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Administrative and Judicial Enforcement in
Consumer Protection: The Way Forward

Fabrizio Cafaggi and Hans-W. Micklitz

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

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Abstract

The paper analyses the relationship between administrative and judicial enforcement in Consumer Protection. It first sets out the European state of development with regard to injunctions, thereby focusing on the different models of the European group actions and the regulation of standing, as well as comparing ex post ante and ex post intervention. The second part reframes the European debate in the light of the US and Canadian experiences and formulates a whole set of policy options. In the final part we propose a set of policy recommendations that the Commission should consider in the process of reviewing the collective redress directive and more in general the European policies concerning collective redress

Keywords

Collective enforcement – administrative and judicial enforcement – injunctions – damages – group and class actions – standing

Table of contents

1.	THE RELATIONSHIP BETWEEN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT IN CONSUMER PROTECTION: THE WAY AHEAD.....	1
2.	ADMINISTRATIVE AND/OR JUDICIAL CO-OPERATION IN EUROPE	6
2.1.	Actions for injunction	7
2.1.1.	Shift from judicial collective enforcement to administrative co-operation?	7
2.1.2.	The European minimum standard – action of injunctions	7
2.2.	European group actions and American class actions	9
2.3.	Three models of group actions in 27 Member States.....	11
2.3.1.	The search for the perfect European model.....	11
2.3.2.	The key role of consumer associations.....	13
2.3.3.	Collective consumer actions in new democracies	15
2.4.	Regulating entry and exit – Comparing ex ante and ex post intervention.....	16
2.4.1.	Consumer organisations	18
2.4.2.	Self or ad hoc organisations.....	19
2.4.3.	Administrative agencies.....	20
2.4.4.	Lead plaintiffs and lawyers in tandem.....	21
3.	REFRAMING THE EUROPEAN DEBATE IN THE LIGHT OF THE US AND CANADIAN EXPERIENCES.....	22
3.1.	The constitutional balance between collective and individual redress in light of the debate between public and private enforcement	22
3.2.	Administrative and judicial enforcement	24
3.3.	Injunctions and pecuniary remedies.....	26
3.4.	The ‘indirect’ effects of national legislation concerning group actions on substantive consumer law.....	27
3.5.	The players	28
3.6.	The role for European governance to foster effective aggregate litigation in consumer law	31
4.	CONCLUDING REMARKS	35
	Bibliography	38

Administrative and Judicial Enforcement in Consumer Protection: The Way Forward

Fabrizio Cafaggi and Hans-W. Micklitz*

1. The relationship between administrative and judicial enforcement in consumer protection: the way ahead

Consumer protection law is in great transformation. Global market integration requires new modes of governance to tackle new forms of risk interdependencies affecting consumer safety and, more broadly, consumer choices. While emerging markets are posing serious problems concerning risks and safety, trilateral or multilateral agreements are far from being frequently used. The main legal instruments are still bilateral agreements concerning co-operation about risk management in product safety.¹

Consumer protection strategies need to be defined in relation to the broader framework, linking the different regulatory policies, including competition and environment. The relationship between consumer regulation and the level of market competitiveness has become a milestone of enforcement policies. This is not to say that competitive markets need less consumer protection and enforcement; more simply they need different devices and institutions. Competition and consumer law interplay in different ways in highly competitive and non-competitive markets.² Thus consumer protection policies need to internalise the current and future level of competitiveness in their design.

Policies interdependencies require coordination among the different actors but how are the main players developing their regulatory strategies.

The US, Canada and Europe still differ quite significantly in relation to enforcement policies although some signs of convergence are stronger than in the past.³ In South America, recent legal reforms have introduced or reinforced class actions and *astreintes*.⁴ In Europe a new stream of legislation concerning group actions has been

* The contribution will be published in F. Cafaggi/H.-W. Micklitz (eds.), *New frontiers of consumer protection: combining private and public enforcement*, Kluwer Intersentia, 2009 forthcoming. References in the footnotes 'to this volume' are referring to contributions to be published in that book.

¹ See the EU/US agreements but see also the Memorandum of Understanding (MoU) between China and EU, both available at http://ec.europa.eu/consumers/safety/int_coop/index_en.htm.

² See Trebilcock, in Rickett/Telfer (eds.) 2003, p. 68 ff. at 72 ff.

³ For a comparative analysis see Cafaggi/Micklitz, 2008, p. 391; Issacharoff/Miller, 2009, forthcoming; Ramsay, in Rickett/Telfer (eds.) 2003, p. 42 ff. part. 50 ff.; Kagan, 2007, pp. 17, 165, where the author speaks of 'institutional convergence at least with regard to some policy fields'.

⁴ See in Argentina Law n. 26.361 which has modified law n. 24240, *Normas de proteccion y defensa d los Consumidores. Autoridad de Aplicacion. Procedimiento y sanciones. Disposiciones finales*. In particular Article 54 concerning a form of opt-out class action, and Article 52 bis introducing a form of *astreinte* named *daño punitivo*. For a synthesis see Pellegrini Grinover and Mullenix, in Pellegrini Grinover/Calmon (eds.), 2007.

enacted. In the US CAFA has changed the balance between states and federal level impacting also on substantive law. The key questions concern modes of regulation and combinations of different actors at the stage of enforcement: in particular agencies and courts.⁵ In both the US and EC these two dimensions have to be framed within a multilevel system, encompassing both federal and state levels. The main differences are related to the levels of market integration: while in the US the market is fully integrated, in Europe integration has only been partially achieved. These differences are also reflected on the legal frameworks. In the US it is more uniform, while in Europe it is characterised by a higher degree of differentiation at Member State (MS) level.

Conventionally the analysis presents a contrasting picture: the US is characterised by a model grounded on regulation through litigation and organised around the paradigm of private lawyer general,⁶ the result being adversarial legalism;⁷ public regulation plays a less relevant role ever more 'protected' from judicial interference.⁸ For pre-emption to occur, the superiority of federal regulatory law over state common law in contract or torts has to be expressly legislated.⁹ Regulatory agencies in the US are substantially immune from tort liability and are based on accountability systems grounded on participatory rights, transparency and judicial review.

In Europe MS have been displaying a much stronger level of public regulation, featuring a collective judicial enforcement model, predominantly based on public institutions (ombudsmen, consumer agencies) or private organisations (consumer associations). European legislation on consumer protection has focused primarily on substantive law, leaving MS the task to provide for effective enforcement. This choice has been partly influenced by lack of competence and by the principle of procedural autonomy.¹⁰ The separation between substantive and remedial law is causing uneven effectiveness in MS and potentially undermines the goals pursued by the legislative reforms of the last 20 years. For this reason collective redress has recently become a priority in the European and MS agenda. Interestingly enough, implementation of European legislation at MS level reveals a relative preference for private over public enforcement. When MS have been left with the option, they have chosen more judicial than administrative enforcement (AE), although choices vary from field to field, i.e. between unfair contract terms where private enforcement prevails and unfair trade practices where there is more balance.¹¹

⁵ See Micklitz, in van Boom/Loos (eds.), 2007, p. 13.

⁶ On the private lawyer general model see Coffee, 1986, p. 669; the same, 1983, p. 215; Issacharoff/Rubinstein, 2004, p. 2130 ff.

⁷ Kagan, 2001.

⁸ See *Riegel v. Medtronic, Inc.*, 552 US (2008); Sharkey, 2008, p. 449.

⁹ Justice Scalia writing the opinion for the Court stated 'State requirements are pre-empted under the MDA only to the extent that they are "different from or in addition to" the requirements imposed by federal law'. See *Riegel v. Medtronic*, cit.

¹⁰ See on a US/EC comparison, Lindholm, 2007, p. 386 See also Commissioner Kuneva Speech at the Leuven Brainstorming Meeting on Collective Redress, 29th June 2007 http://ec.europa.eu/consumers/redress_cons/docs/kuneva_leuven_speech290607.pdf; and the New Consumer strategy 2007/2013, SEC (2007) 321, 13th March 2007.

¹¹ See with regard to unfair terms and unfair commercial practices the analysis of 25 Member States, Micklitz/Rott/Docekal/Kolba, 2007.

Viewed from the consumers' perspective, the two systems, US and EC, present different accountability mechanisms to promote access to justice for consumers and compliance with consumer legislation.

The US system relies primarily on market mechanisms, based on a relatively mature competitive market for legal services that ensures incentives to select the relevant claims and to grant compensation for injured parties.¹²

Europe relies more on social and political mechanisms, associated with liability devices. Effectiveness of public and private institutions to bring claims is predominantly ensured by exerting political pressure and channelling public resources to private organisations and, to an increasing extent, to liability systems. Public entities are held liable for lack of control and even for not enacting proper regulation.¹³ Private entities have been held liable for mismanagement of cases.¹⁴

If we locate the US and EC in the broader global perspective we discover firstly that the models of enforcement of consumer law varies across a wider range of alternatives and that internal differences in Europe, despite the increasing role of European legislation, make it very difficult to speak yet of an integrated European strategy.¹⁵

Changes are taking place in both environments. In the US there is an increasing deference towards regulatory agencies, limiting the role of state common law in the area of consumer protection, coupled with the introduction of a stricter federal legislation on class actions.¹⁶ In Europe the more recent trend shows an increasing effort to create public regulators in charge of coordinating transborder monitoring and enforcement issues with a volume of MS legislation introducing judicial collective enforcement. The former change is complemented by the increasing role of co-regulation in consumer matters, taking the form of bilateral (public and industry) or trilateral (public, industry, consumer associations) agreements.¹⁷ The latter contribute to creating a multilevel structure where injunctive reliefs are primarily legislated at EU level and display

¹² Consensus over the effectiveness of this system is far from being unanimous. There is a strong debate over the level of consumer protection and the rents generated by the litigation system in the US. Hotly debated is also the level of competitiveness of the market for legal services see below.

¹³ See with regard to product safety control, Micklitz/Roethe, 2008; particularly telling ECJ, 17.4.2007, Case C-470/03, COS.MET, [2007] ECR I-2749; Reich, 2007, p. 410.

¹⁴ In Germany, a regional consumer advice centre organised in the form of an association went bankrupt after mismanagement. The German Supreme Court indirectly recognised the liability of tenant advice centres for misleading advice, BGH 25.10.2006 VIII ZR 102/06, NJW 2007, p. 428.

¹⁵ According to an OECD study, published at the end of 2006, there are five principal models of enforcement

“i) those relying on the criminal justice system for penalties

ii) those in which administrative agencies have power themselves to impose financial penalties

iii) those in which the administrative agencies have power themselves to impose financial penalties

iv) those relying primarily on consumer complaints to an Ombudsman

v) those relying primarily on self-regulatory arrangements and on the enforcement of private rights”.

See OECD, Best Practices for consumer policy: report on effectiveness of enforcement regimes, p. 12, available at www.oecd.org

¹⁶ On the regulatory changes see Epstein/Greeve (eds.), 2007, Hensler, 2007, p. 883.

On the role of CAFA (Class action Federal Act), see Nagareda, 2006, Sharkey, 2008, Erichson, 2008.

¹⁷ See Cafaggi, 2006.

relative uniformity, while damages are regulated at MS level and reflect a high level of differentiation partly due to an experimental phase.

Another important development in Europe is related to consumer protection for infringements of competition law. Here there is a strong push towards judicial private enforcement driven by European institutions, with sometimes strong resistance from Member States.¹⁸ While the traditional consumer protection seems to be characterised by an increasing importance of public regulation, mainly in the form of co-regulation, consumer protection, related to infringements of competition law, has witnessed a fast growing trend towards private enforcement.¹⁹ The proposal in the White paper by the European Commission is to combine representative actions and opt-in collective actions.²⁰ The open question is whether the choices to be made in relation to competition infringements about collective redress may be applied to consumer protection law in general. It shall be recalled that the driving force behind private enforcement in competition law has been the ECJ, pushing the European Commission into action.²¹ Certainly, at least when consumers are the claimants, coordination between collective redress for violations of consumer law and violations of competition law should take place. Incentives from the ECJ, however, are missing.

The direction of the changes drives towards complementarity between administrative and judicial enforcement and induces a focus on the variables affecting this combination. But first we need to identify the meanings of public and private enforcement.

Public enforcement includes criminal and administrative regulation which can have different institutional implications: the former is administered primarily by Courts, the latter primarily employed by agencies or governmental entities with an increasing involvement of private actors.

