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Administrative and Judicial Collective  
Enforcement of Consumer Law in the  
US and the European Community

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**EUROPEAN UNIVERSITY INSTITUTE  
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**FABRIZIO CAFAGGI AND HANS-W. MICKLITZ**

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## **Abstract**

In the consumer society, as it stands today in Western-type democracies, consumers have a far larger choice of products and services originating from all over the world than they did decades ago. Risks associated with products and services have also increased, as have mass problems and mass damages, often in a transborder dimension. The US and the European Community, though battling against common problems, maintain different standard setting and enforcement regimes. This paper focuses on enforcement regimes, thereby distinguishing between administrative enforcement via agencies and judicial collective enforcement via European collective actions and US class actions. The existing theoretical framework depicting administrative and judicial enforcement as alternative strategies is contrasted against modern developments in the US and the EC.

In the field of consumer protection administrative control and judicial collective enforcement are being understood more as functional complements than alternatives. Enforcement covers negotiation, settlement, adjudication and arbitration. The analysis of the institutional variables determining the choice between administrative and judicial control – ex ante vs. ex post control, injunctive relief versus damages, personal injuries and economic losses, sector specificity vs. general instruments to protect consumers, public agencies vs. private organisations – provide the ground for preliminary thoughts on a revised theoretical approach.

## **Keywords**

Consumer protection – Judicial enforcement – Class action – Administrative agencies – Transborder litigation

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# *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community<sup>1</sup>*

Fabrizio Cafaggi and Hans-W. Micklitz

## **1. Introduction**

In the consumer society, as it stands today in Western-type democracies, consumers have a far larger choice of products and services originating from all over the world than they did decades ago. Today, consumers heavily contribute to the national gross income. Risks associated with products and services have also increased, as have mass problems and mass damages. The transnational dimension of consumption is today predominant, posing more and more problems for risk management and risk compensation. The US and the European Community, though battling against common problems, maintain different standard setting and enforcement regimes. There are endless stories to be told from all industrialised and developing countries, concerning rotten foodstuff, train accidents or loss of private investments to mention a few. Last but not least, in reaction to mass accidents and scandals, the Western industrialised countries have adopted a dense net of legal rules aimed at protecting consumers from risks to their health and safety as well as from economic losses. In a common market, i.e. an internal market, neither the setting of standards nor the enforcement can be managed nationally. For this reason the European Community has become the key regulator. In a recent policy document the Commission stated its objectives for 2007-2013. Among them, collective enforcement is one of the five priorities<sup>2</sup>.

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<sup>1</sup> This paper constitutes the background for a research project on consumer enforcement directed by Fabrizio Cafaggi and Hans Micklitz at EUI and it will constitute part of a forthcoming longer publication.

<sup>2</sup> See New Consumer strategy 2007/2013 SEC (2007) 321, March 13-2007, where strong systems for redress and enforcement are advocated. The Commission acknowledged that consumers will not enjoy the benefits of the Single Market unless there are strong and effective systems in place to resolve problems with goods and services when things go wrong. Thus, the Commission will take action to:

- Reinforce monitoring and encourage the use of existing recommendations which establish a number of minimum guarantees for alternative disputes resolution (ADR) Schemes
- Consider action on collective redress mechanisms for consumers for infringements of consumer protection rules and breaches of the EC anti-trust rules
- Report on the Injunctions directive (2007) followed by public consultation on its impact
- Implement the new Consumer Protection Co-operation (CPC) Regulation to tackle cross-border scams and breaches of consumer protection rules (see IP/07/253).

This paper focuses on enforcement regimes, thereby distinguishing between administrative and judicial collective enforcement.

**Administrative enforcement** means enforcement via government, or agencies set up with tasks of risk management of particular groups or products and services. Setting up common standards for a common market turned out not to suffice for guaranteeing a common risk management within the European Community. However, the European Community did not follow the American blueprint. There was and still is no preparedness to establish European regulatory agencies as counterparts to US-federal agencies with powers to take binding action all over the European Community.<sup>3</sup> The European legislator had to accept that the European legal order is built in essence on the concept of *Vollzugsföderalismus*, under which the Member States are and will remain responsible for the enforcement of European legal rules in so far the European Community respects the principle of institutional autonomy. That is why the European Community can only encourage Member States to adopt appropriate public regulatory authorities at national level. This entails the need to specify the role of the European Commission which usually plays the role of the spider in the web, co-ordinating the enforcement activities of public national authorities. The European Commission has been very innovative in formulating new modes of governance (new approach, comitology, Lamfalussy-procedure, open method of co-ordination) which are the subject of intensive research, though not in the realm of enforcement of consumer law and consumer interests.<sup>4</sup> In today's Europe, administrative enforcement of consumer law cannot be squeezed into a simple scheme. The degree to which administrative enforcement is Europeanised depends largely on the type of product or service concerned.

**Judicial collective enforcement** has always been a substantial feature of US consumer law. Since the late sixties, it has very much been linked to the key role of class actions and the high involvement of lawyer entrepreneurs before the courts. In Europe judicial enforcement lies first and foremost in the hands of the Member States in which the constitutional powers are vested. The European legislation, according to the interpretation given by the European Court of Justice<sup>5</sup>, has considerably strengthened judicial individual enforcement.<sup>6</sup> The individual citizen, in particular the supplier and the consumer, are granted rights to accelerate the European integration process. Supremacy and direct effect have been the most important legal devices.<sup>7</sup> The European Court of Justice has even contributed to the 'creation' of European remedies; injunctive relief,<sup>8</sup> and compensation claims against Member States<sup>9</sup> which do not comply with the EC law. However, neither the European Treaties nor the European Court of Justice have developed adequate means for collective judicial enforcement.<sup>10</sup> For this reason, the development of judicial enforcement has so far largely depended on the preparedness

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<sup>3</sup> Majone 1996

<sup>4</sup> But see Cafaggi, 2003, 2006a, Van Gerven 2006, Cafaggi and Muir Watt 2007.

<sup>5</sup> Judgment, 25.2.1988, Case 249/83, *Les Verts-Parti Ecologiste v. Parlement* (1988) ECR 1017 et seq

<sup>6</sup> Reich, 1999.

<sup>7</sup> Judgment 5.2.1963, Case 26/62 *van Gend & Loos* (1963) ECR 1, Judgment Case 6/64, *Costa ENEL*, (1964) ECR 585.

<sup>8</sup> Judgment 19.6.1990, Case 213/89 (1990) ECR I-2433.

<sup>9</sup> Judgment, 19.11.1991, Case C-6 and 9/90 - *Francovich* (1991) ECR I-5357

<sup>10</sup> Micklitz/Reich, 1996



and willingness of the European legislator to establish appropriate devices via secondary community law.

The European dilemma begins at the point at which it has to be decided whether the European legislator should have the competence and the responsibility to shape the conditions under which private parties, in whatever collective form, organised in an association, gathered together under ad hoc decision or represented by a third party player (lawyer), should have access to courts. Seen through the eyes of the EC legislator, judicial collective enforcement touches upon matters of the inner-organisational processes of national civil societies. The few directives, mostly rooted in consumer and to some extent labour law, seem to support the concept of judicial collective enforcement, though there remains the question for Member States of whether effective legal protection of collective consumer interests could not be guaranteed as well through administrative enforcement mechanisms. At the EC level, judicial collective enforcement is at the very best in the offing. Currently the European Commission is striving for the enhancement of judicial collective enforcement in the field of antitrust injuries<sup>11</sup> and in the field of consumer law<sup>12</sup>.

The regulatory gap is increasingly being filled by national regulatory initiatives. The Member States have adopted or are in the process of adopting various forms of judicial collective enforcement.<sup>13</sup> There seems to be a common denominator in the recent initiatives. The judicial collective enforcement mechanism largely depends on national regulatory traditions and cultures. This makes it all the more difficult, if not impossible, to develop a European judicial collective enforcement regime which could stand side-by-side with administrative enforcement regimes.

Whilst Europe seems at least partially inspired by the US approach to combine administrative and judicial collective enforcement, it remains bound to its so-called constitutional restrictions. Contrary to the US, there is no power vested at the federal level that allows it to establish central European agencies with regulatory powers, or to introduce a common scheme of collective judicial enforcement. This does not mean that there are no tendencies that point to an ongoing process of federalising European consumer law, but it is a difficult process which requires and yields new modes of governance both in administrative and collective judicial enforcement.<sup>14</sup>

## **2. Complementary institutional strategies to ensure consumer protection: a comparative assessment**

A theoretical framework depicting administrative and judicial enforcement as alternative strategies was provided more than 20 years ago.<sup>15</sup> Specifically in the field of

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<sup>11</sup> Green Paper, Damages action of the EC antitrust rules, COM (2005) 19.12.2005, 672 final

<sup>12</sup> COM (2007) 99 final, 13.3.2007, p. 11

<sup>13</sup> See the country reports on the Spain, Sweden, the UK and Germany in Micklitz/Stadler, 2005, p. 655 et seq., 497 et seq., 795 et seq. 1187 et seq. ., An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report, Study for the European Commission, (hereinafter Stuyck Report), available at [http://ec.europa.eu/consumers/redress/reports\\_studies/index\\_en.htm](http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm).

<sup>14</sup> See Cafaggi/MuirWatt, 2007

<sup>15</sup> Shavell 1984, Rose-Ackerman 1991

tort law the framework presented by Calabresi which included both secondary and tertiary costs (1970) has been enriched by the inclusion of adjudication costs in the social welfare function. Such costs vary substantially in mass torts litigation where the alternative between individual and group litigation may affect economies of scale and the ability to achieve deterrence.<sup>16</sup>

The alternative between individual versus collective adjudication has been deeply analysed and the benefits of aggregate litigation explored.<sup>17</sup> In particular the risk of under-deterrence associated with individual litigation due to costly and ineffective selection of claimants and different judicial outcomes, may be minimised by the use of aggregate litigation mechanisms. The need for aggregate litigation arises not only in specific cases such as those involving small claims, but also when bundling claims would generate economies of scales and optimal ex ante investments.<sup>18</sup>

Two important questions emerge. Firstly, should the bundling occur? Secondly, who should bundle? From the adjudication stand point the alternative between individual and collective adjudication has been presented as one between market and regulation. While in individual litigation lawyers compete for shares of marketable claims, in aggregate litigation lawyers play a strong regulatory function in the US<sup>19</sup> and, to an increasing degree, in Europe. By avoiding duplicative litigation they contribute to costs minimisation.<sup>20</sup> If they have sufficiently broad binding effects they will perform better regulatory functions.

How far should bundling go? Should it be mandatory or left to the individual choices of harmed or likely to be harmed consumers? How strong should the protection of consumer's individual autonomy and right to individual redress be? If lawyers or associations have legal or factual monopolies, how can individual consumers be fairly protected? More broadly, to what extent does bundling of consumer rights reduce the distance between administrative and judicial collective enforcement, thereby forcing reconsideration of the relevant institutional variables?

Shavell's frame concerning the alternative between liability and regulation, though extremely useful, fails to provide a realistic account of the interaction between administrative regulation and private remedies, particularly collective enforcement, in today's European scenario and perhaps even in the US. Here we seek to redefine the relevant variables accounting for the different combinations that occur in the selected legal systems in framing the choice between administrative and judicial collective enforcement. Subsequently, we outline a comparative institutional analysis to explain the current differences. Though the inquiry focuses on consumer protection, some of the issues raised are applicable to other sectors.

We will try to address consumer protection issues in general although we are aware that the combination of administrative and judicial enforcement is likely to change in

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<sup>16</sup> Shavell 2004, Rosemberg 2002. Economies of scale in litigation serves different purposes: deterrence and regulatory function. See below text and footnotes.

<sup>17</sup> Issacharoff 1999a, Rosenberg 2002

<sup>18</sup> See Schaefer 2000, and Rosenberg2000, at p. 260.

<sup>19</sup> Rosenberg2002, at p. 245 f.

<sup>20</sup> In the US this is done through different devices: class actions and collateral estoppel for example.

relation to the type of product-related risk or service and the scope of regulation, whether quality (i.e. protection of economic interests) or safety regulation.<sup>21</sup>

In the field of consumer protection administrative control and judicial collective enforcement constitute more functional complements than alternatives. We do not observe any legal system choosing only one set of regulatory strategies to control risks related to products and services for consumers. The main theoretical and policy questions are therefore related to the modes of this complementarity, i.e. the way in which administrative regulation and private remedies for contractual and tortious claims are combined, maybe in connection to the subject matter concerned.

It is important to note at the outset that at stake in both cases is the combination between the regulatory and compensatory functions associated to consumers' risks and harms related to product and services. We assume that both administrative regulation and private collective enforcement can perform regulatory and compensatory functions.<sup>22</sup> Enforcement contributes to risk-regulation and management, especially if a broad definition is adopted<sup>23</sup>.

We begin by sketching some of the variables that may affect the choice between the two strategies to control consumer related risks and then suggest that current institutional changes, occurring both in Europe and in the US, force us to rethink the terms and modes of the combination. They are examined in the light of institutional constraints that affect both the US and Europe. For example the federal-state allocation of power in the US affects the choice between regulation, mostly associated to administrative federal law, and judicial enforcement, predominantly related to state common law. In the EC, the same choice is determined by the EC Treaty under which directives representing the common regulatory device must be addressed to the Member States.

These variables do not include expressly the different legal cultures which affect the choice and modes of integration between administrative and judicial collective enforcement. In this paper cultural legal differences are premised and will be analysed only to the extent that they have strong explanatory value.

The conventional story describes the US and Europe by underlining the different weight given to judicial and administrative enforcement<sup>24</sup>. The institutional framework that characterizes litigation both in and outside Courts in the US and Europe is still very different. To some extent the substantive fields involved are also different. While in the US mass litigation before courts is associated to torts and only to a limited extent to contract, in Europe collective litigation has also affected some aspects of contract law

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<sup>21</sup> Consumer protection is traditionally broken down into the protection of the economic interests of the consumers by way of contract and tort law (private law) and the protection of the health and safety of consumers by way of public law means.

<sup>22</sup> The debate about the desirability for contract and civil liability to perform a regulatory function is very rich on both sides of the Atlantic and is beyond the scope of the essay. Suffice to say that in both scholarly environments it is still much debated.

<sup>23</sup> See below text and footnote.

