemented EU consumer protection rules or national consumer law.

⁵⁵⁹ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (notified under document number C(2001) 1016).

⁵⁶⁰ The role of the Commission may be compared to its role with regard to Regulation 2006/2004, where the Commission plays a role of “a spider in the cobweb”, see Chapter III 6.2.

In January 2005 institutional change came in the form of merger of two previously existing networks – the Euroguichets and European Extra-Judicial network. The ECC-Net provides consumers with information on their rights under European and national law, gives advice and assists in the resolution of cross-border consumer disputes and complaints.⁵⁶¹ The new design benefits much from the experiences gained.⁵⁶²⁵⁶³ The ECC-Net is based on the activity of national European Consumer Centres established in each of the Member States and in Iceland and in Norway.⁵⁶⁴ Every national Consumer Centre must be a public or non-profit making body and is selected by a Member States. The choice of the Member State requires the EU Commission's approval.⁵⁶⁵ The EEC-Net aims at performing the following tasks:

- (i) providing an information to consumers and giving them an advice about their rights in cross-border shopping,
- (ii) giving advice and providing a support to any consumer with a complaint related to cross-border shopping,
- (iii) providing an easy access to ADR-bodies if there is no chance to solve a cross-border consumer complaint amicably and assisting consumers during this procedure,
- (iv) raising the awareness of the out-of-court resolution schemes among consumers and traders,
- (v) sharing best practices between consumers and traders at the national and the EU level,
- (vi) entering in cooperation with other EU-networks which provide for information on EU, national legislation and case studies (for examples SOLVIT, FIN-NET).

ECC-Net has developed a particular case-handling procedure for cross-border disputes. The Consumer Centre of the country of the consumer's residence will receive support of the Consumer Centre of the country where the dispute occurred. Consumer Centres are supposed to perform the following role:

⁵⁶¹ More details: website of ECC-NET/ECC-NET <http://ec.europa.eu/consumers/ecc/index_en.htm> accessed on June 9, 2014.

⁵⁶² In order to increase consumer confidence in the Internal Market, ECC-Net is supposed to follow the following six main objectives: (i) promotional activities to raise consumer awareness; (ii) responding to consumer inquiries about rights in connection to cross-border shopping; (iii) to assist consumers with complaints; (iv) to assist consumers with disputes; (v) to contribute to the development of ADR schemes in their host countries; (vi) to engage in networking in feedback to be found in CPEC (2011); Evaluation of the European Consumer Centres Network. p. v.

⁵⁶³ ECC-Net (2009) Cross-border Dispute Resolution; European Parliament (2011), Cross-border Alternative Disputes Resolution in the European Union, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, Internal Market and Consumer Protection, IP/A/IMCO/ST/2010-15, PE464.424.

⁵⁶⁴ The finding comes from the EU Commission and from national governments of the member states participating in the ECC-Net.

⁵⁶⁵ For procedural details EEC-Net (2009), Cross-border Dispute Resolution Mechanisms in Europe – Practical Reflections on the Need and Availability.

- (i) to indicate a consumer a proper alternative dispute resolution scheme which fits to the case at hand,
- (ii) to inform a consumer about the alternative disputes resolution bodies relevant for the case at hand,
- (iii) to indicate the pros and cons of the case at hand,
- (iv) to support a consumer in monitoring of the dispute,
- (v) to support a consumer in the formalities accompanying the procedure, for example by assuring access to translation service of the relevant documents for the case at hand.

In theory, the case-handling procedure is designed in a complex manner and it should be beneficial for consumers to bring cross-border cases before the Consumer Centres. Nevertheless, there is an important practical problem, resulting from the lack of alternative disputes resolution mechanisms.⁵⁶⁶

The ECC-Net established an effective legal network. In 2011, it dealt with more than 70,000 cases. As the annual report for 2012 shows 72,000 EU consumers requested help from European Consumer Centres. More than half of these contacts related to 32,000 complaints about a purchase made in another EU country, Norway and Iceland. The ECC-Net turned out to be particularly valuable in air transportation sector. According to the data collected in the Annual Report for 2012 about one third were related to the transport sector, of which 22% were linked to the air transport. E-commerce area covered around 60% of complaints.⁵⁶⁷

8. 2. FIN-NET

FIN-NET was launched by the Commission in 2001. The network is addressed to financial dispute resolution only within the European Economic Area countries. This means that its scope has been extended to Iceland, Liechtenstein and Norway. The states are responsible for handling disputes between consumers and financial service providers, such as banks, insurance companies, investment firms and others of this kind.⁵⁶⁸ The FIN-NET is meant to bring solutions for consumer problems in cross-border cases regarding the relations between consumers and the financial sector.

⁵⁶⁶ EEC-Net (2009), Cross-border Dispute Resolution, pp. 10-11.

⁵⁶⁷ For more details and in particular figures regarding the ECC-Net activity see website.

⁵⁶⁸ For more details see the website of the FIN-NET.

The activity of FIN-NET is aimed at providing consumers with easier access to ADR schemes in cross-border cases related to financial matters through cooperation and assistance of national alternative dispute resolution bodies.⁵⁶⁹ The FIN-NET activity is aimed at:

- (i) providing a consumer with easy and informed access to out-of-court means of redress in cross-border matters,
- (ii) assuring exchange of information between the European out-of-court complaint schemes,
- (iii) improving the quality of alternative dispute resolution schemes and making sure that there are based and run upon a common set of principles addressed to alternative dispute resolution frames⁵⁷⁰,
- (iv) increasing consumer confidence in terms of use alternative dispute resolution schemes among the Member States.

The activity of FIN-NET has systematically grown. Since 2001 the year of initiation of the FIN-NET activity there were 335 complaints to be handled, in 2009 this number increases up to 1.542 cases, in 2011- 1.854 cases.⁵⁷¹

8. 3. SOLVIT

SOLVIT was set up in year 2002 as an on-line problem solving network with a single national centre in every Member State and in Norway and Lichtenstein. The SOLVIT activities are addressed to both consumers and business.⁵⁷² Nevertheless, they are not involved in disputes between consumers and businesses. The SOLVIT network is aimed at:

- (i) ensuring that all EU citizens and businesses have access to a high-quality service both in their country of residence and in the country in which the problematic issue has arisen,
- (ii) making a guarantee that all SOLVIT centres are committed to working with the Commission to achieve a high-quality service,

⁵⁶⁹ European Commission, Directorate General Internal Market and Services (2013), FIN-NET Activity Report, <http://ec.europa.eu/internal_market/fin-net/docs/activity/2012_en.pdf> accessed on May 31, 2014.

⁵⁷⁰ Recommendation 98/257 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17.04.1998, p. 31–34).

⁵⁷¹ Directorate General Internal Market and Services (2013), FIN-NET Activity Report, <http://ec.europa.eu/internal_market/fin-net/docs/activity/2012_en.pdf> accessed on May 31, 2014; which provides for more recent data.

⁵⁷² Recommendation of 17 September 2013 on the principles governing SOLVIT European Commission (OJ L 249, 19.09.2013, p. 10).

- (iii) ensuring that the quality and performance of the SOLVIT service will not deteriorate with the expansion of the network and an increase in numbers of cases submitted,
- (iv) working with a completely transparent database that allows all parties involved to monitor the network's quality and sufficiency, and
- (v) emphasising that SOLVIT represents a completely new approach that combines the handling of complaints with a high level of administrative cooperation.

The claims must have a legal background in violation of EU consumer law, or misapplication of single market rules by the public authorities, or social security issues.⁵⁷³ SOLVIT network is a good example of the cooperative element between authorities dominates. Contrary to Regulation 2006/2004 the co-operation in SOLVIT network operates on a voluntary basis. SOLVIT Centres are committed to providing real solutions to problems within ten weeks. Short and speedy dispute resolution is one of the predominant elements of SOLVIT's activity. The effectiveness of its activity is incomparably higher than other networks aiming to combat difficulties in cross-border cases. One of the most positive aspects of SOLVIT's is the short time-span of dispute resolution, as well as the strong interconnectedness of the authorities *via* a central database boasting transparency. For many years, different kinds of organisations representing consumers or businesses have been able to submit their cases online.⁵⁷⁴

8. 4. The New Design under the ADR/ODR Directive/Regulation

In 1998⁵⁷⁵ and 2001⁵⁷⁶ the Commission had already adopted two recommendations defining common principles for efficient and effective ADR entities. Ten years later in 2011, the Commission launched a Proposal for Directive on ADR⁵⁷⁷ and a Proposal for Regulation on ODR⁵⁷⁸, both were adopted in 2013 as Directive on ADR and the Regulation on ODR. The main objective was “(...) *to improve the functioning of the retail internal market and more*

⁵⁷³ Recommendation of 17 September 2013 on the principles governing SOLVIT European Commission (OJ L 249, 19.09.2013, p. 10).

⁵⁷⁴ Santini (A.A. 2008/2009), *La Risoluzione Extragiudiziale dei Conflitti tra Cittadini Privati e Pubblica Amministrazione nell'Unione Europea: la Rete SOLVIT*, Tesi di Laurea in Sistemi amministrativi comparati.

⁵⁷⁵ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17.04.1998, p. 31–34).

⁵⁷⁶ Commission Recommendation 2001/310 of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109 , 19.04.2001, p. 56 – 61).

⁵⁷⁷ Commission Proposal for a Directive on Consumer ADR, COM(2011) 793 final.

⁵⁷⁸ Commission Proposal for a Regulation on Consumer ORD, COM(2011) 794 final.

particularly to enhance redress for consumers".⁵⁷⁹ Both the pieces based on Article 114 TFEU, which refers the Internal Market rationale.⁵⁸⁰ This is in line of rationale of the Injunction Directive and Regulation 2006/2004.

The Commission had carefully prepared the step from mere recommendations to a binding piece of law. The therefore initiated study⁵⁸¹ concluded that geographical inaccessibility and limited sectorial availability lead to serious obstacle for consumers, which "(...) prevent a consumer and business from fully exploiting their [ADR] potential".⁵⁸² The new Commission's plan was supposed not only to fill up the gap in coverage, but also to consider the new challenges, resulting from of e-commerce trade. Somewhat oversimplified one what argue that the ADR Directive constitutes the follow on to the Recommendation 98/27 and the ODR Regulation to Recommendation 2001/310.

The ADR scheme covers non-judicial procedures, such as conciliation, mediation, arbitration⁵⁸³ or complaints board. ADR, or as Hodges remarks CADR⁵⁸⁴ - Consumer ADR - refer to the resolution of disputes between consumers and traders (in relation of b2c) linked to the sale of goods and provision of services by traders, online and off-line.

The ADR Directive builds on existing national schemes. The aim is not to impose obligations on Member States to create a specific ADR entity for each retail sector, but rather to introduce a set of common binding principles⁵⁸⁵, codifying the *Alassani* judgment of the ECJ.⁵⁸⁶

The ADR Directive does not replace existing schemes but shall bring them down to a common standard Article 3(1) states "*(...) if any provision of this Directive [on ADR] conflicts with a provision laid down in another Union legal act [EEC-NET, FIN-NET, etc.]*

⁵⁷⁹ Commission Communication by the European Commission on Alternative Dispute Resolution for consumer disputes in the Single Market', COM(2011) 791 final, dated in 29 November 2011.

⁵⁸⁰ Chapter IV 4.1.

⁵⁸¹ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

⁵⁸² Commission Communication on ADR for consumer disputes in the Single Market', COM(2011) 791 final.

⁵⁸³ It is highly conflictual whether arbitration in consumer litigation is an appropriate means. The ECJ refused to declare arbitration clauses in standard terms non-binding; See: Judgment of the Court (First Chamber) of 26 October 2006, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05 (ECR2006, p. I-10421).

⁵⁸⁴ Hodges, Ch., Benöhr, N. Creutzfeld-Banda (2012), Consumer-to-Business Disputes Resolution: the power of CADR, ERA Forum 2012, Vol. 13, p. 199-225, DOI 10.1007/s12027-012-0263-y.

⁵⁸⁵ Article 1 of the ADR Directive "*(...) consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures*", and upon requirement of effectiveness as in Article 8 let. (e) of the ADR Directive provides a deadline for dispute solving: "*(e) the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file*". The costs issue has been defined in Article 7 let. (l) "*(l) the costs, if any, (are MO) to be borne by the parties, including any rules on awarding costs at the end of the procedure*".

⁵⁸⁶ Judgment of the Court (Fourth Chamber) of 18 March 2010. European Court of Justice, *Rosalba Alassini v Telecom Italia SpA* (C-317/08), *Filomena Califano v Wind SpA* (C-318/08), *Lucia Anna Giorgia Iacono v Telecom Italia SpA* (C-319/08) and *Multiservice Srl v Telecom Italia SpA* (C-320/08), ECR 2010, p. I-02213.

and relating to out-of-court redress procedures initiated by a consumer against a trader, the provision of this Directive shall prevail". Therefore, the ADR Directive will prevail over existing out-of-court measures. The ADR Directive envisages an active participation of the EEC-centers, in cases where the EU consumers run into problems when buying from a trader based in another EU country, so then they can ask for help and assistance of the ECC-Net, Article 14:

"1. Member States shall ensure that, with regard to disputes arising from cross-border sales or service contracts, consumers can obtain assistance to access the ADR entity operating in another Member State which is competent to deal with their cross-border dispute", while in para. 2 of Article 14 is directly made to the ECC-NET.

2. Member States shall confer responsibility for the task referred to in paragraph 1 on their centres of the European Consumer Centre Network, on consumer organisations or on any other body".

With regard to FIN-NET, the respective reference can be found in Article 16(1):

"1. Where a network of ADR entities facilitating the resolution of cross-border disputes exists in a sector-specific area within the Union, Member States shall encourage ADR entities that deal with disputes in that area to become a member of that network.

Recital (56) Networks of ADR entities, such as the financial dispute resolution network 'FIN-NET' in the area of financial services, should be strengthened within the Union. Member States should encourage ADR entities to become part of such networks".

SOLVIT and ADR will work side-by-side. SOLVIT is a problem-solving network designed to help citizens and businesses who run into difficulties. Therefore, SOLVIT remains outside the scope of the ADR directive, Article 2(1):

"1. This Directive [on ADR] shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution".

Apart from ADR, the ODR Regulation is dedicated to consumers' e-commerce transactions.⁵⁸⁷ The ORD introduces a pan-European online dispute resolution platform free

⁵⁸⁷ The ODR frame is the response to consumers' needs. According to the report submitted by the ECC-Net in 2010 56,5% of EEC-Net complains referred to e-commerce transactions; EEC-Net website, Recital (18) and Article 5(2) of the ODR Regulation.

of charge.⁵⁸⁸ The ORD platform will check the admissibility of the claim and then transmit it to the relevant ADR. The complaint shall be solved within 30 calendar days.⁵⁸⁹ Time will tell if and ORD will work in practice once it is established. One of the crucial issues in the legislative process was the development of software, which could be used for cross-translation of the claims into other languages.⁵⁹⁰

9. Intermediary Conclusion

The chapter shows the transborder side of the dualism of enforcement measures in the field of cross-border consumer enforcement, which is based on (i) collective cross-border scheme designed by the Injunction Directive, (ii) Regulation 2006/2004 which is focusing on collective enforcement *via* national public bodies, (iii) ADR and ODR schemes, which stressing individual enforcement out of courts.

Dualism of enforcement measures in the cross-border context differs from the thesis of dualism in national context. In cross-border context contrary to the national context, there is no true parallel between the collective and the individual. Although both the national and collective frame cover consumer protection in the same manner, in national cases the two forms coexist in parallel, while in cross-border matters they may have different ends, links, and conjunctions. In the cross-border context a more holistic vision of the collectiveness of procedural measures failed since neither the injunctive procedure nor the frame of national bodies brought by the Regulation 2006/2004 was sufficient to address collective cross-border matters. At the cross-border level the two spheres of enforcement stand rather separately from each other.