Private collective judicial enforcement, in theory, includes injunctions, compensatory damages, profit disgorgement, pecuniary penalties, publicity orders and compliance programmes. A central role in administering these remedies is played by Courts through different forms of aggregate (collective) litigation.²² In the US the ALI project on the

¹⁸ See White paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, (hereinafter White paper on damages in antitrust) and Commission staff working paper accompanying the White Paper on Damages actions for breach of EC antitrust rules SEC (2008) 404, and Mansel/Dauner-Lieb/Henssler (eds.), 2008.

¹⁹ Fostering the legal framework for greater effectiveness in antitrust private enforcement is not only aimed at providing full compensation for victims of violations but also at enhancing deterrence. The approach in the White paper is that of complementarity between public and private enforcement; see White paper on damages in antitrust at p. 3: “the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement”.

²⁰ According to the White paper the two instruments should complement each other.

²¹ The seminal *Courage and Manfredi* judgments: ECJ, 20 September 2001, Case C-453/99, *Courage*, [2001] ECR I-6297; ECJ, 12 July 2006, Case C-295/04, *Manfredi*, [2006] ECR I-6619.

²² Aggregate or collective litigation includes different forms of aggregation: mass joinder, mass consolidation, model cases, and test or bellwether cases, assignment of rights, group actions and class actions. These different forms of aggregation presuppose different rules and roles for judges and counsel. See also ALI Principles of the law of aggregate litigation, tentative draft, April 2008 book 1 on general principles.

law of aggregate litigation is making an attempt to introduce a functional differentiation among aggregate proceedings and to provide a more structured set of principles concerning settlements.²³ To these proceedings, ADR should be added, given the increasing importance that it is gaining in consumer disputes.²⁴

In this framework, monitoring within public enforcement is done by agencies, while in private enforcement the burden is primarily on private actors, the potentially injured parties and, where existing, by private organisations representing them. Monitoring in private enforcement is thus highly context-dependent on the incentives such that private parties have to detect injuries and bring legal claims to Court. The marketability of the potential legal claim provides incentives to monitor which claims may bring about inefficient results. It can help to select which unlawful conducts have to be detected and eventually deterred. Not always the incentives of private parties to monitor correspond to social welfare. For this reason complementarity between public and private actors is necessary.

Important differences occur if the public entity can monitor and enforce directly or can monitor but not enforce, and has to use the Court system to enforce the sanctions. In theory the use of public agencies to monitor and directly sanction would seem to be more effective than separating administrative monitoring from judicial enforcement. But especially in relation to cooperative enforcement, when the enforcer has to conclude agreements with the infringer, the resort to an independent judiciary may ensure transparency and reduce capture. Thus the higher the use of cooperative enforcement the more necessary it is to resort to separation between monitoring and enforcement.²⁵

Important differences between administrative and judicial enforcement are related also to the players. While in relation to Administrative enforcement (AE) the main players are agencies and enterprises, in litigation consumers play a much more active role. Recent changes at Member States level²⁶ in participatory rights and standing have expanded the voice of consumers, both individually and collectively in AE but still the main responsibility and discretionary power is on the public entity.

However some qualifications to the above described picture are needed. Many European legal systems use a mix: monitoring is passed to public entities, being them agencies, ombudsmen or governmental entities, while enforcement is delegated to the Courts.

²³ § 1.02 Of ALI Principles of the law of aggregate litigation defines 3 types of aggregate proceedings
(a) An aggregate lawsuit is a single lawsuit that encompasses claims or defences held by multiple parties or represented persons.
(b) An administrative aggregation is a collection of related lawsuits, which may or may not be aggregate lawsuits, proceeding under common judicial supervision or control.
(c) A private aggregation is an informal collection of the claims or defences of multiple parties, represented persons, claimants or respondents proceeding under common non-judicial supervision or control.”

Principles of the law of aggregate litigation p. 14 ff.

²⁴ Scherpe, 2002.

²⁵ See Cafaggi, 2008.

²⁶ The European Community has done little in secondary consumer legislation to strengthen participatory rights of consumers in product regulation. Two prominent examples are the Product Safety Directive 2001/95/EC and the Regulation on Transborder Enforcement 2006/2004 where MS rejected respective proposals during the law-making process. That is why participation depends on the MS; see with regard to energy, telecommunications and transport, Keßler/Micklitz, 2008.

Often monitoring is the result of cooperative efforts between public and private entities. Private individuals and organisations report to the public entity which is empowered, *de jure* or *de facto*, to bring the legal claim before the Court. While reporting by private entities does usually not imply a duty to act, in many legal systems public authorities would have to give reasons for inaction if a serious and well structured complaint has been produced. Public authorities differ as to their monitoring policies, giving more or less weight to their own internal systems of control or to external reporting.²⁷

Even when there is no legal monopoly of standing on the public entity, as is the case in the UK or in the Scandinavian countries, the OFT and the Ombudsmen have *de facto* the most relevant role to decide whether or not a certain case should be litigated. The development of cooperative ventures between public and private entities suggest that there is no coincidence between judicial and private enforcement because often judicial enforcement is triggered by public entities on the basis of information gathered through a complex network composed of private and public actors.

For these reasons we prefer to speak of administrative versus judicial enforcement rather than juxtaposing public and private enforcement.

In this contribution we consider administrative regulation more than criminal penalties although some MS have so far heavily relied on the use of criminal penalties to enforce consumer protection law.

The provision of adequate and effective collective redress to European consumers should be based on the combined use of administrative regulation and collective judicial enforcement. While rule-making has become increasingly European, enforcement remains strongly in the hands of national authorities, be they administrative agencies or Courts. This separation, partly justified by the principle of procedural autonomy, makes it necessary to engineer coordination in enforcement policies at State level. Such coordination has to occur at national level between administrative authorities and courts, and at European level among the judiciaries and the administrative agencies. The recent case-law on damages in competition infringements shows perfectly this point. Common rules, in primary legislation, translate into very different outcomes when enforced at national level.²⁸

2. Administrative and/or judicial co-operation in Europe

Setting the US aside where there exists a Federal Rule on class actions and a procedure to overcome competing multi-state jurisdictions, Canada and the EU seem to face similar challenges: the absence of common rules on class actions/group actions at the “federal” level and therefore the absence of a court with exclusive jurisdiction in transborder cases.

²⁷ The most developed system seems to be the super-complaint procedure under which consumer organisations may address the OFT in the UK which then is obliged to investigate the complaint within 90 days, EA Section 11 and 205 2002.

²⁸ See White paper, Commission staff working document and Impact assessment available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>. See on these questions Basedow, 2007.

2.1. Actions for injunction

2.1.1. Shift from judicial collective enforcement to administrative co-operation?

The Regulation 2006/2004²⁹ on transborder co-operation in consumer law aimed at shifting the balance from judicial to administrative enforcement. Although Directive 98/27/EC left it to the Member States to determine whether the competent entity, an administrative authority or a consumer organisation may be the competent entity, it was guided by the overall spirit to foster private judicial enforcement via consumer organisations.³⁰ This attempt more or less failed, since very few transborder cases have been brought to court. This might be largely due to the still underdeveloped, understaffed and underfinanced consumer organisations all over Europe. The Directive has produced partially satisfactory results in regions where the cross-border trade is constantly high and where consumers are used to shop across the borders, such as in Austria/Germany, the triangle Belgium/Netherlands/Germany and in the Scandinavian countries.³¹

Whilst Directive 98/27/EC was clearly adopted in the aftermath of the *Homeshopping* case,³² which blatantly demonstrated the deficiencies in getting to grips with transborder litigation, the history of Regulation 2006/2004 is more complex. It is closely linked to the elaboration of Directive 2005/29/EC³³ on unfair commercial practices. Although Directive 2005/29/EC did in no way change the enforcement mechanism, which was literally taken over from Directive 84/450/EEC³⁴ on misleading advertising, the European Commission was convinced that there was a need to strengthen transborder enforcement in the advertising law and more broadly in consumer law. As it is well-known, the Regulation obliges Member States to establish or to designate a public body to serve as co-operation partner in the network.³⁵ Passing the overall difficulties of dealing with transborder litigation in review, it seems plausible to try to find solutions to transborder consumer conflicts by way of co-operation. However, the scope of the Regulation is bound by a set of directives and the type of infringement is typically one which results either from unfair contract terms or from unfair commercial practices.

In the following part we address separately different remedies and then suggest that coordination problems between injunctions and pecuniary remedies have arisen in the EU. We provide some examples and then suggest that at least for transborder litigation, a rapid intervention is needed.

2.1.2. The European minimum standard – action of injunctions

Since the adoption of Directive 84/450/EEC on misleading advertising, the action of injunction belongs to the core of consumer law remedies. It is enshrined in two major fields of consumer law, unfair trade practices law, now condensed in Directive

²⁹ OJ L 364, 9 December 2004, 1.

³⁰ See in particular recital 2 of the Regulation and preparatory documents.

³¹ See for a full account of the empirical analysis, Micklitz/Rott/Docekal/Kolba, 2007.

³² Micklitz, 1993, p. 411; Id., in Bernitz/Weatherill, 2007, p. 235.

³³ OJ L 149, 11 June 2005, 22.

³⁴ OJ L 250, 19 September 1984, 17.

³⁵ On this shift already, Cafaggi/Micklitz, 2008, p. 391.

2005/29/EC, and unfair terms law, Directive 93/13/EC³⁶ currently under review.³⁷ The European Commission could rely on a longstanding regulatory strategy in Austria, Germany and some other old Member States. This solid background allowed the European Community to harmonise the regime for injunctions, a development which nevertheless stimulated changes in quite a number of Member States. Directive 98/27/EC on injunctions is meant to give shape to the remedy in national *and* in transborder litigation. Injunctions are aiming at setting an end to unfair or misleading advertising or the use and recommendation of unfair standard contract terms. It is a stop order mechanism that can prohibit future infringements but also include cease and desist orders.³⁸ Directive has also promoted the introduction of penalties for lack of compliance with injunctions.³⁹ In case of default, MS legislation can choose between payment to the public purse or to the claimant.⁴⁰ These resources are generally devoted to promote further litigation.

The Directive provides for a mechanism which MS may implement whereby the claimant has to seek an agreement concerning the injunction before the legal claim is brought before the Court.⁴¹ Prior consultation is required but no reference to the legal value of the agreement reached by the parties is made especially in relation to preclusion issues.⁴² This provision shows the importance of the bargaining model in Europe and the attempt to reduce the level of litigation that might arise.⁴³

The draft Directive on injunctions went further.⁴⁴ The original draft did not even mention injunctions⁴⁵ and the European Parliament⁴⁶ did not even discuss the purpose of the action, whereas the Social and Economic Committee⁴⁷ advocated for the integration

³⁶ OJ L 95, 21 April 1993, 29.

³⁷ Green Paper on the Revision of the Consumer Acquis, COM (2006) 744 final, for a deeper analysis see Loos, 2008, p. 40.

³⁸ See Article 2.2 (a) EC Directive 98/27.

³⁹ See Article 2.1 (c) “insofar as the legal systems of the MS concerned so permits an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event that a failure to comply with the decision within the a time limit specified by the courts to administrative authorities, of a fixed amount for each day’ s delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.”

⁴⁰ See Article 2.1. (c) EC Directive 98/27.

⁴¹ See for example Article 4 of the Cooperation agreement between the Nordic Consumer Ombudsmen available at <http://www.forbrug.dk/english/dco/icpen0/nordic-cooperation/ncoagreement/>; see on the degree to which MS have introduced this obligation, Micklitz/Rott/Docekal/Kolba, 2007, p. 234.

⁴² See for references concerning the differences between agreements concerning injunctive relieves and those concerning compensatory damages Cafaggi/Micklitz, 2008, p. 391 ff.

⁴³ For the different models of adjudication developed in Europe and the US, see Cafaggi/Micklitz, 2008, p. 391 ff.

⁴⁴ Article 1 (1) of the Draft ran as follows: The purpose of this Directive is to coordinate the laws, regulations and administrative provisions of MS relating to certain remedies designed to protect consumers’ interests, so as to ensure the smooth functioning of the internal market. The “action for injunction” was only mentioned in recital 3 and reappeared in the heading of Article 2., OJ C 1007, 13 April 1996, 3.

⁴⁵ OJ C 107, 13 April 1996, 3.

⁴⁶ OJ C 362, 2 December 1996, 236.

⁴⁷ OJ C 30, 30 January 1997, 312 under 2.4, see in more detail Micklitz/Rott 2006, Rdnr. 6-9.

of liability claims. This is worth recalling as the European Commission intends to publish a proposal for the revision of Directive 98/27/EC.⁴⁸ It would not be the first time that the European Commission goes back to its earlier proposals. Harmonisation of EC remedies could then be extended beyond injunctions. As EC law stands, it is fair to conclude that injunctions constitute the sole harmonised remedy all over Europe.