<sup>24</sup> It has been argued that the US compensates for weak administrative enforcement through strong judicial collective enforcement, whereas the EC Member States rely on strong administrative enforcement thereby making judicial collective enforcement superfluous (Säcker, 2006). Whether this is right or wrong remains to be seen. However, it goes without saying that there are soft factors that determine regulatory choices and that reach beyond the hard core variables here under review

and unfair competition. But an important difference is related to the subject of the claim, i.e. whether it is concerned with personal injury or with economic losses.

Before entering the comparative analysis in more detail it is important to underline that no consensus exists on the picture concerning the US and Europe both with regard to administrative versus judicial enforcement and, within the latter, between collective versus individual. In the US the debate concerning the weight of aggregate versus individual litigation concerning tort claims has characterized both recent scholarly, institutional and policymaking debate. In Europe the role of collective enforcement has been promoted through legislative action in the last decade and it is now under scrutiny. Comprehensive, comparative surveys have recently been released providing a rich set of data to develop the comparative analysis.<sup>25</sup> Further research is under way, both on antitrust injuries and on collective actions in the field of consumer protection.<sup>26</sup>

The role of settlements in collective enforcement is different in the two systems. While settling the case in the US is crucial, in Europe it has thus far been much less relevant. This is partly due to the limited existence of collective actions outside and beyond injunctive relieves. That is why the importance of settlements might increase with the growing number of legislative initiatives in the Member States. However, it should be recalled that also in Europe mass damages have led to concerted actions by lawyers outside a tight legal frame in order to put pressure on plaintiffs. This meant that concerted though legally separated actions could easily end up in settlements. Here the plaintiffs may choose a buy-out strategy, where they settle the case with the most active plaintiffs to the benefit of the lawyers and to the detriment of those persons concerned who were waiting for a positive outcome.<sup>27</sup>

### **3. Different socio-economic and institutional players**

In defining the choice between collective judicial and administrative enforcement the institutional players are very relevant. Differences concern both the public-private divide and the actors within the private domain.

In relation to the public-private divide the European landscape is quite differentiated. In some cases private organisations are key players because they are entrusted quasi-public functions, whilst in other cases the role of public agencies relegate them to a secondary role. The difference between Austria and Germany on the one side, the Scandinavian countries on the other might serve as an illustration. In the former countries, consumer

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<sup>25</sup> See J. Stuyck, E. Terry, V. Colaert, T. Van Dyck, et al., An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report, Study for the European Commission, (hereinafter Stuyck Report), available at [http://ec.europa.eu/consumers/redress/reports\\_studies/index\\_en.htm](http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm).

<sup>26</sup> Both studies are commissioned by the European Commission, the one on antitrust injuries by DG Competition, the other one on collective actions by DG SANCO. The first is under way, but not yet published, the second has just been tendered.

<sup>27</sup> This is what happened in the German case on wood preservatives, where there were 6000 claimants. The case was settled then to the benefit of a handful of affected persons and their lawyers. The problem has been that none of the lawyers was willing to disclose clear cut information on the settlement as they feared to be blamed by the non active claimants who got nothing in the end. See facts and background of the case in Micklitz, 1989.

organisations are more or less the sole players in such areas as unfair terms and unfair commercial practices. They have a monopoly at least with regard to national litigation. In the latter countries the Consumer Ombudsman or Consumer Ombud – to be understood as a consumer agency – is at the forefront of the development of consumer protection. Consumer organisations play only a subsidiary role.

Within Europe the interaction between public consumer protection agencies and private consumer associations are not at all homogenous. It is largely stamped by the institutional choice through which Member States enforce the law. More generally speaking consumer organisations play a less important role in countries with a strong consumer agency and vice versa. The interaction between the two players therefore depends on who is taking the lead in enforcing consumer law. In Austria and Germany, public institutions remain bound to supervisory tasks, in particular as far as consumer organisations receive public funding. In countries with strong consumer agencies, the role of the organisation might range from supporting the enforcement activities of public agencies to filing a lawsuit in their own right.<sup>28</sup> The strong federal dimension makes the landscape in the US relatively homogeneous, although the presence of State agencies should not be underestimated.

In relation to the private sphere, plaintiffs and defence lawyers play a strategic role in shaping the regulatory alternatives in the US while they do not exist or merely have a minor role in Europe<sup>29</sup>. Consumers and other associations play a more important function in Europe than in the US, although, as recent empirical research shows, the impact differs quite substantially among European Member States<sup>30</sup>. If we disaggregate old and new Member States and even within the old, where traditions are significantly different, we discover that consumer associations have very different impact on policy shaping.<sup>31</sup> It is possible for example that the different use of injunctive relief versus pecuniary remedies may at least in part be explained by reference to the different private interest groups involved in the implementation of EU and US legislation.<sup>32</sup>

The comparison between lawyers and associations as different institutional players affecting the choice between administrative and judicial enforcement needs further refinement.

First when using the market/regulation juxtaposition, employed by US scholars, to compare individual versus aggregate litigation, it should be clarified that the incentives of lawyers to litigate and to gather plaintiffs change dramatically in the context of aggregate litigation. Here, lawyers play a regulatory function even if their incentives are

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<sup>28</sup> This will be developed further below text and footnotes.

<sup>29</sup> See Issacharoff/Witt 2004, claiming that : “the American preference for adversarial legalism over public hierarchical bureaucracy often results in private systems of informally aggregated settlement that bear a closer resemblance to public compensation systems that Kagan allows.” In a different perspective see J. Coffee, 2000.

In an historical perspective Witt 2004; Burke 2002; Kagan 2001.

<sup>30</sup> See H.-W. Micklitz/P. Rott/U. Docekal/P. Kobla, *Unterlassungsklagen*, 2007.

<sup>31</sup> See Stuyck Report.

<sup>32</sup> Some has gone as far as building a link between the institutional choice – public enforcement vs. collective judicial enforcement and the way in which the economy is structured. The involvement of strong trade and – subsequently strong consumer organisations in law enforcement is mirrored in an economy where small and medium seized industries play an important even dominant role. See Bakardjieva 2003 who builds a link between the German law on unfair commercial practices and its enforcement through trade and later consumer organisations.

still profit-driven. This function differs significantly from deterrence objectives that individual litigation may pursue together with compensation of the injured plaintiff<sup>33</sup>.

Associations play a significant role only in the context of collective enforcement although they can have different preferences for models of group litigation depending on the main functions they like to interpret. As we shall see the European landscape presents a high level of differentiation in relation to the role of associations with respect to other public entities.

In the context of a comparative institutional analysis concerning US and Europe four major functions should be considered:

- a) The comparative ability to aggregate claims of plaintiffs lawyers and consumers' associations. The 'ability' is also driven by the incentives provided by the legal framework.
- b) The ability to distribute fairly, within the consumer group, pecuniary and non pecuniary resources, generated by litigation and/or negotiations with the injurers.
- c) The comparative incentives to promote the regulatory function of litigation. These incentives may affect the choice of remedies (injunction v. damages) but also the type of injunctions (i.e. purely prohibitory injunctions versus affirmative injunctions).
- d) The different methods of financing. The regulatory function presupposes availability of resources to manage the tasks attributed to an agency and/or organisation.

#### **4. Broadening the definition of enforcement: negotiation, settlement, adjudication and arbitration**

While the focus of the paper is on enforcement it should not be forgotten that litigation's threats are often used to negotiate rules. We thus assume a broad definition of enforcement, through litigation, through negotiations and settlements and last but not least through arbitration. Negotiation may end up in settling the case. The line between negotiation and settlement is blurred.

In this respect we should distinguish four different phenomena: (1) negotiations aimed at preventing litigation and (2) negotiations within litigation and (3) negotiations aimed at receiving judicial approval.<sup>34</sup> Under all three forms negotiations occur within a regulatory frame. It is the stick behind the door which allows for negotiations under whatever of three phenomena. Negotiation may end up in settling the case. In so far the line between negotiation and settlement is blurred. The last phenomenon concerns arbitration, where the parties delegate litigation to private dispute settlement bodies (4).

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<sup>33</sup> On the regulatory function of aggregate litigation see Issacharoff 1999a, Nagareda 1996, Rosenberg 2002.

<sup>34</sup> This is the Dutch model, see country report Netherlands, Micklitz/Stadler 2005, at p. 343.

#### **4.1. Preventing litigation through negotiation**

Often lawyers and associations are called to participate in different forms of negotiations concerning law making but also implementation of consumers' legislation. The outcome of both legislative and administrative process is partly related to their participation.

Regulation 2006/2004 requires Member States to identify a public agency in order to enhance co-operation in transborder consumer law enforcement. The primary objective of the Regulation is to seek conflict resolution outside litigation through information exchange and co-operation, that means via negotiation. Litigation in court should serve only as a last resort. In order to integrate the professional skills of consumer and trade organisations carrying out judicial enforcement, the Regulation allows the delegation of enforcement powers to trade and consumer organisations. This opportunity is particularly interesting for those countries in which consumer and trade organisations are the sole players in the enforcement of unfair commercial practices and unfair contract terms legislation. E.g. in Germany a co-regulatory scheme to implement Regulation 2006/2004 has recently been introduced<sup>35</sup>. The details of such delegation will be elaborated in a framework contract to be concluded between the public agency and the trade/consumer organisations. Similar developments are supposed to take place in Austria.

Outside the EC initiative on transborder law enforcement, Member States are free to shape their own model of linking together litigation and negotiation. In Italy e.g., banking and consumer associations have been given the power to negotiate a general agreement concerning termination of loan agreements under the threat of the public agency (Bank of Italy) regulation were negotiations to fail.<sup>36</sup> An agreement has been reached by the associations and it is binding on both consumers and banks<sup>37</sup>.

#### **4.2. Negotiation within litigation - settlement**

Enforcement often takes the form of negotiated agreements: thus litigation often shifts from an adversarial into a negotiating model or from a negotiating model into an adversarial model.

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<sup>35</sup> See EG-Verbraucherschutzdurchsetzungsgesetz 21.12.2006, Bundesgesetzblatt, II p. 3367, which is meant to implement Regulation No. 2006/2004 on Consumer Protection Co-operation, OJ L 364, 9.12.2004, 1.

<sup>36</sup> See D. L. 7/2007 Convertito in Legge n.40/2007 at art. 7.5 and 7.6 provides:

“5. L'Associazione bancaria italiana e le associazioni dei consumatori rappresentative a livello nazionale, ai sensi dell'articolo 137 del codice del consumo di cui al decreto legislativo 6 settembre 2005, n. 206, definiscono, entro tre mesi dalla data di entrata in vigore del presente decreto, le regole generali di riconduzione ad equità dei contratti di mutuo in essere mediante, in particolare, la determinazione della misura massima dell'importo della penale dovuta per il caso di estinzione anticipata o parziale del mutuo.

6. In caso di mancato raggiungimento dell'accordo di cui al comma 5, la misura della penale idonea alla riconduzione ad equità è stabilita *entro trenta giorni* dalla Banca d'Italia e costituisce norma imperativa ai sensi dell'articolo 1419, secondo comma, del codice civile ai fini della rinegoziazione dei contratti di mutuo in essere.”

<sup>37</sup> See Agreement between ABI and Consumers associations, may 2, 2007, available at <http://www.confconsumatori.com/downloads.asp?id=7>

Settlement is a device which allow to set an end to litigation at any stage. They may be found notwithstanding the type of remedy concerned. The role of settlements in the US shows the importance of negotiations in mass litigation. More than 90% of US class actions are being settled. This might indicate that settlement is the true purpose of filing a class action.<sup>38</sup> The high level of settlements has led the US legislator to take action. Over time, judges are given an ever more active role in reviewing and managing settlements.

Similar experiences, though at a much lower level, can be reported from EC Member States that have introduced collective compensation claims irrespective of the concrete shaping of the regulatory device (US type class action, European group action, or test case), provided the regulatory scheme allows for bundling the issue. The so far limited experience clearly indicates the strive for settlements at various stages within litigation. However, Member States differ considerably in the degree to which judges are involved in the settlement. Only Member States with a US type of group/class action submit settlements between the parties to judicial control. The situation is different in Member States which clearly separate the collective part of the mass litigation from individual conflict resolution. Here the mass litigation is limited to set the facts and determine the key legal questions. Individual litigation will then have to determine the amount of individual litigation. Such a mechanism leaves less room for collective dispute settlement. If no such bundling is legally possible, settlements between individual claimants and the company may also occur. They are, however, not necessarily meant to solve a mass conflict.

Outside compensation claims there are explicit examples in the field of injunctive relieves where the injunction is issued within a consent agreement that parties have reached. This is true for Scandinavian models, where the Consumer Ombudsman is given the power to issue consented injunction, and it is also common practice in other countries such as Austria and Germany, where trade and consumer organisations use cease-and-desist letters to get a cease-and-desist declaration (*Unterwerfungserklärung*) from companies using unfair contract terms or unfair commercial practices.<sup>39</sup>

#### **4.3. Negotiations aimed at judicial approval**

The most striking example of negotiated agreements occur in the Netherlands. Here the logic of filing an action in order to settle the case is turned upside down.

The Dutch law invites the mass conflict parties to engage in negotiations in order to reach a settlement which then needs to be approved by the court.<sup>40</sup> It bears a true class action element, in that the court may extend the settlement to individuals which have not participated in the negotiation, i.e. the settlement.

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<sup>38</sup> Säcker 2006.

<sup>39</sup> This is the case in unfair commercial practices and unfair contract terms. The declaration is legally qualified as a contract.

<sup>40</sup> For more details, see country report Netherlands, in Micklitz/Stadler 2005.



#### 4.4. Negotiation and arbitration

Arbitration serves as a means to replace litigation in court. It has to be distinguished from alternative dispute settlement mechanisms usually not meant to substitute litigation but to avoid litigation by searching an amiable solution.<sup>41</sup> From a consumer point of view ADR may be a useful tool for all sorts of minor conflicts where the costs of litigation do not outweigh the possible result. In the type of conflicts which are at stake in our research on administrative/judicial enforcement ADR mechanism are of minor importance.

True conflicts arise, however, if consumer contracts provide for arbitration clauses which affect the consumer's freedom to participate in mass litigation. Arbitration may only be binding on the parties, if it results from a contractual agreement, ideally if it has been individually negotiated.<sup>42</sup> Reality is different. Arbitration clauses may usually be found in standard contract terms. The point then is whether and to what extent arbitration clauses are legally recognised or legally rejected. Two different constellations will have to be kept separated:

1. the *ordre public* defence of the consumer, which arises in recognition proceedings where the consumer is not willing to accept the decision taken by the arbitrator,
2. the arbitration cause defence of the trader, which arises when the consumer brings a case to court and the enterprise refers to the agreement of getting possible conflicts solved via arbitration.