After the European Commission had realised the limited impact of the Injunction Directive it shifted the focus from judicial enforcement through collective actions of consumer organisations to administrative enforcement through co-operation between national authorities. Regulation 2006/2004 is currently under review as its limits became abundantly clear. Both schemes are not inter-related, although the action for injunction survived as a means of last resort in Regulation 2006/2004. The new development results from the consumer organisations which instead of engaging in complicated transborder litigation, co-

⁵⁸⁸ Article 5(2) of the ORD Regulation.

⁵⁸⁹ Article 9(8) of the ODR Regulation.

⁵⁹⁰ Personal communication of the author with lawyers, politicians and academics at the occasion of “*Conference on ADR & ODR in the European Union*” organized by European Justice Forum in Brussels held in Brussels, on May 15, 2012 at the Representation of the Free State of Bavaria to the European Union.

ordinate their enforcement activities at the national level against one and the same wrongdoer or one and the same problem through the European consumer organisations, BEUC. The most recently adopted Directive on ADR and the Regulation on ODR opens up new avenues of individual cross-border enforcement, however, without looking for possible links between collective action *via* injunction and dispute settlement procedures.

Chapter IV From Multi-level Diversity to Convergence

1. The European Skeleton

The European enforcement scenario of injunctions and other types of remedies presents a very specific structure arising from a combination of the EU and MS models. The two-level structure is often called a multi-level structure since it ties two layers of law at national and the EU level.⁵⁹¹ The European concept of the multi-level structure of injunctions shows a certain similarity to the US model advocating a convergence between the US-federal and US-state level, which may serve as background for the comparison of Member States and the EU level.⁵⁹² This does not mean that I intend to embark on a deeper comparison between the US and the EU, but to indicate that the multi-level structure of the US might serve as a source of inspiration for analysing the interplay between the EU and the US models and for testing the potential for convergence in the field of consumer law enforcement *via* the action for injunction.

2. The “Hybrid”⁵⁹³ Structure of Action for Injunction

Currently, in the design of European law, there are convergences and conjunctions of various kinds to be discovered at the EU level and at the national level. Remedies constitute an example/illustration of hybridity because they are multi-level constructs remedies. This issue has been investigated by N. Reich, who advanced the theory of hybridisation of legal remedies.⁵⁹⁴ Although Reich’s theory refers to competition law, it can be extended to the field of consumer protection. In terms of European remedial law, the theory of hybridization draws on the principle of equivalence and effectiveness. It requires a “*reshaping*” and an “*upgrading*” of the national system of remedies in order to assure the *effect utile* of

⁵⁹¹ Storme (2008), *Une Question de Principe(s)? Réponse à Quelques Critiques à L’égard du Projet Provisoire de “Cadre Commun de Référence”*, Lecture Conference, The Draft Common Frame of Reference (DCFR), Europäische Rechtsakademie, Trier, 6–7 March; Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 1-38, p. 2-3; *Le rapport entre les Règlements européens en matière de procédure (en particulier celle relative aux petites créances) et le droit judiciaire interne belge*, Revue de la Faculté de droit de l’Université de Liège 2010, p. 5-30, <www.storme.be/procedureeuropeenne.pdf> accessed on June 9, 2014; Smits (2011), *Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?* in Brownsword/Micklitz/Niglia/Weatherill (2011), *The Foundations of...*, p. 161-171.

⁵⁹² Storme (2008), *Une question de...*, p. 65-77.

⁵⁹³ Tuori (2014), *On Legal Hybrids*, in Micklitz (2012), *A Self-sufficient European Private Law – A Viable Concept?* EUI Working Paper, 2012/31, Florence, p. 67-74.

⁵⁹⁴ Reich (2007), *Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights*, *Common Market Law Review*, Vol. 44(1), p. 705-742.

substantive rights granted in the EU law. Reich's conclusion has been based on the principle of direct effect of EC law towards individuals, whose rights are protected by the EC law.⁵⁹⁵ Micklitz defines hybridization more generally "(...) as an overall normative model of a composite legal order, within which the European and the national legal both play their part in some sort of a merged European-national private legal order. Hybridisation means that the legal character of the respective rule is neither European nor national. It bears elements of both legal orders and is therefore supposed to be hybrid".⁵⁹⁶

In order to elaborate the conjunction between the national and the EC frame, Reich proposes a two-step procedure: first, there is a need to find out the applicable rules of Member States law in which are relevant to the frame of EU law. Secondly, there is a need to evaluate these rules in light of EC principles in order to make sure that the minimum (adequate) standard of protection is achieved. Thirdly, the applicable Member States law has to be corrected under principle of supremacy and direct effect of EC law.⁵⁹⁷ Hybridisation is bound to the scope and reach of the EU legal framework granting rights to individuals on the one side⁵⁹⁸ and the procedural autonomy of the Member States on the other.⁵⁹⁹ According to Micklitz and Cafaggi hybridisation should be understood as a gradual intrusion of EU law enforcement measures into national legal orders. Such an understanding fits to the Injunction Directive which links the EU and the Member States level.

3. Approved Diversity of Injunctions and the Way Forward

The enforcement of consumer law in the European Union through the remedy of injunction is characterized by a high degree of differentiation. There is no uniformisation of national remedies.⁶⁰⁰ Each Member State determines individually the shape of remedies⁶⁰¹ in

⁵⁹⁵ Reich (2007), *Horizontal Liability in...*, p. 705-742.

⁵⁹⁶ Micklitz (2013), *The Visible Hand of European Regulatory Private Law – The Transformation from Autonomy to Functionalism in Competition and Regulation*, <<http://biblio.juridicas.unam.mx/libros/8/3581/19.pdf>> accessed on April 25, 2014.

⁵⁹⁷ Craig/De Búrca (2011), *The Legal Effect of...*

⁵⁹⁸ Reich (1998), *System der Subjektiven-öffentlichen Rechte, to Be Found in the Union: A European Constitution for Citizens of Bits and Pieces*, Academy of European Law, Collected Courses of the Academy of European Law VI/1 1995, p. 158-236.

⁵⁹⁹ Van Gerven (2000), *Of Rights, Remedies and Procedures*, Common Market Law Review, Vol. 37(3), p. 501-536; Kakouris (1997), *Do the Member States Possess Judicial Procedural Autonomy?* Common Market Law Review, Vol. 34, p. 1389-1412; Galetta (2009), *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the „Functionalized Procedural Competence of EU Member States"*, p. 11-17.

⁶⁰⁰ Dougan (2004), *National Remedies Before the Court of Justice. Issues of Harmonization and Differentiation*, *Modern Studies in European Law*, Oxford, p. 97-99.

⁶⁰¹ Chiti (1995), *Towards the Unified Judicial Protection in Europe(?)*, European Review of Public Law, Vol. 9, p. 553-565.

order to ensure compliance with EU standards.⁶⁰² This yields a broad diversity of national models of enforcement and forms of injunction. The result is heterogeneity.⁶⁰³ This hardly complies with the ideal of legal certainty.⁶⁰⁴ Nowadays, it is quite difficult, if not impossible to find a common denominator among in the various schemes for the action of injunction. The degree of heterogeneity in enforcement informs the level of consumer protection available.⁶⁰⁵

According to Micklitz emphasis should be put on effective application and enforcement of remedies already in force.⁶⁰⁶ Member States should focus on the introduction of effective and adequate means of implementation of the respective directives. National enforcement measures should be shaped in a way, which allows for the realization of the *effect utile* of consumer law.⁶⁰⁷ There is no need for copy-paste technique of enforcement measures, but only for the establishment of common rules of application.⁶⁰⁸ The European Union is built on diversity of enforcement schemes. This is the essence of the principle of procedural autonomy.

The difficult question is how much diversity and much heterogeneity the European Union can live with, without jeopardizing the whole enterprise of European Union consumer law. Europe is united in diversity. This means there is more than simply approved diversity, there is also the striving for more unity – the EU means unity in diversity. Before I look into the potential for convergence out of or in heterogeneity, I will first analyse the reasons, which explain the multi-level structure, which explain hybridization and which explain the broad variety of injunction mechanism.

⁶⁰² Kas (2014), *Reshaping the Boundaries of the Enforcement of European Social Regulation: Unitas in Diversitate – The Construction of a Hybrid Relationship*, in Micklitz/Svetiev (2012), *A Self-sufficient European...*, p. 119-139.

⁶⁰³ Report on the application of Directive 2009/29/EC, p. 11.

⁶⁰⁴ Legal certainty is often considered in the substantive law context, while omitted in procedural matters; See: Green Paper on Consumer Collective Redress, COM(2008) 794 final, p. 2.

⁶⁰⁵ Cross-border tools of consumer protection are often criticized by consumers because of the complexity of the procedure, its length, language barriers, etc. For more details see: Eurobarometer Survey 358, Flash Eurobarometer (2013); Consumer Attitudes Towards Cross-Border Trade and Consumer Protection; Twigg-Flesner (2011), *Good-Bye Harmonization by Directives, Hello Cross-Border only Regulation? – A Way Forward for EU Consumer Contract Law*, European Review of Contract Law, Vol. 7(2), p. 235-256, p. 239.

⁶⁰⁶ Following Micklitz, in order to realize the effect utile of consumer protection directives, more emphasis shall be put on enforcement. For similar approach see: also Kas (2014), *Reshaping the Boundaries...*, in Micklitz/Svetiev (2012), *A Self-sufficient European...*, p. 119-139.

⁶⁰⁷ Kas (2014), *Reshaping the Boundaries...*, in Micklitz/Svetiev (2012), *A Self-sufficient European...*

⁶⁰⁸ Micklitz (2011), *The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-made European Law on Remedies*, in De Witte/Micklitz (2011), *The European Court of Justice and the Autonomy of the Member States*, Antwerp, p. 367-369.

4. Looking for an Explanation of Heterogeneity of Injunctions

Many different pieces of legislation have been adopted thus far at the EU level, all of which were meant to bring the different legal systems closer together, to strive for harmonisation.⁶⁰⁹ The emphasis has always been on the harmonisation of substantive law, initiated at the EU level.⁶¹⁰ The approximation of procedural matters remains by and large outside the scope of application of EU law. That it occurred in this manner through Directive of injunctions does not lead to harmonization but at the very best to the development of a broader framework.⁶¹¹ Until today it is unclear whether and to what extent the EU is allowed or not allowed to bring an action in order to intervene into procedural matters of the Member States; what the limits of this intervention are and what the legal basis of such an enterprise could be.⁶¹²

This ambiguity is mainly rooted in the division of competences for procedural matters between the EU and Member States.⁶¹³ The Rome Treaty as well as subsequent EC Treaties were silent or only fragmentarily tackled the issue of EU competence in the area of the civil justice. The Treaties have never provided all-encompassing solutions. The Amsterdam Treaty extended the EU competence to “*the area of freedom, security and justice*”. In the aftermath, the EU used its monopoly to initiate more harmonization measures in civil justice. That is why in the course of time harmonisation has more and more used in procedural law matters too. The Lisbon Treaty has not brought any further innovation in this regard. It left the main division of responsibilities untouched.⁶¹⁴ However, since 2009 the EU has a wider

⁶⁰⁹ Craig/De Búrca (2011), *EU Law...*, p. 203; Vogenauer/Weatherill (2006), *The Harmonization of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Studies of the Oxford Institute of European and Comparative Law, p. 115.

⁶¹⁰ Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93)576, 16 November 1993, p. 57; where the Commission has concluded that the divergences between national procedures „*are the product of country-specific traditions: rules of procedure as a whole represent a delicate balance and can only be harmonized gradually and with the utmost caution*”.

⁶¹¹ Which thanks to the Recommendation 2013/396, can be regarded as a pattern in order to design other collective redress mechanisms, see for more details in Chapter III.

⁶¹² Stuyck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 65.

⁶¹³ Stuyck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 70; states as follows “*(...) this principle of procedural autonomy only applies when there are no procedural rules at the EU level. Interestingly, the EU legislation (directives, regulations), including legislation in the consumer field, goes halfway in prescribing national procedural rules for the enforcement of the substantive provisions it sets*”. For more details see Betlem (2007), *Public and Private Transnational...*, p. 683-704.

⁶¹⁴ The amended Article 3(1) of the Lisbon Treaty states that “*competences not conferred upon the Union in the Treaties remain within the Member States*”. This is subject to principle of loyalty which has been expressed in the same article; See: Bernitz/Nergelius/Cardner (2008), *General Principles of EC Law in a Process of Development*, p. 75-76.

competence to adopt civil justice measures, which legal harmonization of national procedural law.⁶¹⁵

The principle of procedural autonomy of Member States remains the key to understanding the constitutional limitations in harmonizing procedural laws. Although the EU has not been granted a treaty right to “*intervene*” into procedural matters, under certain conditions the EU might initiate legislation with regard to procedural aspects if the non-existence of enforcement measures endangers the uniform application of EU law.⁶¹⁶ Originally the boundaries between substantive law and procedural law were quite clearly established. The division of competences between Member States and the EU were sharp and impassable. Member States kept their independence as to procedural matters and the EU did not to intervene. However, as the European integration process advanced the boundaries of competences between the Union and Member States gradually changed and the division of competences became less clear-cut.⁶¹⁷ Hence, the role of the EU and of Member States has changed significantly in the last decade, which is illustrated through the uncommon/unusual scheme of the Injunction Directive. M. Storme has expressed this quite radically⁶¹⁸ “(...) *the European Union has only attributed powers, most of these are non-exclusive and thus concurring with the Member States, the exercise of these concurring powers is governed by complex rules, different legal procedures including a common use of so-called co-ordination methods*”.

In the process of legal harmonisation, as far as procedural rules are concerned, the EU has progressively extended its powers and capacities to “*intervene*” and to “*interrupt*” the national legal orders.⁶¹⁹ However, the EU disguised its intrusions because it sold the intrusion into the national law to the Member States to the Council through the idea of minimum harmonization which left the Member States room for manoeuvre. That strategy, however,

⁶¹⁵ Cafaggi/Micklitz (2009), *Introduction*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 2.

⁶¹⁶ There are policy areas in which the Commission has no enforcement power, like environmental law. In such cases, the Commission uses the infringement procedure as a tool for assuring the proper implementation of EU law, and its proper application, including its proper enforcement. For further details see: Micklitz (2011), *Administrative Enforcement of Private Law*, in Brownsword/Micklitz (2011), *The European Foundations of European Private Law*, Oxford.

⁶¹⁷ Micklitz/Cafaggi (2009), *New Frontiers of...*, p. 1-7.

⁶¹⁸ Storme (2009), *The Foundations of Private Law in a Multi-level Structure: Balancing, Distribution of Lawmaking Power and other Constitutional Issues*, in Brownsword/Micklitz/Niglia/Weatherill (2011), *The Foundations of European...*

⁶¹⁹ For one of the most radical statement refers (I) to harmonization of national laws as intrusive and disruptive to national legal systems and therefore in conflict with the principle of proportionality; Schulte-Nölke (2010), *The Way Forward in European Consumer Contract Law: Optional Instrument Instead of Further Deconstruction of National Private Laws*, in Twigg-Flesner (2010), *The Cambridge Companion to European Union Private Law*; and (II) to disruption of the national legal cultures by EU law, see: Collins (1995), *European Private Law and the Cultural Identity of the States*, *European Review of Private Law*, Vol. 3, p. 353-365.

yielded changes in the institutional relationship between the EU and the Member States. Under the blurred rules of the EC Treaties, the EU has been equipped in “a veiled” competence- because still not granted *ex lege* - to intervene into procedure-related national law. This veiled competence has found approval by the ECJ.⁶²⁰

4. 1. The Legal Basis of the Injunction Directive

The controversies on the nature, scope and content of the Injunction Directive result, perhaps not solely but to a large degree, from such basic issues as the search for the appropriate legal basis. Three possible legal bases exist:

- (i) Article 114 - a proper legal basis that has been chosen as the Treaty background for the Injunction Directive,
- (ii) Article 81 - as a possible legal basis that might have been chosen, that would fit to its cross-border dimension and to the idea of procedural law harmonization,
- (iii) Article 169 - as a potential legal basis for the Injunction Directive that would emphasise its particular consumer protection dimension.