Directive 98/27/EC regulated standing, identifying two groups of potential claimants that MS could choose: independent public bodies and consumer organisations. They can select one or both. The Directive set up a notification procedure under which Member States notify the European Commission of ‘qualified entities’ which defend the collective interests of consumers. A principle of mutual recognition has been established by the Directive in order to empower foreign entities to act.⁴⁹ Member States benefit from considerable leeway in choosing not only between administrative or judicial enforcement via consumer organisations, but they are also relatively free in setting their own standards on what they define as a consumer organisation. The Commission publishes regularly a list of qualified entities which are granted standing in their home countries and to which national courts of other Member States are legally bound.⁵⁰

2.2. European group actions and American class actions

In the late 70th and early 80th a debate in some European Member States took place on the feasibility and transferability of the US class action to Europe. This discussion blossomed when consumer policy in Europe was at its peak. However, it seems as if the time was not yet ripe for going beyond individual litigation. France failed after lengthy discussions around the codification of consumer law as well as Germany, where collective actions were debated in the field of unfair commercial practices for many years.⁵¹ Both projects were however of paradigmatic importance.

In France the ambitious project of the Commission de la Refonte aimed at developing a fully fledged consumer code standing side-by-side to the Code Civil and setting standards for the development in Europe. In the end, a Code de la consommation was adopted but it was more a compilation of laws than a codification in the proper sense. The rather ineffective “action des la représentation conjointe”, regulated in Article L-422, could hardly substitute a class action type of regulation.⁵²

In Germany the ground was well prepared with comprehensive empirical studies meant to analyse the potential damage of unfair and misleading advertising in relation to consumers.⁵³ The outcome was a right of withdrawal if the consumer had been driven by misleading advertising. It never gained any importance. Similar experience could be reported from the Scandinavian countries.

⁴⁸ See EC Commission.

⁴⁹ See recital 11 and Article 4.1 of EC Directive 98/27.
For the implementation of the mutual recognition principle through specific agreements see, for example Article 3 of the Cooperation agreement between the Nordic Consumer Ombudsmen available at <http://www.forbrug.dk/english/dco/icpen0/nordic-cooperation/ncoagreement/>

⁵⁰ OJ 63, 8 March 2008, 5.

⁵¹ See for Germany Micklitz, 1996, p. 383. For France Calais-Auloy, 1985.

⁵² See Franck, 2006, p. 153.

⁵³ See von Falckenstein, 1977.

Directive 98/27 on injunctions was enacted in 1998. In less than 10 years the scene has dramatically changed. Again Member States have taken the lead. Today it seems that Member States are convinced that they need some sort of a collective redress mechanism to reach beyond mere injunctions and aims at collective compensation. Why is that so? And why now? As mentioned we seek the change in the separation between substantive vs. procedural remedies and in the development of a proper common community interest.⁵⁴

This does not mean that the common incentives have led to similar solutions. Member States' legislative attempts to get to grips with collective private enforcement may serve as a perfect example for making the overall formula "united in diversity"⁵⁵ a leading principle. Each Member States follows its proper legal culture and tradition. The result is an enormous variety of solutions, each grounded in national particularities and in a bewildering confusion in terminology which renders difficult a deeper comparison of the models. Furthermore it may also constitute more a barrier to European justice than an incentive for competition between legal orders. The development is so fast that research is outdated before it is published. The 2006 Stuyck study does no longer represent the state of art in Europe.⁵⁶ Stanford and Oxford University have taken the initiative to install a stable network of researchers aiming at keeping pace with the ongoing development not only in Europe but world wide.⁵⁷

However, this does not mean that there are no common denominators at all. The benchmark of the European debate has been the US class action regulation. In the European political debate the US class action is characterised by three constitutive elements: opt-out, jury trial and contingency fee.⁵⁸

As the jury trial is rather alien at least to continental procedural systems, the debate has focused on opt-out vs. opt-in and on contingency fee vs. the loser pays principle. There is no public hearing or no political conference where the US class action does not show up, either favoured as the sole solution to protect effectively consumers or as a "*horror juris*" which is blamed for destroying the much more balanced European legal systems. Such a rough dichotomy clearly overlooks the mutual convergence tendencies. In the US, there are constant and ongoing efforts to cut back the misuses of the class action, to introduce a second opt-out option after the settlement has taken place and to intensify the judicial control of contingency fees.⁵⁹

In Europe, there is a strong move towards a group action, based on opt-in. Sweden has set the standard after long-lasting debates and a last minute shift in Parliament from opt-out to opt-in. However, not only Portugal, Spain, and to some extent Denmark and

⁵⁴ See for an account Micklitz, 1996, p. 21 at 29.

⁵⁵ Taken from the Treaty, http://europa.eu/abc/symbols/motto/index_en.htm

⁵⁶ 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.

⁵⁷ See www.globalclassactions.stanford.edu. 26 country reports are available on the internet as well as some of the national legislation.

⁵⁸ See the already paradigmatic documentation of Mansel/Dauner-Lieb/Henssler, 2008, where representatives from industry and the academia discussed the pros and cons of group actions; Stadler in this volume.

⁵⁹ See Beuchler, 2007.

Norway have introduced an opt-out solution, but also the UK and Germany, at least with regard to unfair commercial practices allow for opt-out type actions.⁶⁰ The liberalisation of the verdict of contingency fees at least in some Member States, documents the growing preparedness to take into consideration the fact that the success or failure of group actions in the European sense depends to a large extent on lawyers who have to be remunerated for the higher intensity of work and the higher risk.⁶¹

We will not try to compare the different solutions adopted in the Member States. Application of the new laws is still rather limited. The experience is even more circumscribed with regard to collective judicial enforcement of consumer law. At this stage we can analyse the law in the books and identify the regulatory strategies lying behind the diversity.

2.3. Three models of group actions in 27 Member States

Some clarifications on the terminology are needed. Collective action is used as the overarching category in contrast to individual action. This complies to a large extent with the US terminology of aggregate litigation.⁶² However, subcategories have to be built to reflect the European approach. We distinguish between representative action, group action (opt-in or opt-out), model cases or test case and US class actions.⁶³

2.3.1. The search for the perfect European model

The search for a European approach to aggregate litigation is largely determined by the strong desire to develop a perfect legal model which avoids the so-called deficiencies of the US class actions in response to the separation between substantive and remedial law in a multi-layered Europe. The European Commission is, at least in theory, not bound to the US agenda. It could and it does to some extent more openly and less ideologically address the question whether and why collective actions, to put in neutral terms are needed. This comes clear in the White Paper on Private Enforcement in Competition law. The shift to private enforcement is fostered by European institutions, the ECJ with *Courage*⁶⁴ and *Manfredi*⁶⁵ and the European Commission with the Green and White Paper on private enforcement following suit.

Outside and beyond competition law that is in consumer law, the position of the European Commission is weaker, not least because of its reduced legislative competence. One may wonder, however, whether the rather weak position of the

⁶⁰ Country reports in www.globalclassactions.stanford.edu, Denmark: Werlauff, Germany: Baetge, Finland: Viitanen, Norway: Bernt-Hamre, Portugal: Sousa Antunes, Spain: Gutiérrez de Cabiedes Hidalgo, Sweden: Lindblom as well as the more comprehensive national reports on Germany, the United Kingdom, Sweden in Micklitz/Stadler, 2005.

⁶¹ Sweden has introduced risk agreements; Italy has got rid of the prohibition concerning fee agreements between lawyers and clients, see for a fuller presentation of the laws of the MS, Ros, 2006, p. 299.

⁶² See ALI project on the law of aggregate litigation Chapter 1.

⁶³ See already, Cafaggi/Micklitz, 2008, p. 391; Stuyck in this volume.

⁶⁴ ECJ, 20 September 2001, Case C-453/99, *Courage*, [2001] ECR I-6297.

⁶⁵ ECJ, 12 July 2006, Case C-295/04, *Manfredi*, [2006] ECR I-6619.

European Commission in consumer law would not enable the arguments in favour of private collective enforcement strategies to be openly addressed. The envisaged green paper of DG Sanco, to be expected in 2008/2009, will have to demonstrate whether the European Commission is willing to discuss and rethink the principle of the procedural autonomy of the MS in a European Community.

Be that as it may, Sweden has set the agenda not only for the Scandinavian countries in the long established spirit of Nordic legislative co-operation⁶⁶ but for most of the old Member States in its long and intensive political debate over the pros and cons of transferring the US class action model to Europe. The result has been an opt-in solution, which was lately based on the need to respect the right to be heard of all those who are involved in mass actions but are not leading the case.⁶⁷ None of the Member States, perhaps with the exception of the UK, undertook such a serious effort to do justice to the US experience beyond oversimplification and the horror of an open political debate. In Germany the then competent Ministry of Consumer Protection launched a research project which led to the development of an academic draft.⁶⁸ A public hearing in France in June 2006 did not go beyond the rather simplified debate over the pros and cons of opt-in and opt-out.⁶⁹ In Germany and in the Netherlands the respective legislation is not so much the result of public debate of the pros and cons of a group action and its possible outlook, but of social events which pushed the legislature into action. The German Capital Markets Model Case Act is the result of the so-called Telecom case.⁷⁰ The Dutch Law on mass damages is very much going back to a huge litigation over the disastrous effects of hormones.⁷¹

The Swedish law on Group Actions⁷² takes up all issues which are discussed in the US class action. However, the overall aim is to set up a perfect legal model which avoids the incriminated pitfalls of the US solution and embeds the European version of the group action into a tight legally formalised legal jacket. The act devotes careful attention to the determinants of what constitutes a group action, to the commencement of the procedure, to the choice of the appropriate group representative, his or her control by the judges, the tasks and duties of lawyers and judges during the litigation to carefully manage the litigation, to settlement in courts and its possible legal effects.⁷³

⁶⁶ See Bernitz, 2002, p. 95.

⁶⁷ See Micklitz/Stadler, 2005, p. 497.

⁶⁸ See Micklitz/Stadler, 2005, p. 497. However, neither the research nor the draft ever reached the political level. This might be due to the fact that the study had been undertaken by the 'wrong' ministry. For legislative matters the Ministry of Justice claims competence.

⁶⁹ See www.globalclassactions.stanford.edu the French report written by Magnier. The new French government has not yet decided whether to take up Chirac's initiative again which led to a proposal in Parliament which might be regarded as a developed form of the *l'action de la representation conjointe*.

⁷⁰ Nearly 16,000 private investors sued German Telecom at the Court of First Instance in Frankfurt for having published relevant information too late which would have affected the emission of the second tranche of telecom shares.

⁷¹ See Mom, in Micklitz/Stadler, 2005, p. 435; Hondius in this volume and Tzankova, Country report Netherlands, available at www.globalclassactions.stanford.edu.

⁷² Reprinted in Micklitz/Stadler, p. 628, translated by the Government Office, Office for Administrative Affairs, Stockholm Sweden.

⁷³ See Micklitz, in van Boom/Loos, 2007, p. 3; from a Swedish perspective, country report Sweden, written by Lindblom, available at www.globalclassactions.stanford.edu

The respective legislative acts adopted in Denmark, Finland and Norway follows the Swedish opt-in model though allowing opt-out claims in particular circumstances.⁷⁴ The German “Academic” Draft Act was inspired by the Swedish model as well.⁷⁵

The UK Group Litigation Order⁷⁶ does not copy the US class action, but it fits nevertheless into the overall search for an appropriate European model. In essence it maintains the individual character of the litigation and reduces the collective elements to the strict minimum.⁷⁷ The beginning and end of the procedure are and remain individual claims. However, the GLO recognises the need for the judge to shape the procedure and even explicitly refers to the “managing judge”.⁷⁸

2.3.2. The key role of consumer associations

The role and function of consumer organisations varies considerably in Europe. It is tempting to use the distinction between pluralistic and corporatist societies as a paradigm to assess and to define the role of associations. In such a rough pattern the US appears as a pluralistic society, whereas in particular the Scandinavian countries, Austria, Germany and the Netherlands are generally roughly associated with corporatist societies. This might suggest that consumer organisations are strong in corporatist countries. This, however, is only partly true. It might fit with regard to Austria, Germany and the Netherlands, but it is less true with regard to the Scandinavian countries where public agencies are the key players in collective enforcement. However it must equally be admitted that the distinction is superficial and might vary with regard to different policy fields even among Member States.⁷⁹ This seems to be true even within the same policy field. Consumer organisations are playing an ever increasing role even in countries which are not regarded as prototypes of corporatist states such as France and Italy. In France, for example, the state is traditionally regarded as representing the public interests which include consumer policy.⁸⁰

So alternative explanations to the role of consumer organisations in enforcement policies are needed which reach beyond the dichotomy of pluralistic vs. corporatist societies. They may be found in the interplay between public government and consumer organisations. We may observe Member States with strong public and private institutions (Germany and France), countries with strong private and weak public institutions (Italy) or countries with weak public and weak private institutions (the new Member States). Such a distinction might provide for new insights, but is again of limited value. Germany has strong public institutions, but not in the field of consumer law, not even with regard to product safety. More or less the same applies to France, where consumer organisations are the key players as public institutions have no or limited regulatory power in the field of consumer law enforcement. More research is

⁷⁴ See Viitanen, 2007, p. 83, as well as the respective country reports for Denmark, Finland and Norway available at www.globalclassactions.stanford.edu

⁷⁵ Stadler/Micklitz, p. 1471.