The degree to which arbitration clauses are used in consumer contracts seem to differ considerably between the US/Canada on the one hand, and Europe.<sup>43</sup> The US Supreme Court took a very liberal view towards arbitration clauses agreed 'in commerce' without drawing a distinction between consumers and enterprises<sup>44</sup>. Most recently the Supreme Ct of Canada released two decisions, both involving Quebec, upholding the validity of the clauses even though Quebec had adopted legislation, after the actions were started, invalidating such arbitration provisions<sup>45</sup>. Ontario adopted a similar invalidating law about two years ago. The Supreme Court relied on the *competenz-competenz* principle to prevent consumers from challenging the validity of the arbitration provisions in court. The judgments said these arguments must be presented to the arbitrator.

The liberal US/Canada view is not fully shared in Europe. The ECJ held in *Claro*<sup>46</sup> that the validity of arbitration clauses in consumer contracts has to be decided on the basis of the Directive 93/13/EEC, but that this decision has to be taken by the Member States courts. The degree to which Member States courts are willing to accept or to reject arbitration clauses differs widely. Spanish Law has established a 'Sistema Arbitral de

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<sup>41</sup> See Micklitz § 32 in Reich/Micklitz, 2003.

<sup>42</sup> Here used in the meaning given to it under the Directive 93/13/EEC on unfair terms in consumer contracts. Individually negotiated terms serve as counterpart to standard contract terms, that means those terms which are developed in advance and 'imposed' by the user on the contracting party, i.e. the consumer.

<sup>43</sup> See Reich, 2007.

<sup>44</sup> *Southland Corp. v. Keating* (1984) 465 US 1, 10 = 104 SCt 852, 858.

<sup>45</sup> Supreme Court of Canada, *Dell Computer Corp. v Union des Consommateurs*, 2007 SCC 34.

<sup>46</sup> Case 168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* (2006) ECR I-nyr.

Consumo' which imposes a priority of certain recognised consumer arbitration bodies.<sup>47</sup> German law links the validity of arbitration clauses to a document signed by the parties themselves.<sup>48</sup> The form requirements is regarded as a sufficient means which should warn the consumer against the risk of such clause.<sup>49</sup> According to French law, an arbitration clause in a consumer contract is invalid and cannot be enforced against the consumer.<sup>50</sup> Scandinavian law relies on particular complaint handling procedures which make arbitration superfluous. So the situation in the European Community differs widely and it gets even more complex if one takes cross border arbitration clauses into account, where the Brussels Convention, or the Brussels Regulation 44/2001 applies.

#### **4.5. Reconsidering the distinction between adversarial and bargaining models**

The differing models of negotiation suggests that the distinction between adversarial and bargaining models, often used to describe the differences between US and EU should be reconsidered. It also suggests that remedies in consumer litigation may have different functions, triggering a re-combination of judicial and administrative enforcement. If we consider the regulatory functions of non pecuniary remedies, particularly the risk management function of injunctions, the emergence of a bargaining model of enforcement in place of the adversarial one appears. A potential correlation between models of enforcement and type of remedies should thus be analysed to explore the differences between the EU and the US<sup>51</sup>.

As a preliminary conclusion it may be said that 'agency problems' arise regardless of whether they are plaintiffs, lawyers or associations acting on behalf of consumers. Difficulties increase when the group of consumers is large and interests are heterogeneous or conflicting. Agency problems are solved differently when plaintiffs' lawyers are the main actors or when consumer associations are key players. The particular type of procedural device (representative action, group action, class action<sup>52</sup>) may also play a role. In the former case market mechanisms are generally employed, in the latter, voice through governance is the main device.

### **5. The public-private divide**

The distinction between administrative control and collective private enforcement has been grounded on the assumption that public agencies or ministerial entities are easily distinguishable from collective private enforcement organisations. Legal systems differ quite significantly regarding the allocation of functions between public and private bodies. While in certain systems the role of public bodies is predominant (Scandinavian, Eastern European) in others, private organisations play a very important role, though in very different ways. In some systems private organisations operate as private bodies

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<sup>47</sup> Article 31 of the Consumer Protection Law of 1984, implemented by the Real Decreto 636/1993, modified by Decreto 60/2003.

<sup>48</sup> § 1031 (5) Zivilprozessordnung.

<sup>49</sup> BGH, Neue Juristische Wochenschrift 2005, 1125.

<sup>50</sup> J. Calais-Auloy/F. Steinmetz, *Droit de la Consommation*, 7<sup>th</sup> ed. Paris Dalloz, 2006, para. 497.

<sup>51</sup> See below text and footnote.

<sup>52</sup> See below par. 8. 1. 2.

without any formal delegation by the legislator, whilst in the majority of legal systems these private bodies are formally and informally in charge of public functions.

This is largely the result of the harmonisation policy under Directive 98/27/EC, which left it to the Member States to decide whether to put enforcement in the hands of private or public bodies<sup>53</sup>. A good example to illustrate the impact of EC law is the development in the UK of the relationship between OFT and consumer associations, which has been strengthened by Regulation 1999<sup>54</sup>. The recognition of standing for private organisations, however, has not increased private litigation at the expense of administrative control exercised by OFT, but has triggered trilateral negotiations among OFT, consumer associations and trade associations. Consumer organisations are silent players in that the public body now feels under pressure to take action.<sup>55</sup>

However, the European Commission has changed its policy with long term effects on the interplay between private and public bodies in consumer law enforcement. Regulation 2006/2004 obliges Member States to designate one public authority to manage trans-border law enforcement. The list of issues is the same as under Directive 98/27/EC, but the policy is different. Member States have no choice anymore to put enforcement in the hands of private or public bodies or both; they have to grant public bodies legal rights to take action<sup>56</sup>. Countries like Austria and Germany fought hard in the Council and Parliament to be given the opportunity to delegate trans-border enforcement to private bodies. Even such a softened version entails a double change in these countries. First, the prime responsibility for trans-border enforcement is now in the hands of public bodies and secondly, private bodies remain under public supervision even if they are given the right to take action. The details of the co-operation between the newly established public agency and the established consumer organisations have been laid down in a framework agreement specifying the rights and duties of both parties to the agreement as well as the rules on the reimbursement of costs. It remains to be seen to what extent the Regulation 2006/2004, which covers only transborder enforcement, might yield an impact on institutional patterns of the public/private body divide. It is the explicit policy of the European Commission to strengthen the role of public bodies, that is to have the primary responsibility of consumer law enforcement in the hands of public agencies. If the European Commission succeeds, new patterns of the relationship between private and public bodies will arise.

## **6. Two multilevel systems**

There is a move from the Member State level to the Community level, at both ends – administrative and judicial enforcement. Although the European Community has not managed to establish US type agencies in the fields at issue here, it has invented new modes of governance in which European forms are established, whereby Member States' enforcement agencies have a key role to play, though the European Commission operates as a catalyst or even as a silent regulator depending on which new form of

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<sup>53</sup> OJ L 166, 11.6.1998, 51.

<sup>54</sup> Unfair Contract Terms Regulations 1999 (UTCCR) SI 1999 No. 2083.

<sup>55</sup> Micklitz 2005

<sup>56</sup> This is not to say that private enforcement is abolished. Art. 4 of directive 98/27 is still effective.

governance (comitology, Lamfalussy) applies. Individual judicial enforcement has always played a strong role as the ECJ instrumentalised private individuals to foster the European integration process by granting individual rights and even particular remedies. This however, is not true with regard to collective private enforcement. Here the ECJ has played a more restrictive role.<sup>57</sup> It remains for the EC legislator to decide to what extent particular regulatory means in the form of directives or regulations should be taken to improve collective judicial enforcement, not only at the Member State but also at the EC level.

The multilevel dimension suggests the importance of pre-emption as a key institutional variable explored in depth in the US while receiving less attention in Europe<sup>58</sup>. Federal pre-emption causes the predominance of administrative control over judicial enforcement in the US. The principle of procedural autonomy – although it has been narrowed down by the ECJ in various ways<sup>59</sup> - makes pre-emption less relevant in Europe, though clearly European directives introducing administrative or judicial enforcement modify the internal balance of Member States. This effect will be enhanced if the European Commission succeeds in its intention to replace minimum with full harmonisation.<sup>60</sup> We shall see that directive 1998/27 on injunctions has brought about important institutional changes.

**7. The institutional variables concerning the choice between administrative and judicial control.**

In the following table we indicate the variables we would like to consider in order to describe the different combinations that we observe between collective judicial and administrative enforcement, and which will be analysed in the following paragraphs.

	Ex ante / ex post	Injunction / damages	Health / economic interests	General / sector specific	Public agencies / private organisations
Administrative enforcement					
Judicial enforcement					

<sup>57</sup> See for more details from the ECJ case law under the Treaty as well as from various policy fields of EC secondary law, Micklitz/Reich, 1996.

<sup>58</sup> On the question of pre-emption in areas partly overlapping with this project see Issacharoff/Sharkey 2006; Sharkey 2007. In Europe, in relation to products liability, the question of pre-emption has been analysed by Cafaggi 2008b

<sup>59</sup> See van Gerven 2000, at p. 501, Micklitz in Reich/Micklitz 1996, at § 29.

<sup>60</sup> The type of conflicts that emerge within the product liability directive might increase. Here the ECJ argued that the Directive strives for maximum harmonisation barring stricter national legislation, whereas Member States started from the premise of an implicit minimum harmonisation rule, see Case C-52/00, *Commission v. France*, [2002] ECR I-3856; ECJ, 25.4.2002, Case C-154/00, *Commission v. Greece*, [2002] ECR I-3887; ECJ, 25.4.2002, Case C-183/00, *González Sánchez/Medicina Asturiana*, [2002] ECR I-3905; ECJ, 10.1.2006, Case C-402/03, *Skov Aeg v. Bilka* [2006] ECR I-00199.

## **7. 1. The ex ante versus ex post**

A first dimension of the combination administrative/judicial enforcement is related to the ex ante/ex post divide.

The traditional juxtaposition between the two strategies relates to time. In the past, administrative control over product safety and quality has operated ex ante, i.e. prior to the release of products and services into market circulation, while judicial enforcement has been used as an ex post device, i.e. in order to repair the damage occurring after the product has been marketed and used by consumers. The allocation was theoretically based on information. If information about the risks were ex ante available, administrative control should have been preferred. If information about the risks could only become available after marketing the product, then judicial enforcement would be preferable<sup>61</sup>.

More recently we observe that administrative control operates also as an ex post device due to changes occurring in administrative regulation modes.<sup>62</sup> Administrative control implies both monitoring but also rule-making, given that new modes of regulation often link the two phases more strictly. New modes of regulation have introduced iterative standard setting processes, employing market based or responsive regulation.<sup>63</sup> Regulators and firms cooperate during the whole life cycle of the product or the service, to improve quality and safety. Many forms of delegation to private bodies take place. These delegations often imply the adoption of an ex post control strategy.<sup>64</sup> Standards are not defined only before marketing but often constitute the outcome of an iterative process, taking into account new scientific and technological developments as well as changes in preferences concerning risk perception and management.

Also in relation to monitoring of product-related risks we observe a significant move from ex ante approval techniques to ex post control. In Europe this is largely a consequence of the EC's policy to complete the Internal Market. Opening up markets for products that inherently bear risks to the health and safety of consumers such as drugs, pesticides, chemicals, cosmetics, foodstuff and technical consumer goods, or for services that produce new and yet unknown risks to consumers' economic interests, entails a risk management policy which guarantees that unsafe products are removed from the market and that unsafe or improper services are effectively managed ex post<sup>65</sup>. In practice, often monitoring is the result of a cooperative effort between different firms operating along the chain and the competent agencies as it is clearly the case in the framework of the product safety regulation in Europe. Private regulatory networks among firms in the same production chain have been created to monitor and detect new risks (e.g. General Product Safety Directive, 2001/95).<sup>66</sup>

On the side of judicial enforcement, similarly, the ex ante versus ex post divide does not hold. A crucial difference is represented by the type of administered remedy. Judicial enforcement in Europe employs more often than in the past remedies to prevent firms

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<sup>61</sup> Shavell, 1984

<sup>62</sup> Stewart 2002, 2006, Strauss 2006, Cafaggi, 2006 b

<sup>63</sup> Ayres and Braithwaite 1992; Black 1996, 2001; Scott/Trubeck 2002; Stewart, 2002, 2003; Hodges, 2005, Cafaggi, 2006b

<sup>64</sup> Cafaggi 2006b

<sup>65</sup> Hodges 2005.

<sup>66</sup> Cafaggi 2006a, 2008a

from introducing or selling unsafe products, unsafe or improper services or to remove them if they are already on the market.<sup>67</sup> European legislation has permitted the use of regulatory means (i.e. by withdrawal and recall) to end the circulation of unsafe products and unsafe or improper services<sup>68</sup>. As we shall see in the next section the possibility to use injunctive reliefs has expanded over time although the European legislator has not taken a clear stand on whether injunctive reliefs must be regarded as being part of administrative or private judicial enforcement or both. While the main reason is due to the principle of procedural autonomy that still gives the Member States the power to decide which institutional framework best suits the goals defined by EU legislation, the implication is that at the EU level the choice concerns the remedy, leaving open the question of which institution is selected to administer.<sup>69</sup>

When Courts are asked to issue an injunctive relief they are dealing with measures aimed at affecting the likelihood of future harms together with removal of harmful effects already occurred. Though the directive on injunction focuses on cessation and prohibition, some Member States have gone beyond this.<sup>70</sup> In other areas such as unfair

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<sup>67</sup> Again this can be partly regarded as a direct consequence of an ever growing Internal Market. The larger the market the less administrative ex-ante enforcement can guarantee effective protection of consumers. That is why private judicial enforcement gains pace in order to compensate for eventual deficiencies.

<sup>68</sup> See already Micklitz, *Post Market Control of Consumer Goods*, 1990 and Hodges, 2005.

<sup>69</sup> The principle of procedural autonomy has been narrowed by ECJ see above and Tridimas 2006, at p. 418 ff.

