

# Global Class Actions Project

## Summary of European Union Developments

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This paper gives an overview of the mechanisms that exist in European Community law in relation to collective action, and the state of debate on further possible legislation.

### Enforcement of the collective interests of consumers

Various European measures in the consumer protection field include, as part of their enforcement provisions, an obligation on Member States to provide in their implementing legislation for collective action to be taken by consumer representative bodies to defend the collective rights of consumers in specified circumstances. The available remedies would typically be limited to orders related to the defendant's conduct, such as injunctive relief, rather than monetary claims.<sup>1</sup>

Many Member States have in fact had "representative claim" mechanisms for some years in their domestic legislation,<sup>2</sup> which enable consumer organizations to take enforcement action to protect the collective interests of consumers. However, such mechanisms have not been used extensively, primarily because the consumer organisations that could bring claims have not had enough money to fund the legal costs, or to accept the risk of costs of losing. A further reason is that some consumer associations have been uncomfortable in assuming a regulatory enforcement role, which may conflict with their representative role. Most European States typically reveal a rich amalgam of inter-locking public, private, official and informal dispute resolution mechanisms.<sup>3</sup>

The possibility of consumer collective or class actions was first raised in the EU context in a Commission paper of 1984.<sup>4</sup> The paper noted the common legal tradition of the then Member States, irrespective of whether they came from civil law or common law traditions, that no individual is entitled to institute legal proceedings unless he establishes

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<sup>1</sup> See: *Background Report: OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19-20 April 2005, Washington, DC* (OECD, Paris, 2005), p 31.

<sup>2</sup> The Commission's Green Paper: *Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market* COM(93) 576, 16.11.1993, p. 64, noted that of the then 12 Member States, eight States gave consumer organisations a right to bring claims for the protection of the collective interests of consumers, with one (Belgium) permitting such actions to be undertaken by both consumer organisations and by an administrative authority, and the three other States protected consumer collective interests through an independent administrative authority (the Office of Fair Trading in the UK, the Consumer Ombudsman in Denmark, and the Director of Consumer Affairs in Ireland).

<sup>3</sup> J. Stuyck and others, *Commission Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, January 17, 2007, issued April 2007). This important study includes reports from every EU Member State plus USA, Canada and Australia on the range of existing mechanisms.

<sup>4</sup> Memorandum from the Commission: Consumer Redress COM(84) 692, 12.12.1984.

a direct personal interest. The interests of a number of consumers, or of consumers generally, was entrusted to either the public prosecutor's office, or to an authorised public body,<sup>5</sup> or some form of action brought by an individual on behalf of other individuals,<sup>6</sup> or the defence of the collective interests of consumers was sometimes entrusted to associations that satisfied certain criteria.<sup>7</sup> The Commission concluded in 1984 that it was not possible to propose binding harmonisation of national mechanisms on collective actions, since there was too much complexity and diversity amongst the national systems.<sup>8</sup> However, since then various Community measures have included the mechanism of empowering consumer organisations to take enforcement action under consumer protection provisions.

Some details of the relevant EU measures are as follows.

### *Misleading Advertising*

As part of Member States' obligation to ensure that adequate and effective means exist for control of misleading advertising, specified legal powers to take actions must be available to persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising.<sup>9</sup> Most Member States have accorded consumer associations the right to bring actions under this provision.<sup>10</sup>

### *Unfair Terms in Consumer Contracts*

Member States are required to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts with consumers by sellers or suppliers.<sup>11</sup> Such means shall include provisions whereby "persons or organizations, having a legitimate interest under national law in protecting consumers" may take actions according to national law before the courts or administrative tribunals for a decision on whether contractual terms drawn up for general use are unfair, so that appropriate and effective means to prevent the continued use of such terms can be applied.<sup>12</sup>

As at 2000, the above provision had been implemented in different ways by Member States. In some states only consumer associations were entitled to seek injunctions, whereas in others the initiative could be taken by a regulator responsible for upholding

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<sup>5</sup> In that memorandum only two examples were noted, the UK Office of Fair Trading and the Danish Forbrugerombudsman (Consumer Ombudsman).