Article 114 of the EC Treaty as a proper legal basis: Article 114 of the EC Treaty has been recognized as the proper and only suitable legal basis for the Injunction Directive since it applies to pieces of legislation which “(...) *adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*”. The EU, in measures touching upon health, safety, environmental and consumer protection, pursues a high level of protection, taking into account scientific evidence.⁶²¹ Within the scope of their respective powers, the European Parliament and the Council seek to achieve this objective.

Article 114 of the Treaty focuses on legal approximation, in para III achieving a high level of consumer protection⁶²², but although consumer protection forms an integral part of the internal market building, it is not mentioned in Art. 114 para 1. It neither grants specific competence to the EU nor diminishes Member States competence in procedural matters. The main question which was posed at the time of choosing the legal basis for the Injunction Directive was related to the proper description of the subject, or rather the object of the legal

⁶²⁰ Micklitz (2011), *The ECJ between...*, in De Witte/Micklitz (2011), *The European Court...*, p. 367.

⁶²¹ Which is perfectly in line with Article 38 Charter of Fundamental Rights of the European Union.

⁶²² It is not clear what high means and whether high is high enough to satisfy the requirements of this provision, according to AG Trstenjak not “*highest level of protection*”; See: Judgment of the Court (Grand Chamber) of 16 December 2008, *Lodewijk Gysbrechts and Santurel Inter BVBA*, Case C-205/07 (ECR 2008, p. I-09947).

protection in the frame of the Injunction Directive. By choosing Article 114 the EU referred to the completion of the Internal Market, rather than the protection of consumers⁶²³; Internal Market comes first and the consumer only after the Market, as a subject of the legal protection⁶²⁴:

- (i) Article 114 of the Treaty aims at the completion of the Internal Market, not at the protection of consumers, despite Art. 114 para 3 promoting a high level of consumer protection. The assured level of consumer protection should foster the functioning of the Internal Market, but not primarily the protection of consumers;
- (ii) Article 114 of the Treaty does not leave any doubt that consumer protection is covered by its scope. It allows for the harmonization of consumer law, which follows the idea behind the Injunction Directive. Article 114 requires a high level of protection throughout the EU as a basic standard of procedural harmonization;
- (iii) Article 114 of the Treaty covers both the national and the cross-border element⁶²⁵, since approximation concerns the Internal Market as a whole. A consumer who suffers damage at the national level might prima facie become the victim of a cross-border infringement of the very same substantive rule.⁶²⁶

Since the consumer is one of the key players in the Internal Market, his activities have been recognized as the catalyst of the Internal Market enhancing and promoting its development and improvement. Hence, consumer protection is a part of the effective protection of the Internal Market. The Internal Market functions well, only if consumers participate in national and cross-border market relations, and provided they do not need to face legal obstacles related to the functioning of the Internal Market. To improve the Internal Market yields the necessity to render the consumer convinced of his strong position in cross-border relationships. Only a consumer who is confident, aware of his rights and convinced as to the sufficiency and effectiveness of his rights may become an active participant within the Internal Market relations.⁶²⁷

⁶²³ Mak (2009), *Review of the Consumer Acquis - Towards Maximum Harmonisation?* Vol. 17(1), p. 55-73.

⁶²⁴ Stuyck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 65-70.

⁶²⁵ Stuyck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 66.

⁶²⁶ Stuyck (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 65-66.

⁶²⁷ Currently, 1 in 20 consumers face problems with cross-border purchases of goods or services, while 59% of traders face an important obstacles in selling cross-border, because of the lack of effective and sufficient mechanisms of collective redress; Executive Summary of the Impact Assessment of 29 November 2011, SEC(2011), 1409 final, p. 5; Flash Consumer Confidence Indicator for EU Area and EURO Area <http://ec.europa.eu/economy_finance/db_indicators/surveys/documents/2014/fcci_2014_04_en.pdf> accessed on April 28, 2014.

However, taking ECJ case-law into consideration⁶²⁸, Article 114 cannot be read as the unlimited power to design the Internal Market. *Tobacco I* had drawn the limits of the scope of Article 114 in a quite precise manner and taken into consideration the issue of the constitutionality of minimum harmonization. These issues have been reconsidered in *Tobacco II*.⁶²⁹ Measures that are adopted under Article 114 are supposed to bring forth an improvement of conditions in the Internal Market. This is not necessarily the case if EU legislation prohibits certain marketing practices. If one considers both Tobacco judgments, no doubts are left that all measures taking on the basis of Article 114 must aim at the improvement of the Internal Market. As the Injunction Directive is based on Art. 114, it must be recognized as a means which is supposed to improve the Single Market, in addition to improving consumer protection. The wide scope of Article 114 allowed for the procedural novelties that have been brought about by the Injunction Directive.

Article 81 of the EC Treaty as a possible legal basis: In various discussions concerning the pros and cons of the Injunction Directive, its legislative scope and purpose is taken into consideration. This quite necessary leads to Article 81 as a basis for achieving coherence in terms of injunctive procedures. Article 81 of the EU Treaty states that measures in the field of judicial cooperation in civil matters⁶³⁰ “*having cross-border implications*”⁶³¹ shall be taken “*in so far as it necessary for the proper functioning of the internal market*”.⁶³² Measures shall be used in order to “*(...) eliminating obstacles to the good functioning of the civil proceedings, if necessary by promoting the compatibility of the rules of the civil procedure applicable in the Member States*”.⁶³³

⁶²⁸ Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-376/9 (ECR 2000, p. I-08419).

⁶²⁹ Judgment of the Court (Grand Chamber) of 12 December 2006, *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-380/03 (ECR 2006, p. I-11573).

⁶³⁰ Miedzińska (2011), *Judicial Cooperation in Civil Matters in the European Union*, Conference Materials, Vilnius, 2011, <http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Miedzinska.pdf> accessed on June 9, 2014.

⁶³¹ Sadowski/Taborowski (2011), *Współpraca Sądowa w Sprawach Cywilnych*, Seria podręczników: System prawa Unii Europejskiej - przestrzeń wolności bezpieczeństwa i sprawiedliwości Unii Europejskiej, Vol. XI.3, 2nd ed., p. 234-256.

⁶³² A broad interpretation of Article 81 is recommended by J. Stuyck, who states that “*(...) the aim of the Article is to ensure that citizens do not suffer any inconveniences from the fact that civil litigation is not restricted to their Member State of residence. In this sense a cross-border case is one where there is a legal issue relating to goods or persons outside the borders of a particular Member State*”; Stuyck (2009), *Public and Private...*

⁶³³ Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil states as follows proceedings (OJ C 103E , 30.04.2002, p. 368–372), Explanatory Memorandum, Objectives, sent. 3. states as follows “*By Article 65(c) of the Treaty establishing the European Community, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*”.

Concerning its procedural, cross-border and harmonization-friendly approach, Article 81 of the EU Treaty has been proposed as a legal basis for an action for injunction. The Article expresses in a direct way the possibility of approximation of the laws and regulations of the Member States. It includes within the list of areas in which such measures can be taken “*access to justice*”. Civil law matters including consumer law issues are to be included into the specific list.

Article 81 should be read in accordance with Article 5 of the Lisbon Treaty, laying down the principle of subsidiarity and the principle of proportionality. Considering that Article 81 of the Treaty is focusing on the development of judicial cooperation in civil matters “*having cross-border implications*”, it goes hand-in-hand with the procedural nature and the cross-border implications of the Injunction Directive. Article 5 should not be overlooked in the research for the appropriate legal basis of the Injunction Directive. The relatively broad scope of Article 81 and its openness towards the harmonization of procedural law, makes Article 81 a possible legal basis for legal acts such as the Injunction Directive. The Article immediately indicates a cross-border dimension by going deeper into specific aspects of cross-border relations. It explicitly addresses the cross-border aspects quite contrary to most other competence rules. This would be suitable for the Injunction Directive if its cross-border aspects are considered only, but it would not necessarily include judicial cooperation in cross-border litigation outside and beyond the preliminary reference procedure. However, judicial co-operation might be the answer to some of the deficiencies of the Injunction Directive.

Article 81 states the competence of the European Parliament and the Council to adopt measures particularly when necessary for the proper functioning of Internal Market, which, however, is focused on ensuring effective access to justice and the proper functioning of civil proceedings, by promoting the compatibility of rules on civil procedure applicable in the Member States. This reasoning complies with the arguments behind the Injunction Directive, even if formulated from a somewhat different legal perspective than Article 114. However, one key difference remains, Article 81 envisages procedural barriers in cross-border relations, whereas Article 114 aims at setting aside barriers hindering the completion of the Internal Market as a whole.

The analysis of the basic requirements of Article 81 demonstrates how broad the general scope of Article 114 is. Article 81 includes a reference to “*in so far as necessary for the proper functioning of the Internal Market*”. It has to be emphasized that Article 81 introduces another limitation using the word “*proper*”, which does not appear in Article 114. This leads to the conclusion that the scope of Article 81 is broader than that of Article 114,

since Article 81 not only requires measures to ensure the functioning of the Internal Market but also the adoption of measures ensuring that the Internal Market functions properly. The EU would therefore be competent under Article 81 where goods or persons are present in another Member State. In other words, the reference to the Internal Market within the scope of Article 81 does not add to the “*cross-border*” requirement. Therefore, concerning the typically procedural dimension of the Injunction Directive, Article 81 would suffice as a legal basis. Although it seems to meet all requirements which hypothetically need to be considered in the Injunction Directive, it has never been considered as the appropriate legal basis, not even in the preparatory work on the Injunction Directive, or in the process of adopting the consolidated version in 2009 (Directive 98/27 became Directive 2009/22). The reason might be that Article 81 focuses excessively on cross-border elements while the cross-border issue of injunctions constituted just one of elements in the Injunction Directive. One might even have the impression that the an important if not the underlying/main purpose of the Injunction Directive was and is, to lay down a common scheme for the collective enforcement of consumer rights within the Member States.⁶³⁴ All things considered, Article 114 gives more leeway than article 114, and could be regarded as a kind of open-bag, which may cover national and cross-border aspects of consumer relations.

Article 169 of the EC Treaty as a potential legal basis: Article 169 is the only Treaty provision that is directly and exclusively aimed at consumer protection issues and which considers consumer protection policy as a key issue in order to strengthen consumer rights. It expresses the substantial impact of EC legislation on Member States’ domestic laws, although adhering to a minimum level of consumer protection.⁶³⁵ More closely Article 169(2) is divided into two types of measures. Para 2 (a) explicitly refers to Article 114, this means it reiterates the link between the Internal Market and consumer protection. The much more important provision is para 2 (b) which empowers the EU to take action in the interests of consumers without there being a connection to the Internal market, thereby distinguishing measures to “*support*”, “*complement*” and “*monitor*” the policy of the Member States in the field of consumer protection. The EU has used Article 169 only once, in the adoption of Directive 98/6 on price indications. All consumer contract law directives have been adopted on the basis of Article 114. Following Reich⁶³⁶ and Twigg-Flesner⁶³⁷ Article 169(2)(b) could

⁶³⁴ See Chapter I 1.6., 5.3.

⁶³⁵ Mak (2012), *Two Levels, One Standard? The Multi-Level Regulation of Consumer Protection in Europe*, in Davenney/Kenny (2012), *European Consumer Protection: Theory and Practice*, p. 21-43.

⁶³⁶ Reich (2005), *A European Contract Law, or an EU Contract Regulation for Consumers?* Journal of Consumer Policy, Vol. 28, p. 383-407.

serve as a legal basis not only for consumer contract law rules but also and in particular for adoption of procedural rules such as the Injunction Directive. Consumer matters would be recognized as a basic element of the EU policy behind the Injunction Directive. Taking into consideration that the Injunction Directive has introduced an action for an injunction exclusively dedicated to the field of consumer law, thus providing for the sectorial specification of remedies, it seems that due to its enhancement of the power of remedies in the field of consumer law, Article 169 of the Treaty would have been the best possible legal basis for issuing the Injunction Directive.

Looking deeper into matters regulated by Article 169(1) EC, it is argued that this article obliges the Community to ensure a high level of protection in the field of consumer law. It is in line with Article 38 of the Charter of Fundamental Rights.⁶³⁸ Article 169 (4) is in line with the logic laid down in (3) (b) is limited to minimum harmonisation.⁶³⁹ To this extent Article 169 differs from Article 114 which is read by the EU in a way that offers a choice between minimum and maximum harmonization. Since the famous Lisbon Strategy 2000⁶⁴⁰ the EU aims at maximum harmonization in the field of consumer law and this has triggered strong resistance in a number of member states and in the academic environment. I will come back to the question of minimum *versus* maximum harmonization.⁶⁴¹

4. 2. The Principle of the Procedural Autonomy

The basic meaning and legal interpretation of the principle of procedural autonomy has been laid down and confirmed by the ECJ in a whole series of judgments: “(...) *it is for domestic legal system of each Member State to designate the courts having jurisdiction and to determinate the procedural conditions governing actions at law intended to ensure the protection of the rights which the citizens have from the direct effect of the Community*”

⁶³⁷ Twigg-Flesner (2012), *A Cross-Border-Only Regulation for Consumer Transactions in the EU, A Fresh Approach to EU Consumer Law*.

⁶³⁸ Article 38 “*Consumer protection*” stating that Union policies shall ensure a high level of consumer protection; Charter of Fundamental Rights of the European Union (OJ L 303/01, 14.12.2007).

⁶³⁹ Mak (2009), *Review of the Consumer...*, p. 55-73.

⁶⁴⁰ European Council held a special meeting on 23-24 March 2000 in Lisbon to agree a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy; “*The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*”.

⁶⁴¹ See Chapter IV 4.4.

law”.⁶⁴² The principle of procedural autonomy is a broad concept that has been developed in order to “protect” the rules of national legislation from too strong and too extensive an intervention of the Community within the national legal orders.⁶⁴³ The principle of procedural autonomy covers remedies and procedures.⁶⁴⁴ Thanks to the principle of the procedural autonomy, Member States have been left the choice between procedural enforcement measures and their modes of governance.⁶⁴⁵ It promotes diversification of the European enforcement structure and has brought extensive fragmentation since the EU Treaty does not grant powers to the EU to adopt and to harmonise procedural matters, outside Article 81.

More often it is questioned whether the EU has the power and the EU can get a mandate to intervene into procedural matters. Currently procedural autonomy is divided in procedural autonomy *sensu stricto*, in the standard form based on a clear-cut division of competences between the EU and the Member States and procedural autonomy in which substantive law and procedural matters are so closely intertwined that the original division of power enshrined in the Treaty seems to be somewhat outdated and does not fully reflect the reality of EU law making in the last decades.⁶⁴⁶ In the light of the growing European influence on the national enforcement structures the concept of procedural autonomy has lost its previous relevance and the clear-cut distinction between EU and Member State law simply

⁶⁴² Judgment of the Court of 16 December 1976, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case C-33/76 (ECR 1976, p. 1989), para. 5; since then repeated in dozens of cases, e.g. Judgment of the Court of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, Case C-45/76 (ECR 1976, p. 2043), para. 13; Judgment of the Court of 28 September 1994, *Geertruida Catharina Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel*, Case C-128/93 (ECR 1994, p. I-04583), para. 39; Judgment of the Court of 6 December 1994, *Elsie Rita Johnson v Chief Adjudication Officer*, Case C-410/92 (ECR 1994, p. I-05483), para. 21; Judgment of the Court (Sixth Chamber) of 23 November 1995, *Gabriel Alonso-Pérez v Bundesanstalt für Arbeit*, Case C-394/93 (ECR 1995, p. I-04101), para. 28; Judgment of the Court (Sixth Chamber) of 11 December 1997, *Mary Teresa Magorrian and Irene Patricia Cunningham v Eastern Health and Social Services Board and Department of Health and Social Services*, Case C-246/96 (ECR 1997, p. I-07153), para. 37; Judgment of the Court of 16 May 2000, *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*, Case C-78/98 (ECR 2000, p. I-03201), para. 31; Judgment of the Court (Fifth Chamber) of 22 February 2001, *Office national des pensions (ONP) v Gioconda Camarotto (C-52/99) and Giuseppina Vignone (C-53/99)*, Joined cases C-52/99 and C-53/99 (ECR 2001, p. I-01395), para. 21; Judgment of the Court (Grand Chamber) of 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, Case 432/05, (ECR 2007, p. I-02271), para 39; Judgment of the Court of First Instance of 25 June 2008, *Olympiaki Aeroporia Ypiresies v Commission*, Case T-268/06 (OJ C 197, 02.08.2008, p. 22–22), para. 44; Judgment of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08, (ECR 2009, p. I-09579), para 41.