<sup>70</sup> See art. 2 .1 dir. 98/27 “ Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of article seeking

- (a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or **prohibition** of any infringement;
- (b) where appropriate measures such as the publication of the decision in full or in part, in such forms as deemed adequate and/or the publication of a **corrective statement with a view to eliminating the continuing effects of the infringement**”

See the Italian implementing Act, art. 140 Codice del consumo:

“1. I soggetti di cui all’art. 139 sono legittimati ad agire a tutela degli interessi collettivi dei consumatori o degli utenti richiedendo al Tribunale:

- a) di inibire gli atti e i comportamenti lesivi degli interessi dei consumatori e degli utenti
- b) di adottare le misure idonee a correggere o ad eliminare gli effetti dannosi delle violazioni accertate
- c) di ordinare la pubblicazione del provvedimento su uno o più quotidiani a diffusione nazionale oppure locale nei casi in cui la pubblicità del provvedimento può contribuire a correggere o eliminare gli effetti delle violazioni accertate.”

In France art 421-6 Code de la Consommation states that:

“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”.

In Uk the recent Enterprise Act (2002) its part 8 extends extends the former Regulation Stop Now Orders! (2001), which implemented the directive 98/27, to a wider range of consumer protection legislation, when breaches of that legislation harm the collective interests of consumers. In particular, two types of infringement are created by the Act: (i) Community infringements are acts or omissions contrary to any of the consumer protection directives, or parts of directives, listed in the Injunctions

contract terms and deceptive advertisements, injunctions may have both functions: to cease unlawful conducts and to take corrective actions.<sup>71</sup> Injunctions may require additional activities; for example affirmative injunctions concerning disclosure of information, product recalls, issuing new standard contract forms may imply some type of monitoring system that ensures compliance. When the enterprise has to provide information, an injunction imposing disclosure can be issued. Compliance with the injunction implies control over the means and the quality of the information provided, particularly if this information concerns the life cycle of a product. In this case the distinction between judicial and administrative enforcement tends to blur.

In relation to damages judicial enforcement remains predominantly an ex post device. However where latent harms are concerned it may happen that Courts – so far only US courts - are required to manage long term funds that have to provide compensation as damages materialize. These are the hypotheses where the occurrence is certain but the time is uncertain.

## **7. 2. Injunctive relief versus damages**

A second dimension of our institutional analysis is related to different remedies within judicial enforcement: injunctive relief versus damages. In both cases there is an alternative between the individual and collective dimension. Legal systems allow individual and collective injunctions and individual and collective damages.

Within the collective dimension different models of litigation are available. As we shall see the distinction between administrative and judicial enforcement cannot be drawn according to the type of remedies. We suggest that shifting from the content to the scope of remedies may improve the ability to redesign the boundaries between administrative and collective enforcement. We will first examine injunctions and then damages. However, some more generally remarks are needed to explain the background.

The benefits of aggregate litigation are generally associated with the principles of procedural economy, regulatory policy and fairness.<sup>72</sup>

Aggregate litigation increases consumer protection because it rebalances the costs of litigation, reduces under-deterrence, permits a more fair distribution of resources among injured plaintiffs and promotes regulatory goals while performing risk-management<sup>73</sup>.

In mass litigation the defendant defines a uniform strategy of litigation while plaintiffs' lawyers if scattered would have to incur the same costs to select the claims, to generate scientific evidence, etc. Aggregate litigation generates savings on the side of plaintiffs that may increase available resources to improve the quality of litigation. Different models of aggregate litigation may maximize this advantage in different forms and degrees.

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Directive and in Schedule 13 (as amended) to the Act. (ii) Domestic infringements are acts or omissions breaching other domestic law requirements set out in the *Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003* made under section 211 of the Act.

<sup>71</sup> See art. 2 lett. b) and c) 1998/27

<sup>72</sup> Issacharoff 1999a; Micklitz/Stadler 2006, Rosenberg 2002.

<sup>73</sup> Issacharoff, Nagareda

We should distinguish between voluntary and mandatory aggregate litigation and between opt-in and opt-out. Mandatory aggregate litigation has been proposed as an efficiency enhancing mechanism, however the monopolistic position that mandatory class action presupposes may also generate some efficiency loss.<sup>74</sup> Some level of competition within aggregate litigation may be useful, while the possibility for plaintiffs lawyers to cooperate should be left open. To what extent can the paradigm of aggregate litigation be applied to consumers' associations and to the litigation models employed especially in relation to pecuniary remedies?

Aggregate litigation also has costs that may vary if lawyers are direct agents of individually harmed consumers or consumers associations act as agents litigating through lawyers. Lawyers incentives may not be aligned with those of consumers thus both the selection of relevant claims, the decision to settle and the terms of settlements may not necessarily maximize consumers' welfare.<sup>75</sup> That is why it might be possible to argue that consumers are better off if consumer organisations and/or consumer agencies are defending their interests and effectively monitoring lawyers' behaviour if litigation arises.

When associations, instead of lawyers, are the primary actors, responsible for selecting the claims, and deciding on the basis of legal advice about the litigation strategy, the choice of remedies and their scope, given alignment problems, may take different forms, depending on several factors<sup>76</sup>.

- 1) First the level of accountability towards the injured. Associations have to be accountable towards their members but often not to third parties. In each litigation only a small fraction of members may be involved. Even very accountable associations may not be aligned with the group of injured consumers. The democratic structure of the association may not grant adequate voice to the group of consumers. Thus specific voice mechanisms should be granted for individual consumers on behalf of which the association litigates.
- 2) The alignment between agent (lawyers or associations) and principals (consumers) may be more problematic when litigation involves groups of consumers with conflicting interests.
- 3) Unlike lawyers, whose selection is driven by market competition, the selection of associations might be connected – exceptionally - to membership or – what is usually the case - to recruitment of interested plaintiffs. When associations have to be designated by a public authority as it is the case for injunctions in Europe a third type of selection mechanism is in place.
- 4) Professional skills might differ. Lawyers have to be specialists in the field at issue and in leading and managing mass procedures. Associations may organise mass procedures without having necessarily the required professional skills themselves. Though they need lawyers, these might create frictions between the mandated lawyer and the association.

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<sup>74</sup> See for the proposal of mandatory class action Rosenberg 2000, part. at p. 269, 282.

<sup>75</sup> Issacharoff \*\*\*; Nagareda 2003; Schaefer 2000; Shavell \*\*\*

<sup>76</sup> See for a complementary perspective Schaefer 2000, at p. 198 ff.



General law concerning associations is a weak device to deal with alignment.<sup>77</sup> EC law does not clearly define the necessary requirements although scholars argue that some minimum standards may be deduced from the Directives.<sup>78</sup> Currently the Member States are setting the criteria, which vary from country to country.<sup>79</sup> In theory they should all contribute to ensure that associations, deciding about whether and how to litigate, are acting in the best interests of the group of injured consumers.<sup>80</sup> How well that directive 98/27 has succeeded in aligning associations and consumers' interests is under scrutiny, but the first findings suggest that expectations have not been met. Agency problems remain and a better institutional design is needed<sup>81</sup>

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<sup>77</sup> The European Parliament has held a hearing in October 2006 concerning whether and to what extent European requirements are needed to effectively ensure collective enforcement. See ...

<sup>78</sup> Grabitz/Hilf/Wolf/Pfeiffer 1999, Art. 7 Richtlinie 93/13/EWG, Rdnr. 17 ff.; Wolf/Horn/Lindacher 1999, Art. 7 RiLi Rdnr. 9

<sup>79</sup> See for example in Italy Consiglio di Stato, sez. VI, dec. 15-2-2006, n. 611 “ L’iscrizione di un’associazione di consumatori nell’elenco di quelle rappresentative a livello nazionale è illegittima qualora a) lo statuto non sancisca un ordinamento a base democratica, prevedendo la concentrazione di poteri di gestione in un organo i cui componenti per la parte maggioritaria non vengono eletti dai soci ed un sistema elettorale privo di garanzie idonee a rendere sicuro il voto per corrispondenza, anche alla luce delle concrete modalità attuative; b) il proprio legale rappresentante sia presente nei consigli di amministrazione di società di capitali non costituite o partecipate in via maggioritaria dall’associazione medesima, che operino nel suo stesso settore”, Foro it. Parte III, c. 16 ff.

<sup>80</sup> See for example the Order of the Secretary of State and the Guidance for private bodies seeking a designation under sec. 231 of the Enterprise Act 2002 in the UK issued by the DTI. Analogous though stricter criteria are defined for the Supercomplainants, those bodies designated by the Secretary of State which have the right to make super complaints according to the Enterprise Act 2002.

Some of the criteria may illustrate the relationship between these requirements and the alignment problem:

- (1) the applicant is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity and has established procedures to ensure that any potential conflicts of interest are properly dealt with
- (2) ...
- (3) the applicant has demonstrated the ability to protect the collective interest of consumers by promoting high standards of integrity and fair dealing in the conduct of business in relation to such consumers
- (4) ...
- (5) ...
- (6) the applicant is ready and willing to co-operate with the OFT and other general enforcers, designated enforcers and Community enforcers and any other person responsible for the regulation of matters in respect of which acts or omission may constitute domestic or community infringements including by
  - (a) sharing information with such other enforcers and persons in so far as legally permitted; and
  - (b) by participating in arrangements to coordinate action under Part 8 with other enforcers and persons acting or proposing to act in respect of the same person.

See the Report on *Designation as an Enforcer for Part 8 of the Enterprise Act 2002: Guidance for private bodies seeking designation under section 213*, available at <http://www.dti.gov.uk/files/file11976.pdf>; and the related Report on *Super-complaints: Guidance bodies seeking designation as super-complainants*, available at <http://www.dti.gov.uk/files/file32780.pdf>.

<sup>81</sup> See Stuyck report and in particular Micklitz/Rott/Docekal/Kolba, *Unterlassungsklagen* 2007.

## *Section I - Injunctions*

### *7. 2. 1. Injunctive relieves in the European scenario.*

Injunctive relieves at EU level are regulated through different directives. One horizontal directive concerns injunctions to protect collective interests (Directive 98/27/EC), while other directives allow injunctions in specific areas such as unfair contract terms (art. 7 dir. 1993/93/EC), misleading advertisements (84/450/EEC), unfair commercial practices (2005/29/EC), and finally product safety, where products may be withdrawn from the market or recalled from consumers (Dir. 2001/95/EC art. 5). What is the relationship between the horizontal directive and the sector specific directives? The interesting question is related to the effect that directive 98/27/EC on injunctions has brought about in the allocation between judicial and administrative enforcement in other consumer related fields.

The relationship between the two sets of directives, 98/27 on the one hand and the sector/subject related directives on the other could be understood as follows: Directive 98/27 deals with procedural issues only, that means its major purpose is the mutual recognition of standing, i.e. of the qualified entities which could be both administrative authorities and consumer organisations. The Annex to Directive 98/27/EC then enlists the Directives where these rules apply, e.g. unfair terms and misleading advertising. However, Directive 98/27/EC applies equally to purely national litigation as well. As the Directive is not meant to introduce new remedies, its effects are bound to the procedural side of injunctive relief. For this reason the subject related Directives might be understood as complementing Directive 98/27/EC. The European Commission will publish a Green Paper on Directive 98/27/EC which might in theory clarify its relationship with the sector related Directives<sup>82</sup>. For the time being the relationship between the general provision concerning injunctions in art. 2.1 dir. 98/27 and the sector specific injunctions, concerning unfair contract terms (art. 7) and unfair trade practices (art...) has brought about different solutions in some Member State.<sup>83</sup>

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<sup>82</sup> See Green Paper on the revision of the consumer acquis, COM (2006) 744 final.

<sup>83</sup> See also ECJ, 24.01.2002, Case C-372/99, Commission v. Italy, [2002] ECR Page I-00819, paras 25-27, where the Court raise its concerns on Italina transposition since “the relationship between Article 1469e of the Civil Code and Article 3 of Law No 281/98 is not free of ambiguity. As he noted, it appears that certain Italian courts consider that in relation to unfair terms, Article 1469e, as a special law, takes precedence over Article 3 of Law No 281/98. Such an interpretation involves consequences as regards the group of bodies empowered to act, as the two provisions do not have the same field of application in that respect” (par. 25).

In Italy for example despite the silence of the implementing act the Corte di Cassazione has recently held that consumer associations can bring a claim for injunctions before the judge even if the implementing Act concerning defective advertising had chosen administrative enforcement. The foundation of this interpretation is the legislative change occurred after the implementation of dir. 1998/27, introducing collective judicial enforcement as a complement to administrative enforcement, previously indicated as the main enforcement strategy. See Corte di Cassazione SSUU Ordinanza 28 marzo 2006, n. 7036 in Foro it. 2006, I, 1713 because the Deceptive advertising Act implementing directive was modified by making reference to the implementing Act of directive 98/27 l. 281/1998 not art. 140 of Codice di Consumo. “ La questione posta con il regolamento va risolta nel senso della sussistenza del giudice ordinario a conoscere della domanda con la quale l’associazione dei consumatori attrice, inserita nell’elenco di cui all’art. 5 l. n. 281 del 1998, aveva domandato l’inibizione degli atti di pubblicità ingannevole e la condanna della società che li aveva posti in essere al risarcimento del danno. L’art.7 d.lgs. n. 74 del 1992, come sostituito dall’art. 5 del d.lgs. n. 67 del 2000

Unification, however, has been reached with regard to the available remedy. The Directive 98/27/EC as well as the sector related Directives, 97/7/EC (distant selling), 97/55/EC (comparative advertising), 2002/65/EC (distant selling for financial services) and 2005/29/EC (unfair commercial practices), and Directive 93/13/EEC on unfair contract terms refer to the action for injunction. The latter may be regarded as the guaranteed EC minimum level of protection, i.e. what the Member States are required to do under EC law.

Directive 1998/27 is only concerned with collective enforcement. Member States remain, however, free to decide whether they grant standing to individual consumers to claim for an injunction, which however, is only exceptionally the case.<sup>84</sup> They are certainly able to claim for injunction under the unfair contract terms directive or in other sector specific directives, for example in the field of deceptive advertising.<sup>85</sup> Some countries have implemented Directive 98/27 expanding its scope and granting standing for injunctions also to individual consumers.<sup>86</sup> Member States differ as to the possibility for individual consumers to join the suit for seeking individual damages.

### **7. 2. 2. Administrative and/or judicial enforcement**

This more recent EU legislation takes an innovative approach because it is remedial in nature. It introduces a general remedy and leaves somewhat open the choice between administrative and judicial enforcement. Choice is, however, limited with regard to the role and function of consumer organisations which should be given standing at both ends.<sup>87</sup> The directive on injunction leaves Member States in principle free to decide whether the injunction should be brought before a Court or an administrative entity (art. 2). It is important to point out that the directive referred to injunctions that could be sought before a court or before an administrative authority or both, implicitly acknowledging that MS have different approaches.<sup>88</sup>

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sotto la rubrica tutela amministrativa e giurisdizionale prevede al 14° comma che per la tutela degli interessi collettivi dei consumatori e degli utenti derivanti dalle disposizioni del presente decreto si applica l'art. 3 l. 30 luglio 1998 n. 281. Tale disposizione stabilisce al 1° comma che le associazioni dei consumatori e degli utenti sono legittimate ad agire a tutela degli interessi collettivi richiedendo al giudice competente tutto quanto nella specie domandato all'associazione attrice”.