<sup>6</sup> The Commission's Memorandum noted very few examples of this category as at 1984: in common law jurisdictions a "relator action" (brought with the approval of the Attorney General) or a "representative action" (very rarely used since every claimant must have exactly the same interest), and in civil law jurisdictions the "*action civile*" (based on criminal proceedings) or the "action for cessation" (for an injunction, an example being under the Belgian Law of 14 July 1971, art 55).

<sup>7</sup> Ibid. However, the Commission noted that the conditions that a consumer organisation had to satisfy varied considerably between states.

<sup>8</sup> Ibid.

<sup>9</sup> Directive 84/450/EEC, art 4.1.

<sup>10</sup> See *Green Paper: Access of consumers to Justice and the settlement of consumer disputes in the single market*, COM(93) 576, 16.11.1993, p10.

<sup>11</sup> Directive 93/13/EEC, art 7.1.

<sup>12</sup> Ibid, art 7.

the public interest, such as the Office of Fair Trading (OFT) in the UK, or the Director of Consumer Affairs in Ireland,<sup>13</sup> the consumer ombudsman in Nordic states, and the Verbraucherschutzvereine in Germany, and the relevant Ministry in Spain and in Portugal.<sup>14</sup> In its 2002 Green Paper, the Commission noted that the UK system, in which the OFT was pivotally involved, was notably effective in reaching compliance, in both qualitative and quantitative terms, including through direct negotiation that might avoid the necessity for court action and costs.<sup>15</sup>

### *The “Injunctions Directive”*

Directive 98/27 on injunctions for the protection of consumers’ interests (the “Injunctions Directive”) permits qualified entities in one Member State to apply to the courts or administrative authorities in other Member States for measures that include an order requiring the cessation or prohibition of any infringement of the collective interests of consumers in the first Member States<sup>16</sup> under specific European consumer protection measures.<sup>17</sup> A “qualified entity” is any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions of the Member States relating to actions for a cross-border injunction aimed at the protection of the collective interests of consumers under listed consumer protection Directives.<sup>18</sup>

Member States have adopted differing approaches to nomination of qualified entities, ranging from a single governmental regulator in Ireland, to forty-seven private bodies in Germany.<sup>19</sup> The study for the European Commission on implementation of the Injunctions Directive found that the legal and practical significance of injunctive actions is rather low, and described the picture across Member States as showing “no coherent system”.<sup>20</sup> Only one cross-border injunction seems to have been sought or obtained,<sup>21</sup>

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<sup>13</sup> The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, Regulation 8(1).

<sup>14</sup> Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, COM(2000) 248, 27.4.2000. France and Belgium have created collegiate bodies whose main mission is to recommend the elimination of unfair terms, and the courts are reported to refer to the recommendations of these bodies in their judgments. Data showed a difference in approach, with Germany, Austria, France and the UK predominantly adopting preventative actions, which were rarer in Belgium and Spain, and unknown in Ireland and Luxembourg, where the approach was on individual actions.

<sup>15</sup> The Report said that the OFT had moved from a situation of no prior regulatory control in the area of unfair terms to examining over 800 cases annually.

<sup>16</sup> Directive 98/27/EC.

<sup>17</sup> Directive 84/450 on misleading advertising; Directive 85/577 on contracts negotiated away from business premises; Directive 87/102 on consumer credit; Directive 89/522 on television broadcasting, Directive 90/314 on package travel, package holidays and package tours; Directive 92/28 on advertising of medicinal products for human use; Directive 93/13 on unfair terms in consumer contracts; Directive 94/47 on the protection of purchasers in respect of property timeshare contracts; Directive 97/7 on the protection of consumers in respect of distance contracts: some of these provisions have since been amended or incorporated into other legislation, and the Injunctions Directive has been overtaken by the Consumer Protection Regulation and the UCP Directive, discussed below.

<sup>18</sup> *Ibid*, arts 1-3.

<sup>19</sup> See Commission communication at OJ C 321/26, 31.12.2003; in Germany various local tenants’ associations are authorised.