⁶⁴³ Craig/De Búrca (2007), *EU Law...*, p. 677–679; Steiner/Woods/Twigg-Flesner (2006), *EU Law*, 9th ed., Oxford, p. 378–382, 397.

⁶⁴⁴ Van Gerven (2000), *Of Rights, Remedies and Procedures*, *Common Market Law Review*, Vol. 37(3), p. 501–536.

⁶⁴⁵ Cafaggi (2009), *The Great Transformation...*, p. 496–501.

⁶⁴⁶ Kakouris (1997), *Do the Member...*, p. 1389.

does not make sense any more.⁶⁴⁷ Some scholars even question whether the procedural autonomy still exists.⁶⁴⁸ In the light of this development it seems desirable to reconsider the concept of procedural autonomy.⁶⁴⁹ In this new configuration the EU is granted the role of a moderator in the current heterogeneous enforcement scenario and the Commission has more power to this end. The relevant question is what is the proper legal basis for this development?

De facto national courts are entrusted with ensuring the legal protection that citizens derived from the supremacy and the direct effect of the provisions of Community law. The pros and cons of the various procedural consequences have been discussed both from the EU or the Member States perspective.⁶⁵⁰ Legal rules and concepts are subjects to change. The dynamics of the market changes and the fact that some legal rules over the course of time might be upgraded or downgraded lead toward a reconsideration of the notion of the procedural autonomy of the Member States. In the light of the change as of the laws and the market, it would perhaps be better to replace the term of procedural autonomy with “*procedural competence*” as Bobek proposed⁶⁵¹, or through “*primary national procedural responsibility*”.⁶⁵²

The principle of procedural autonomy of the Member States is applicable when there is a deficit of procedural rules at the European level.⁶⁵³ However, procedures by themselves have to be defined at the national level since only the national legislator has the competence to establish them.⁶⁵⁴ Establishing procedural rules has never been a task of the EU. This issue has been reserved to the national legal orders. The competence of the national legal orders to decide on procedural rules does not oppose the fact that the Member States are bound by procedural rules at the EU level such as the Brussels I Regulation⁶⁵⁵, Rome I⁶⁵⁶ and Rome

⁶⁴⁷ A radical statement that there is no procedural autonomy of the Member States to be found in Bobek (2011), *Why There is no Principle of “Procedural Autonomy” of the Member States*, in De Witte/Micklitz (2011), *The European Court...*, p. 305-322.

⁶⁴⁸ Bobek (2011), *Why There is...*, in De Witte/Micklitz (2011), *The European Court...*, p. 305-322.

⁶⁴⁹ Bobek (2011), *Why There is...*, in De Witte/Micklitz (2011), *The European Court...*, p. 305-322.

⁶⁵⁰ Craig (2008), *The Institutional Balance...*, p. 1-35.

⁶⁵¹ Bobek (2011), *Why There is...*, in De Witte/Micklitz (2011), *The European Court...*, p. 305-322.

⁶⁵² Craig/ De Búrca (2011), *EU Law...*, p 306-309.

⁶⁵³ For more detail see: Van Gerven/Dougan/Kakouris/Delicostopoulos (2003), *Toward European Procedural Primacy in National Legal Systems*, *European Law Journal*, Vol. 9(5), p. 599-613.

⁶⁵⁴ “Of course, the EU law has no binding force in Poland. (...) Poland is thereby obliged to use ‘its best endeavours to ensure that future legislation is compatible with community legislation. (...) the Constitutional Tribunal holds the obligation to ensure compatibility of legislation(...) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility”; Constitutional Tribunal, 29 November 1997, Case K 15/97.

⁶⁵⁵ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 012 , 16.01.2001, p. 1-23).

⁶⁵⁶ Rome I (OJ L 177, 04.07.2008, p. 6-16).

II⁶⁵⁷ and the Small Claims Procedure.⁶⁵⁸ These pieces of legislation might be regarded as a kind of “*upper measures*” which establish and give shape to an overall structure of procedural law in Europe. To achieve sufficient coherence of rules in the interrelationship between the different national legal orders, the EU had to develop such regulations which include consumer protection measures which decide issues of jurisdiction and applicable law.⁶⁵⁹ The Injunction Directive is embedded in this context. Although Member States are given a broad margin of discretion in its implementation, they are not allowed to remove the duty to respect the totality of procedural regulations at the EU level. Even if the Member States keep their procedural autonomy, they still have to operate within the limits, set out in EU measures.

What remains is the problem that there is no specific EU consumer procedural law, which would be applicable for all Member States on the equal basis.⁶⁶⁰ Currently, there are neither general procedural standards nor specific regulations designed and applicable for consumer matters. This leads to a situation in which specific rights of the European Union are supposed to be enforced in 28 different member states. Differentiation between and divergence of enforcement standards are a commonplace in the EU. The Injunction Directive is just one, perhaps one of the most puzzling, piece of EU law which reflects the consequences of procedural autonomy, despite all the tendencies towards a Europeanisation of procedural law. First and foremost, procedural issues have to be read and interpreted in light of procedural nuances which vary across Member States.⁶⁶¹

The truth of the matter is: Member States are allowed to shape to a remedy according to the needs and nuances of their national legal orders. Cafaggi proposes to draw a distinction between (1) the gap-filling function of the principle of procedural autonomy⁶⁶² and (2) the recognition of procedural autonomy as a certain kind of constraint that could set limits for

⁶⁵⁷ Rome II (OJ L 199, 31.07.2007, p. 40–49).

⁶⁵⁸ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.07.2007, p. 1-22).

⁶⁵⁹ See Chapter III 5.6.

⁶⁶⁰ There is not much discussion about consumer procedural law. Only in Germany there has been a sustained effort by H. Koch who discussed the need of such a branch of law already in 1991.

⁶⁶¹ When applying a national rule, a national judge shall take into account the EU rule corresponding thereto, including its interpretation by the ECJ or (ideally, and if only exists) also the practice in the EU Member States. Moreover, the Polish Constitutional Tribunal stated this to be a general rule of construction under its domestic law: Decision of The Polish Constitutional Tribunal of 29 September 1997, K. 15/97, pub. Z.U. 1997 / 3_4 / 37 with a note in English Gender Equality in the Civil Service Case. In Polish decision K.15/97, Collection of Decisions of the Constitutional Tribunal, no. 19/1997, p. 380.

⁶⁶² The gap filling function implies that absent Community legislation courts have to refer to national legislation. For example, the previously quoted *Rewe Case*.

both Member States and the EU.⁶⁶³ This “*double path interpretation*” of the principle of procedural autonomy has been adopted and found confirmation by the ECJ, thereby confirming the law-making function of domestic judicial bodies⁶⁶⁴ that try to close gaps in incomplete enforcement schemes counting on measure of domestic legislation that include an intervention as to the scope of “*rights, remedies and procedures*”. The same is true at the European level. M. Storm writes “(...) *European judges have found and also invented the principle common to the law of the Member States*”. However, thus far the ECJ had only one occasion to interpret the action of injunction under the unfair terms Directive 93/13/EEC – *Invitel*.⁶⁶⁵ The Injunction Directive is still a “*sleeping beauty*”, to parrot the metaphor used by Micklitz/Reich⁶⁶⁶ for the unfair terms Directive which expresses the potential which lies behind the Injunction Directive. If national and European courts were given the opportunity to engage in an open process of interpretation and judicial co-operation, judges could concretise the basic principles of a European procedural law on the action of injunction.

4. 3. Principles of Subsidiarity and Proportionality

The EU’s competence as regards the creation and modification of procedural enforcement regulations is shaped through the principles of subsidiarity and proportionality. Both principles are anchored in the Treaty and may provide for answers on ambiguities as to whether or not the EU enjoyed competence to adopt Injunction Directive. In areas which do not fall within the Union’s exclusive competence, the principle of subsidiarity, laid down in the Treaty on European Union, defines the circumstances under which it is preferable for action to be taken by the Union, rather than the Member States.⁶⁶⁷ The Treaty on the Functioning of the EU distinguishes between three types of competence⁶⁶⁸ and draws up a non-exhaustive list of the fields concerned:

- (i) exclusive competences (Article 3 of the TFEU): the EU alone is able to legislate and adopt binding acts in these fields. The Member States’ role is therefore limited to applying these acts, unless the Union authorises them to adopt certain acts themselves;

⁶⁶³ Cafaggi (2009), *The Great Transformation...*, p. 496-539.

⁶⁶⁴ Kühn (2005), *The Application of European Law in the New Member States: Several (Early) Predictions*, German Law Journal, Vol. 6(3), p. 563–582.

⁶⁶⁵ See Chapter I 3.1.4.

⁶⁶⁶ Micklitz/Reich (2014), *The Court and the Sleeping...*

⁶⁶⁷ Craig/De Burca (2011), *EU Law...*; Groussot (2003), *The EC System of...*, p. 221-248, Tridimas 2nd edition, p. 175-192.

⁶⁶⁸ Cremona (2011), *External Relations and External Competence: The Emergence of an Integrated Policy*, in: De Burca/Craig, *The Evolution of EU Law*, 2nd ed., OUP, p. 244-259.

- (ii) shared competences (Article 4 of the TFEU): the EU and Member States are authorised to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence;
- (iii) supporting competences (Article 6 of the TFEU): the EU can only intervene to support, co-ordinate or complement the action of Member States. Consequently, it has no legislative power in these fields and may not interfere in the exercise of these competences reserved for Member States.

In the context of my analysis the key question is whether the Member States are better placed to regulate the action for injunction or whether it is better for the EU to decide unilaterally for all Member States. What is at stake is, in essence, the reach and importance of the principle of subsidiarity. Since the harmonization of procedural law has not been given a green light in the Treaty – outside Article 81, one might argue in line with the subsidiarity principle that the broader competences of Article 114 and Article 169 (2) (b) should not be used to set the basic competences of the Member States in the field of procedural law aside. However, one might also argue *a contrario*. The principle of subsidiarity should not be used by the EU to justify non-action, provided the Member States are not ready to take action. Read this way the subsidiarity principle would hinder progress in the field of consumer protection.⁶⁶⁹ One might pose the question as to what is wrong with granting the EU competence, if in EU action yields benefits for consumers. Basically, the scope and reach of EU consumer law should respect the boundaries of the proportionality principle and make all efforts to create an added value for consumers. Another problem results from the importance of subsidiarity for Member States. If Member States refer to the principle of subsidiarity to justify in-action, the principle of subsidiarity may be used as a justification for EU activities, provided the converse of the subsidiarity principle is the responsibility of the Member States to take action.⁶⁷⁰

The core issue of the principle of subsidiarity may be summarized as its “*allocation of competence*” between the EU and Member States. The principle is considered necessary by the Member States to participate in the development of the process of European integration. If the EU refers to its competence and sets aside the subsidiarity principle it puts emphasis on the realization of the Internal Market, very much in line with Article 114. Nevertheless,

⁶⁶⁹ Craig/De Burca (2011), *EU Law...*

⁶⁷⁰ Micklitz (1993), *The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration*, LAKIMIES, The periodical of the Association of Finnish lawyers, Special Issue on European Integration, 4/1993, p. 508.

consumers may benefit from Internal Market-driven EU consumer protection rules.⁶⁷¹ In the manner consumers need to be sure that equal rules of consumer protection are applicable in all Member States, there is a need to make sure that their own State has participated in the development of the rules on consumer protection.

However, lately Article 114 TFEU has been turned into a tool that is used to justify EU intervention into fields of law in which EU competences is at least shaky. It remains to determine whether a European intervention into national procedural rules shall be really recognized as covered by the scope of Article 114 or whether it violates the principle of subsidiarity and must be regarded as misuse of EU power. In this aspect subsidiarity allows the EU to hide its activities such as imposing obligations and new commitments on the Member States. Is the EU entitled to broaden the EU fundamentals and include procedural rules, justifying them through the vehicle of the principle of subsidiarity?

If the Member States themselves are not in a position to find an appropriate procedural solution for a particular consumer problem, this can obviously be a reason for the initiation of EU action. This is particularly true in situations in which an EU action would bring better results than actions at Member State level. The dilemma of EU legislation is the tension between rules which apply to cross-border transactions only and those which are equally applicable to transactions within the Member States. The cross-border dimension easily justifies the competence of the EU. Member States are simply not in a position to offer a solution for the EU as a whole. Here the EU is structurally and institutionally better placed. The experience gained so far in the application of the Injunction Directive⁶⁷² seems to advocate an even deeper intervention, in an even broader and more comprehensive regulation of the action for injunction. The problem begins with the extension of the Injunction Directive to mere national transactions. Here Member States might rightly argue that they are better placed, as they know the field and are in a better position to access and rank those qualified entities which should be given standing, including the requirements these entities have to meet to act legitimately in the collective interest of consumers. The only convincing argument which could justify the establishment of common standards for cross-border and for national transactions results from the deeper foundations of Article 114 which ties the completion of

⁶⁷¹ The activity of the Commission can also be justified by the paradigm of the confident consumer; Wilhelmsson (1995), *The Principle of the Legitimate Exception as a Basic Principle of Community Private Law*, in Paasivirta/Rissanen (1994), *Principles of Justice and the Law of the European Union*, Proceedings of the Helsinki Seminar, Hanasaari, Finland, 325-331.

⁶⁷² See Chapter I 1.6., 1.7.

the Internal Market to the existence – or the introduction of a common platform of consumer protection throughout the EU.

Since the harmonization of procedural rules represents the best solution, the EU has rightly decided to adopt the Injunction Directive in its present form. EU law is different from national law, since it is interpreted by the *ratio legis* and the general spirit of the overall European measure. That is why the EU's competence reaches beyond the standard design of competences in national constitutions. The required high level of consumer protection which is a primary aim of all consumer law might then serve as a bridge to close the gap between the cross-border and the internal national dimension of the scope of the Injunction Directive.

4.4. Minimum Harmonisation in the Injunction Directive

The flexibility of the Injunction Directive is grounded not only in the principle of procedural autonomy, but also in the minimum harmonisation approach used for framing the Injunction Directive. Until the Lisbon Council 2000, the minimum harmonisation approach dominated the adoption of directives on consumer protection.⁶⁷³ Minimum harmonization served as a means to set reservations aside which resulted from the fact that the EU was intruding ever deeper into national private legal orders. The marketing strategy of the EU was to sell minimum harmonization as a means to establish a platform of consumer protection, in line with Article 114 (3). The Consumer Policy Programme 2002-2006 marked the break-even point in that the EU started to promote maximum harmonization⁶⁷⁴ as a means to complete the Internal Market.⁶⁷⁵ The EU succeeded in Directive 2002/65 on distant sales of financial services⁶⁷⁶, in Directive 2005/29/EC on unfair commercial practices⁶⁷⁷ and partly in the consumer rights Directive 2011/83/EC.⁶⁷⁸ However, in line with academic literature the

⁶⁷³ Kunkiel-Kryńska (2013), *Metody Harmonizacji Prawa Konsumentckiego w Unii Europejskiej i Ich Wpływ na Procesy Implementacyjne w Państwach Członkowskich*, p. 177-192.

⁶⁷⁴ Kunkiel-Kryńska (2013), *Metody Harmonizacji Prawa...*, 202-209.

⁶⁷⁵ On the shift in EU consumer policy from minimum to full harmonization; See: Howells (2006), *The Rise of European Consumer Law - Whither National Consumer Law?* Sydney Law Review, Vol. 28, 2006, p. 63- 88; Micklitz/Reich (2009), *Crónica de una Muerte Anunciada*, Common Market Law Review, 46, p. 471-519; Mak (2009), *Review of the Consumer...*, p. 55-73.

⁶⁷⁶ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (OJ L 271, 09.10.2002, p. 16–24).