<sup>84</sup> See Stuyck report, at p. 332.

<sup>85</sup> For the Italian experience see Corte di Cassazione S.S.U.U. ordinanza 28 marzo 2006, n. 7036 in Foro it. 2006, I, 1715 “non appare irragionevole – come ritenuto dal tribunale- la diversità di trattamento tra singolo consumatore, che può rivolgersi solo all’Autorità Garante della concorrenza e del mercato per richiedere la inibizione degli atti di pubblicità ingannevole (ex art. 7 d.leg. 74/92 come sostituito dall’art. 5 d.leg. 67/00) e le associazioni di consumatori e degli utenti iscritte nell’elenco di cui s’è detto, che per la tutela inibitoria degli interessi collettivi possono rivolgersi sia alla predetta autorità (ai sensi dell’art. 7 legge cit.) che al giudice ordinario (ex art. 3 l. 281/98)”.

<sup>86</sup> Individual consumers are entitled to bring actions for injunctions in the following jurisdictions: Belgium, the Czech Republic, Denmark, Slovakia and Slovenia. However, this is not a general trend among Member States. See the respective country reports in the Stuyck study.

<sup>87</sup> See under 7.2.1.

<sup>88</sup> See Recitals 8 and 9 of Dir. 98/27/EC

(8) “... whereas, in accordance with that Article the specific features of national legal systems must be taken into account to every extent possible by leaving Member States free to choose between different options having equivalent effect; whereas the courts or administrative authorities competent to rule on the proceedings referred to in Article 2 of this Directive should have the right to examine the effects of previous decisions

Two alternatives were available at Member State level:

- a) To clarify in the national implementation act whether a uniform strategy should be adopted i.e injunctions should only be administered by the judiciary or distinguish between those judicially provided and those to be issued by administrative entities.
- b) To leave the sector specific choices as they had been made before Dir. 98/27 had been enacted; i.e injunctions in the field of unfair contract terms should be brought before the judiciary while those against deceptive advertisements should be brought before administrative agencies<sup>89</sup>.

However, it has been argued that the Member States are even obliged to grant consumer organisations standing to file an action for injunction.<sup>90</sup> The European Court of Justice has so far had no opportunity to decide the matter since the reference from the UK High Court of Justice, as the then Labour government amended the respective law on unfair terms accordingly<sup>91</sup>. Thus the question remains open as to whether the Member States are free to choose between administrative and judicial private enforcement or whether they are obliged under EC law to pave the way to consumer organisations to file an action for injunction in the courts or before the administrations.

The implementation of the Directive 98/27/EC demonstrates that there is no uniformity in the European Community. The picture has the potential to become even less clear if one were to take all the sector related Directives into consideration.<sup>92</sup> There are Member States that have laid enforcement in the hands of a competent 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. The key actors are then consumer organisations and sometimes also business organisations which may file an action for injunction in the courts.

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Whereas an option should consist in requiring one or more independent public bodies, specifically responsible for the protection of the collective interests of consumers, to exercise the rights of action set out in this Directive; whereas another option should provide for the exercise of those rights by organisations whose purpose is to protect the collective interests of consumers, in accordance with criteria laid down in national law;”.

<sup>89</sup> To illustrate the alternative suppose that in the field of unfair contract terms a Member State had chosen to use administrative control. If the Member State implementing Directive 1998/27 had chosen to allow a qualified entity to claim for injunction before a Court it would allow competing claims thereby relaxing the institutional choice made in previous legislation. If the Member State choose not to say anything it should be interpreted as leaving the pre-existing institutional allocation. So that associations could only bring a claim for injunction before the administrative entity. Similarly in the field of deceptive advertising. If a Member State had chosen to give an agency the power to control deceptive advertisements the Member States could choose either to complement this with a claim before the Court by indicating this strategy in the implementing Act or to conform with the institutional choice and only extend standing to qualified entities to claim for injunctions before the Agency

<sup>90</sup> See Micklitz in Reich/Micklitz 2003, at § 30.15, with further references from legal doctrine

<sup>91</sup> The question was: „Does Art. 7 Abs. 2 of the Directive 13/93 impose obligations on Member States to ensure that national law, (1) states criteria to identify private persons or organisations having a legitimate interest in protecting consumers, and (2) allows such private persons or organisations to take action before the courts or before competent administrative bodies for a decision as whether contractual terms drawn up for use are unfair?“, reprinted in Dickie 1996.

<sup>92</sup> This, however, is nothing more than a presumption. Neither the Stuyck study nor the Consumer Law Compendium [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf) allows to get a full picture of the degree to which Member States have made use of the institutional choice.

<b>Country</b>	<b>Administrative enforcement through Government/IRA/Agency</b>	<b>Judicial enforcement through Consumer organisations and business organisation</b>
Austria	No	Consumer organisations and (particular) business organisations
Belgium	Yes	Consumer organisations and business organisations
Cyprus	Yes	Consumer organisations
Czech Republic	Yes	Consumer organisations
Denmark	Yes	Consumer organisations and business organisations
Germany	No	Yes and business organisations
Estonia	Yes	Consumer organisations
Finland	Yes	Consumer organisations, but only if Consumer Ombud does not take action
France	Yes, but no right to take action	Consumer organisations
Greece	No	Yes and chambers of commerce
Great Britain	Yes	Consumer organisations(Which?)
Ireland	Yes	
Italy	No, but Autorità Garante	Consumer organisations and partly business organisations
Hungary	Yes	Consumer organisations
Latvia	Only	
Lithuania	Only	
Luxembourg	No	Consumer organisations and business organisations
Malta	Yes	Consumer organisations, but no right to take action
Netherlands	Yes	Consumer organisations, in case of unfair terms business organisations too
Poland	Yes	Consumer organisations, but have to approach public authorities
Portugal	Yes	Consumer organisations and partly business organisations
Sweden	Yes	Consumer organisations and business organisations, but only if CO does not take action
Slovakia	Yes	Consumer organisations
Slovenia	Yes	Consumer organisations, and business organisations
Spain	Yes	Consumer organisations and partly business organisations

## *Section II - Damages*

Damages are remedies generally administered by Courts, although there has been an increase in the use of funds administered to compensate victims of product related mass disasters.<sup>93</sup> The necessity to compensate consumers for harms imposes the complementary use of judicial enforcement at individual level. At collective level damages may play a different role. They can compensate for harms associated with collective interests (health product related harms that affect the community of consumers) but they generally serve different purposes: deterrence and regulatory functions.

### *7. 2. 3. The distinction between individual and collective damages.*

#### *7.2.3.1. The individual versus collective harms and the role of damages*

Has there been a distinction between the policy strategy concerning individual and collective harms? More generally has there been a distinction between individual and collective harm? Can we identify a precise policy strategy concerning mass consumer risks/harms at European level? How do these strategies differ at national level? What is the relations with the choice of enforcement mechanisms?

The question concerning collective risks and harms and the legal and economic instruments to be used has not been addressed comprehensively. A recent trend of law reforms introducing group actions has taken place at national level, independently from European intervention<sup>94</sup>. The combination of recent scandals and the awareness of limited access to justice have brought about an effort to improve the level of consumer protection. The majority of these law reforms do address specific types of harms. Only in few cases (particularly in the area of investor protection in response to the recent financial scandals) the law reform has been tailored to specifically regulated areas.

On the side of damages the differences among MS are more significant. They become even deeper if one takes a closer look at the meaning of the term damage.<sup>95</sup> A first distinction could be the difference between individual and collective damage.

**Individual damages.** In European terminology, individual damage means the injury or economic loss from which a person suffers. Even if a considerable number of people have suffered as a result of the same accident or incident, the damage remains individual.

**Collective damages.** The situation is complex with regard to so-called collective damages. French law, which stayed away from introducing a group action despite extensive preparation twenty years ago, introduced the notion of ‘collective interests’.<sup>96</sup>

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<sup>93</sup> E.g. aids affected contaminated blood or thalidomide. See in the U.S. R. Rabin, 2003,2006.

<sup>94</sup> See for a definition of group actions par. 8.2.1.

<sup>95</sup> See Reimann/Zimmermann 2006.

<sup>96</sup> see Calais-Auloy/Steinmetz 2003, at p. 603, “Bien que l’article L. 421-7 ne le prevoie pas exprssemént, l’association peut certainement réclamer des dommages et interéets, en réparation du préjudice causé à l’interet collectif des consommateurs ; ces dommages et intersts sont distincts de ceux réclamés par le ou les consommateurs ayant formè la demande initiale”.

See also the proposals for the introduction of group action in France, the first directed only to collective actions made by consumers, (n. 3055, 26 avril 2006, Proposition de loi visant à instaurer les recours

No one knew what it would mean and it remained for the courts to clarify that the action brought by consumer organisations to recover the damage to the collective interests has to be understood to cover compensation for the lawyer's fees who defend consumer organisations in an action for injunction<sup>97</sup>. The Greek experience tells another story of a courageous Supreme Court which granted consumer organisations compensation in a case concerning unfair contract terms<sup>98</sup>. Germany has introduced legislation with a skimming-off procedure for gains resulting from unfair commercial practices.<sup>99</sup> The lower courts tend towards a restrictive interpretation, turning the skimming off procedure into a toothless tiger, the Court of Appeal of Stuttgart opts for a larger interpretation. It remains to be seen which way the Supreme Court will choose.<sup>100</sup>

### 7.2.3.2 Judicial collective enforcement

Collective judicial enforcement refers to collective procedures for redress of multiple individual damages and collective damages, suffered by an entity. We will first focus on different techniques to group individual damages using the CLEF (Consumer Law Enforcement Forum) glossary.<sup>101</sup>

*Representative action:* A broad variety of consumers may be affected by the same type of accident, injury or violation of the law. These consumers might – instead of bringing the case to court themselves – transfer their rights to a representative who then acts instead of the consumers. In some systems, the representative must be a member of the group, but in others it can be a consumer organisation or a state agency. The representative can either bring the action on behalf of consumers who will receive the damages themselves (traditional representative action) or she/it receives the damages (collective representative action) and then distributes among consumers.

*Group action (opt-in or opt-out):* Group action on the European level refers to a system where one claimant, either an individual consumer or a consumer organisation, can seek redress and ask for a judgement on behalf of a group with equal or similar problems,

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collectifs des consommateurs, présenté par l : Chatel), whereas the more recent ones provided a general application of class actions or action de groupe (n. 3729, 15 février 2007, proposition de loi, relative à l'introduction de l'action de groupe en France, présentée par A. Montebourg; and n. 3775, 13 mars 2007, proposition de loi tendant à créer une action de groupe, présentée par J. Desallangre). And also the *Rapport sur l'action de groupe, Groupe de Travail présidé par Guillaume Cerutti*, presented on the 16 décembre 2005, available at [http://www.finances.gouv.fr/directions\\_services/sircom/protection\\_conso/protection\\_eco/rapport.pdf](http://www.finances.gouv.fr/directions_services/sircom/protection_conso/protection_eco/rapport.pdf).

<sup>97</sup> See for the French case law also Cass. Civ. 1.02.2005, Bulletin 2005 I N° 59 p. 50; and similarly in Cass. Civ., 05.10.1999, Bulletin 1999, I, n° 260, p. 169, where the court states that “les associations agréées de défense des consommateurs sont en droit, dans l'exercice de leur action préventive en suppression de clauses abusives devant les juridictions civiles, de demander la réparation notamment par l'octroi de dommages-intérêts, de tout préjudice direct ou indirect porté à l'intérêt collectif des consommateurs”.

<sup>98</sup> See in Micklitz/Stadler, p. 169 et seq.

<sup>99</sup> § 10 Gesetz gegen den unlauteren Wettbewerb (UWG).

<sup>100</sup> OLG Stuttgart, 2.11.2006 2 U 58/06.

<sup>101</sup> See also Micklitz/Stadler 2005. Analogous classification is used in the Stuyck report : “ ... different forms of collective actions exist in Europe that serve the same purpose of grouping individual claims for damages, such as group actions where individual actions are literally grouped into one procedure, representative actions, where one individual or an organization represents a multitude of individuals and, finally, test cases, where a case brought by one or more persons leads to a judgement that forms the basis of other cases brought by persons with the same interest against the same defendant” p. 261



giving the members of the group the right to enforce their rights in accordance with the judgement. Some countries have introduced group action in their legislation, also referred to as multiparty action or collective action. They can vary as to the degree of formality involved. In opt-in group actions, consumers have to declare before the court that they intend to participate in the organised procedure.<sup>102</sup> In opt-out group actions, all consumers affected automatically are regarded as belonging to the group, unless they declare that they do not wish to participate.

*Model or test case.* In some legal systems it is also possible to select a test or model case and then the final outcome of the judgement may be extended to other injured parties who are in the same factual and legal situations. At first sight, test cases do not even seem to influence the idea of group actions. Generally, such an action is filed by a consumer, by an affected individual or, in exceptional cases, by an association or by a body which merely bundles interests. The main characteristic of such a procedure is that those cases serve as an example for a multitude of equal or similar cases. The major motivation of a real test case thus lies in a non-individual interest. Austrian consumer organisations have quite successfully made use of this legal device, Germany has followed, but there is not yet much experience available upon which to draw.<sup>103</sup>

*Class action (US-style):* A US-style class action is in principle a group action but with very specific features that do not exist in European group action models. The lawyer (i.e. a law firm) plays a key role, in preparing, organizing and financing the class action. Her investments will be compensated for by contingency fees. Once the class is defined, consumers can only pursue their rights individually, if they opt-out. A jury of laymen plays a key role in the decision-making process<sup>104</sup>.

Beyond action for injunction the Member States' approach differ considerably.<sup>105</sup> Even the seemingly clear distinction between test cases, representative action, group actions and collective damages overstates the argument.

The first difficulty results from terminology. For example: in our understanding a representative action would require an assignment of rights from the individual consumer to a body that has been given standing, either a public body or a consumer organisation. However, one might also argue that representative actions do not require such an assignment of rights. The point then is that nearly each and every group action could be regarded as a representative action, be it a public agency or a consumer organisation action on behalf of consumers, or even a lead plaintiff who is bringing a group action to court.