<sup>20</sup> M U Docekal, P Kolba, H-W Micklitz and P Rott, *The Implementation of Directive 98/27/EC in the Member States* (Bamberg/Vienna, 2005).

and this action was instituted by the UK regulator (the OFT) rather than by a consumer organisation.<sup>22</sup>

### *The Consumer Protection Cooperation Regulation*

The Consumer Protection Cooperation Regulation (the CPC Regulation)<sup>23</sup> provides for cross-border enforcement of 15 designated measures comprising the corpus of EU consumer legislation. Unlike the other Directives mentioned here, the CPC Regulation does not give rise to substantive rights but provides enhanced mechanisms for enforcement collaboration between Member States.

In addition to collaboration between the normal national enforcement authorities, Member States have an option to designate “bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements”,<sup>24</sup> and such a body may take all necessary enforcement measures available to it under national law.<sup>25</sup> A recital to the Regulation sets out a formal statement of the rationale for empowering consumer organisations to assume such a regulatory role:

“Consumer organisations play an essential role in terms of consumer information and education and in the protection of consumer interests, including in the settlement of consumer disputes, and should be encouraged to cooperate with competent authorities to enhance the application of this Regulation.”

### *The Unfair Commercial Practices Directive*

Directive 2005/29/EC prohibits unfair commercial practices, including misleading actions and omissions and aggressive commercial practices.<sup>26</sup> Member States must

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<sup>21</sup> Although anecdotal reports refer to communications about infringers between the authorities of different member States, which may have resulted in domestic enforcement action that would have avoided the more cumbersome and costly cross-border mechanism.

<sup>22</sup> The case was brought by the Office of Fair Trading against a Belgian company that was sending unsolicited mail order catalogues to UK residents together with notification of a prize win, usually £10,000. The Belgian court issued an order banning the practice as constituting a breach of the Misleading Advertising Directive, on the basis that consumers believed that they had only to make a purchase in order to secure a prize, whereas winners were pre-selected and few recipients would receive a prize. The company was reported to have received about 4,000 orders per day from its catalogues, and many consumers complained: press release at <http://www.offt.gov.uk/News/Press+releases/2004/208-04.htm>, and see *Report from the Commission: First Annual Progress Report on European Contract Law and the Acquis Review*, COM(2005) 456, 23.9.2005. *OFT v. D Duchesne SA* referred to in *TS Today* February 2006, 4.

<sup>23</sup> Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. This is in force from 29 December 2005, and the provisions on mutual assistance from 29 December 2006.

<sup>24</sup> Regulation (EC) No 2006/2004, art 4.2.

<sup>25</sup> *Ibid*, art 8.3.

<sup>26</sup> An unfair commercial practice is a commercial practice which is contrary to the requirements of professional diligence, and materially distorts, or is likely to distort, the economic behaviour with regards to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a

ensure that adequate and effective means exist to enforce compliance. Such means shall include persons and organisations that are regarded under national laws as “having a legitimate interest in combating unfair commercial practices” being permitted to take action before the courts and/or administrative authorities to enforce unfair commercial practices within the EU.<sup>27</sup> It is for each Member State to decide which facilities (court or administrative tribunal) are to be available. The facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.<sup>28</sup> The purpose of this rule is so that infringements that are initiated by a trader in one State but have effect in another can be dealt with. Thus, the Member States must ensure that powers are available either to order cessation of an unfair commercial practice, or to order its pre-emptive prohibition.<sup>29</sup>

### **Intellectual property enforcement**

A further European mechanism is that arising under Art 4 of Directive 2004/48. This requires Member States to recognize, as persons entitled to seek redress, a list that includes, in addition to intellectual property right holders:

- Intellectual property collective rights-management bodies (*inter alia*), and
- Professional defence bodies which are regularly recognized as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.

The aim of these provisions is to deploy strong and effective measures against counterfeiters. However, the above wording has caused some confusion in the intellectual property and government world.

### **Late payments**

A similar mechanism is included in Directive 2005/35/EC on combating late payment in commercial transactions.<sup>30</sup> This was to be implemented by Member States from August 2002.<sup>31</sup> The primary enforcement obligation on Member States is to ensure that adequate and effective means exist to enforce the provisions of the Directive, for example in relation to preventing the continued use of terms which are grossly unfair.<sup>32</sup> In addition, it is specified that such means

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commercial practice is directed to a particular group of consumers; Directive 2005/29/EC, art 5.2. Misleading or aggressive commercial practices are deemed to be unfair; *ibid*, arts 5- 9.