⁷⁶ See Mulheron, 2004; Stadler/Micklitz, p. 795 at 891.

⁷⁷ See Mulheron, 2004.

⁷⁸ See GLO Rule 19.13 and Hodges, 2001, p. 321.

⁷⁹ See Strünck, 2006, p. 18 and 44.

⁸⁰ Baumgartner, 1996, p. 9, 1.

needed to explain the role and function of consumer organisations. However, in contrast to the US it is obvious that consumer organisations have a role to play in the shaping and in the implementation of consumer law via collective actions. The introduction of the action for injunction and the Member States preparedness to give exclusive standing to consumer organisations has certainly contributed to the current situation in Europe.

The prototype is the representative action “invented” in Austria and then co-opted for by Germany. Both countries rely heavily on consumer organisations in private collective enforcement. This is largely due to a common history under which private organisations rather than administrative bodies were regarded as the appropriate enforcers of unfair commercial practices legislation.⁸¹ When the pressure grew to extend the available remedies beyond injunction, the Austrian consumer organisations managed to get confirmation in the Supreme Court for their strategy, to litigate on behalf of consumers who had individually transferred their rights to claim compensation to the organisation.⁸² Since then the Austrian consumer organisations improved their management skills and developed a fine-tuned strategy to collect claims in appropriate cases and to claim compensation.⁸³ They have filed more than twenty cases and successfully managed them.⁸⁴ The key to the success has been the role of the so-called process insurer, an insurance company which bears the risk, but claims 30 % of the profit. Consumers who transfer their rights to the organisation have to sign a document that they agree with this form of ‘contingency fee’.

The parallel German rule has been the result of a ‘clandestine’ co-operation between German consumer organisations and the competent Ministry of Justice.⁸⁵ Both managed to smuggle the new power into the much debated law on the reform of the German Civil Code. German consumer organisations started a test case and had to learn how reluctant German Courts react against any attempt to stretch the civil procedural law beyond the boundaries of individual litigation. In the end the legislator had to intervene to correct the imperfections.⁸⁶ German consumer organisations seem now to be prepared to go down the Austrian way in seeking support from so-called process insurers.⁸⁷

The French action en représentation conjointe comes near to the Austrian/German approach, but never played a role in practice, mainly because of the high risk consumer organisations run in financing the litigation. The French Draft Act which was officially withdrawn, pointed in the same direction.⁸⁸

The Dutch and the Italian laws rely heavily on consumer organisations. The Dutch law requires collective litigants, consumer organisations as well as associations or

⁸¹ Bakardjieva Engelbrekt, 2003.

⁸² See Klauer, 2005, p. 79, where the development of the Austrian Sammelklage is presented in full, from a German perspective Stadler/Mom, 2006, p. 199.

⁸³ Which does not mean that the representative action is the appropriate means in all constellations where consumers suffer damages; see the different contributions in Gabriel/Pirker-Hörmann, 2005.

⁸⁴ Klauer, 2005, p. 79.

⁸⁵ See Brönneke, 2001.

⁸⁶ See BGHZ 170, 18 and then the amendment in § 8 Abs. 2 Rechtsdienstleistungsgesetz, BGBl. 2007, 2840.

⁸⁷ This is the case in the pending litigation initiated by the Hamburg consumer advice centre against a telecom company.

⁸⁸ See www.globalclassactions.stanford.edu, the French report written by Magnier.

foundations established just for that very purpose, to conclude a settlement, which is then approved by the courts and extended to the whole class. It is an opt-out mechanism based on the assumption that litigants are able to find a compromise which is not only acceptable for both sides but also for the court. It is quite a unique procedure which has been applied twice.⁸⁹ The Italian law on group actions, which shall enter into force on 1 January 2009, grants standing to consumer organisations.⁹⁰ Those consumers and users who intend to benefit from the protection afforded by Article 140-bis must notify the association in writing and their intention to join the collective action. Just in line with the dominating philosophy in Europe, Italy has introduced an opt-in procedure.

2.3.3. *Collective consumer actions in new democracies*

The southern new Member States of Portugal, Spain and Greece have introduced collective consumer actions shortly after their transformation into democracies. It is a major characteristic of these countries that consumer law and consumer policy formed an integral part of the democratisation process. This is overtly documented in the respective consumer legislations.⁹¹ The historical background might explain why the respective rules on collective action in these countries are rather broad and policy oriented. They sometimes look more like policy programmes needing further fine-tuning by the legislator than fully fledged laws.⁹² However, the rules on collective actions in the consumer protection acts have gradually been supplemented by more detailed rules in regulations enshrined in the civil procedure or in separate legislative acts.⁹³

The original versions tend to refer in a large sense to the collective or diffuse interests somewhat inspired by the French concept of the “*intérêt collectif*”.⁹⁴ Article 20 of the Spanish Law on Consumer Protection 26/1984 and Article 11 of the Civil Procedure Act refer to the diffuse and collective interests that consumer organisations have to defend.⁹⁵ Article 12 (4) and (5) of the Portuguese Law 24/96 refers to liability claims and regulates standing in Article 13 *inter alia* of the Public Prosecutor who may intervene to protect the collective and diffuse interests of consumers.⁹⁶ However, Portugal has introduced new legislation to be added to that introducing popular action enacted in 1995.⁹⁷ The system of aggregation established by the legislator in Decree-Law 108/2006, of 8 June, pursuant to Council of Ministers Resolution 100/2005, of 30 May, is of substantially more limited reach. The measure allows the judge to operate

⁸⁹ See Stadler/Micklitz, p. 343.

⁹⁰ Article 140-bis of the Italian Consumer Code; see for details www.globalclassactions.stanford.edu, Silvestri, Italian report.

⁹¹ See Gerlach, 1986, p. 247; Micklitz/Roethe/Weatherill, 1994.

⁹² See Stadler/Micklitz, p. 169 (Greece), p. 655 (Spain).

⁹³ www.globalclassactions.stanford.edu Portugal: Sousa Antunes; country report Spain: Gutiérrez de Cabiedes Hidalgo.

⁹⁴ See on this concept Micklitz/Stadler, p. 115.

⁹⁵ www.globalclassactions.stanford.edu Spain: Gutiérrez de Cabiedes Hidalgo with an English translation of the respective Acts.

⁹⁶ www.globalclassactions.stanford.edu Portugal: Sousa Antunes with English translations.

⁹⁷ Law 83/95 and Decree-Law 108/2006.

through “mass acts” so long as there is an element of connection between the actions and the combined performance of a procedural act or diligence simplifies the court’s task. The intervention of the legislator was the result of an increase of mass non-compliance, in particular with regard to “small debts of communications companies, consumer credit, car leasing and, in general, all the natural litigation of a consumer society”.⁹⁸

It seems as if the Middle and Eastern European countries have chosen a different path. Early hopes that the transformation process will equally yield strong civil societies with active consumer organisations that collaborate with public agencies has not become true or if any to a much more limited extent.⁹⁹ Whilst market building was certainly fostered in particular in the pre-accession period, last but not least under pressure from the European Community, the middle and Eastern European countries were reluctant to integrate collective actions into their respective consumer laws, meant to implement the various EC directives. The action for injunction constituted the bottom-line of reform, sometimes undertaken much more to pay lip service to the EC law requirements than to vitalise a new remedy in a changed economic and political environment.¹⁰⁰ However, the wave of law making has now reached the new Member States as well. Nearly twenty years after the break down of communism, the middle and Eastern European countries are undertaking major efforts to keep up with the development in the old Member State.¹⁰¹ It is suggested, however, that not all new Member States are prepared to introduce collective remedies beyond injunctions. Poland¹⁰² and the Czech Republic¹⁰³ belong to countries where there are not even concrete plans.

2.4. Regulating entry and exit – Comparing *ex ante* and *ex post* intervention

Regulation in collective judicial enforcement relates to various aspects of standing, financing and entry and exit options. Legally speaking Member States are free to regulate *ex post* or *ex ante*. Directive 98/27/EC, which adopts an *ex ante* approach with highly regulated entry, applies only to injunctions.¹⁰⁴

Standing differs quite significantly across countries in group litigation. In some MS, standing is open to private, both individual representative and collective organisations,

⁹⁸ www.globalclassactions.stanford.edu Portugal: Sousa Antunes, with English translations.

⁹⁹ Micklitz, 2001, pp. 137-182.

¹⁰⁰ This is the overall finding of empirical investigation in 25, not 27 MS, Micklitz/Rott/Docekal/Kolba, 2007; see also Bakardjeva, 2006, pp. 1-36 and Ead, in this volume.

¹⁰¹ See Bakardjeva in this volume.

¹⁰² See Safjan/Gorywoda/Janczuck in this volume; www.globalclassactions.stanford.edu Poland: Tulibacka.

¹⁰³ See Tichy/Balarin, in this volume; Tichy (ed.), 2008.

¹⁰⁴ See Cafaggi/Micklitz, 2008, p. 391 ff.

and public;¹⁰⁵ in others only to individual representatives and *ad hoc* organisations;¹⁰⁶ in others only to private organisations.¹⁰⁷

Ex ante governmental intervention occurs when States organise civil society by limiting standing to consumer organisations and/or public agencies, by excluding self-organisations from acting as claimants and in providing funding from the public purse. The practical effect of *ex ante* intervention is control over access to justice. According to this perspective, collective judicial enforcement shall not be driven by market forces, but shall develop and grow, if at all, under the auspices of state control. European business arguing against US class action directly or indirectly supports *ex ante* intervention. The flood gates to the judiciary should not be opened.

Ex post intervention refers to a regulatory model where states leave the organisation and the funding of collective actions to civil society or even beyond where the state sets incentives to promote that goal. It relies on self-organisation, be it on an *ad hoc* basis or on lawyers which organise claimants and bundle consumer complaints. Such a regulatory model requires room for competition between possible plaintiffs; it implies more leeway for civil society, more economic incentives for lawyers and more powers for the managing judge.

One may wonder whether there is a silent but steady shift in Europe from the *ex ante* state control to the market based *ex post* US control of access to the judiciary in collective actions. Although, Europe is in a test phase, our tentative answer to a paradigm shift is a cautious yes. Collective actions might then become a regulatory device to rebalance matters of (social) justice.¹⁰⁸

Prominent candidates for such a move are the UK Group litigation order, the Dutch settlement approval concept and the German Capital Market Model Case Act. The UK model allows for self-organisations and fosters the concept of the managing judge.¹⁰⁹ The societal Dutch model puts moral pressure on the conflicting parties to settle the conflict. The feasibility of this concept seems to be linked to particularities of Dutch society.¹¹⁰ The standard method in aggregate litigation works exactly the other way around. Litigation in court ends up in a settlement.¹¹¹ The German model shows promising tendencies since the Capital Markets Model Case Act favours enforcement via lawyers and lead plaintiffs and no longer relies only on consumer organisations. Typically for Germany, however, it is a rather mixed scene. Representative actions lie in the hands of registered public consumer organisations alone.

¹⁰⁵ See the Swedish Act of 2002, more generally in the Scandinavian countries, see Viitanen, 2007, p. 83, as well as the respective country reports for Denmark, Finland and Norway in www.globalclassactions.stanford.edu.

¹⁰⁶ This is the case in the German Capital Markets Model Case Law.

¹⁰⁷ See the Italian model in Article 140 bis codice del consumo and the Dutch group actions, Hondius in this volume.

¹⁰⁸ Gidi, 2005, p. 37; Meller-Hannich, 2008, p. 13; sceptical on this issue Stürner, 2008, pp. 113, 118.

¹⁰⁹ See Micklitz/Stadler, p. 857; Hodges: country report UK, www.globalclassactions.stanford.edu

¹¹⁰ See Mom, 2007, and Hondius in this volume.

¹¹¹ See Klauer, 2005 and Stadler/Mom, 2006.