A second difficulty results from hybrids as that represented by Dutch law, which turns the logic of collective judicial enforcement upside down. The parties to a conflict have

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<sup>102</sup> See for example the Swedish model.

<sup>103</sup> See Micklitz/Stadler, 2005, at p. 1478 and the Stuyck report, at p. 262 “ The idea of test cases as they presently exist in Austria and Germany) is based on the finding that in a mass claim situation, it would in principle be possible to conduct only one model or test proceeding, take the case through all levels of the judicial system, and, as regards all other cases wait for the outcome and follow the example in the form of a settlement with the defendant. As there is no binding precedence value in civil law jurisdictions, it is important that, before the test case is dealt with an individual or an organization reaches an agreement with the defendant whereby the latter recognizes that the judgement is a test for claims brought by other plaintiffs.”

<sup>104</sup> See Stuyck report p. 268.

<sup>105</sup> See Stuyck report p. 270 ff.



to settle the dispute and then seek confirmation in the court. Once the settlement is reached parties can go to the Court and ask for a judgement that would make it binding. After the judgement individual victims can opt out within a certain period of time.<sup>106</sup> Is it a group action because the mass conflict is solved even on behalf of those who have not opted in or it is a representative action because the interests of the individual consumers have to be pooled outside the court by a representative body?<sup>107</sup>

In terms of effectiveness it appears desirable to make a distinction in particular between representative actions and group actions. Representative actions – as for example established in Austria and Germany – are bundling a limited number of claims. Explicit consent of the individual consumer is required to file an action on her behalf. By contrast group actions, according to a widespread understanding, refer to a form of action where one claimant (individual, organisation or public agency) files an action on behalf of a large number of class or group members without their prior consent. One may therefore also regard the Austrian/German test cases as a particular form of a group action.

At first hand sight group actions exist in Lithuania, the Netherlands, Portugal, Spain, Sweden and the UK. However, group action is a broad and simplifying category in regards to the sophisticated differences. Spain just as Portugal disposes of rather broad legislation which allows for an interpretation that covers group actions.<sup>108</sup> In Bulgaria and Lithuania, in theory a group action may be filed, but the law is missing the necessary procedural rules. Sweden has discussed for years the feasibility of a US class action type of regulation. In 2002 the Group action has been successfully introduced.<sup>109</sup> UK law allows under quite restrictive conditions for a group action.<sup>110</sup>

Whatever the classification might be, the practical effects have been limited, perhaps with the exception of Austria, where both form, test cases and representative actions have been heavily used once the Austrian Oberste Gerichtshof had paved the way for consumer organisations to collect individual claims and to act on behalf of consumers.<sup>111</sup> In France, l'action en représentation conjointe never met the expectations.<sup>112</sup> Three cases in 20 years cannot be regarded as a success story.<sup>113</sup> In

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<sup>106</sup> Law governing the Settlement of collective damage June 23 2005. See the national report on the Netherlands in the Stuyck study and Micklitz/Stadler, p. 343 et seq.

<sup>107</sup> See Stuyck Report at p. 371.

<sup>108</sup> With regard to Spain, see Micklitz/Stadler, 2005, p. 655.

<sup>109</sup> Group Proceedings Act 2002, see Sweden national report in the Stuyck report, Micklitz/Stadler, 2005, p. 497.

<sup>110</sup> See British national report in Stuyck report, and in case law see *Office Of Fair Trading v. MB Designs (Scotland) Ltd & Ors* [2005] ScotCS CSOH\_85 (29 June 2005), for more details Micklitz/Stadler, 2005, p. 795.

<sup>111</sup> See Stadler/Mom, 2006, at p. 200.

<sup>112</sup> L'action à représentation conjointe art. 422-1 to 422-3 Code de la consommation, in detail Micklitz/Stadler, 2005, p. 57 et seq.

<sup>113</sup> See M. Tenreiro, *La compétence internationale des tribunaux en matière de consommation*, Mélanges Calais-Auloy, Paris, Dalloz, 2004, p.1093; J. Calais-Auloy, *Les actions en justice des associations de consommateurs*, Recueil Dalloz 1988, chron. P.93, J. Franck, *Pour une véritable réparation du préjudice causé à l'intérêt collectif des consommateurs*, Mélanges Calais-Auloy, Dalloz Paris 2004, p.409; D. Manguy, *A propos de l'introduction de la class action en droit français*, Recueil Dalloz 2005, p.1282.; D. Manguy et al., *L'introduction en droit français des class actions*, Les Petites Affiches, 22 décembre 2005 n° 254, P. 6 ; L. Gaudin, *L'introduction d'une action de groupe en droit français: Présentation du projet de loi en faveur des consommateurs*, Les Petites Affiches, 17 janvier

Germany it remained for the Supreme Court to reject a tendency in the court of appeal to bind representative actions to requirements that are difficult to meet.<sup>114</sup> Unlike Austria, Germany is just in the process of shaping the criteria for representative actions.<sup>115</sup> In Sweden four cases have become known since the adoption of the Act in 2002.<sup>116</sup> In Portugal it is just one case.<sup>117</sup> The situation is very much the same in Spain and the UK. That is why there is only very limited experience available which allows to investigate the feasibility of the different approaches.

Country	Test case procedures	Representative action	Group action / class action	Collective damage
Austria	yes	Yes, representative action	Group action under discussion	
Belgium		Representative action under discussion	Group action under discussion	
Bulgaria			yes	
Cyprus				
Czech Republic				
Denmark		Consumer Ombudsman may act on behalf of consumers	Group action under discussion	
Germany	yes	Yes	With regard to capital investment	Skimming-off procedure with regard to unfair commercial practices
Estonia				
Finland		Consumer Ombudsman may act on behalf of consumers	Group action under discussion	
France		yes, action en représentation conjointe	Group action under discussion	intérêt collectif des consommateurs
Greece				compensation of immaterial damage of consumer organisations

2007 n° 13, P. 3 ; S. Cabrillac, L'introduction d'une action de groupe en droit français : Présentation du projet de loi en faveur des consommateurs, Les Petites Affiches, 17 janvier 2007 n° 13, P. 13 ; O. Dufour, Le débat sur les class actions ne fait que commencer !, Les Petites Affiches, 22 décembre 2005 n° 254, P. 4 ; A. Outin-Adam and J. Simon, Faut-il ou non une class action à la française ?, Les Petites Affiches, 13 septembre 2005 n° 182, P. 3.

<sup>114</sup> BGH, 14.11.2006 AZ XI ZR 294/05, WM 2007, nyr.

<sup>115</sup> There is a reform project under way <http://www.bmj.bund.de/files//1306/RegE%20Rechtsdienstleistungsgesetz.pdf>

<sup>116</sup> See M. Abyhammar, Experiences gained with collective enforcement and collective redress in Sweden, in : Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (Hrsg.), Kollektive Rechtsdurchsetzung – Chancen und Risiken, Bamberg, 2006, p. 125 et seq., available at [http://www.bmelv.de/nn\\_1097004/SharedDocs/downloads/02-Verbraucherschutz/Markt/Verbraucherrechtstage/Tagungsband,templateId=raw.property=publication.File.pdf/Tagungsband.pdf](http://www.bmelv.de/nn_1097004/SharedDocs/downloads/02-Verbraucherschutz/Markt/Verbraucherrechtstage/Tagungsband,templateId=raw.property=publication.File.pdf/Tagungsband.pdf).

<sup>117</sup> CLEF report 17. May 2007.

Country	Test case procedures	Representative action	Group action / class action	Collective damage
Austria	yes	Yes, representative action	Group action under discussion	
Great Britain			Group action under restrictive conditions possible	
Hungary				
Ireland				
Italy			Group action under discussion	
Latvia				
Lithuania			Yes, in theory	
Luxembourg				
Malta				
Netherlands			Particular type of group/class action	
Poland				
Portugal			yes	
Sweden		Consumer Ombudsman may act on behalf of consumers	Yes, opt-in	
Slovakia				
Slovenia				
Spain			yes	

The survey indicates that Member States are now more than ever prepared to give judicial collective enforcement a stand. However, the large number of empty boxes in the table indicates that there is a clear cut line between new Member States, where no such forms exist and old Member States where at least some success stories might be told, though a substantial amount of Member States are discussing concrete legislative steps. In fact the more recent initiatives have shocked the European Commission into action. Whilst it seemed as if the European Commission was prepared to leave the floor to the Member States, the European Commission now intends to investigate whether European legislative measures are needed to deal with the new phenomenon.<sup>118</sup>

The differences between old and new Member States also reveal the varied institutional framework. Often new Member States have chosen the administrative enforcement, but for a few exceptions. It is thus possible that within Europe a divergence between administrative and judicial enforcement might develop. One may wonder to what extent the Regulation 2006/2004 which requires administrative enforcement in transborder litigation will affect the regulatory choice of Member States with regard to national litigation. We could argue that the strong impact of the Regulation 2006/2004 to establish regulatory agencies for transborder litigation will strengthen administrative enforcement to the detriment of judicial enforcement.

In addition to the differences between administrative and judicial enforcement, it is important to point out the distinction among the different models: especially between

<sup>118</sup> EU Consumer Policy strategy 2007-2013, COM(2007) 99 final, at p. 11.

those in which the qualified entity acts to pursue the collective interest and those where it acts as representative of consumer interests. In the latter, representation involves the ability to fair representation and to solve internal conflicts among different and not always converging classes of consumers.

A meaningful comparison between consumer associations and plaintiffs lawyers can only be made in relation to the agency function. Clearly no equivalence can be established when the association acts to protect its own collective interest and not as a representative on behalf of individual consumers.

At first sight it seems relatively easy to link the European, Canadian and the US experiences together. There is an overall emphasis on seeking appropriate means to group together individual damages. However, the differences between the US and Canadian class action and the European group action are much deeper in legal culture and tradition regarding the way in which the action is shaped and in the role that judges, associations and lawyers are playing.<sup>119</sup> The same is more or less true with regard to ill-gotten gains and antitrust injuries.<sup>120</sup> Europe is exploring new collective enforcement devices, following different regulatory patterns from the US. A clear tendency is at the moment hard to recognise. We try to summarise the differences in the following table.

		<b>Individual damage</b>	<b>Antitrust injuries</b>	<b>Ill-gotten gains / skimming-off</b>
	US	Class action, opt-in	Developed system	yes
	Canada			
	Europe	Initiatives under way	Proposal under way	The envisaged proposal on antitrust injuries might equally cover ill-gotten gains
	Member States	If any, opt-in	underdeveloped	Some Member States

In Europe, the term class action is associated with typical features of the US system: contingency fees, jury trial and large amounts of compensation. In short it is a term that is difficult to use even in legal doctrine. The last minute shift in Sweden from an opt-out to an opt-in solution is largely inspired by the value loaded political decision to avoid ‘American conditions’.<sup>121</sup> That is why there is a certain tendency even in legal doctrine to replace the term class action by group action in order to show that a European group action differs considerably from an American class action. Whether this is really true, remains to be discussed. At least in the field of financial services, European solutions

<sup>119</sup> See above on the role of institutional players and the differences in the private spheres text and footnotes.

<sup>120</sup> See Bulst, 2006.

<sup>121</sup> See the national swedish report in the Stuyck study and Micklitz/Stadler, 2005, p. 497.

come near to the US class action.<sup>122</sup> Doubts concerning American type class action determine the way in which Member States give shape to ‘group actions’.<sup>123</sup>

Europeans put the emphasis on already existing regulatory schemes, setting aside proposals as well as representative actions. The survey indicates a relative similarity between all sorts of group actions in that they are principally bound to individual damages. If the number of the injured parties is sufficiently large, these individual claims are bundled to allow for a more efficient conflict resolution. This can be demonstrated by looking into the six Member States of the European Community which have introduced group actions: France, Germany, Netherlands, Spain, Sweden and the United Kingdom. All require that individual consumers have suffered and that their individual claims are bundled together. Only France and Spain go beyond in that they have introduced the category of collective damage.<sup>124</sup>

	<b>Individual damage</b>	<b>Collective damage</b>	<b>Purpose</b>
France I Action civile – intérêt collectif		The collective interests of consumers must have been suffered	Compensation of the collective harm of consumers
Germany I Skimming-off procedure	In principal individual damage, but hard to quantify		Compensation of petty damages and wide spread damages (unfair commercial practices)
Germany II Model law suit under Investor Protection Act	Individual damage, individual filing of action (at least ten)		Bundling of individual compensation claims
Netherlands Wet collectieve afwikkeling massaschade	Individual damage of a large number of persons, being negotiated between the injured parties and the wrongdoer		Approval of the negotiations through the court – opt-out option
Spain legitimación de grupos	Individual claims, particular rules to the benefit of those who might have standing	Distinction between collective interests (intereses colectivos de los consumidores y usuarios) and diffuse interests (intereses difusos de los consumidores y usuarios)	Bundling of individual claims to the benefit of consumers
Sweden Lag om grupprättegång	Individual damage, but lead plaintiff		Bundling of individual claims for those who have opted-in
United Kingdom Group litigation order	Individual damage, individual filing of an action		Bundling of individual claims – multi party action

<sup>122</sup> On this question see J. Coffee 2006.

<sup>123</sup> See the Stuyck report p. 267 para 380 : “ Some observers have stated that US-style class actions would not work in continental Europe because 1) the discovery process differs in Europe from that in the US; 2) European attorneys are not allowed to share in an award as their payment for taking a case to court and 3) opt-out based class actions would violate the due process rights of individual citizens. Indeed in Europe it is widely believed that article 6 of the ECHR and the relevant constitutional principles guaranteeing access for each citizen to a judicial decision maker form an obstacle to the introduction of Us type class actions based on an opt-out system”

<sup>124</sup> See the French and Spanish national reports in the Stuyck report. For french caselaw see n. \*\*\*

However such an assessment seems to be rather superficial as it sets aside the different regulatory philosophies which lie behind each type of group action. A closer look reveals that the six countries under review do not have much in common. Each country is very much tying the group action into its procedural system. There are particularities at all ends, particularities in the subject matter that is regulated and the way in which the procedure is shaped.

The French system focuses on the collective interests of consumers – the old idea of a collectivity which might sue in its own rights - a concept which shows up to some extent in the Spanish legal system. The proposed legal reform (Projet de loi Chatel, 2005) is aimed at introducing a collective action whereby a consumer association can bring an action without proving the existence of a mandate<sup>125</sup>. The association seeks for a pecuniary remedy without compensatory function in addition to individual compensation for consumers. The award would go first to the consumer association, second to the Legal Aid bureau if it helped the association and, thirdly to the Fund for access to justice<sup>126</sup>. New projects have been proposed.