⁶⁷⁷ Unfair Commercial Practices Directive 2005/29/EC (OJ L 149, 11.06.2005, p. 22–39).

⁶⁷⁸ Consumer Rights Directive 2011/83/EU (OJ L 304, 22.11.2011, p. 64–88).

Member States rejected maximum harmonization in core fields of contract law – unfair terms and consumer sales.⁶⁷⁹

It can be questioned whether minimum harmonisation applied in the Injunction Directive constituted the best solution possible or whether it would have been better to fully harmonise the respective procedural rules. In light of the various ambiguities that have been brought up by the Injunction Directive due to its unclear structure and hybrid nature, it seems that the minimum harmonisation approach has brought about more confusion than legal certainty.⁶⁸⁰ The minimum harmonisation approach might be blamed for the patchwork structure of the European enforcement map. The idea of coherence, strongly promoted in most national legal orders, suffers considerably in procedural rules. The variety of the EU enforcement scheme has been spelt out and explained in detail. The Injunction Directive clearly demonstrates that “*the effective enforcement of minimum protection rules depends on implementation by the Member States which may vary from country to country*”.⁶⁸¹ At least at the time of its adoption in 1998, no one expected that the long-heralded Injunction Directive would bring diffusion and variety instead of coherence and consistency.

The idea behind minimum harmonisation is to leave Member States the possibility of applying more stringent rules than those indicated in the directive itself. They may raise the level of consumer protection but cannot lower the standards established in the relevant directive. It might already be difficult to set a clear benchmark of what is higher or lower in substantive law. Although here the logic is that, for better or worse, more stringent rules guarantee better and broader consumer protection. In procedural law such a *prima vista* assessment does not work. The Injunction Directive has laid down common standards for the mutual recognition of standing recognition. However, the Directive does not lay down standards on the legitimacy of qualified entities to take collective action.⁶⁸² What should the criteria to decide what is less and what is more legitimate be? Minimum harmonization in procedural law does not result in coherence of rules per se because Member States implement rules which are most suitable to their national enforcement patterns.

Indeed, the minimum harmonisation approach opened the possibility for the Member States to shape the remedy of injunction at the national level. This can be understood as part

⁶⁷⁹ Micklitz/Reich (2009), *Crónica de una...*, p. 471-519; The Commission Proposal for a Directive on Consumer Rights. The idea of full harmonization was also rejected by BEUC, <<http://www.beuc.org/publications/2011-00323-01-e.pdf>> accessed on June 10, 2014.

⁶⁸⁰ See Chapter IV 4.4.

⁶⁸¹ European Consumer Law Group, *European Consumer Law Jurisdiction and Applicable Law in Cross-Border Consumer Complaints. Socio-Legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union* (1998), *Journal of Consumer Policy*, Vol. 21, p. 315-337.

⁶⁸² See Chapter III 5.3.

of their procedural autonomy. EU law sets a threshold and defines requirements, which national legislations must meet: indicating the qualified entities, which represent the legitimate interests of the consumers, whether public or private, notifying these qualified entities to the European Commission. Under the minimum approach there are no obstacles to exceed the terms of the Injunction Directive, if Member States so desire and if it is for the purpose of consumer protection. They may define “*legitimate interests*” in a much more comprehensive way. They may ask for qualified entities to be registered as a condition of legal standing (the French solution).⁶⁸³ The Injunction Directive was not supposed to regulate these procedural details. It laid down minimum standards for procedural design but these minimum standards are different from substantive standards which could be conceived of as lower or higher. Since the Injunction Directive leads to a mixture of different national and the EU elements, the minimum harmonization approach allows for and promotes a patchwork of different legal solutions and differences between the 28 Member States.

For the consumer, who is crossing a border, the minimum harmonization approach seems quite detrimental. He may never know how to recognize and how to make himself familiar with normative diversification and particularities of different legal models. Apart from the language differences that are somehow unavoidable, the diversity of different and incoherent legal solution across the European Union produces additional barriers for consumers.⁶⁸⁴ This increases the level of legal uncertainty, which is recognized as an additional disincentive to cross-border consumer shopping. The Injunction Directive has been designed with good intentions to establish an institutional framework for consumer law enforcement, but it did not seem to take the social needs of consumers seriously into consideration. Such an undertaking would have needed a much more sophisticated discussion. Member States, this is the lesson to be learnt from the implementation process through the Member States in all its variations, were much more concerned with internal consistency of the national legal order than with a vision to improve consumer protection law enforcement within the EU as a whole.

⁶⁸³ According to the French model, qualified entities, but only those whose main activity focuses on the protection of the collective interests of consumers shall be passed for approval of the Association of Unions d’Associations Familiales. The Commission des Clauses Abusives, which is charge of monitoring of the use of unfair terms, is not registered as an independent public body.

⁶⁸⁴ TNS Political & Social at the request of the European Commission, Directorate-General for Health and Consumers Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM “*Research and Speechwriting*” Unit); Flash Eurobarometer 358, <http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf> accessed on April 26, 2014.

5. From Diversity to Convergence?

The use of various legal instruments produced considerable diversity of enforcement frames in Europe. The implementation of the Injunction Directive in the national legal orders could be regarded as approved diversity, as the variety of frames has been developed under “*the auspices of the EU*”. The legal acceptance of the diversity has pros and cons. On one hand, with respect to the procedural autonomy of Member States, Member States have the chance to develop their enforcement models. On the other hand, the *ratio legis* of the Injunction Directive has not been entirely achieved. The Injunction Directive has not introduced the desired or intended consistent remedy within a coherent European enforcement scheme/model? The implementation of the Injunction Directive gave rise to a broad diversity of modes of enforcement⁶⁸⁵, which, however, might pave the way for more convergence of the enforcement frames and modes.

I will continue the debate already started in the beginning.⁶⁸⁶ I will develop my argument in three steps: first I will demonstrate that the Injunction Directive and Regulation 2006/2004 read together can be understood as a rudimentary design of a two-step European enforcement scheme; secondly, I will show the potential for convergence within the seemingly messy picture of the national enforcement schemes; thirdly, I will integrate the herein developed understanding into the interplay of individual and collective, horizontal and vertical enforcement.

5. 1. The European Design of Consumer Law Enforcement

Gradually a European enforcement scheme is emerging. The first step constituted the adoption of the Injunction Directive, promoting diversity and private collective enforcement; the second constituted the adoption of the Regulation 2006/2004 on consumer protection cooperation shifting the focus towards public enforcement. Both read together can be understood as a two-layer system: on top the public authorities on bottom the consumer organisations.

⁶⁸⁵ See Chapter I 5.

⁶⁸⁶ See Chapter I 1.6., 1.7., 2.5., 4.

5. 2. Approved Diversity through the Injunction Directive

The minimum approach realized in the Injunction Directive respects the principle of procedural autonomy.⁶⁸⁷ The result is a broad variety of injunction mechanisms in the national enforcement schemes.⁶⁸⁸ Although all Member States met the implementation requirements – the Commission did not make use of the infringement procedure - the way in which the Injunction Directive has been implemented within the Member States differs from one Member State to another. In practical terms, one cannot understand the degree of variety in enforcement frames without looking into the reality of enforcement frames throughout Europe.⁶⁸⁹ The maximum harmonization approach was never seriously considered. It would be too strong a tool, which could have destroyed national frames and enforcement traditions.

A less intrusive, though more effective, alternative would have been to realize the very same objectives of harmonising injunctions through the means of a regulation instead of a Directive. Reich promoted the adoption of consumer law regulations under Article 169(2)(b); however, his argument is somewhat directed against the move towards maximum harmonization. It has to be recalled that Article 169 (4) allows only for minimum harmonization.⁶⁹⁰ The advantage would have been a directly applicable piece of EU law, a technique, which the EU had realized in the Brussels Regulation⁶⁹¹ and the two Rome Regulations⁶⁹² under the umbrella of Article 81. However, the EU used neither its power to design the rules in a frame of a regulation nor seriously considered a shift from minimum to maximum standards, not even in its attempts to modernize the existing consumer law *acquis*.⁶⁹³ In utilizing the directive option, the EU paved the way towards variety of enforcement schemes in injunction in Europe. The EU clearly intended to introduce the Injunction Directive as a flexible frame, which allows for leeway for Member States. Thus Member States could choose to implement elements of the Injunction Directive within their

⁶⁸⁷ Bernitz (2005), *Controlling Member States Courts under EU Law: The Duty to Refer Cases to the ECJ and the Köber Doctrine on Member States Liability*, paper presented at a seminar in Harvard Law School <www.law.harvard.edu/students/orgs/hela/papers/> accessed on June 9, 2014.

⁶⁸⁸ Cafaggi (2009), *The Great Transformation...*

⁶⁸⁹ To be found at least in the *Consumer Law Compendium* regarding different directives on consumer protection: Schulte-Nölke/Twig-Flesner/Ebers (2008), *EC Consumer...*

⁶⁹⁰ Reich (2005), *A European Contract...*, p. 383-407; Reich discussed the idea of replacing directives with a regulation, basing his reasoning on the drawbacks of using directives.

⁶⁹¹ 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 (OJ L 338, 23.12.2003, p. 1–29).

⁶⁹² The Rome II Regulation applies to non-contractual obligations and the Rome I Regulation applies to contractual obligations.

⁶⁹³ See: Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final (n. p. in OJ).

national legal orders in a way that made them the most suitable and compatible with the particularities and nuances of their national enforcement frames. According to M. Monti “Currently, 80% of the single market rules are set out through directives. These have the advantage of allowing for an adjustment of rules to local preference and situations”.⁶⁹⁴ What the European legislator offered is a general frame for the establishment of the injunction procedure, without giving further details as to how the procedure should be sketched in the national enforcement schemes. These matters are all left in the hands of Member States.⁶⁹⁵

5. 2. 1. Freedom of Choice between Private and Public Enforcement

Having in mind the overall structure of the EU enforcement map and the models that have been employed in Europe, the remedy of injunction is embedded in the interplay between public and private enforcement measures. In 1998, at the time the Injunction Directive was adopted, the EU entered into unknown legal territory.⁶⁹⁶ In the Injunction Directive for the first time ever, the Member States are left the choice of the enforcement path to be used, which may be either public or private, or a combination of the two.⁶⁹⁷

The Injunction Directive triggered for the first time an interaction between European and Member State levels⁶⁹⁸, between public and private enforcement devices; and finally between judicial and administrative enforcement schemes.⁶⁹⁹ It is argued that public and private devices do not necessarily correspond with the distinction between administrative and judicial enforcement schemes. Although the distinction public and private on the one side, and judicial and administrative on the other, sounds plausible and even systematic, in fact, they are incomparable.⁷⁰⁰ Micklitz and Cafaggi have described the enforcement scenario in these words “There are Member States that have laid enforcement in the hands of competent

⁶⁹⁴ Monti (2010), *A New Strategy for the Single Market – At the Service of Europe’s Economy and Society*, Report to the President of the European Commission José Manuel Barroso, Brussels, <www.ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> accessed on April 28, 2014.

⁶⁹⁵ See Chapter I 2.5., 6.

⁶⁹⁶ The topic of the interplay between the public and private measures in various areas of law have been discussed by only a few authors: Hodges (2008), *The Reform of...*; Hodges (2007), *Competition Enforcement, Regulation and Civil Justice: What is the Case?* *Common Market Law Review*, Vol. 43(5), p. 1381-1407.

⁶⁹⁷ See Chapter III 5.4., 5.5.

⁶⁹⁸ Report on the application of Directive 98/27/EC.

⁶⁹⁹ Ogus (2007), *Better Regulation, Better Enforcement*, in Weatherill (2007), *Better Regulation*, Oxford, p. 107; Ogus (2004), *Costs and Cautionary Tales: Economic Insights for the Law*, Oxford, p. 445; Shavell (2004), *Foundations of the Economic Analysis of Law*, p. 445; Polinsky/Shavell (2000), *The Economic Theory of Public Enforcement of Law*, *Journal of Economic Literature*, Vol. 38(1), p. 45-76.

⁷⁰⁰ Cafaggi/Micklitz (2007), *Administrative and Judicial...*; Cafaggi/Micklitz (2008), *Administrative and Judicial (...): A Way Forward*; Dashwood/Johnston (2001), *The Future of the Judicial System of the European Union*, *Centre for European Legal Studies University of Cambridge*.

ministry or an independent or dependent agency and there are others that have combined administrative and judicial enforcement or simply relied on judicial enforcement alone".⁷⁰¹

Member States may make choices according to their national history, culture and other national conditions. This is not imposed by the European Union, the EU legislator just leaves Member States the choice.

The EU did not indicate any preference as of the enforcement measures to be in place at the national level. Neither do the EU documentation as to the Injunction Directive.⁷⁰² On one hand, the Injunction Directive may be easily implemented in the national enforcement scheme following established preferences of the Member States. On the other hand, enforcement schemes of the Member States vary so that the consumer can never be sure what kind of enforcement scheme he has to face in a given Member States. This situation, as the EU repeatedly reiterates is said to negatively affect cross-border consumer shopping. Leaving the choice of the enforcement path in the hands of Member States was, however, the best available option possible at the time the Injunction Directive was adopted. If the EU would have chosen one of the two enforcement paths, that decision would not only have provoked rigorous reactions by Member States but would have led to drastic changes in Member States enforcement schemes. This would have been too much of a revolution, in particular in light of the shaky competence of the EU in procedural matters.⁷⁰³ The European scenario shows, that there are some Member States in which a public enforcement does not exist, or even if it exists, they do not have any specific legal relevance; therefore, the EU does not impose an obligation for shaping and creating additional bodies for the effective consumer law enforcement. The choice is put in the hands of the Member States leading to "*united diversity*" – "*united*", because national frames are shaped by the Injunction Directive, "*diversity*" – due to the lack of coherence in the enforcement models within the European Union. Each Member States may achieve the goal defined in the Injunction Directive, but through the use of a variety of solutions. Approved diversity and choice turns into the means to keep the legal irritation which the Injunction Directive triggered in the Member States enforcement schemes under control.⁷⁰⁴

⁷⁰¹ Cafaggi/Micklitz (2007), *Administrative and Judicial...*

⁷⁰² Proposal for the Injunction Directive, COM(95) 712 final.

⁷⁰³ See Chapter IV 4.

⁷⁰⁴ Teubner (1998), *Legal Irritants...*, p. 11-32.

The EU starts from the premise that a lack of consumer confidence constitutes a potential obstacle in consumer trade.⁷⁰⁵ This legitimates measures to improve the structure of enforcement, nationally as well as solving cross-border issues. The Injunction Directive was the response to cross-border consumer problems, even if at the end it introduced many ambiguities and uncertainties.⁷⁰⁶ The EU legislator equipped the Member States with a flexible remedy in the form of a so-called “*one suit fits all solution*”. Obviously the EU legislator and more precisely the EU relied on Member States willingness, in particular the willingness of their enforcement authorities, to fill the frame with actual practice and pave the way for further coherence through practice. This turned out to be an misplaced trust.⁷⁰⁷ What remains is an amazing coincidence between the broad shaky legal basis and the “*trust*” in bringing the different enforcement schemes closer together – not through tight European standards but through legal practice.

5. 2. 2. Towards Public Administrative Enforcement

The free-choice policy promoted by the Injunction Directive has turned into a single enforcement models under Regulation 2006/2004.⁷⁰⁸ This was a radical change in designing “(*... a pan-European network of national public authorities responsible for enforcing EU consumer law and obliging them to work together in a mutual assistance model and with the Commission*)”.⁷⁰⁹ The reason behind, perhaps not the only one, but a highly important, is certainly the limited success of the double path model.⁷¹⁰ The EU turned towards public

⁷⁰⁵ Charter of Fundamental Rights, in which the Commission has indicated a high standard of consumer protection as a priority of its activities and policies; confirming that a protection of consumer rights has been granted a human right dimension; 2. Green Paper on Review of the Consumer Acquis (OJ C 187E, 24.07.2008); 3. Consumer Protection Strategy 2006-2013 (OJ C 162 25.06.2008); 4. Green Paper on Collective Consumer Redress (COM/2008/0794 final, 27.11.2008); 4. Report Concerning the application of the Injunction Directive (COM(2008) 756 final, 18.11.2008); 5. Evaluation of the effectiveness and efficiency of collective redress mechanisms in the EU 2008, <http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf> accessed on June 9, 2014; 6. Eurobarometer - Consumer Redress in the EU: consumer experiences, perceptions and choices; Aggregated Report, August 2009, <http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf> accessed on June 9, 2014; 7. Public Consultation: Toward a Coherent Approach to Collective Redress, (SEC(2011)173 final04.02.2011).