We will give shape to the *ex ante* and *ex post* regulation of entry with regard to the four potential sets of plaintiffs: consumer organisations, *ad hoc*-organisations, statutory agencies and lead plaintiffs in tandem with lawyers.

2.4.1. Consumer organisations

Consumer organisations exist in all Member States with different weight, legitimacy and accountability.¹¹² The policy question is whether and why consumer organisations should have standing in group actions.

Their organisation and performance requires skills and resources. It is useless to grant standing to consumer organisations if they are unable to monitor effectively violations and to select claims to be brought before courts. This, however, happens in nearly all Member States. The long list of notified consumer organisations does in no way correlate with their practical importance.¹¹³ In Europe only a few consumer organisations are effective litigants. As long as the question of funding is not solved, it remains somewhat artificial to discuss the pros and cons of standing for consumer organisations in group actions.

None of the Member States has adopted particular laws on consumer organisations to regulate solely and particularly the status and the potential funding of consumer organisations to promote litigation. Their regulatory status is generally based on the law of associations and on constitutional freedoms of speech and self-organisation. Funding does not play a role here.

Particular requirements related to standing might be found in the respective EC rules on actions for injunctions.¹¹⁴ These requirements, however, define only a minimum and are rather vague. The European Commission does not have the power to impose on Member States an obligation to provide adequate funding.¹¹⁵ It is for the Member States to decide standing – and funding.

In the laws implementing Directive 98/27/EC and some of the Consumer Codes they have laid down criteria on the characteristics of consumer organisations.¹¹⁶ There are no commonly agreed criteria on consumer organisations. It is obvious, however, that consumer organisations are submitted to much more stringent criteria in the new than in the old Member States.¹¹⁷

The role of consumer organisations in group actions varies across MS, lacking a European directive. Although consumer organisations are particularly strong in Austria and Germany, last but not least because these states provide nearly 100 % of the funds,

¹¹² See Article 3 EC Directive 98/27 on which Cafaggi/Micklitz, 2008, p. 391 ff.

¹¹³ See Micklitz/Rott/Docekal/Kolba.

¹¹⁴ See Article 3 EC Directive 98/27.

¹¹⁵ However, the European Commission may ask MS to provide for adequate funding, which it has done in the consumer strategy 2007-2013.

¹¹⁶ See for example the Italian Consumer Code Article.

¹¹⁷ The old MS leave the organisation of consumers to civil society and limit the regulatory requirements to the strict minimum. Often these criteria are not even enshrined in mandatory legislation but are the result of diverse court rulings. See Micklitz/Rott/Docekal/Kolba, 2007. In this volume see Bakardjeva.

it can by no means be taken for granted that they will be entrusted with group actions in the here defined terminology.¹¹⁸ Germany has excluded consumer organisations from the Capital Market Model Case Act, but granted them a monopoly in test cases. The distinction should not be overestimated, however, as the adoption of the respective law is more erratic than systematic. Which way Austria will go is by no means clear. The Netherlands and in particular Italy have granted consumer organisations alone standing, thereby excluding all other potential players.¹¹⁹ In countries with strong public authorities, consumer organisations are often relatively weak. This is true with regard to the UK and the Scandinavian countries. In the UK and in the Scandinavian countries strong agencies form an integral part of the respective form of capitalism.¹²⁰ Denmark, Finland, Norway and Sweden have granted standing to both; in practice, however, the Ombudsmen are the key players.¹²¹

In the new Member States weak public authorities and weak consumer organisations go hand in hand. Public institutions in socialist times were weak because the party was the running leader. To limit private constituencies' power the new Member States have chosen primarily to rely on public institutions. This leads to the problematic effect that weak state authorities tend to control the access of consumer organisations to the judiciary beyond mere minimum standards. It seems as if consumer organisations and public authorities are competing in the enforcement of consumer law. The constant need for public funding provides a prominent ground for playing off consumer organisations against each other by providing limited funding to a large number of organisations. Such a strategy keeps the influence of consumer organisations low and enhances the position of the statutory authorities.¹²²

2.4.2. Self or ad hoc organisations

Under the framework of Directive 98/27 organisations need to be registered to be granted standing.¹²³ Only organisations with a stable infrastructure and long standing experience should be regarded as qualified entities having standing to sue. The Directive sets precedents which run counter to the idea of self-organisations, where these elements are missing or only available in rudimentary form.

Ad hoc organisations are the result of incidents and accidents. Self-organisations emerge on an *ad hoc* basis as the result of homogenous interests in collective litigation.¹²⁴ The victims or better the parents of the thalidomide catastrophe or of the hormone case in the Netherlands have organised themselves into the form of an associations.¹²⁵ In

¹¹⁸ Taken from CLEF.

¹¹⁹ See Article 140 bis of the Italian consumer code.

¹²⁰ See Hall/Soskic, 2001.

¹²¹ Lindblom: National report Sweden available at www.globalclassactions.stanford.edu.

¹²² Bakardjieva in this volume.

¹²³ OJ L 166, 11 June 1998, 51.

¹²⁴ Such self-organisations may be reported in particular from the field of product safety, where the victims of an accident gather together to better defend their interests. Then a stable organisation is needed which may be organised according to the law of associations or company law as far as this applies also to non-profit making institutions.

¹²⁵ See Hondius in this volume.

Germany the companies which suffered from a cement cartel have established a BGB-Gesellschaft Partnership under the German Civil Code.¹²⁶ In Belgium a company has been created to defend injured parties in competition law infringements.¹²⁷

The question then is whether self-organisations should have standing. There are policy arguments for and against penalising *ad hoc* organisations while privileging rooted and stable organisations.

The main reasons why longstanding, representative organisations are given standing in those countries where *ad hoc* organisations are not granted standing are twofold: a) to prevent opportunism¹²⁸ and b) to empower existing organisations and avoid competition and to some extent the emergence of a strong civil society.

The arguments to grant standing to *ad hoc* organisations are a) to favour the creation of groups of victims in order to generate economies of scale and b) to put pressure on existing organisations and, promote social and legal pluralism and to avoid rent-seeking.

In Europe the picture is rather scattered which reflects to some extent the distinction between liberal and corporatist societies. Corporatist societies, such as Germany, prevent the formation of new and *ad hoc* organisations to negotiate with existing and well recognised organisations or make them even mandatory, like the Dutch law on group actions.¹²⁹ Liberal societies, such as the UK, favour the formation of new organisations and try to prevent rent-seeking of the existing ones. However, the picture becomes blurred once the comparison is extended. In Austria, a classical corporatist country, self-organisations have been granted standing by the highest court in the country.¹³⁰ As to group actions in Sweden self-organisations are allowed.¹³¹

2.4.3. Administrative agencies

Consumer agencies in Europe take very different forms. They may be (1) independent regulators, (2) they may be part of the government or (3) something in between. It has to be recalled that the policy of the European Commission is bound so far to the establishment of public enforcement bodies with regard to transborder litigation only.¹³² There is no (not yet) EC policy similar to the services of general economic interests to advocate for the setting up of independent consumer agencies dealing also with internal national matters. But even the ideal type of consumer agency, the independent and separate public body with proper competences and well equipped, runs similar risks as those of a consumer organisations. If the public body launches a collective action, it

¹²⁶ Hess, 2008, pp. 61, 70-71 with references to the diverse forms of self-organisation.

¹²⁷ Cartel Damages Claims (CDC), <http://www.carteldamageclaims.com/english/press.htm>.

¹²⁸ An *ad hoc* organisation can be created to exploit specific opportunities without being grounded in civil society.

¹²⁹ However, the former relatively strict approach of the German Federal Supreme Court which prohibited the transfer of rights to an association which then could sue on behalf of the assignees is going to be softened now; see references in Hess, 2008, fn. 99.

¹³⁰ See the documentation of the case law in Klauer, 2005, p. 79.

¹³¹ Compare Sweden where *ad hoc* organisations can be created, see Lindblom: National Report Sweden available at www.globalclassactions.stanford.edu

¹³² See Regulation 2006/2004 Article 1.

runs the same financial risk. It cannot go bankrupt, but it can be held liable for improper judicial advice.¹³³ What matters even more is that consumer agencies differently from other national regulators such as cartel offices or the network regulators (energy, telecom) often do not have their own sources of income and depend entirely on transfers from the government. Only when competition agencies have been given enforcement tasks in the field of consumer protection can they use the resources generated by infringements of competition law.

In Member States with strong public enforcement structures in the field of consumer law and weak consumer organisations, the former often play a relevant role in collective judicial enforcement. In the Scandinavian countries, consumer law judicial enforcement lies in the hands of the Ombudsmen, entitled to file collective compensation claims. Similar tendencies are to be reported from the UK where the enforcement lies primarily in the hands of the Office of Fair Trading and from the new Member States, where often separate units of the competent Ministries are in charge of the enforcement.¹³⁴ The EC move towards the establishment of consumer agencies in each Member States may even strengthen this development. Consumer organisations are then reduced to mere watch dogs which might file motions to the consumer agency, at the best establishing co-operation mechanisms.

2.4.4. Lead plaintiffs and lawyers in tandem

Lead plaintiffs are relatively new actors in European collective judicial enforcement. The terminology and the category are definitely borrowed from the US class action. There is overall agreement that group actions of several, maybe hundreds, of claimants need a plaintiff to lead the case. In Europe this is predominantly the claimant who has the strongest economic interest in the outcome. Member States do not apply the first come first serve principle.¹³⁵ This might be due to the fact that there is less fear in the Member States that lawyers are competing against each other with their respective claimants on the basis of ill-founded and less-settled claims. So far, this has not happened or where there are tendencies like in financial services litigation, these seem to be under the control of the competent judges.

The true problem for the EU Member States is the definition of the role and function of the lawyer. In the US, lawyers are the driving force behind the class action, due primarily to the contingency fee structure. Collective judicial enforcement, in the field of consumer protection, is regarded as business which needs investment. Europe, at least European governments, are far away from such approach. Whilst there is a strong move to look at lawyers as service providers, they are still regarded as being part of the judicature, thereby fulfilling quasi statutory tasks.¹³⁶ EC law too remains ambivalent. Whereas lawyers are regarded in competition law as enterprises, the ECJ exempted the

¹³³ There are two famous examples both from the area of product safety and both concern the public warning against health risks. See OLG Stuttgart NJW 1990, 2690 – Birkel and ECJ, 17 April 2007, Case C-470/03, COS.MET, [2007] ECR I-2749; Reich, 2007, p. 410.

¹³⁴ On the enforcement powers of OFT see Ramsay, 2007; Howells/Weatherill, 2005.

¹³⁵ See references in a comparative perspective, Stadler/Micklitz, p. 1390.

¹³⁶ Ros, 2006, p. 299.

chambers of advocates from the scope of application of EC law.¹³⁷ Europe is not willing to go down the American road which means in essence that new forms of funding should be considered. This, however, is not really the case.

3. Reframing the European debate in the light of the US and Canadian experiences

Two different yet related questions concerning consumer enforcement policies are before Europe: (1) the definition of a consistent multilevel system with strong coordination between European and MS legislation, (2) the relationship between administrative and judicial enforcement and within the latter between injunctive reliefs and pecuniary remedies. Furthermore, should the strategy distinguish between transborder and domestic litigation? Should specific rules and policies be devised to promote European aggregate litigation?

We try to address these points by breaking them down into 5 issues:

(1) the constitutional dimension of collective redress, (2) the relationship between administrative and judicial enforcement, (3) the role of hybrid class actions and the interplay between injunctions and pecuniary remedies, (4) the effects of remedial strategies on consumer substantive laws and (5) the players.

We end with a brief analysis of what European institutions should do next (6).

3.1. The constitutional balance between collective and individual redress in light of the debate between public and private enforcement

Aggregate litigation often involves separation between ownership of the claims and control over litigation. This separation raises agency problems with constitutional relevance. The degree of separation and the rights of principals (consumers) to monitor the agents (public entities, private consumer organisations, lead plaintiffs, law firms, etc.) is limited by constitutional principles.

The right to access the class, the definition of the class, the limits of res-judicata, preclusion of subsequent litigation, the effects of settlements and the right to opt out all bear constitutional relevance both in the US and EU.¹³⁸

In the US the focus has been on due process rights to individualised treatment and a right to trial by the same jury of non-separable issues. The tension between aggregate litigation and individual rights has been at the core of judicial and scholarly attention. The principles are differentiated in relation to the type of remedy.¹³⁹ Due process

¹³⁷ ECJ 19 February 2002 C-303/99, [2002] ECR I-1577.

¹³⁸ See Hazard, 2008, S. Burbank, 2008.