The German system is very much focusing on compensation for economic losses. The skimming-off procedure is designed to compensate for market insufficiencies<sup>127</sup>. The English group litigation order emphasises the enforcement of individual rights – it is a multi party action, in the proper sense of the word<sup>128</sup>. The Dutch two-party older class action combines elements of voluntary negotiations and judicial approval in an innovative way. Only Sweden has fully discussed the pros and cons of an American class action type of regulation that fits into the Swedish legal system<sup>129</sup>.

### **7. 3. Distinguishing between personal injuries and economic losses**

The next question is: do the different institutional strategies correlate to the type of protected interests (economic and personal injuries, quality and safety) and or to the type of harm? A complementary question is related to the legislative approach: how do we choose between general consumer protection versus sector specific (directives concerning investor protection, consumer protection in the food field, the drug field etc.)?

We will first address the (1) distinction between economic and personal interests, then (2) the different policies associated to the type of harm and finally (3) the general versus sector specific legislation on consumer protection.

The overall European strategy suggests that judicial protection of consumer health has been pursued through specific instruments and distinguished from those concerning economic interests. National systems have operated through contract and civil liability

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<sup>125</sup> See Projet de loi n° 3055 visant à instaurer les recours collectifs de consommateurs, présentée par L. Chatel.

<sup>126</sup> See Projet de loi n° 3055 visant à instaurer les recours collectifs de consommateurs, présentée par L. Chatel.

<sup>127</sup> See Micklitz/Stadler 2005.

<sup>128</sup> See Civil Procedure Rules Part 19 III completed by the Practice Direction-Group Litigation and by the Rule %8.6A CPR and the national Report on the UK in the Stuyck study and Micklitz/Stadler, p. 795 et seq.

<sup>129</sup> See the Group Proceedings Act of 2002 and the national report on Sweden in the Stuyck study, as well as Micklitz/Stadler, p. 497 et seq.

to protect consumers' health. The former traditionally mainly directed at protecting economic interests, the latter at protecting property and personal interests.

### **7. 3. 1. The distinction between economic and personal interests**

Over time contract law has expanded towards the protection of health and other non pecuniary interests, through the creation of duties both to contractual and third parties, while civil liability has been used incrementally to recover economic losses.<sup>130</sup>

At the European level policy choices concerning the alternative use of contract and civil liability have never been explicit. However, historically the pattern has developed consistently with European national traditions.

Consumer contract law has been mainly used to protect economic interests while civil liability has been predominantly used to protect personal and property interests. The limits concerning recoverable damages in the products liability directive 85/374 are a good illustration of the divide between personal injury, property harm and economic losses. If combined with the sale directive 99/44 the partitioning between contract and civil liability in relation to the different protected interests is clear<sup>131</sup>.

However in other field, such as unfair trade practices, civil liability, sometimes even tort law regimes, has been extensively used to address risks associated to consumer economic interests.<sup>132</sup> The European approach releases the control of unfair commercial practices from the tort law and paves the way for a new understanding, where civil liability is replaced by judicial or administrative action taken in the public interest.

When it comes to administrative regulation the differences are less striking although a distinction between administrative regulation, aimed at product quality, and administrative regulation, aimed at product safety, should be made. Regulation in the field of product safety has been predominantly used to protect consumers' health (see product safety general directive 2001/95 but also sector specific directives concerning food, toys, drugs, chemicals, pesticides).<sup>133</sup>

Type of harm / type of damage	Individual enforcement Injunction	Individual enforcement Damages	Collective enforcement Damages	Collective enforcement injunctions
Economic loss	Unfair contract terms	In principle individually	Only where individual harm cannot be determined	always
Personal injuries	Product safety (before administrative authorities)	Always		Only when MS have expanded the scope of dir. 98/27

<sup>130</sup> In relation to the expansion of contract law as a protecting device for personal injury community legislation and case law has been particularly relevant. In particular see the indirect effect provided by the package travel directive 314/90, and the ECJ, 12.03.2002, *Simone Leitner v TUI Deutschland GmbH & Co. KG.*, ECR [2002] I-02631.

<sup>131</sup> See *Cafaggi 2008 (b)*

<sup>132</sup> *Collins 2004, Micklitz 2006, Weatherill 2007.*

<sup>133</sup> *Cafaggi 2006a, Hodges 2005.*

Information regulation deserves some specific reflections. In theory it covers both information concerning economic and health related risks. It can cut across different interests. In practice often we observe different instruments to regulate information related to products or services depending on which consumer interest is to be protected. Information regulation thus becomes fragmented between administrative and judicial enforcement but also within the latter among different tools such as contract law, civil liability, unfair competition and to some extent property and privacy laws.

Outside and beyond similarities or differences in dealing with individual or collective harm, there is a correlation between the type of harm (individually/collectively) and the type of damage (economic loss or personal injuries). Where people's health and safety are affected, the legal systems look predominantly at the individual harm. In mass accidents the individual harm might be aggregated so as to enable collective action of a limited or unlimited number of consumers concerned, but the determination of the harm remains in essence individual. The situation is different with regard to economic loss. It might be similar in case consumers suffered from substantial loss, where the loss might be determined individually. However, the situation is different, where the individual economic loss may not be determined or is so low that consumers will not take action individually. Here particular devices are needed to cover the collective harm. A major field of interest is antitrust injuries or economic losses resulting from unfair commercial practices.

A comparison with the US cannot avoid considering the role of health care systems in Europe and that of insurance.<sup>134</sup> As to the first the stronger presence of publicly funded health care systems has lowered the use of civil liability and more in general litigation in relation to personal injuries<sup>135</sup>. Such a difference does not exist in relation to economic losses, which may be explained more in relation to the combination between regulation and private law devices<sup>136</sup>. On the contrary litigation concerning standard contract forms and other aspects of product quality is as intense in Europe as it is in the US although much more comparative empirical research is needed. The role of private insurance differs in relation to personal injuries and economic losses. These differences again affect significantly the choice between negotiations and litigation and that between administrative and judicial enforcement.

### ***7. 3. 2. A different approach with injunctive relief in Europe***

The remedial legislation which addresses consumer protection from a different perspective has not clearly distinguished between different interests. At the European level, however, injunctive relieves cover only the protection of economic interests. The Annex to Directive 98/27/EC mentions neither product liability (directive 85/374) nor product safety (2001/95).

There has been some debate in the legislative process of Directive 98/27 on whether or not to integrate the product safety directive into the Annex, thereby providing the so-called qualified entities (public authorities and/or consumer organisations) with the right

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<sup>134</sup> See for an early account Micklitz, 1979.

<sup>135</sup> See Cafaggi, 2006 a

<sup>136</sup> See Cafaggi, 2006 a



to file an action for injunction<sup>137</sup>. A similar debate arose during the revision of the product safety directive, again with no results. However, as the Directive 98/27 provides for minimum standards only, Member States could extend injunctive relieves to health and safety issues. They did so either directly (Italy and Greece) or indirectly by formulating an open textured general clause which leaves room for all sorts of laws and regulations aimed at the protection of the 'collective interests of consumers' (Austria, Belgium, Czech Republic, Denmark, Germany, Estonia, France, Greece, UK, Netherlands, Poland, Portugal, Sweden, Spain). There is only a small minority of Member States which has transposed the Directive *tel quel*. The extension of remedies to health and safety issues, however, is accompanied by a discriminatory side-effect. Injunctive relieves are often deliberately restricted to national qualified entities (Denmark, Estonia, France, Greece, Great Britain).

Despite the variations resulting from the minimum character of the Directive 98/27/EC, we may distinguish between two lines of European legislation: one addressing substantive questions which designs boundaries between private law, contract and tort, and regulation, and within private law between contract and civil liability. The other based on remedies which cuts across different fields, at least in the interpretation given by the majority of the Member States. The same remedy, injunctive relief, can be used to protect the consumers economic interest as well as to protect them from risks to their health and safety. However, a closer look will reveal that the Member States are not so much relying on the distinction between protection of the economic interests on the one hand, and protection of health and safety on the other. They are shaping remedies according to the type of harm, be it individual or collective and the degree of risk management which is required.

#### **7. 4. Sector specificity or general instruments to protect consumers?**

Another issue is the distinction between a policy strategy ensuring consumer protection across sectors and one tailoring the combination between administrative control and private collective enforcement to sector specificity. There is a strict correlation between this question and the previous ones. Sector specific consumer protection strategy may be grounded on the nature of the risk generated by firms' activity.

There are three possible levels of legislation:

- 1) Legislation protecting individuals;
- 2) Legislation protecting consumers, independently from the sector;
- 3) Legislation protecting consumers in a specific sector such as financial market, telecom, energy, media etc.

The most recent remedy based legislation tends to belong to the first or the second category. In some cases collective enforcement mechanisms have general application regardless of the consumer identity of plaintiffs. In other cases legislation is limited to individual or consumer associations.<sup>138</sup> While legislation concerning injunctions is mainly addressed to consumers, legislation concerning judicial enforcement

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<sup>137</sup> See above p. 18 ff..

<sup>138</sup> Examples of the former are the German, Dutch, Swedish and British legislation. Examples of the latter are the Spanish, Portuguese, French legislation

mechanisms is equally divided between general application and consumer protection. The rationales for these choices are not always clarified and often the most convincing explanation is based on public choice arguments.

As to the legislation that limits consumer redress to a specific regulated market the arguments may be associated with the specificity of that market and its regulatory goals. The example of financial market is perhaps the most illustrative but telecom and energy also provide good examples<sup>139</sup>.

In the area of financial markets risks associated to investors' choices have very specific features that require specific instruments both for individual and collective protection. This seems to be a global tendency. The United States has adapted the class action to the particularities of the financial markets.<sup>140</sup> Similar developments may be reported from some Member States as well as Switzerland.<sup>141</sup>

Germany introduced in 2005 a model suit law to protect investors. The Statute will apply only to investors for five years and then its scope might be broadened. The main idea of the new remedy is to decide the common factual and legal questions in a multitude of similar legal actions only once with a binding effect for all the affected plaintiffs by choosing a certain test case. Due to the significance of the test case judgment, the Higher Regional Court shall have jurisdiction to decide it. This shall also enable judges to specialize in the field of group actions. The law applies to damage that occurs in series to a multitude of capital investors, independently from the amount of the damage. If several affected individuals bring an action for damages due to wrong, misleading or omitted information on the capital market or if they seek the fulfilment of a contract due to the Law Governing the Purchase and Acquisition of Stocks, the plaintiffs and the defendants in each lawsuit are now entitled to refer to the new procedure.<sup>142</sup> In order to enhance the information flow between the courts, the KapMuG introduces a new electronic register of lawsuits in order to publish and to exchange relevant news and information. If at least ten applications for a test judgment are filed, the first court that receives such an application will decide that the procedure shall be transferred to the Higher Regional Court which must carry out the test procedure. From those who have already filed a suit, it must choose one plaintiff as a representative test plaintiff.<sup>143</sup> Similar to the choice of a "lead plaintiff" in the US-American *Private Securities Litigation Reform Act 1995*, § 8 para. 2 No. 1 KapMuG contains the assumption that the plaintiff with the highest individual claim has the biggest interest in the test case procedure. As long as there is no decision in the model suit, the individual legal proceedings are suspended.<sup>144</sup> Once the test judgment has been released (the German Federal High Court is competent for a final decision), the individual lawsuits are continued, while the parties involved shall be – roughly speaking – bound by the test decision.<sup>145</sup> The legal construction, according to which a test case is binding for those who have not been chosen as test plaintiffs, resembles the institute of summons to interested parties in administrative procedures, i.e. those who are not a party to the

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<sup>139</sup> See Cafaggi 2007 b

<sup>140</sup> For the US Coffee 2006 and Beuchler 2007

<sup>141</sup> Keßler/Micklitz 2005

<sup>142</sup> § 1 para. 1 KapMuG.

<sup>143</sup> § 8 para. 2 KapMuG.

<sup>144</sup> § 7 para. 1 KapMuG.

<sup>145</sup> § 16 KapMuG.

proceedings but whose legal interests will be affected by the decision. Parties of a model suit are solely the defendant and the chosen plaintiff (called-in third parties). All the other plaintiffs, whose proceedings are suspended, obtain the status of called-in third parties.

The European Community does not yet seem prepared to tackle the issue in order to provide for a common compensation scheme, although the Directive 2004/39/EC (the MIFID Directive) contains a first rather cryptic provision on collective enforcement<sup>146</sup>.

Likewise in food and drug safety the nature of the risk, its management and the remedies therein associated have very specific nature and require a particular combination of ex ante and ex post enforcement strategies. However, these have not yet led to particular devices of judicial enforcement.

Outside sector related schemes, Member States tend to seek a common solution across sectors, that means mainly notwithstanding the type of product or service which is behind the collective injury. However, it seems useful to introduce a third category that reaches beyond cross border and sector related strategies. This could and should cover so-called antitrust injuries. It is not sector-related, as antitrust injuries may occur in each and every sector as long as it is governed by competition. However, the type of damage is particular and any such compensation system has to take the particular kind of damage into consideration. Thus the requirements are similar to compensation schemes in financial markets, but the type of damage is not sector related. Compensation schemes for the recovery of antitrust injuries seem to be largely underdeveloped all over the European Community (Ashurst study)<sup>147</sup>. As the European Commission relies in its new decentralised antitrust policy on the strong involvement of private (individual and collective?) enforcement, has launched a debate on the feasibility of a European regulatory instrument.<sup>148</sup>

## **7. 5. Public agencies v private organisations**

The US and Europe are difficult to compare with respect to the distinction between administrative and collective judicial enforcement due to the role consumer and business organisations should or could play within both administrative and judicial enforcement. The majority of the Member States in Europe start from the premise that consumer organisations should be given a stand in administrative and/or in judicial enforcement. However, there is a policy behind this which seems less settled in the US. At least those Member States with a strong social welfare bias hold the view that consumer organisations are public policy players, they may not only legitimately claim to be granted rights and remedies but also state funding.<sup>149</sup> In the US the functional

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<sup>146</sup> Article 51 para 2: Member States shall provide that one or more of the following bodies, as determined by national law, may in the interest of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this directive are applied, a) public bodies or their representatives, b) consumer organisations having a legitimate interest in protecting consumers and c) and professional organisations having a legitimate interests in acting to protect their members.