⁷⁰⁶ Pegado Liz (2010), *The EESC Opinion on Consumer Law Enforcement*, A presentation for High Level Conference “*European Consumer Protection Enforcement Day*”, held in Brussels on 22 September 2010; On Law in action vs. Law in the Books, Schwartz (2000), *Loose Teeth in...*, p. 527-552.

⁷⁰⁷ See Chapter III, 5.,6.

⁷⁰⁸ Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364, 09.12.2004, p. 1-11).

⁷⁰⁹ Hodges (2008), *The Reform of...*, p. 109.

⁷¹⁰ See Chapter III and Docekal/Kolba/Micklitz/Rott (2005), *The Implementation of...*; as well as The Study from Leuven, Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

enforcement⁷¹¹ in order to provide for more efficient and effective tools of consumer law enforcement.⁷¹² Regulation 2006/2004 does not introduce new rights and remedies, it only establishes a procedural framework of collaboration among Member States.⁷¹³ In a straightforward way Regulation 2006/2004 shifted towards the public enforcement path as the only suitable one in enforcement of consumer rights. The private enforcement model is not abandoned by virtue of Regulation 2006/2004.⁷¹⁴ In fact under pressure from Austria and Germany, consumer organisations can be entrusted with cross-border enforcement. However, private enforcement remains subsidiary to public enforcement. All Member States are obliged to designate a public authority, which has the ultimate responsibility for the co-operation duties under the enforcement scheme.

The best possible option to enhance the protection of consumers in cross border litigation is no longer the action for injunction but the co-operation between public national enforcement authorities, along the line of Regulation 2006/2004.⁷¹⁵ Co-operation was, indeed, the missing link in the Injunction Directive. The exchange of information is crucial in cross-border consumer enforcement. It aims at overcoming difficulties faced by a national body which under the former regime of the Injunction Directive were directed towards making use of the action for injunction in another Member State, with all the legal and practical difficulties which result from the cross-border use in terms of jurisdiction, applicable and enforcement of injunction judgments.

The EU never justified the shift neither in explanatory documents nor in any other report on enforcement matters. The two sets of rules, the Injunction Directive and Regulation 2006/2004 are kept deliberately distinct from each other as if there is no relationship at all. It seems as if the EU is not ready to open Pandora's Box, to openly address in policy and political terms if and how the two pieces of legislation could be integrated into a European enforcement scheme. This is left to the courts and academia. Without much noise the Commission tends to keep two procedural enforcement realities in place (i) an alternate enforcement measures approach in the Injunction Directive and (ii) uni-directional purely public approach on enforcement provided by Regulation 2006/2004.⁷¹⁶ The two forms comply

⁷¹¹ Report on the application of Regulation (EC) No 2006/2004.

⁷¹² The frame of the public enforcement bodies played a gap-filling role in effective cross-border enforcement and assistance.

⁷¹³ See Chapter III 6.; Hodges (2008), *The Reform of...*, p. 109-110.

⁷¹⁴ See Art. Article 4(1) Regulation 2006/2004, for details see Chapter III 6.

⁷¹⁵ Micklitz (2010), *Reforming European Unfair...*, 348-383.

⁷¹⁶ This has been criticized by van den Bergh since such a shift to a purely public enforcement may significantly disrupt national legal orders with established private enforcement rules; Van den Bergh (2009), *Should Consumer Protection Law be Publicly Enforced? An Economic Perspective on EC Regulation 2006/2004 and its*

in abstracto and *in concreto* with modes of enforcement; the first being more closely related to public administrative enforcement, the second to private judicial enforcement. There are Member States⁷¹⁷, in which *in abstracto* control is already triggered through a suspicion expressed by a consumer or a consumer organization. Other Member States require much more concrete information on an infringement and select the control *vis-à-vis* specific fields of consumer law.⁷¹⁸

Before the Injunction Directive had been passed the public enforcement model was the dominant form of enforcement in the field of consumer protection.⁷¹⁹ The break-even point occurred when consumer organizations discovered cross-border litigation as a field of action in which they could demonstrate strength against rogue traders benefitting from the ever lower barriers to trade in Europe.⁷²⁰ For the first time, consumer organizations were recognized as active players in cross-border consumer law enforcement.⁷²¹ The Injunction Directive recognized and legitimated their legal standing. „*It is also necessary to strengthen bodies and organizations that are active in the area of consumer protection as that they can be more effective driving force for making consumer aware of the priorities set by the Community*”.⁷²² Finally the EU could rely on consolidated bodies, which helped “*to safeguard the consumers’ interest by themselves*”.⁷²³ Both the EU as well as Member States devoted more attention to the pros and cons of consumer associations’ enforcement activities.

Implementation in the Consumer Protection Laws of the Member States, in Van Boom/Loose (2007), *Collective enforcement of...*, p. 181.

⁷¹⁷ Poland is a good example, see also Safjan/Gorywoda/Janczuk (2009), *Taking the Collective Interest of Consumers Seriously: A View from Poland*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 171-200.

⁷¹⁸ For instance in Germany, where even an action for injunction against unfair terms can only be initiated provided the consumer organizations can bring evidence that the term has been used in practice and it could potentially cause a harm for consumers, for Poland the Supreme Court November 11, 2007, III SK 19/07 hand watered down the standards, it allows the assessment of unfairness of the contact term in separation from the circumstances of the contract conclusion.

⁷¹⁹ See also for the superiority of public enforcement Van Boom/Loose (2007), *Effective Enforcement of Consumer Law in Europe*, in Van Boom/Loose (2007), *Collective Enforcement of...*, p. 250; The public enforcement, understood as enforcement in the form of administrative measures was the crucial method of dispute resolution in post-socialist countries; Bakardjieva-Engelbrekt (2009), *Public and Private Enforcement of Consumer Law in Central and Eastern Europe: Institutional Choices in the Shadow of the EU Enlargement*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 101-102.

⁷²⁰ This was particularly important for cross-border consumer cases as illustrated in the Home Vertrieb Case; Joustra (1993), *Cross-Border Consumer Complaints in Private International Law*, *Journal of Consumer Policy*, Vol. 15(4), p. 431-443.

⁷²¹ Hodges (2008), *Competition Enforcement...*, p. 1381-1407. Hodges has provided a short summary of the situation relating the activity of consumer organizations, also in the light of the umbrella activity of BEUC.

⁷²² Decision No. 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (OJ L 34, 09.02.1999, p.1), <http://ec.europa.eu/dgs/health_consumer/general_info/legal_base01_en.print.html> accessed on June 9, 2014.

⁷²³ Article 169 (1) TFUE.

Problems such as the requirements and rules of establishment and terms of the functioning of consumer organizations were quickly identified and put forward for political solution.⁷²⁴

Although the Injunction Directive promoted the legitimacy of consumer organizations, the Injunction Directive does not impose an obligation on Member States to establish consumer organizations for purposes indicated in the Injunction Directive. The debate arose in the aftermath of the Directive 93/13 when British consumer organisations obtained a preliminary reference. However, the ECJ did not need to decide the case as the incoming Blair government changed the implementing law to the benefit of consumer organisations.⁷²⁵ Despite the even less favourable language in the Injunction Directive, consumer organisations benefitted from the favourable environment of the 1990s. This addressed the need to strengthen civil society in the envisaged Eastern enlargement of the EU and resulted from pro-European sentiment after the fall of the Berlin Wall. Many Member States were used to living without established consumer organizations. It might be that there was no real need for consumer organisations, in particular in member states with strong public enforcement authorities. When the need was insinuated, when consumer organisations were formally established, they then tended to play no role at all or a minor role. They document the Europeanization of domestic legal orders without producing real effect. Overall, however, the impact of the Injunction Directive was positive. It brought consumer organisations to the political fore in Europe and strengthened their position not only in courts but in civil society.

The rise of consumer organisations under the auspices of the Injunction Directive was not promoted as an alternative to public bodies. In Austria and Germany consumer organisations are hybrids⁷²⁶, they look like private associations, but they are heavily funded by their governments.⁷²⁷ The most prominent enforcement design is a mix of public and private authorities.⁷²⁸ Just to give an example of hybrid enforcement schemes: various public

⁷²⁴ See Chapter III 5.4; Micklitz (2010), *Reforming European Unfair...*, p. 348-383. Until now there is no monograph that analyses consumer organizations across Europe.

⁷²⁵ For the background Dickie (1996), *Article 7 of...*, p. 112-117.

⁷²⁶ Jolowicz (2000), *On Civil Procedure*, Cambridge, p. 128-129, 160-174.

⁷²⁷ The Austrian consumer association, Verein für Konsumenteninformation (VKI) counts four ordinary members (the social partners) and one extra-ordinary member (the Federal Ministry for Labour, Social Affairs and Consumer Protection) which is responsible for consumer protection. It is financed primarily the Federal Ministry for Labour, Social Affairs and Consumer Protection on the basis of a contract; <http://ec.europa.eu/consumers/empowerment/docs/AT_web_country_profile.pdf> accessed on June 9, 2014. The Germany consumer associations are paid for from the public purse, see: German Report on Consumer Association Activity, <http://ec.europa.eu/consumers/empowerment/cons_networks_en.htm> accessed on June 9, 2014; Koch (2001), *Non-class Group Litigation...*, p. 355-367; Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

⁷²⁸ J. Stuyck: „In all Member States both public and private enforcement of consumer law exists. But the mix of private and public law remedies and procedures varies a lot”; Stuyck, (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 65-70.

bodies utilize private bodies in the “*pre-trial phase*”. Hence, on various occasions the public bodies influence this private law-related activity. Doubtless the Injunction Directive has triggered juggling between administrative and judicial enforcement, promoting hybrids or mixed solutions, which is well perceived in the academia.⁷²⁹

However, this is not the full story. With Regulation 2006/2004 the wind changed. Public enforcement was pushed into pole position. This is in line with the overall tendency of the EU legislator to establish strong public authorities in regulated markets, such as telecommunications, energy, postal services, transport, and financial services. The EU puts pressure on these national regulatory agencies not only to look after the proper functioning of the respective markets, but also to look after the interest of consumers. In the EU public authorities are the key players when it comes to enforcement, consumer organisations should fill gaps and are thus put into a subsidiary position.

5. 2. 3. The Member States Response: A Regulatory Mix

The enforcement map can be divided into the following modes of enforcement:

- (i) Enforcement through public authorities⁷³⁰, mainly ministries⁷³¹, sometimes independent or dependent public authorities⁷³²,
- (ii) Enforcement through an ombudsman as a particular variant of public authorities to be found in the Nordic countries only,
- (iii) Enforcement through courts heading toward a private model of enforcement⁷³³,
- (iv) Enforcement through mixed solutions binding private and public (e.g. post-socialist countries).⁷³⁴

Despite all the ups and downs triggered by the Injunction Directive and Regulation 2006/2004, public enforcement is still the most prominent and strongest form through which

⁷²⁹ Van den Bergh (2009), *Should consumer protection...*, in Van Boom/Loose (2007), *Collective Enforcement...*, p. 202-203.

⁷³⁰ The tradition of the enforcement of consumer law by public bodies is strong in Scandinavian jurisdictions, Ireland and in the United Kingdom.

⁷³¹ Very often ministries are involved in supervisory activities, like in Bulgaria, Latvia, Estonia, Slovenia, Hungary. In Belgium public enforcement is left in the hands of the Minister of Economic Affairs.

⁷³² Cyprus – the Competition and Consumer Protection Department of Cyprus Ministry of Commerce, Industry and Tourism; in Estonia - the Consumer Protection Board, the State Agency of Medicines, the Communication Board, the Financial Supervisory Authority, the Ministry of Culture.

⁷³³ For example: Germany, France.

⁷³⁴ For example: Poland, and most of the post-soviet countries; See: also Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

the enforcement frame is designed in Europe.⁷³⁵ The Injunction Directive yielded a positive climate for consumer organisations but did not affect established public enforcement schemes.⁷³⁶ The reasons might be found in established legal cultures and traditions.⁷³⁷ There is a common believe in civil society throughout Europe that national governmental bodies are best suited to handling law enforcement.⁷³⁸

The ombudsman⁷³⁹ constitutes a special variant of the public enforcement model in the field of consumer protection.⁷⁴⁰ The ombudsman is recognized as a public authority that is granted standing before special tribunals called Market Court.⁷⁴¹ To some extent the role of the ombudsman in the Nordic countries is comparable to the role of the now dissolved Office of Fair Trading.⁷⁴² Since in these countries, actions are only rarely delegated to private bodies, consumer organizations are of limited importance, sometimes even deprived of their socio-legal value.⁷⁴³ The high level of a social acceptance can only be explained through the particular spirit of the community, an element of belongingness, which *de facto* convinces people as to the effectiveness and large public power.

Although public enforcement dominates in Europe, there are some countries with a well-developed private enforcement model, likes as France and Germany. The two dispose of a well-functioning and easily accessible judicial system. Until today many different private enforcement schemes exist across the European Union⁷⁴⁴, which can be broken down into the following sub-models according to the intensity of the mix of public and private enforcement frames:

⁷³⁵ Hodges (2008), *The Reform of...*, p. 239; refers to Denmark, Finland, Ireland, the Netherlands, Norway, Sweden and the UK as the examples of public model enforcement, which give – if ever – the secondary and a highly restricted capacity to private law issues, and activity of consumer organizations.

⁷³⁶ Cafaggi/Micklitz (2007), *Administrative and Judicial...*; Stuyck/T erryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*; Hodges/Tulibacka, *Costs and Funding...*, p. 461-462.

⁷³⁷ Cafaggi/Micklitz (2008), *Administrative and Judicial...*, p. 10.

⁷³⁸ Bakardijeva-Engelbrekt (2009), *Public and Private...*, in Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 91-133.

⁷³⁹ The Nordic ombudsman engages in direct negotiations with suppliers, using soft law techniques such as guidelines for consumer law enforcement, and various forms of dialogue between the parties to the dispute; Hodges (2008), *Model A: Primacy of Public Bodies*, in Hodges (2008), *The Reform of...*, p. 27-37.

⁷⁴⁰ More information as of the functioning of the Ombudsman's office, <<http://www.kkv.fi/en-GB/>> accessed on April 29, 2014.

⁷⁴¹ Viitanen (2007), *Enforcement of Consumers' Collective Interests by Regulatory Agencies in the Nordic Countries*, in Van Boom/Loos (2007), *Collective Consumer Interests and How they Are Served Best in Europe: Legal Aspects and Policy Issues on the Border between Private Law and Public Policy*, p. 83-107; Viitanen (2010), *Nordic Group Actions: First Experiences and Future Challenges*, *Consumatori, Diritti e Mercato*. Argomenti, p. 119-133.

⁷⁴² Lindblom (2007), *National Report: Group Litigation in Sweden*; Vittanen (2007), *Collective Litigation in Finland*, Country Report, accessed on <<http://globalclassactions.stanford.edu/>>.

⁷⁴³ Cafaggi (2009), *The Great Transformation...*, p. 496-539.

⁷⁴⁴ Hodges (2008), *The Reform of...*, p. 27-37; refers to Germany, Austria, Italy and Portugal which have somehow “privatized” enforcement including development and improvement of activity of consumer organizations.