<sup>27</sup> Directive 2005/29/EC, art 11.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*, art 11.2.

<sup>30</sup> OJ L 200/35, 8.8.2000.

<sup>31</sup> *Ibid*. Art 6.

<sup>32</sup> *Ibid*. Art 3.4.

“shall include provisions whereby organizations officially recognized as, or having a legitimate interest in, representing small and medium-sized enterprises may take action according to the national law concerned before courts or before competent administrative bodies on the grounds that contractual terms drawn up for general use are grossly unfair within the meaning of the Directive, so that they can apply appropriate and effective means to prevent the continued use of such terms.”<sup>33</sup>

### **Possible future reforms: The European Union Context**

There has been very considerable debate on possible reforms and extensions to current procedures, both at European and national level in Europe. Important issues that are being discussed relate to the technical aspects of representative mechanisms for collective damages claims, to the problems of funding mass claims especially those of low value, but the essence of the debate relates to whether private damages claims should be enlisted as supplementary mechanisms for regulatory enforcement, and whether it is possible to so balance civil procedures and funding systems for multiple claims such that excessive litigation and cost are avoided.

It is important to understand the European Union background within which all debate is currently being carried out at national level in Member States. Although the question of whether the EU possesses jurisdictional competence to propose harmonizing legislation in relation to class or collective actions, either generally or in specific sectors, is an unresolved issue, there is now a considerable level of debate over whether collective remedies should or should not be introduced and, if so, what checks and balances should be included.

The major policy objectives are to strengthen the internal market and European competitiveness, especially through strengthening competition and consumer protection, without imposing unnecessary burdens on the European economy and business. There is a significant level of concern to avoid what are seen as strong disadvantages of the American class action system, involving excessive litigation, excessive legal transactional costs, blackmail settlements, and punitively high costs for business that impose significant unnecessary drag on the economy and innovation.<sup>34</sup>

In this context, a possible rationale of increasing access to justice per se is of far lesser importance than the policy of adopting private litigation as a quasi-regulatory mechanism. This approach raises questions over its efficiency and appropriateness as a mechanism, and whether it is sensible to combine compensation with regulation.<sup>35</sup>

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<sup>33</sup> Ibid. Art 3.5.

<sup>34</sup> Lessons from USA, Australia and the UK, (European Justice Forum, 2006); [www.europeanjusticeforum.org](http://www.europeanjusticeforum.org).

<sup>35</sup> It is argued in C Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’ *Common Market Law Review* 43 1381-1407, 2006 that consumer organisations are inefficient as regulators.

The received policy of the European Commission and Parliament appears to be that encouragement of collective actions is good for the economy and politically popular with consumers. However, there is an underlying issue over whether regulatory enforcement is significantly more effective if undertaken by public authorities, rather than private entities. Secondly, the US experience is that “private enforcement” only achieves a level of significant activity if encouraged by significant financial incentives,<sup>36</sup> and an important aspect of the developing EU debate is whether Europe is prepared to accept the consequences of liberalization in costs and funding mechanisms. Politicians have made statements that they do not wish to see a compensation or litigation culture, and that existing proposals would not bring such a culture about, but these views are belied by the substance of the trends and changes that are in fact occurring in collective mechanisms and funding systems. The two extreme positions might be, on the one hand, that the move towards collective actions with no liberalization in funding systems would simply be ineffective in imposing competitive pressure on the economy so therefore a waste of effort or, on the other hand if there is a liberalization in procedures and funding systems, a significant growth in collective actions that would include both good and bad consequences, as in USA.

It is important to recognize that developments in procedures and in funding systems are occurring at both EU and national levels, and are not coordinated. In general, liberalization of funding systems is occurring at national level and the consequences for change are not understood. Many Member States have recently introduced collective actions mechanisms, especially spurred on by the various EU consumer protection Directives mentioned above but in some cases on a wider basis, and further reforms are also being considered in both competition and consumer protection areas at EU level.