<sup>147</sup> [http://ec.europa.eu/comm/competition/antitrust/others/actions\\_for\\_damages/study.html](http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html)

<sup>148</sup> Green Paper, Damages action of the EC antitrust rules, COM (2005) 19.12.2005, 672

<sup>149</sup> Wilhelmsson 2004.

equivalent to consumer organisations are quite often big law firms or lawyers that organise and defend the consumer interest via collective judicial enforcement.

Administrative control in the field of product safety encompasses both *ex ante* and *ex post* monitoring compliance techniques. As a parallel development judicial collective enforcement operates both with preventive remedies such as injunctive reliefs – if we accept that action for injunctions can be treated as *pro-active* remedies - while compensatory remedies such as damages can only have an indirect deterrent effect. It is therefore necessary to redefine the rationales in order to be able to distinguish between the different enforcement techniques and remedies.

## **8. Preliminary concluding remarks**

### **8. 1. The European scenario.**

The combination between administrative and judicial enforcement is defined in a multilevel system by the interaction between the European and the Member State level. The principle of procedural autonomy and the choices made at EU level have left wide discretion to implement different institutional strategies despite the boundaries set out by the European Court of Justice. Differences are still wide both among old Member States and between them and the new ones. The combination between administrative and judicial enforcement differs in old Member States and between them and new Member States. There is a tendency for new Member States to privilege administrative over judicial enforcement due to different considerations, partly related to institutional preferences, partly to regulatory choices.

The overall picture in Europe may be characterised by development in flux. The European Community has set minimum standards for injunctive reliefs, but it is bound to stop commercial behaviour that affects the economic interests of consumers. The protection of health and safety has not been ensured by a European action for injunction. This subject matter has been left to the Member States, some of which have been willing to extend the scope of application to health and safety issues.

Outside and beyond injunctive reliefs, the overall picture becomes even more blurred. There is a limited number of Member States which have introduced representative actions and group actions. Here again group actions seem mainly associated to recovery of economic losses while for personal injury related claims, often individual harm is a pre-condition. However similarities disappear even within group actions when procedural rules are considered. Often each country is following its own regulatory tradition and culture in the way in which these remedies are shaped<sup>150</sup>. The relatively large number of Member States where group actions are under discussion will, in all probability, lead to an ever more scattered picture. Member States are not discussing the feasibility of a group action in a European perspective, i.e. a perspective which takes the effects of the Internal Market into account. Risks are no longer bound to national territories. This is true for products and services.

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<sup>150</sup> Rott, 2007.

A clear and well identifiable policy strategy defining the tasks of administrative and judicial enforcement is still missing. We can try to describe some of the features that may ex post rationalize choices made at EU level and then implemented at Member State level.

The line between administrative regulation and private law devices can be drawn along the distinction between product quality and product safety. While quality regulation operates mainly through private law devices and more often through judicial enforcement, health and safety product/related regulation are equally divided between administrative and judicial enforcement. The use of injunctive relieves characterizes economic losses while damages are used more in the area of personal injuries and non pecuniary remedies are employed more to protect consumers from economic losses.

There are several potential variables along which a policy strategy for consumer protection should be designed in the future. They cannot be taken in isolation but ought to be considered together. How should the distinction between injunctions, other non compensatory remedies such as avoidance of contracts and damages be combined with administrative and judicial enforcement?

**Compensatory versus regulatory remedies: advocating a functional approach.** The functional distinction among remedies should be a driving criterion of European policy making about consumer protection.

**We propose to move from content to the scope of remedies.** The main distinction should not be drawn along the lines of the type of damages, i.e. pecuniary or non pecuniary, economic or personal injury, rather it should be defined according to the compensatory or regulatory function of remedies, injunctions and damages.

If the remedy is purely compensatory then judicial enforcement still provides the best generalised solution both for personal injuries and economic losses except where there are

- a) an indefinite class of potential claimants
- b) a high level of latency

In these cases administrative enforcement, not necessarily through a public agency, may be better equipped. US experience may be very useful to experiment circumscribed European solutions.

If the remedy has a regulatory function, in particular if it operates as a risk management device then, given the current procedural rules, administrative enforcement seems the most appropriate. Regulatory remedies require a long time for monitoring activities on both sides; firms and consumers. The distinction between structural and behavioural remedies applied in antitrust can be usefully analogised in the area of consumer protection. When behavioural remedies asking for changes in production or marketing processes are required, judicial enforcement may not be the best solution. This conclusion forces us to rethink the strategy about injunctions<sup>151</sup>. While prohibitory

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<sup>151</sup> It seems as if a strong European input is needed – not necessarily to harmonise the different initiatives but to test their feasibility in the larger European legal environment. The European Commission has started its activities in the field of antitrust injuries. The presented ideas and proposals will certainly not only discuss the effects of cartels on consumers and possible individual/collective remedies, they will likewise deal with ill-gotten gains resulting from unfair commercial practices. This is what the German skimming-off procedure is all about. Most recently

injunctions are generally easy to monitor, affirmative injunctions may require additional efforts with the involvement of technical expertise. It may not be feasible, consistently with the use of new modes of regulation, to have an order by a judge or an agency where the technical solution for a mass product related harm can be found. There, very much like in the environmental field, the remedy itself has to be defined through a cooperative process between public enforcers, firms and consumers. New modes are needed since both traditional Courts and Agencies do not fit with this purpose<sup>152</sup>.

## 8. 2. The different combinations between administrative and judicial enforcements

We observe different combination at EU level. There are Member States that rely either on administrative enforcement or judicial enforcement. However, there are also Member States that combine the two levels. The key to the understanding of the combination is the role attributed to private organisations, mostly consumer organisations. Their role may be limited to direct a complaint to the administrative authorities, maybe even to force the authority into action, such as under the UK supercomplaint procedure. However, consumer organisations may also have standing to file an action in case the enforcement authorities remains inactive. There is some sort of competition between judicial enforcement via organisations and administrative enforcement through agencies or governmental entities.

	<b>Administrative enforcement alone</b>	<b>Administrative and judicial enforcement</b>	<b>Judicial enforcement only if administrative enforcement fails</b>
Statutory agencies	Ireland, Latvia, Lithuania, Malta,	B, CZ, Cyprus, DK, Estonia, GB, Hungary, Italy (partly), Netherlands, Portugal, Slovakia, Slovenia, Spain,	
Consumer organisations	Austria, France, Germany, Luxembourg,		Finland, Sweden, Poland

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the European Commission has announced its willingness to study the effectiveness of national collective compensation schemes and to come up if necessary with concrete legislative proposals. The revision of the so-called consumer acquis did not yet cover enforcement matters. However, the policy strategy 2007-2013 now includes (SEC (2007) 321) two references to enforcement of consumer law, first the revision of Directive 98/27/EC on injunctions and secondly the announcement of the European Commission to investigate the need of collective redress both in the area of antitrust injuries and of other areas of consumer law, with no distinction between health and safety on the one hand and economic losses on the other.

<sup>152</sup> See G. De Burca and J. Scott, *New governance and constitutionalism in Eu and Us*, Hart, 2006, F. Cafaggi and H. Muir Watt, *The making of European private law*, NEW GOV w.p. February 2007.

### **8.3 The comparative analysis: preliminary thoughts**

Europe, the US and Canada have generally been juxtaposed while describing regulatory strategies concerning consumer protection. Consumerism versus producerism, market versus corporatism have typically been used to synthesize the differences. The evolution of consumer protection into risk regulation and risk management occurred in all systems has brought about significant institutional and substantive changes. Clearly the differences concerning the role of consumer protection associated to market structures, firm sizes, the role of administrative state and that of private organisations remain significant. However the degree of consumer protection in European countries has clearly grown with European intervention. The comparison should therefore look at the different institutional players and regulatory strategies that have been used. This paper has focused more on enforcement options and looked at regulatory strategy only to the extent they are relevant to explain different enforcement types.

The major differences concern remedies and institutional players. But they have evolved over time and present new forms that have to be reconceptualized.

**Remedies.** The choice between administrative and judicial enforcement has an impact on both the width of effects and the consequences on behaviour. Judicial and administrative injunctions have very different impact given the differences concerning their binding effects. Despite the effort to expand *res judicata*, judicial injunctions are more limited than administrative injunctions.

In relation to remedies the distinguishing features seem to be the availability of injunctions in Europe to a wider extent than in the US. In North America damages seem still to be the dominant choice. This difference may suggest different degrees to which enforcement systems are used to perform risk regulation and risk management. In theory one might suggest that a risk management strategy is better associated with injunctions than damages. Furthermore one could claim that risk management in Europe through remedies represents the endorsement of a co-regulatory strategy whereas risk management in the US and Canada is still predominantly a matter between firms and public agencies.

In practice, however, the use of injunctions in Europe is highly differentiated both geographically but also in relation to subject matters. The use of injunctions is highly diffused in the area of unfair contract terms but not in other areas. Thus often the remedial differences are in reality not as deep as they appear in the books.

In relation to damages the difference between Europe and US have also decreased. After 2000 in European countries a new generation of law reforms concerning collective judicial enforcement has been introduced. Unlike the injunctions enacted by European legislation the group actions law reforms have been introduced at the initiative of individual Member States. Collective and individual damages are now more easily recoverable, although access to justice (i.e. judicial remedies) is still quite uneven.

Differences are also associated with the different role played by adversarial versus negotiated enforcement. European models, especially the Dutch, the German and the Scandinavian, have privileged negotiation over adjudication as dispute resolution mechanisms. The US model used to be adversarial. Over the past 20 years however a negotiating model has emerged and the role of settlements has increased the shift. While

the two negotiating models present significant peculiarities a common evolution towards the increasing importance of enforcement through negotiations can be stated.

**Institutional players.** The comparative analysis shows quite clearly that major differences between the EU and the US still concern the players. To a lesser degree this is true about Europe and Canada. Distinctions are relevant in both the public and the private domain.

Within the public domain the role of agencies and governmental institutions aiming at consumer protection still differ quite significantly between the EU and US. These distinctions are related to the institutional framework, although the American Independent regulatory agency model has entered the consumer protection domain as well. More significant differences still concern the regulatory strategies employed to protect consumers<sup>153</sup>.

But within this domain differences are as significant within Europe due to the lack of a European administrative policy strategy aimed at consumer protection<sup>154</sup>.

Within the private domain the most relevant distinction is between the role of plaintiffs, lawyers and that of consumers associations. Again Europe is not at all homogeneous. The weight of private organisations, their governance and accountability varies significantly between old and new Member States and even with the former. It would be interesting to assess whether the role of associations and plaintiffs bar associations varies across States in the US. While it is most likely that it does not vary to the same degree, divergences are probably higher than it is usually acknowledged.

In the field of collective private enforcement the role of plaintiffs lawyers in the US has no counterpart in Europe.<sup>155</sup> Moving from general consumer protection to financial markets differences decrease. In this field securities representative and group actions, have developed and lawyers in some Member States are beginning to manage the cases like their American counterparts.<sup>156</sup> Outside and beyond financial services, more particularly investor protection, the role of plaintiff lawyers in Europe is played by different players: within the private realm consumers' associations, within the public domain consumers' ombudsmen.

When acting as consumers representatives the strategies of these two actors may significantly differ as to (1) the choice between litigation and negotiations, (2) the choice of litigation strategy, (3) the choice and the definition of the scope of remedies. The for profit nature of law firms and the not for profit nature of consumers associations clearly makes a difference. But the misalignment of incentives exist in both cases. Thus in both cases agency problems arise. When plaintiffs' lawyers operate, alignment is

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<sup>154</sup> See the Communication for 2007-2013 issued in march 2007.

<sup>155</sup> Witt, 2004, Issacharoff /Witt 2004

<sup>156</sup> See Tilp, Massenbetrugsfall Telekom – Geburtsstunde des KapMuG – Präsentation, in in : Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (Hrsg.), Kollektive Rechtsdurchsetzung – Chancen und Risiken, Bamberg, 2006, p. 125 et seq., available at [http://www.bmelv.de/nn\\_1097004/SharedDocs/downloads/02-Verbraucherschutz/Markt/Verbraucherrechtstage/Tagungsband,templateId=raw,property=publicationFile.pdf/Tagungsband.pdf](http://www.bmelv.de/nn_1097004/SharedDocs/downloads/02-Verbraucherschutz/Markt/Verbraucherrechtstage/Tagungsband,templateId=raw,property=publicationFile.pdf/Tagungsband.pdf)



mainly pursued through market mechanisms. When associations are leading, incentive alignment occurs through voice, particularly through governance<sup>157</sup>.

	Plaintiff's lawyers	Consumer organisations	Government bodies	Independent Regulatory Agencies
US				
Canada				
Europe				

#### **8. 4. The public-private combination**

The European policy on administrative and judicial enforcement is based on a clear distinction between public and private bodies. European legislation often defers to Member States which make the choice between public or private bodies, between administrative and judicial enforcement. The relationship between domestic and transborder disputes and within the latter between injunctions and administrative cooperation is to be explored further.

In Europe the relationship between public and private bodies is complex. Different forms of interactions occur. More specifically it seems possible to distinguish between three modes of delegation: there is a minority of Member States (Austria, Germany, Luxembourg) where there are no public bodies entrusted to enforce the law. The legislator relies on private bodies to file actions for injunction, in particular against unfair contract terms and unfair commercial practices. However, the legislator grants rights, it does not impose obligations. These private bodies may take action, but they are not obliged to take action.

The second model consists of agencies which are assisted by private bodies with no mandate at all, not even the right to file an action. This is certainly the minority.

The third model is the one where both public and private bodies are given legal rights, but where the public bodies are usually taking the lead. Private bodies have rights and their exercise is either formally subject to inaction of public bodies (Scandinavian countries) or dependent on resources usually concentrated in public bodies. This means the impact of European law on national institutional patterns remains limited.

Private organizations substitute public agencies for certain functions (especially monitoring) and complement public agencies for others. Thus the boundaries between private collective enforcement and administrative control have to be redefined. Of relevance is the fact that private bodies can at the same time operate as private enforcers before judges and as quasi administrative bodies to monitor the use of unfair contract

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<sup>157</sup> See the requirements to which several legal systems have conditioned the status of qualified legal entity to claim injunctions on behalf of consumers according to directive 98/27.

terms or the safety control systems that firms must adopt. In the US the use of cooperative governance is less diffused in the field of consumer protection, although public private partnerships are not unknown.<sup>158</sup>

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<sup>158</sup> Freeman, 1997, 2000, 2003, Aman, 2000, 2003, Metzger, 2003

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