- (i) A private model with no public bodies, which could be entrusted to enforce the law. European legislators rely on private bodies, which are entitled to bring an action for an injunction, and although the legislator grants rights, he does not impose any obligations. This means that although private bodies may take an action, they are not obliged to so.
- (ii) A private model with the assistance of public agencies, in which private bodies have no mandate at all, with the so-called “*puppet’s role*” of private bodies.⁷⁴⁵
- (iii) A private model that is mixed with the activities of public bodies, in which public bodies often take a lead while private bodies are rather responsible for the monitoring of enforcement decisions.⁷⁴⁶

The choice of a model depends on particularities of national schemes and usually meets requirements posed by the national legislator. A mix of public and private enforcement measures has been chosen by most of the post-socialist countries as the best possible option. These countries were supposed to build up the enforcement structure according to the EU frames of legislation, from an obsolescent stage in respect to people’s beliefs and previous experiences from the socialist interval, which are still alive in the cultures of these states and are so deeply rooted in the legal and cultural aspect of people’s life. The idea of mixed solutions on enforcement in the field of consumer law has gained popularity though Ms Kuneva, Commissioner for Consumer Protection at Lisbon in 2007⁷⁴⁷, where the Commission underlined that enforcement of consumer law is based on the interplay of various enforcement frames.⁷⁴⁸ It seems that it is exactly this mix of public and private which has the greatest potential for convergence.⁷⁴⁹

5. 3. Convergence through Practice – the Move towards Soft Remedies

Historically the Injunction Directive marked the beginning of the EU involvement in getting to grips with consumer law enforcement. As the name indicates the action for

⁷⁴⁵ The public enforcement bodies are supposed to intervene, or react in any other way, if the private organization activity fails, see also Hodges (2008), *The Reform of...*, p.104.

⁷⁴⁶ Injunctive relief obtained by a consumer organization by no means guarantees voluntary compliance with the court decision. Therefore, the question arises as to who will monitor the enforcement decision. The issue of the monitoring of the enforcement decisions is often put into question, because it is rather insufficient to grant consumer associations a right to monitor the decisions passed by public bodies. Full monitoring might be too expensive and inefficient; Shavell (1993), *The Optimal Structure...*, p. 255-287, Becker (1968), *Crime and Punishment...*, *The Journal of Political Economy*, 76(2), p. 169-217, at p. 193.

⁷⁴⁷ Kuneva (2007), *Healthy Markets Need...*

⁷⁴⁸ Kuneva (2007), *Healthy Markets Need...*

⁷⁴⁹ See Chapter IV 5.2.1, 5.2.3.

injunction was regarded as the key to building such a scheme. Over time it turned out that softer enforcement is needed and might even be more efficient. This is documented through the regulation on the co-operation in transborder law enforcement. Again the name of the measure contains the message – from injunction to co-operation. This shift nicely coincides with the similarities of the prior consultation procedure under the Injunction Directive and the informal solution approach under Regulation 2006/2004. It is this move which brings back the thesis of dualism of enforcement enshrined in the interplay of individual and collective enforcement which is rooted in the Injunction Directive⁷⁵⁰ had been – temporarily – overturned in the strong focus on transborder issues in Regulation 2006/2004. This development is conditional on the shift from *ex ante* to *ex post* control of consumer law enforcement.

5. 3. 1. Towards *ex post* Control

The choice of the enforcement path is determined through the timing of the control. The nature of the interests involved which are protected through the Injunction Directive require quick action, the effectiveness and success of which may depend on the timing and the action's speed.⁷⁵¹ The type of the enforcement body involved affects whether *ex-ante* or *ex-post* device will be taken into account. As a rule, regulatory activities of administrative bodies may be *ex ante* or *ex post*, while judicial measures are classified as an *ex-post* device. Within the scope of consumer law, more precisely the law on the control of unfair terms and unfair commercial practices, *ex ante* control through prior approval mechanism has never been an issue. Quite the contrary, in the litigation between the Commission and Germany on the compatibility of prior approval mechanism with EU law, the ECJ paved the way for the liberalisation of insurance contract law through secondary legislation.⁷⁵² Since then *ex ante* control in contract law is no longer an issue.

Product safety is a special case. Not least due to its non-positioning in the Annex to the Injunction Directive⁷⁵³, it might serve to illustrate the deeper logic of the *ex ante* and *ex post* control design. It is a good example to illustrate these issues whilst having a closer look

⁷⁵⁰ See Chapter I 5.1.

⁷⁵¹ With regard to timing and the procedure's speed; Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*, p. 326; Rott (2001), *The Protection of Consumers'...*, p. 404.

⁷⁵² Judgment of the Court of 4 December 1986, *Commission of the European Communities v Federal Republic of Germany*, Case 205/84 (ECR 1986, p. 03755).

⁷⁵³ Directive 2001/95/EC on general product safety (OJ L 11, 15.01.2002, p. 4–17).

at the national legal regimes of the selected Member States.⁷⁵⁴ Up to the harmonisation of product safety regulation through the EU, both product safety and to some extent quality as far as it is enshrined in technical standards, have been in the hands of national administrative bodies that operated *ex ante*, which means that they carried out control before a product is circulated on the market. Initially the EU believed that the European product liability Directive 85/374 sufficed as an *ex post* device executed in courts to manage post-market control. However, Directive 92/59/EC on general product safety set a new tone in EU regulation and introduced for the first time ever in product regulation a comprehensive administrative post-market control regime.

Following Shavell, the choice of one or the other option depends on the balance and accessibility of information.⁷⁵⁵ The accessibility of information before the product arrives in the market has often triggered the need for administrative enforcement, while information about risks caused by products typically set judicial mechanisms into action. The growing interest of the EU in the administrative enforcement model goes hand in hand with the development of the idea of networking and co-operation spirit⁷⁵⁶ and with the increasing need to improve and speed up the information flow within the EU.

The *ex post* administrative control, established in Regulation 2006/2004 and governed by the spirit of co-operation, became the dominating model of the EU enforcement model. This is not only true for the rather narrow domain of cross-border co-operation, but for the much broader fields of regulated markets in which the EU has established administrative bodies, with *ex post* private enforcement powers.⁷⁵⁷ *Ex post* control documents the new trend in the EU aiming at the improvement of the Internal Market Structure and at the increasing interest of the EU in developing enforcement tools, to manage potential infringements not *via* prior restrictions to the Internal Market but *via* an extensive net of post-market control measures through administrative bodies. Private regulators such as standards and certification bodies, play their part and are more and more integrated into the European design. The EU enforcement policy through administrative networks under integration of private bodies is well documented in the frame of the general product safety Directive.⁷⁵⁸

⁷⁵⁴ Tulibacka (2009), *Product Liability Law...*, p. 17-43.

⁷⁵⁵ See also Shavell (1993), *The Optional Structure...*, Cafaggi/Micklitz (2007), *Administrative and Judicial...*

⁷⁵⁶ Micklitz (2010), *Reforming European Unfair...*, p. 352-354; with regard to networking COM(98) 198 final at 10 the Commission has already established a database of organizations and resolution bodies pursuant to the goals of the recommendation.

⁷⁵⁷ Verbruggen (2009), *Enforcing Transnational Private Regulation: A Comparative Analysis of Case Studies in Advertising and Food Safety*, EUI phd 2012; Cafaggi (2009), *The Great Transformation...*, p. 496-539.

⁷⁵⁸ Directive 2001/95/EC on general consumer product safety (OJ L 11, 15.01.2002, p. 4).

Similarly, the wind of change from *ex ante* to *ex post* can also be observed in judicial enforcement measures. The growing popularity of *ex post* judicial measures may be regarded as a consequence of Internal Market. The Injunction Directive is in line with such overall trend. Injunctive relief is meant to stop the eventual future harms, together with a formal ban - in the form of cessation or prohibition - of a certain practice or an unlawful activity. Therefore, the Injunction Directive combines *ex ante* and *ex post* devices under one single piece of law.⁷⁵⁹ The concept, the definition and the function of injunction points towards *ex ante* and *ex post* control as implemented in Member States laws across the EU. The Injunction Directive enables not only an order “*requiring the cessation or prohibition of any infringement*”, but also “*a publication of a corrective statement with a view to eliminating the continuing effects of the infringement*”. The content of the injunctive order provided for by the Injunction Directive may change according to the field of law, or the specific sector that is taken into consideration. In some areas of law, like unfair contract terms, or misleading advertisements, injunctions may perform both functions at the same time, namely they may be used to cease unlawful conduct or take a kind of corrective action. In regulated markets the injunction may require additional activities.⁷⁶⁰ The minimum character of the Injunction Directive leaves procedural autonomy to the Member States in designing the injunction procedure but they are barred from re-introducing *ex-ante* administrative control. So all the different ways Member States have developed to transpose the Injunction Directive should be understood as attempts to shape the most appropriate and the most efficient stop order mechanism.⁷⁶¹

5. 3. 2. Towards Soft Remedies

Read together individual and collective enforcement, judicial (courts), extra-judicial (ADR) and administrative enforcement (public agencies), there is an overall trend strongly promoted by the EU and gradually finding ever greater acceptance in Member States, to use soft remedies as means to solve consumer conflicts, individually and collectively, within the nation state territory or cross-border, outside courts and outside administrative regulatory action, through co-operation between the regulators and the regulates individually and collectively. The shift from hard remedies (injunctions) to soft remedies (all sorts of

⁷⁵⁹ See Chapter I 1.5.

⁷⁶⁰ For example, a compliance with information requirements, disclosure of information or a monitoring of compliance.

⁷⁶¹ See Chapter I 1.6.2.

“*agreements*”), from the traditional enforcement institutions (courts and regulatory bodies) to new institutional designs, mixing the public and the private, paves the way for convergence in the enforcement of European consumer law. This is not to pretend such convergence has been realised already, but it shows the potential of new institutions and new remedies to enhance convergence in the European consumer law enforcement. The Injunction Directive has triggered a development, which read only in conjunction with Regulation 2006/2004 and new Directive 2013/11 on ADR and Regulation 524/2013 on ODR discloses its enormous potential for a transformation of enforcement. This brings together – the increasing importance of ADR in individual dispute resolution, the thus far under-estimated and under-investigated prior consultation procedure in the Injunction Directive and the information-exchange and cooperation mechanism in Regulation 2006/2004.

5. 3. 3. The Place of Dispute Resolution in Individual Litigation

The move towards an ever denser European frame on solving consumer disputes *via* ADR is obvious. Since the adoption of Recommendation 98/257 the EU activities aim at promoting redress through alternative dispute resolution schemes. These out-of-court mechanisms are meant to serve as an alternative not a substitute to judicial and administrative means of redress. The two 2013 measures, Directive 2011/83 and Regulation 524/2013 introduce a new layer of consumer law enforcement into the European enforcement scheme, so far composed of the judiciary and the administrative agencies. One might go as far to argue that the EU has generalized the approach, which has been distilled out of the Injunction Directive. Individual enforcement of consumer contract law – the economic rights of the consumer – are thereby harmonized, contrary to the judicial systems where the ECJ’s jurisdiction as to the interpretation of EU law and contrary to administrative enforcement, where a Europeanisation of the law enforcement occurs only in steps such as through Regulation 2006/2004 and the secondary law measures on regulated markets. The new layer is universally applicable to all consumer conflicts, national and transnational, online or traditional. The decade long promotion of ADR by the EU and through an endless chain of sector and subject related references to out-of-court dispute settlement procedures in consumer law directives have not only paved the ground politically within Member States but have also helped to give ADR with considerable popularity.

Most consumers faithfully accepted its development alongside judicial and administrative enforcement.⁷⁶² ADR helps consumers to resolve low value consumer disputes in cases where long-lasting and expensive court-led consumer disputes are not really a serious option.⁷⁶³ Looking for explanations for these apparently contradictory legislative procedural elements there is a need for more in-depth analysis, including elements of its legal history including the EU plans and policies regarding the ADR schemes in Europe.⁷⁶⁴ The focus has been two elements justice through litigation⁷⁶⁵ and the limits of judicial adjudication throughout Europe.⁷⁶⁶ This bring to light the lack of effectiveness of enforcement measures in Europe and a lack of a confidence in judicial measures⁷⁶⁷, due to strained resources, growing case loads and the increasing number of lay litigants who cannot afford legal representation and cannot obtain legal redress. In practice ADR performs a gap-filling function.⁷⁶⁸

5. 3. 4. Consultation and Co-operation prior to Litigation

The prior consultation mechanisms introduced in Article 5 of the Injunction Directive should be regarded as an out-of-court dispute settlement mechanism⁷⁶⁹, which is meant to offer “*qualified entities*” – enjoying legal standing – a way to settle the conflict before going to court. Prior consultation might better meet the needs of both consumers and professionals than directly going to court.⁷⁷⁰ The preliminary scheme allows for “*a moment of reflection*” as to whether the parties to the conflict should really engage in complex litigation. In that sense it could serve as a realistic and pragmatic alternative for the normal course of judicial procedure paving the way for a speedy solution which is mutually satisfactory.⁷⁷¹

⁷⁶² Hodges (2008), *The Reform of...*, p. 101-103.

⁷⁶³ Weatherill (1997), *EC Consumer...*, p. 146; “*Consumers frequently write off disappointing purchases*”, especially where dealing with non-home state Member State’s avenues of consumer redress. “*Literally the last thing consumers want to do is to go through the expense and delay of purchasing formal proceedings in court*”; Hodges/Tulibacka/Vogenhauer (2010), *The Costs and Funding...*, p. 20-27, 30-32, 106, 456; stress (1) the high costs of consultations, opinions and fees, (2) the overloading of Member States’ courts, (3) a risk of the loser party pays principle, (4) a psychological barrier arising from formalism and complexity of court’s procedure.

⁷⁶⁴ Carbonneau (1989), *Alternative Disputes Resolution*, Oxford, p. 60-66; Hodges/Benöhr/Creutzfeld-Banda (2012), *Consumer ADR in...*, p. 2-3.

⁷⁶⁵ Hazel (2010), *Judging Civil Justice*, Cambridge, p. 119-125.

⁷⁶⁶ Hodges (2008), *The Reform of...*

⁷⁶⁷ Posner (2008), *How Judges Think*, Harvard University Press, pp. 19-56

⁷⁶⁸ Howells/Rhoda (2002), *Litigation in the Consumer Interest*, ILSA Journal of International & Comparative Law, Vol. 9(1), p. 1-56; Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*, p. 326.

⁷⁶⁹ Cafaggi/Micklitz (2009), *New Frontiers of...*, p. 3.

⁷⁷⁰ Howells/Rhoda (2002), *Litigation in Consumer...*, p. 1-59.

⁷⁷¹ Posner (2008), *How Judge Think...*, p. 19-56; Cafaggi (2009), *The Great Transformation...*, p. 496-539.

Article 5(1) of the Injunction Directive does not impose an obligation on Member States, but introduces prior consultation as a mere option:

*“Member States may introduce or maintain in force provisions whereby the party that intends to seek an injunction can only start this procedure after it has tried to achieve the cessation of the infringement in consultation either with the defendant or with both the defendant and a qualified entity within the meaning of Article 3(a) of the Member State in which the injunction is sought. It shall be for the Member State to decide whether the party seeking the injunction must consult the qualified entity. If the cessation of the infringement is not achieved within two weeks after the request for consultation is received, the party concerned may bring an action for an injunction without any further delay”.*⁷⁷²

The way in which the primary consultation procedure requirement is shaped documents the high degree of flexibility leaving the Member States the choice between direct adjudication or combined consultation/adjudication. The need (not the obligation) to integrate a preliminary consultation requirement into the judicial system may yield difficulties since the EU legislator promotes the combination of court-related and non-court procedures. There are no explanatory documents which help to understand what is behind that step. Integration is certainly related to overall policy to strengthen dispute resolution mechanisms in different spheres of private law.⁷⁷³ Again, the preliminary consultation element arises as an alien element, which does not fit at all to the rest of the structure of the Injunction Directive. However, the open design of the Injunction Directive allows flexibility in the transposition process of the Injunction Directive which could be understood as a necessary condition for the suggested process of convergence. Flexibility and the optional character can be viewed as security tools allowing for a simplification of the legally complicated injunction procedure.⁷⁷⁴ This flexibility is related to its hybrid legal nature and the fact that the injunction procedure is at the conjunction of various fields of law. The diversity and the patchwork of solutions do not only present a risk they also present an opportunity for new modes of governance in the enforcement of consumer law.

⁷⁷² Article 5(1) of the Injunction Directive.