¹³⁹ Significant differences exist between aggregate litigation seeking injunctive reliefs and that seeking pecuniary rewards. Individual rights are not considered insuperable obstacles to collective redress. In the area of injunctions opt-out rights are often reduced or eliminated, in that of damages individual rights are given greater importance but limitations to opt out are still held admissible. See Ortiz v.

requires broad opt out opportunities in divisible remedies while it does not require the same for indivisible remedies.¹⁴⁰ In the former case, rights of individual claimants are generally characterised by exit, voice and loyalty.¹⁴¹ The right to opt out and escape the preclusive effect of the judgement (exit), the right to participate and be heard (voice) and the right to adequate representation constitute the pillars of individual protection and define the boundaries of aggregate litigation.¹⁴² Lately a shift towards opt-out policy has been explicitly advocated in the field of securities litigation to improve accountability.¹⁴³

In Europe the general principles focus on the individual rights to limit modes of collective enforcement, sometimes even in a human rights dimension.¹⁴⁴ Differences exist at MS level not only between old and new MS but within Western Europe. The new generation of Constitutions, introducing consumer protection clauses, have balanced the individual and collective dimensions, often providing constitutional basis for collective redress.¹⁴⁵ Thus they strike a different balance from the framework defined in the first half of the XX century in western democracies. These differences may require some balancing at EU level.

European legal systems seem to give greater importance to individual rights and limit the possibility to introduce opt-out systems in national legislation due to constitutional principles concerning access to justice.¹⁴⁶ New legislation in the Scandinavian countries

Fibreboard Corp. 27 U.S. 815 (1999, *Molski v. Gleich* 318 F3d 937, 948-9 (9th Cir 2003), for a review, see Daniels, 2005, p. 499 ff.).

¹⁴⁰ See ALI Principles § 2.08 comment c:

“Aggregate treatment of related claims need not afford claimants an opportunity to avoid the preclusive effect of any determination of those claims if the court finds that the aggregate proceeding should be mandatory in order

- (1) to manage fairly and efficiently indivisible relief
- (2) to allocate equitably a pre-existing limited fund among claimants; or
- (3) to facilitate the fair and efficient adjudication of claims asserted in individual lawsuits subject to court-ordered consolidation.”

¹⁴¹ See Issacharoff, p. 337 at 366 and Coffee, 2000, p. 370 ff. at 376-7.

¹⁴² See ALI Principles § 2.08 comment c: “In the context of aggregate litigation the right of exit in subsection (a) (1) consists of the opportunity to escape the preclusive effect of the aggregate proceeding. The right of voice in subsection (a) (2) consists of the opportunity to participate in the aggregate proceeding and, as its antecedent, notice of that proceeding. The right of loyalty in subsection (a) (3) consists of judicial review, as a precondition for aggregate treatment, to ascertain whether any structural conflicts of interest exist in representation of claimants.”

¹⁴³ See Coffee, Jr., 2008, suggesting, in relation to securities class actions, that Courts should: “not certify the class action before the settlement’s terms have been publicly disclosed....reject proposes settlements that have disproportionate reductions for opt outs. But Courts should not reject settlements that give the class the benefit of any higher payment made to an opt out...” (p. 52)

¹⁴⁴ See Stadler in this volume.

¹⁴⁵ This is the case in Portugal where Article 52 (3) of the Constitution as amended in 1989 states “Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for compensation”, and in Spain Constitution 1978, Section 125 of the Constitution ‘Citizen may engage in popular action and take part in the administration of justice through the institution of the jury, in manners and respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.

¹⁴⁶ See for example the debate on the constitutional right to be heard which has taken place in Germany with the introduction of KapMuG. Constitutional arguments imposed the right to be heard on

has introduced some forms of aggregate litigation with the possibility to opt out where standing is attributed exclusively or primarily to Public organisations.¹⁴⁷ The debate is not entirely consistent. There is some tension between the emphasis on individual rights in the group action debate and the legislation on injunctions granting, *de jure* or *de facto*, monopoly of standing to consumer organisations and public organisations, without providing strong accountability mechanisms, especially towards non-members and the public.

A more balanced set of solutions is needed. On the one hand some trade-off between benefits and costs of aggregate litigation needs to be made with some detriment to individual consumer rights. The necessity to ensure stable solutions reached either through judgements or settlements may preclude individual claimants to litigate the matters over and over in different jurisdictions. On the other hand, higher protection of individual rights in systems may be ensured by increasing accountability mechanisms associated with public and private organisations to which standing is granted. Delegation to private organisations of consumer protection should be combined with specific rules protecting non-members who may be affected by the binding effects of the judgement or the settlement concluded by private organisations.

3.2. Administrative and judicial enforcement

The interplay between administrative and judicial enforcement works differently across the Atlantic both for institutional and cultural reasons.¹⁴⁸ The operations of the two basic institutions, Courts and Agencies, still widely differ and the main players, on both the plaintiff's and defendant's sides, are provided with very different incentive systems.

Given that both enforcement mechanisms are aimed at regulating conducts and deterring unlawful behaviour it is necessary to differentiate sanctions and penalties to achieve the desired level of deterrence. In theory both enforcement mechanisms concern relative homogeneous risks and conducts however they may differ as to temporal and spatial dimension and to the ways conflicting interests of those negatively affected are balanced. When risks and injuries are highly specific clearly judicial should be preferred over AE.

Two important conclusions may be drawn on the relationship between judicial and administrative enforcement:

- a) While it is acceptable and sometimes even desirable to combine administrative and judicial enforcement in relation to different remedies, institutional overlap for the same remedy should be avoided. Conferring power to delete an unfair term, to enjoin an unfair trade practice or to recall a defective product at the same time on administrative and judicial authority may bring about inconsistent

interested parties other than the chosen plaintiffs and limits to the binding effects only on those who were able to 'influence' the outcome of the proceedings. See Baetge, 2007. Similar issues have arisen in Italy in relation to the introduction of the new regime. For a summary of the discussion on the constitutional dimension in Italy see Giussani, 2008.

¹⁴⁷ See Denmark and Norway which for many other issues have followed the opt-in Swedish model, www.globalclassactions.stanford.edu, (see for Denmark, Werlauff and for Norway Bernt-Hamre).

¹⁴⁸ See Cafaggi/Micklitz, 2008, p. 391.

results, increasing social costs without adding any substantial benefit.¹⁴⁹ The case of different institutions employing identical remedies should be avoided. Institutional complementarity should operate between remedies not within the same remedy unless the requirements to administer the remedy are so different to pursue different goals.

- b) The coordination between enforcers does not necessarily imply the definition of hierarchy between the two types of enforcement when they concern the same subject matter. Coordination imposes prioritisation. Combined use of administrative and judicial collective enforcement in consumer protection poses questions of priority/pre-emption. Should administrative have priority over judicial enforcement? To what extent may divergent conclusions between agencies and courts be allowed about infringements, i.e. can the same conduct be considered lawful by an administrative agency and unlawful by a court?

The institutional complementarity approach suggests that divergences are not problematic if and when the two modes of enforcement perform complementary goals.¹⁵⁰ They only become an issue if the same standards and goals lead to different and conflicting outcomes.

It is important to decide rules about sequencing between administrative and judicial enforcement, especially if information costs are taken seriously.¹⁵¹ Most of the debate in the US about cost-effectiveness of administrative versus judicial enforcement gravitates around cost-effectiveness in information acquisition.¹⁵² Often, however, as the case of competition clearly shows, private enforcement follows public enforcement and adds little information to that generated by public enforcers. Thus appropriate sequencing and the possibility of allocation of tasks between administrative and judicial enforcers, making available the evidence already produced may translate into welfare enhancing policies. Some form of participation of public enforcers to private enforcement may therefore be desirable.¹⁵³

An open question concerns the different methods to define penalties and damages in relation to the deterrence effect and how the power to use penalties should be allocated

¹⁴⁹ This does not mean, however, that private collective judicial enforcement should and could be played off against administrative enforcement, but see for such an argument, Säcker, 2006; Jahn, 2008, 19, 24.

¹⁵⁰ See Cafaggi, in Cafaggi, 2006.

¹⁵¹ In the field of damages for breach of competition law the White Paper recalls that once the European Commission finds a breach of Article 81 and/or 82 victims can rely on this decision as binding proof in civil proceedings for damages. Different rules apply in MS as to the relationship between Competition authorities and Courts. To enhance coordination and avoid different results, the Commission has proposed the following rule: “national courts that have to rule in actions for damages on practices under Articles 81 or 82 on which and NCA (National competition authority) in the ECN (European competition network) has already given a final decision finding an infringement of those Articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.” White paper on damages in antitrust, at p. 6.

¹⁵² See Rosenberg/Sullivan, 2006, p. 159 ff.

¹⁵³ See Fisch, 1997, p. 167 ff.

between Courts and Agencies.¹⁵⁴ How should they be coordinated when both a fine and damages can be inflicted upon the infringer as the cases of unsafe product or competition infringements show?

3.3. Injunctions and pecuniary remedies

Judicial collective enforcement can ensure deterrence, provide redress and contribute to risk management in case of latent injuries. The gap being filled by the introduction of group actions at MS level not only refers to compensation but also to deterrence, to a lesser extent, so far, to risk management.¹⁵⁵ Effective aggregate litigation will ensure that small individual claims will be brought before Courts. But it will also ensure that claims that would hardly justify huge investments to generate evidence at the individual level can be brought at a collective level given the possibility to spread the costs across a large number of claimants.

The combined use of injunctions and pecuniary remedies will thus enhance deterrence and perhaps reduce or better qualify the role of administrative regulation. It is beyond the scope of this essay to deal in depth with the optimal combination but it is clear that no uniform principles can be drafted in Europe across different consumer fields. A different balance between the two remedies is needed in unfair contract terms, trade practices, product safety, etc. The role of damages in unfair contract term litigation is different from that in unfair trade practices and product liability. Each sub-sector of consumer law will have to strike its own balance, partly drawn from legislation partly on procedural strategies that claimants will choose case by case.

In the US, the possibility to combine remedies in class actions is ensured when monetary reliefs concern the whole class. These are hybrid class actions.¹⁵⁶

In addition to compensatory damages other types of pecuniary remedies exist or have recently been introduced: in particular, restitutionary damages, unjust enrichment and penalties. The new legislation on group actions is generally not limited to compensatory damages but it refers to disgorgement of profits or the so-called *skimming off*.¹⁵⁷ While now it is possible to seek injunctive reliefs and different forms of pecuniary remedies, the prerequisites are still different; thus an unfair term may be subject to injunctive relief and restitutionary damages but not qualify for compensatory damages. An unfair commercial practice may be stopped by injunction without giving rise to compensatory damages unless negligence is proved.¹⁵⁸

¹⁵⁴ See OECD, Best Practices for consumer policy: report on effectiveness of enforcement regimes, available at www.oecd.org.

¹⁵⁵ In Europe the level of deterrence seems still lower than desirable, given the lower than expected effectiveness of injunctions, especially in transborder litigation, and the compelling necessity to combine it with pecuniary remedies. In relation to the latter it is evident that purely compensatory damages may often be insufficient and need to be combined with restitutionary damages when the level of profit gained by the unlawful term or practice is much higher than the amount of compensation the injured consumers can claim.

¹⁵⁶ Solutions among circuit Courts are not convergent. See Sherman, 2006, p. 707 ff.

¹⁵⁷ Micklitz/Stadler, 2003.

¹⁵⁸ This might be the case if intention is required for restitution or *skimming off* while it is not for the injunctive relief. In Germany, *skimming off* requires intention unlike injunctive relief where not even negligence is required, Micklitz/Stadler, 2003; Stadler/Micklitz, p. 559-562, now OLG

Two issues stand out for legislative intervention: the regulation of entry to litigation, including but not limited to standing; (2) the conclusion of the litigation either with a judgment or settlement, both in relation to injunctions and damages and their binding effects on 'third parties'.¹⁵⁹

(1) We have extensively discussed the differences in standing between injunctions and damages.¹⁶⁰ While in relation to the former consumer associations and public entities have the monopoly, a wider range of claimants can bring claims for pecuniary remedies. The *ex ante* model for injunctions is complemented by a mixed model for pecuniary remedies. This difference partly reflects the different preferences and models at national level and partly the different incentives especially in the private realm. Injunctions are more appealing for consumer organisations than for lawyers, at least for profit driven ones. A different balance may be struck in relation to public interest litigation in the field of fundamental rights.

(2) Both in relation to injunctions and to pecuniary remedies, settlement is a likely, at times even desirable, outcome. However the incentives to settle differ quite significantly whether the leading claimant is a public entity, a consumer organisation or a lawyer representing a group of consumers and whether the 'dominant' remedy sought is an injunction or damages. The nature of repeat player and the extent to which litigants are also involved in negotiations over rule-making play a substantial role in defining the incentive structure.