Two Directorates-General of the European Commission have been investigating options for introducing a collective action mechanism across Europe;<sup>37</sup> one relating to enforcement of consumer protection and the other to enforcement of competition law.

In the consumer protection field, the EU’s Consumer Strategy 2007-2013 headlined the overhauling of the legislation of cross-border shopping rights and the creation of strong systems for redress and enforcement, including consideration of collective redress mechanisms.<sup>38</sup> The Commission was influenced by a 2006 survey which found that 74 per cent of Europeans would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing.<sup>39</sup>

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<sup>36</sup> The US package includes not only the procedural mechanisms of opt-out class actions and decisions on liability and quantum by juries, but also the important financial aspects of no loser pays, some one-way fee-shifting, high success fees for the legal intermediaries, and high damages influenced by the possible availability of vast punitive damages (even if rarely awarded or sustained, these have an inflationary effect on settlements).

<sup>37</sup> The issue was also raised by the Directorate-General on the Internal Market in the Commission’s Green Paper on the Product Liability Directive COM(1999) 396, but did not progress further in that context: see Third report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Mss concerning liability for defective products (85/374/EEC of 25 July 1985, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999), COM (2006) 496, 14.9.2006.

<sup>38</sup> COM (2007) 99, 13 March 2007.

<sup>39</sup> Eurobarometer Special Report 252 ‘Consumer Protection in the Internal Market’, European Commission, 2006, QB28.5, available at [europa.eu.int/rapid/cgi/rapcgi.ksh](http://europa.eu.int/rapid/cgi/rapcgi.ksh). The Report notes that since Greeks are those who most regard resolving a consumer dispute in court as easy (51%), it is not surprising that 86 % of them would be willing to assert

It is an interesting question whether the Commission would have jurisdiction to propose harmonising legislation on a general rule of law that permitted a class action, as opposed to a specific mechanism to enhance consumer protection. In any event, the Commission would presumably not consider that it has the political support of the Mss to proceed with such a proposal unless a sufficient number of Mss were to have existing general national legislation on class claims, but that state of affairs is now not far off.

There seem to have been very few cases brought by either individuals or organisations under the various cross-border injunction Directives noted above. The highest profile case brought by the British regulatory authority against a Belgian infringer.<sup>40</sup> It may well be significant that the claimant in that case was a public body, rather than a private one.

In this context, there has been an important but as yet little considered growth in alternative dispute resolution mechanisms, led by a desire to avoid the costs and delays of litigation processes and adoption of new techniques involving ADR and ombudsman mechanisms. A study led by Professor Jules Stuyck was published in 2007 of the “analysis and evaluation of alternative means of consumer redress other than individual redress through ordinary judicial proceedings”.<sup>41</sup> The following is a summary of relevant conclusions from this important study.

**Alternative dispute resolution** in the EU Member States is a continuum, encompassing the main elements of direct negotiation, mediation/arbitration, small claims procedures, collective actions for damages and actions for injunctions. He found that a multitude of ADR methods are used. Every Member State has put in place a unique mix. From this divergence, it is far from self-evident to come up with one ‘ideal’ ADR system. The ADR matrix in a state must be seen in the context of the organization and effectiveness of its ordinary judicial proceedings, the way its business is structured and consumers are organised, the effectiveness of market surveillance, the way administration operates at local and general levels, and historic, political, socio-economic, educational and cultural factors. The conclusion of the study was that no particular method or mix of ADR processes or techniques could be put forward as the best choice from a consumer perspective. Neither is it possible, nor

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their claims in a joint action. At the other end of the scale, 53% of Hungarians would not be more motivated to take joint court action.

<sup>40</sup> The case was brought by the Office of Fair Trading, against a Belgian company that was sending unsolicited mail order catalogues to UK residents together with notification of a prize win, and the Belgian court issued an order banning the practice on the basis that consumers believed that they had to make a purchase in order to secure a prize, whereas winners were pre-selected and few recipients would receive a prize, usually £10,000. The company was reported to have received about 4,000 orders per day from its catalogues: press release at <http://www.of.gov.uk/News/Press+releases/2004/208-04.htm>, and see Report from the Commission: First Annual Progress Report on European Contract Law and the Acquis Review, COM (2005) 456, 23.9.2005. *OFT v. D Duchesne SA* referred to in *TS Today* (2006) February, p4.