⁷⁷³ The European Commission has been very proactive by promoting the Directive on ADR and the Regulation on ODR.

⁷⁷⁴ In this context see: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 98/257/EC (OJ L 115, 17.04.1998, p. 31–34); Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (OJ C 155, 06.06.2000); Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes C(2001/310/EC (OJ L 109, 19.04.2001, p. 56–61).

More concretely Article 5 (1) leaves those Member States, which are ready to introduce a two-step mechanism without guidance. Member States may require consultation not only with a defendant, but also with an independent public body that is recognized as a qualified entity. How the consultation takes shape, however, is entirely left to the Member States. Therefore, the prior consultation procedure does not influence the EU designed injunction procedure, since the injunction procedure applies, no matter whether a primary consultation phase has been introduced or not. Thus far the prior consultation procedure has not attracted much comment. Cafaggi and Micklitz discuss it in their monograph on collective redress measures in the field of consumer law, looking also into the prior consultation requirement of the Injunction Directive.⁷⁷⁵ However, they did go deeper into the reasons why the EU legislator has not put more emphasis consultation phase and discussed the preclusionary effects. The explanation is only given later, through the adoption of Regulation 2006/2004 on consumer protection cooperation and Directive 203/11 on ADR and Regulation 524/2013 on ODR.

In light of this broader context, in particular taking into account Regulation 2006/2004 which relies on a network of public agencies, the preliminary consultation scheme can be developed as a tool to improve cross-border consumer resolution and help to clarify linguistic nuances in advance. Within the framework of the Injunction Directive prior consultation remained under the sole management of the national legislator in each Member States.⁷⁷⁶ The European Commission had only the task of managing the list of qualified entities. This is different under Regulation 2006/2004. The whole spirit of the Regulation 2006/2004 is governed by co-operation, information exchange, mutual trust and mutual assistance, the search for joint solution – under the guidance of the European Commission which is sitting like the spider in the web.⁷⁷⁷ Therefore, the Regulation 2006/2004 broadens the factual reach of the prior consultation procedure by allowing the exchange of information on prior consultation procedures part of the exchange mechanism.⁷⁷⁸

This, however, does not overcome diversity in the Member States. Some member states had such a mechanism already in place prior to the adoption of the Directive.⁷⁷⁹ In

⁷⁷⁵ Cafaggi (2009), *The Great Transformation...*, p. 496-539.

⁷⁷⁶ Schulte-Nölke/Twigg-Flesner/Ebers (2008), *Consumer Law Compendium...*, p. 400; as various modes of implementation of the mechanisms proved.

⁷⁷⁷ See Chapter III 6.2.

⁷⁷⁸ Terryn/Voinot (2012), *Droit Européen des Pratiques Commerciales Déloyales. Évolution et Perspectives*. Brussel, Larcier.

⁷⁷⁹ Other preliminary measures, which are similar in the functions existing Cyprus and Poland, for more details see: Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*, p. 336-337; Schulte-Nölke/Twigg-Flesner/Ebers (2008), *Consumer Law Compendium...*, p. 399-401.

consequence, a certain modification was needed. Thus, there was no need of duplication and the establishment of a similar or even identical tool of preliminary consultation, which would be equivalent to measures already existing in the national legal systems. Others developed mechanisms, which anticipate the existing judicial/administrative injunction procedure.⁷⁸⁰ In some of the national enforcement models the mechanism recommended in the Injunction Directive does not fit because of the specific nature of consumer protection directives which did not need the introduction of an action for injunction since the specific remedies were regarded as sufficient. Most of the consumer protection directives from e.g. Poland have only been subject to a fragmentary implementation.⁷⁸¹ Whilst it is permitted it does not illustrate a commitment to the philosophy behind the Injunction Directive.

A comparison of those countries, which have a mechanism in place, reveal difference. Although consultation procedure has been introduced in 13 Member States, in 8 of the 13 Member States introduced a consultation with defendant only, whereas 5 require consultation with both the defendant and a national qualified entity.⁷⁸² Most Member States where the primary consultation procedure is in place, have introduced a two-weeks' time limit after which an action for injunction can be brought to court if the addressee does not respond.⁷⁸³ This short time period was supposed to draw a reasonable limit to a claim, as the entity in charge cannot wait more than 15 days before deciding to move ahead. Further delays are not acceptable⁷⁸⁴, since the injunction procedure is supposed to be a kind accelerated measure *per se*.

Even though the national mechanisms obviously vary in their overall structure and the more technical details, they perform the same functions. The Directive opened a window of opportunity for the Member States to simplify the injunction procedure through the introduction of prior consultation mechanism. The Injunction Directive has improved the situation of EU consumers, but cannot be regarded as a procedural tool that was able to resolve the remedial problems of collective actions.⁷⁸⁵ It is only in combination with

⁷⁸⁰ For example: Czech Republic, Estonia, Germany, Hungary, Ireland, Italy, Spain, Sweden, United Kingdom.

⁷⁸¹ See Chapter I 1.6.2.(v).

⁷⁸² Notices from Member States – Rules governing prior consultation adopted by Member States pursuant to Article 5 of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumer's interest (2009/C 181/06), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:181:0006:0037:EN:PDF>> accessed on June 9, 2014.

⁷⁸³ Schulte-Nölke/Twig-Flesner/Ebers (2008), *EC Consumer...*, p. 396-399.

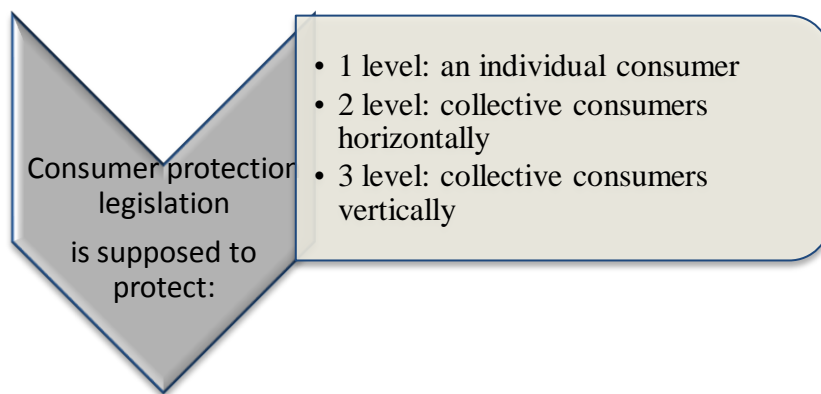
⁷⁸⁴ Stuyck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*

⁷⁸⁵ Collins (2004), *The Forthcoming EC Directive on Unfair Commercial Practices, Contract, Consumer and Competition Law Implications*, Vol. 5, London, p. 124-126.

Regulation 2006/2004 that the role and function of the prior consultation procedure becomes clear.

6. The Thesis of Dualism Adjusted

In the first monograph that touched upon judicial and administrative enforcement of consumer law, Cafaggi and Micklitz⁷⁸⁶ indicated three functions to be performed by consumer protection legislation. These three functions: level 1 individual consumer protection level 2 horizontal collective consumer protection and level 3 vertical sector specific consumer protection, serve as a starting point for the thesis of dualism of enforcement measures developed under the frame of the Injunction Directive (Graph 1 below).



Regarding level 1, consumer protection requires first and foremost the protection of the individual consumer, whose interest may be infringed by unlawful business practices. Individual enforcement underpins the consumer protection directives⁷⁸⁷, it can be either guaranteed through the Member States courts and/or through the EU induced ADR and ODR mechanisms. Individual enforcement was the only enforcement path promoted in the European Union until the Injunction Directive was passed in 1998.⁷⁸⁸ Prior to that date the action for injunction had been introduced in two fields of consumer law: misleading advertising and unfair contract terms. The Injunction Directive scope of application goes in line with the Annex to the Directive. The substantive law consumer protection directives are

⁷⁸⁶ Cafaggi/Micklitz (2007), *Administrative and Judicial...*, p. 35.

⁷⁸⁷ For example: The Unfair Commercial Practices Directive although it introduced an action for injunction remained without prejudice to individual actions. Therefore, it allows for both the individual and collective enforcement measures, which may be used side-by-side, as the authors state „without prejudice”; De Groote/De Vulder (2007), *The Unfair Commercial Practices Directive*, in Howells (2007), *The Yearbook of...*, p. 275-276.

⁷⁸⁸ Following Styuck in the report from 2007: „Although the Injunction Directive does not aim to protect the individual interest of consumers, it does not place any restrictions on such protection either”; Styuck/Terryn/Colaert/Van Dyck/Peretz/Hoekx/Tereszkiewicz (2007), *An analysis...*, p. 328, 322.

addressed to individual consumers.⁷⁸⁹ The dualism of enforcement explains and justifies the existence of individual and collective enforcement measures side-by-side. Even if the Injunction Directive seems to refer to collective enforcement only, this does not mean that individual protection is cancelled *ex lege*. Quite the contrary is true. The “*mark of reference*” opens the gate towards the parallelism of individual and collective enforcement in European consumer law.⁷⁹⁰ Hence, the Injunction Directive provides for protection individual consumers too.

Regarding the level 2, the Injunction Directive has horizontalised collective enforcement. The collective element assures more complex legal protection for consumers in the vast majority of consumer protection directives provided they aim at the protection of the economic interests of consumers. The mechanism of collective consumer enforcement introduced by the Injunction Directive hence protects the consumers independently from the sector, since the Injunction Directive provides for collective horizontal protection. It is only in connection with Regulation on 2006/2004 that the prior consultation procedure so reluctantly introduced in the Injunction Directive turns into a horizontal means to co-ordinate enforcement measures in cross-border transactions.

Regarding level 3, the vertical dimension in the Injunction Directive comes clear in the list of substantive law directives covered by the Annex, which are addressed to specific fields of law, like unfair contract terms, unfair commercial practices, and others. The link is made and stressed procedurally by the mark of reference. On one the hand, the substantive directives grant individual protection, read in junction with the Injunction Directive however, the collective nature of the substantive consumer law directives comes clear. In the end both collective and individual consumer protection stand side by side. The Regulation 2006/2004 and the Injunction Directive differ from each other. Substantive consumer law rules in the regulated markets of energy, telecommunication, financial services are not systematically integrated. Here the more open and more flexible network of information exchange and consultation under the Regulation 2006/2004 compensates for the deficits in the two Annexes, as it allows for at least an informal exchange of information outside the scope of the Annex and below the threshold of regulatory action through the action for injunction.

⁷⁸⁹ Dickie (1998), *Consumer Confidence and the EC Directive on Distance Contract*, Journal of Consumer Policy, Vol. 21, p. 217-229.

⁷⁹⁰ Hodges (2006), *Competition Enforcement...*, p. 1381-1407; “*Further relevant evidence is the complete absence of cases brought by either individuals or organizations under the various cross-border injunction Directive (...) apart from a single case brought by the British regulatory authority*”; (OFT). This underpins the thesis of dualism of the enforcement measures in the area of consumer law.

Conclusion

The Injunction Directive provides for a general framework on the consumer injunction procedure in national and cross-border litigation. Qualified entities, public agencies and/or consumer organisations, are granted legal standing. Once notified to the European Commission and published in the Official Journal, qualified entities may engage in cross-border litigation. National courts are bound to mutually respect the standing of notified qualified entities. Outside these clear-cut rules on the mutual recognition of standing, the Injunction Directive remains largely silent. There are no European requirements on qualified entities, there is no definition on the protection of the collective interests which have to be defended by “*legitimate*” entities, there is, in short, no guidance on the procedural requirements beyond the formal recognition of standing. There is an implicit policy to promote the role of consumer associations as the guardians of European law, but not even this policy is translated into clear rules. EU law introduces a new remedy – injunction – but the content, the form and the effects of the remedy have to be shaped by the Member States through suitable and appropriate national enforcement models. With due respect to the principle of procedural autonomy the Injunction Directive unites Member States in diversity. Therefore it is correct to understand the Injunction Directive as a mean of “*legally approved diversity*”.

Member States differ in their understanding of the remedy of injunction. As far the remedy already existed and was made available in consumer litigation, Member States had to adapt their enforcement system to the EU requirements. Those Member States in which the remedy of injunction was not developed had to make it compatible with the existing systems of enforcement. Underneath the more technical surface there are deep historical and cultural differences on what an injunction means at all, of whether enforcement should be put into the hands of public or private bodies, on the requirements under which public and private bodies should enjoy standing, on whether public bodies must seek an injunction order *via* courts or whether they may act on their own motion, on how the collective enforcement should or should not be linked to individual enforcement and whether *res judicata* can and should be extended to individual litigation.

This dissertation is meant to highlight the differences in approach between Member States, explain and structure them. One way of looking at the effects of the Injunction Directive on national consumer law enforcement schemes is to underline and to highlight the

broad differences and the variety of legal solutions across Europe. In such a perspective the rather limited harmonising effect of the legislative effort of the EU does not come as a surprise. The practical importance within national consumer litigation varies according to the role, function and resources provided to consumer organisations. All in all the policy of the European Commission to promote the development and the importance of consumer organisations through the Injunction Directive failed. In practice, there is no real difference in the use of injunctions before and after the adoption of the Injunction Directive. The adoption did not trigger a rise of actions of injunctions, at least not to the degree the European Commission was hoping for. The results are even more modest in cross-border litigation. Here an extremely limited number of cases demonstrate the legal difficulties of cross-border litigation. The broad leeway left to the Member States, the legally approved diversity turns in legal practice to nearly unsurmountable legal barriers. The immediate policy reaction seems to be call for ever more comprehensive harmonisation. This, however, did not happen for good reasons, as the competence of the EU in procedural matters is disputed. It seems as if the legal experiment failed.

Such a finding, however, falls short of catching the overall tendency of convergence of consumer law enforcement schemes that has been triggered by the Injunction Directive. The herein defended “*thesis of the dualism of enforcement*” paves the way for a more promising future understanding of the long standing effects of the Injunction Directive. Read together with the Annex, the Injunction Directive establishes the deep interconnection between collective and individual enforcement, of substantive and procedural enforcement, of judicial and administrative enforcement. The different levels and means of enforcement should not be regarded separately but should always be regarded in their interplay, in their mutual institutional design and their mutual impact. This is still rather abstract, but it allows for a new understanding of the drafting of consumer law enforcement schemes. It pays tribute to the overall idea behind the Injunction Directive that is setting a framework in which the Member States have to operate and in which they have to build links.

There are limited but promising developments that underpin the herein defended thesis of dualism. The well-known *Invitel* judgment of the ECJ extends *res judicata* of the action of injunction to individual consumer claims.⁷⁹¹ This is dualism of collective/individual enforcement in action. The same is true for the so-called “*co-ordinated action of consumer organisations*” to combat consumer problems across Europe through the use of the existing

⁷⁹¹ See Chapter I 1.7.

dual enforcement structure.⁷⁹² The different design of the action for injunction is overcome outside the formalised setting of international procedural and international private law through a combination of action within the established bodies of enforcement – courts and agencies, within the meaning of the remedy of injunction – and new modes of enforcement through information exchange and enforcement.

With the adoption of Regulation 2006/2004 the EU shifted the focus from private to public enforcement, first and foremost in cross-border consumer problems but certainly meant to re-structure the responsibilities for the handling of national consumer conflicts. For the first time all Member States are obliged to nominate a public authority responsible for consumer law enforcement. This entails a considerable streamlining of the enforcement models. Private enforcement through consumer organisations is not eliminated, but is meant to play a secondary role only. This could be understood as a refinement of the thesis of dualism.

The second major move in Regulation 2006/2004 results from the shift from formal to informal modes of enforcement, from hard remedies to soft remedies. Public agencies may still rely on the action of injunction as a means of last resort, but conflict management is primarily done *via* co-operative conflict management. Read together with ODR Regulation 524/2013 and ADR Directive 2013/11 the recent developments in the EU demonstrate the potential for further convergence through para-legal means, used and applied in the shadow of the law. The potential impact of enforcement of consumer rights, individually and collectively, outside courts on the overall body of consumer law, on legal certainty, the rule of law and the principle of legality requires further investigation which reaches beyond the aim of this dissertation.

⁷⁹² See Chapter III 7.3.

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