The extent to which consumers' ability to reduce risks, individually and collectively, may affect the choice between individual and collective litigation and that between injunctions and pecuniary remedies is not sufficiently debated.¹⁶¹ It is an underinvestigated question which deserves much more attention by legislators and judges.¹⁶²

3.4. The 'indirect' effects of national legislation concerning group actions on substantive consumer law

Divergences in procedural rules concerning group actions should affect substantive rules which are already harmonised. European consumer legislation was enacted without specific references to mass litigation. The implicit reference was to individual litigation but the procedural and remedial part was just outlined. In fact due to the principle of procedural autonomy, often references to remedies was generic or incomplete, leaving MS the power to complete the legislation either in the implementing Act or by reference to existing law.

Stuttgart, 24.03.2006, 2 U 58/6 Lidl v. Verbraucherzentrale Bundesverband. Pending before the German Supreme Court. The conflict deals exactly around the question of intention and what is meant and needed to provide evidence.

¹⁵⁹ See Hazard Jr./Gedid/Sowle, 1998, p. 1849 ff.

¹⁶⁰ See above text and footnotes.

¹⁶¹ See Cafaggi, 2003, p. 393; Id., 2005, p. 191.

¹⁶² But see in the US context a thoughtful yet not necessarily convincing analysis Judge Posner opinion in *In re Rhone Poulenc Rorer, INC* 51 F3d 1293 (7th Cir. 1995); *Castano v. American Tobacco Co.* 84 F.3d 734 (5th Cir. 1996).

The enactment of national legislation concerning mass litigation poses numerous challenges to substantive consumer legislation. On the one hand it will certainly improve effectiveness and discourage unlawful conduct when infringements cause a large amount of small size claims. On the other hand it will underline the necessity to distinguish between substantive rules applied to individual and to mass litigation. Questions concerning causation, harms and damages have to be treated differently in aggregate litigation as the US experience clearly shows. In particular, damages in aggregate litigation have a fairness dimension¹⁶³ which is foreign to individual litigation. The compensation has to be defined according to the general principle of full compensation but within the constraints of a fairness criterion related to the distribution among the injured parties given the level of available resources often below the level of full compensation that should in principle be satisfied. The challenges may be solved by judicial discretion, through a process of adaptation. Potential divergences in national solutions may however require coordination among judiciaries to reach consistent solutions. It would be desirable that both the review of the Consumer *Acquis* and the DCFR will take due consideration of aggregate litigation in drafting the new rules.

3.5. *The players*

Who are or should be the litigants? The creation of an integrated European market suggests that the institutional framework should favour transborder litigation. On the defendant side this does not represent a contested issue. On the claimant side, major differences exist, depending on the nature of the claimant.

We have contrasted different standing regulations concerning injunctions and pecuniary remedies to highlight the different models of centralised and decentralised control over access to litigation.

Ex ante regulation may be understood as a device to exercise state control over those who may file collective actions in courts. The market for mass litigation is thus limited by entry regulation. These systems empower the State to choose among organisations with a top-down centralised decision-making process. They often may reduce legal pluralism and hinder legal innovation.

Ex post intervention leaves much room for market forces and self-organisation in civil societies to decide who emerge as litigants. It is a decentralised system that may increase competition and to some extent accountability if well governed. Lack of rules in *ex post* systems may however also produce *de facto* monopolies and thus reduce accountability and legal innovation.

Engineering effective aggregate litigation requires both public policies and new rules concerning the major players and their agency relationships with claimants. These interventions may vary according to the specific strategy, whether based on consumer organisations or more ‘market’ oriented but the current state is not satisfactory in both cases. Whichever preference will be expressed by each MS, it is clear that both groups will be involved and that some degree of competition between law firms and consumer organisations will arise. But this competition, if limited, can be beneficial.

¹⁶³ Meller-Hannich, 2008, p. 13; Stadler, 2008, p. 93.

The relationship between the claimant and the represented consumers is regulated by national laws, very different both between public and private organisations and within the latter between consumer organisations and plaintiff lawyers.

The typical duty of loyalty, characterising the lawyer/client relationship, differs significantly from the duties owed by the private organisations to the class members where the law of association generally applies, and from those related to public bodies, where administrative law applies.¹⁶⁴

Funding affects incentives but also rules concerning aggregate litigation. The differences within Europe are conspicuous. Consumer organisations, which receive financial subsidies out of the public purse are financed on a yearly basis. If they are well equipped like in Austria or Germany, France and Italy, they have an annual budget for filing law suits. This means that they have to make a choice and to invest where the return rate – in particular in public reputation – is high. When a collective action, an action for injunction or a representative action, ends up in a high cost risk due to the loser pays principle, the consumer organisation has to seek approval from the Ministry.¹⁶⁵ They may be held liable by consumers who may argue that the organisation has not properly led the case.¹⁶⁶ The result is a bargaining process over the question whether the organisation shall file the law suit and more generally how many collective actions should be brought to court. In essence the state exercises control of collective judicial enforcement by restricting standing and channelling funding. Notice however that even those MS known as being more market oriented like the UK, select consumer organisations quite strictly which can play regulatory or enforcement functions. For example in the UK only one organisation has been recognised in the field of unfair contract terms.¹⁶⁷

The specificity of transnational litigation requires *ad hoc* interventions. Strategies will vary depending on the nature of the claimants. The different forms of coordination should mainly refer to homogeneous parties. Separate coordinating strategies are required for public organisations (e.g. ombudsmen or OFT), for private consumer organisations or law firms to bring legal claims before national Courts on behalf of consumers coming from different jurisdictions.

Promoting a market for European legal services to individual consumers and their organisations should become an institutional priority. Public policy requires rules that can promote the birth of an efficient market. This implies not only funding pilot litigation at EU level but also introducing stricter regulation to avoid opportunistic behaviour and to ensure that lawyers act as loyal agents of consumer-principals.¹⁶⁸ Major reforms concerning law of lawyer-client relationships are thus needed. The principles should be defined in a European legislative act. Alternatively soft law should be drafted, concerning lawyer-client relationships and association-claimant

¹⁶⁴ See Cafaggi, Adequate representation of consumers in public and private collective enforcement, unpublished manuscript. In relation to the US, see Hazard Jr., 2003, p. 1397 ff.

¹⁶⁵ There are no rules in Austria and Germany, but it is current practice which results out of the public financing.

¹⁶⁶ In Germany, BGH 25 October 2006, VIII ZR 102/06, NJW 2007, 428.

¹⁶⁷ Hodges, 2007, p. 207.

¹⁶⁸ This has already happened in the home-shopping case which forestalled Directive 98/27/EC, see Micklitz, cit., p. 411.

relationships. These principles should operate in relation to judicial collective enforcement, including both injunctions and damages, and then be implemented through national legislation or co-regulation.

Different arrangements can be devised among private organisations to bring claims. Cooperation can have different forms or degree. It may be centre-driven or based on decentralised market driven patterns. In the first case the role of the BEUC can become extremely important.¹⁶⁹ Coordination among national consumer organisations is far from being satisfactory. It is, however, bound to the availability of the necessary resources and skills. Funding, if any, is provided on a national basis. Ministries might face problems in funding, e.g. transborder litigation, where not only nationals benefit.

The same need for coordination has to occur among law firms.¹⁷⁰ In the US the effort to aggregate claims has pushed towards cooperation among law firms.¹⁷¹ Often this cooperation has reduced competition at the expense of consumers who have been proposed settlements at an early stage and for lower amounts they would have been able to obtain.¹⁷² More recently the use of opt-out options, in the field of securities where big institutional investors play a major role, has triggered more competition and it is reshaping the relationship among plaintiffs and defendants' lawyers.¹⁷³ In the field of consumer protection, where no reasons to opt out exist, the level of competition is low and often there is collusion to define the lead plaintiff.

Differences in Europe concerning legal systems make these developments necessary and urgent. But learning from the US experience, private contractual arrangements among law firms located in different MS may not be sufficient. The role of national judiciaries to promote the creation of European litigants must increase. Here again the powers given to judges by national legal systems may differ significantly. This may engender judicial activism in some legal systems higher than in others. But to avoid the formation of jurisdictional monopoly, judicial cooperation in consumer collective litigation is necessary.

The increasing role of aggregate litigation in Europe will empower national judiciaries. Judges will have to select meritorious claims and avoid frivolous litigation. They will have to ensure adequate representation of consumer interests in litigation; they will have to ensure fair distribution at the end of the proceedings, be it a judgment or a settlement.

For these reasons it is of strategic importance to devise coordination mechanisms among national judiciaries, similar to the Multidistrict litigation Panel in the US that can contribute to coordinating transboundary litigation. Absent a federal judiciary, a European coordinating body will not be able to exercise the same powers but certainly

¹⁶⁹ The BEUC has among its institutional tasks that of co-ordinating the activities of the national consumer organisations. This is however a touchy issue, as Member State organisations enviously defend their autonomy. The BEUC is nevertheless in the CLEF which is sponsored by the European Commission.

¹⁷⁰ Ingenious franchise agreements to generate evidence have been devised in the US in order to promote cost-sharing and economies of scale. With regard to Germany, see the references in Hess, 2008, p. 61, 70-71.

¹⁷¹ See for an historical analysis Burbank 2008.

¹⁷² See Eisenberg/Miller, 2004, p. 27 ff.

¹⁷³ See Coffee, Jr., 2008.

can provide information to the national Courts involved in litigation and try to ensure some consistency in outcomes.

The litigation will also depend on agencies. They are generally empowered to bring legal claims concerning injunctions and in some MS also group actions. In this perspective they are part of the judicial enforcement system not of the administrative one. As a potential claimant has to select the claims to be litigated and the remedies to be sought, to perform this task, two requirements should occur: a) independence from political power and (b) accountability to the injured parties whose interests will be involved in litigation.

It is hard to imagine that a consumer agency is totally freed from political influence when it does not have financial independence. The solution is that consumer agencies are guaranteed and given independency, last but not least by allowing them to raise their proper funds, e.g. via fines. The question whether individual consumers or consumer organisations may sue the inactive public agency for not taking action, may then lose importance. This remedy seems to play a certain role in the new Member States.¹⁷⁴

3.6. The role for European governance to foster effective aggregate litigation in consumer law

Europe is facing a period of intense change. Several MS have enacted or are about to enact national legislation concerning group actions.¹⁷⁵ These statutes will have to be combined with those on injunctions and to administrative regulation to define an integrated and coordinated design of effective consumer protection.¹⁷⁶

Differences concern not only institutional engineering but the basic options and the scope of litigation. The different weight attributed to settlements, the different relationships with individual litigation reveal that not only the rules but also the scope of the game varies extensively.

Europe should promote experimentalism in the future. MS should continue to produce legislation according to their constitutional principles, preferences and traditions. These developments should however internalise the necessity to build appropriate institutions for coordination. For example the lack of a competitive market for legal services on the claimants' side may suggest the adoption of opt-in mechanisms in the first stage while shifting towards some form of opt-out only when sufficient competition in the market for legal services will generate incentives to produce information to enable informed choices by potentially injured plaintiffs.¹⁷⁷

¹⁷⁴ Bakardjieva, in this volume.

¹⁷⁵ See above.

¹⁷⁶ Some level of coordination has been introduced only in a few states. For example the group action Swedish Act allows the seeking of both injunctions and damages.

¹⁷⁷ Different arguments have been provided to suggest that scarce participation of consumers suggest the desirability of opt-in systems. See Mulheron, 2007. These arguments focus on the current institutional setting and do not place particular importance on institution building. We suggest that the long-term goal of building appropriate institutions for aggregate litigation may justify lower rates of participation in litigation. Furthermore a distinction between effective participation and coverage should be made. Opt-in solutions may ensure broader coverage and thus have strong deterrence

MS will learn from each other but this process will have costs. Legislative differentiation may, to some extent, prevent effectiveness of transnational consumer litigation if it is not well coordinated. To the extent that the predominance requirement operates, it will be difficult to find common questions of law in such a differentiated legal landscape.¹⁷⁸ This differentiation can even be instrumentally promoted by introducing apparently consumer-friendly and legally binding jurisdictional clauses in contractual relationships which would bind parties to apply consumer-based jurisdiction to the potential class action.¹⁷⁹ In this case, aggregating consumers coming from different jurisdictions may become difficult because applicable rules to the disputes are different according to consumer nationalities and it would be hard, if not impossible, for the same judge to apply as many rules as the jurisdictions involved by way of aggregation. Transborder litigation concerning consumers coming from different jurisdictions should permit the choice of one single substantive law or a limited number. The alternative, quite costly, is the subdivision in class according to nationalities.

At the same time a European solution might be needed to handle arbitration clauses. The US and Canadian courts have taken a liberal approach to the detriment of consumers. In Europe the landscape is highly segmented, in particular since the ECJ refused to set common standards under Directive 93/13/EC.¹⁸⁰

The effects of aggregate litigation on substantive law should thus be monitored and changes should occur to ensure consistency between consumer protection laws and aggregate litigation at EU level.

For the time being, the role of European institutions should be limited to ensure that national legislation promotes transnational litigation by offering a framework for:

- a) coordinating collective redress for violations in consumer and competition laws;
- b) allowing the creation of claimants' groups beyond national areas; this may require different strategies when MSs adopt opt-out legislation by permitting opt-in by non-residents;
- c) devising public policies, including funding and information, to promote aggregate litigation.

effect but certainly they do not 'promote' consumer active participation. On the contrary they favour consumer apathy.

¹⁷⁸ The predominance requirement is very relevant in the US. According to rule 23(b) (3) Rules of Civil Procedure questions of law or fact to the members of the class predominate over any questions affecting the individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defence of separate actions (B) the extent and nature of any litigation concerning the controversy already commenced by or against any members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum (D) the difficulties likely to be encountered in the management of the action. On the issue of predominance in the US context see Nagareda, 2003.

¹⁷⁹ The ECJ decided in favour of consumers, Judgment 27 June 2000, Case C-281/98 [2000] ECR I-4139.

¹⁸⁰ It reminds one to recall *Claro* to highlight the differences, ECJ, 26 October 2006, Case C-238/05 [2006] ECR I-11125 and *Reich* in this volume.

- (1) The funding policy in particular should be inspired by two concurring principles: contributing to the creation of a solid market for legal services and promoting pilot transboundary litigation.¹⁸¹ Rules at EU level should also regulate the lawyer-client relationship in aggregate litigation and accountability or consumer organisations to non-members when they act on their behalf, to ensure loyalty and adequate representation. Liberalising agreements concerning fees in aggregate litigation can contribute to increase incentives to engage in selective litigation.¹⁸² The role and function of process insurers which play an increasing role in collective litigation should be openly addressed.¹⁸³
 - (2) Setting up a European notification scheme where all pending cases are made publicly available European-wide; likewise creating a data-file and making all national legislations on collective actions available in English.
- d) Promoting judicial coordination in transborder litigation. European institutions should promote coordination among MS' Courts before which are tried cases including consumer claimants coming from other MS. Procedural economies would be required to choose one court and thus one MS, but the differences in substantive and procedural law may not make the choice costless.¹⁸⁴ Subclassing, according to different applicable state laws, may also be a solution that can favour aggregation without being subordinated to the existence of a uniform body of laws across MS;¹⁸⁵
 - e) providing the ground for mutual references to the facts as determined by a court or by a public authority in transboundary litigation;¹⁸⁶

¹⁸¹ Interesting proposals concerning costs allocation rules have been made in the White paper on damages in antitrust pp. 9 and 10 “ The Commission encourages Member States:

- to design procedural rules fostering settlements as a way to reduce costs
- to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims
- to give national Courts the possibility of issuing cost orders derogating in certain justified cases from the normal cost rules, preferably upfront in the proceedings”.

¹⁸² Especially when the English rule applies, the possibility to share part of the financial risks of litigation between clients and lawyers is of the utmost importance. This liberalisation would also encourage law firms to be accurate in selecting claims and to devise financial instruments that may reduce the risks.

See for recent law reforms Sweden, within the Group litigation Act, regulating risk agreement among lawyers and clients (sec. 38, 39, 40, 41).

¹⁸³ They are the key to the success of the Austrian representative action and they can be found in Germany too, Hess, 2008, p. 72 with references to the debate and the case law, pleading for statutory rules.

¹⁸⁴ Similar issues have arisen in the Canadian experience where the Uniform Law Commission of Canada has produced a set of proposals available at www.chlc.ca.

¹⁸⁵ This path is chosen sometimes in the US. See *In re Welding Fume Products Liability Litig.* 245 F.R.D. 279 (N.D. Ohio 2007): “A Court could manage the differences in medical monitoring law among the eight states chosen by the plaintiffs by holding separate separate trials for each state-wide sub class, or perhaps a combined trial for a few statewide subclasses, where the law in those states is similar enough to allow the creation of jury instructions and a verdict form that is not too complex.”, cited by the Reporters note in the ALI Principles, p. 162.

¹⁸⁶ Stürner, 2008, p. 113, 127.

- f) fostering mutual recognition of judgments to a higher extent than it has so far been achieved;¹⁸⁷
- g) regulating uniformly Courts' approval of settlements with particular concern for fair distribution of proceedings and preclusion effects, also in order to avoid replicating litigation for the same case in different MS.¹⁸⁸ In particular for settlements involving consumers, coming from different jurisdictions, trying cases before different courts, it would be useful to draft common rules given the differences in national regimes of contract law, predominantly regulating settlement arrangements;
- h) modifying the consumer *acquis* to adjust substantive law to aggregate litigation;
- i) improving private international law rules in both Rome I and Rome II to adjust substantive law of tort and contracts to mass litigation in a uniform way;¹⁸⁹
- j) coordinating with the review process of Injunctions Directive 98/27;¹⁹⁰
- k) coordinating with the strategy concerning disputes on small claims defined by Regulation 861/2007.¹⁹¹

The overall question will nevertheless be to what extent it is possible to elaborate guidelines or recommendations on how jurisdictional conflicts between multiple competent courts might be solved. Ideally the above mentioned actors of civil society should participate. However, the four parties do not share common interests. Judges might be interested in avoiding duplication of work and favour a single court solution. Lawyers are squeezed between efficiency considerations which speak in favour of a single court solution, and profit interests which might be better served in regionalised judicial markets. Only consumer organisations are structurally bound to a single court solution at least as long as the interest of 'their' consumers are taken into account. The role and function of the Member States and the European Commission needs to be redesigned. Member States are reluctant to grant powers to the EU to adopt a European group action. They might be less reluctant in supporting the search for appropriate

¹⁸⁷ Rott, in this volume demonstrates that the Brussels Convention, as well as the Brussels Regulation does not face the phenomenon on the mutual recognition of group action judgments and/or settlements.

¹⁸⁸ In the US, state court settlements are much less stable than federal court settlements, where the approving Court can provide better preclusion safeguards, see Nagareda, 2008.

¹⁸⁹ In case of aggregate litigation where consumers come from different jurisdictions regulated by different substantive laws it is necessary to engage in a choice of law analysis and verify whether common legal issues arise. The ALI Principles § 2.05 suggest this.

(b) The Court may authorise aggregate treatment of multiple claims, or of a common issue therein, when the Court determines that:

(1) a single body of laws applies to all such claims or issues

(2) different claims or issues are subject to different bodies of law that are the same in functional content; or

(3) different claims or issues are subject to different bodies of law that are not the same in functional content but do present a limited number of patterns that the Court, for reasons articulated pursuant to § 2.12, can manage means of identified procedures at trial:

¹⁹⁰ See SEC.

¹⁹¹ OJ L 199, 31 July 2007, 1.

solutions of multiple competent courts. However, the born leader in such an initiative is certainly the European Commission.

4. Concluding remarks

Consumer law enforcement laws have been subject to important changes both in Europe and the US. The meaning of enforcement and its modes have changed. The public/private divide does not overlap with administrative versus judicial enforcement. Judicial enforcement encompasses both administrative and market-based regulatory devices (contract and extra-contractual liability).

Both in relation to administrative and judicial enforcement the adversarial approach is losing its appeal due to an increasing number of settlements and more broad contracting.

The use of contracting affects not only rule-making but also enforcement. It may increase compliance especially when repeat players are the infringers. The role of negotiation and settlement is expanding, both in administrative regulation and in adjudication. The differences cannot be located in the process of contractualization, affecting both types of enforcement, but in the modes of contractualization which still widely differ.

We have developed the analysis along the relationship between administrative and judicial enforcement, focusing predominantly on the remedial alternatives provided by the latter. The premise is that subfields of consumer legislation diverge significantly and often require different enforcement strategies, especially as to the combination between injunctions and pecuniary remedies. The goal of expanding consumer choices has an impact not only on rule-making and on the regulatory choices but also on the selection of enforcement strategies.

In Europe from the second half of the nineties of the last century law reforms have been enacted introducing first injunctions and then, at the national level group actions; these changes have not materialised in a floodgate of litigation. On the contrary the first analyses reveal a certain degree of ineffectiveness if measured only by the rate of litigation.¹⁹² Even from a theoretical standpoint, however, it is debatable that the success of the new statutes should be measured by the increase of litigation. The deterrence effect may play in the opposite direction; the best laws are those that ensure a higher level of safety and lower levels of litigation.

The main goal of the law reforms was not, of course the quantitative increase of litigation, but its qualitative improvement, certainly coupled with a higher degree of justice accessibility. But it is clear that a higher level of litigation than before is expected and socially desirable. Costs and time effective litigation is an important

¹⁹² See for example the analysis of Lindblom concerning the low level of litigation in Sweden. He identifies numerous potential factors: “the plaintiff’s cost liability – which also applies to public organisation actions – the absence of state funds that support litigation, the absolute opt-in requirement, the lack of pre-trial discovery, the lack of a post-trial calculation mechanism and standardized computation of damages ... the negative attitude among insurance companies, and the negative stance of the Swedish bar association as well as the general problems – primarily slowness, costs and lack of expertise – which make it hard for even ordinary litigation to compete against arbitration and other forms of alternative dispute resolution in a free market.”

public good for modern democracies. Some efforts should be made, especially by political scientists and economists to improve methodologies in measuring effectiveness and impact so that more rapid readjustments concerning collective enforcement can be adopted at EU level. Which combinations of judgments and settlements are socially desirable is hard to predict but certainly some regulation of settlements and a higher level of transparency will contribute to consumer protection.

A European path towards aggregate litigation is developing but the differences with the US regime are still very significant. This is certainly due to the different institutional frameworks but it is also related to the high level of knowledge that Europeans have about the advantages and disadvantages of the US systems. The learning process has involved other common law experiences, particularly those of mixed jurisdictions like Canada, but also Australia, where effective law reform have taken place. South American countries have developed interesting law reforms that deserve more attention than it has been so far devoted.

Europeans will proceed towards an integrated path to combine administrative and judicial enforcement. This combination will partly depend on how effective administrative and judicial coordination will be within and between them. The opt-in/opt-out alternative is losing policy attraction. It has become clear that integrating the two might be the most desirable solution. The opt-in, at least for the time being, seems the most desirable when private claimants act; the opt-out may be a viable alternative when public bodies act, since they are bound by stricter rules of compliance with the rule of law, accountability, transparency and openness. Due process rights would thus still be guaranteed in an opt-out system when public entities bring the claims before the Courts.

In the US, important changes have also been taking place. On the one hand, the use of litigation as a regulatory device has been limited and channelled to be complemented by administrative regulation. The transformation moves in two directions from the State to the federal level and from the judicial to the administration. CAFA and the recent Supreme Court case law show a movement towards federalisation of judicial collective enforcement.¹⁹³ Supreme Court case law has also rebalanced federal statutory regulation and state common law of torts, strengthening administrative regulation.

The move towards a stronger role for administrative regulation has different meanings across the Atlantic. Different accountability systems have been associated with this development in the US and Europe. While in the US stronger procedural rights have been associated with tort immunity, in Europe weaker procedural rights are combined with a fast growing expansion of tort liability of public regulators. Other differences are related to the internal changes of the regulatory process and the shift from *ex ante* to *ex post* within public regulation.¹⁹⁴

To what extent the comparative scenario just described will affect the modes of consumer international litigation? The new challenge ahead is consumer international litigation, where different models will be compared not as a purely academic exercise but as a matter of concrete litigation strategy for litigating consumer matters.¹⁹⁵ Today,

¹⁹³ See Hazard, Jr., 2008; Issacharoff, 1999.

¹⁹⁴ For references see Cafaggi/Micklitz, 2008, p. 391 ff.

¹⁹⁵ See Nagareda, 2009.

unlike thirty or forty years ago, it is possible to respond to worldwide consumer violations with an international strategy where choice of forum but also the best available means can be chosen by consumer advocates. While AE both at EU and US level is not only a viable complement to judicial enforcement but at times the most effective path, at the international level, judicial enforcement seems to represent the way ahead for the years to come until hybrid effective and accountable institutions emerge.

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