<sup>41</sup> J. Stuyck and others, *Commission Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, January 17, 2007, issued April 2007). This important study includes reports from every EU ms plus USA, Canada and Australia on the range of existing mechanisms.

appropriate, to propose a ranking. The implication is that political choices must be made.

**Collective actions** are perceived as tools for increasing access to justice.<sup>42</sup> Great diversity is identified, although the position in Europe is said to be in an experimental stage that is ‘in full evolution’ at Member State level. Three categories are identified: *group actions*, which feature some but not all of US type class actions, *representative actions* and *test cases*.<sup>43</sup> Within these three categories, considerable heterogeneity exists.

The Report states that economic literature reveals no consensus about the cost-benefit justification of collective actions.<sup>44</sup> Potential advantages can be put forward, but so can risks and disadvantages,<sup>45</sup> as is particularly shown in the literature on the US class actions.<sup>46</sup> However, the current European reforms do not imitate the typical US class action: US disclosure is not imported, rules on ‘loser pays’ and cost-sharing arrangements remain strict,<sup>47</sup> ‘opt-out’ principles are used with great reluctance, and rules on standing, evidence, formalism, the role of the judge and so on remain embedded. Punitive damages “are not inherent to class actions”.<sup>48</sup> [The Report does not take into account the extent to which these assumptions may be sensitive to change, such that e.g. changes in funding or ‘loser pays’ rules would impact the position.]

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<sup>42</sup> This statement of the aim and rationale of collective actions in the consumer field is important, since, unlike the position in the competition field, the rationale for collective mechanisms is not primarily presented on ‘regulatory enforcement deficit’ grounds, but on basic access to justice grounds, on the premise that there is a gap in access to justice resulting from the high cost of resolving many consumer claims, and particularly multiple claims which have low value. The role of collective actions in deterring infringements of competition law, of ‘private enforcement’, and the German ‘skimming off of excess profits’ in unfair competition law, are noted later but not so strongly emphasised: para 381.

<sup>43</sup> It cites as examples of the test case approach the German *Munsterverfahren* and *KapMuG* procedures and the Austrian *Munsterprozessen*, but concludes that potential delay and the lack of automatic binding authority make a test case less ‘able to discharge the courts’ as much as a group action: para 389.

<sup>44</sup> This is obviously an important statement, and a significant precedent is quoted. The French consumer organisation *UFC Que Choisir?* invested EUR 500,000 on a damages case against mobile phone operators for overcharging, but only 12,500 consumers (0.6%) opted to join and bring claims.

<sup>45</sup> The Report identifies a significant concern for consumers of the potential for one interested party to achieve additional gains at the cost of another, notably in the case of legal counsel: para 377. For business, there is the concern about unmeritorious claims, pressure on businesses to settle even bad claims, and the risk of bankruptcy. The Report claims that mechanisms can be provided to prevent unmeritorious claims, such as having judges assess the claim at an early stage. (It later notes that in Sweden a judge applies a cost-efficiency test at an early stage, and in Australia there is a requirement that the award should exceed the costs: para 393.) It dismisses the bankruptcy risk, citing it is business’ failure to adhere to proper standards of conduct that drives bankruptcy, and no bankruptcies having occurred in Canada: para 378. For the legal system, the Report dismisses the risk that courts would be overwhelmed, as this has not happened in Sweden, Canada or Australia. [The Report does not note the fundamental influence of local funding systems and cost rules on the incidence of claims.]

<sup>46</sup> It notes that in 2004 31.7% of federal class actions were civil rights cases, and 20.3% securities actions.

<sup>47</sup> The Report is now incorrect in stating that contingency fees are not allowed in continental civil law jurisdictions, but it notes methods of financing lawyers’ initial costs in Austria, Sweden and England: para 437. It notes that some states waive the ‘loser pays’ rule for cases in the public interest, and claims that businesses are likely to spend even more on defence in order to intimidate and defeat consumers: para 438.

<sup>48</sup> Para 427.

The Report notes that all common law jurisdictions have collective actions for damages,<sup>49</sup> but identifies a gap in the collective redress system of many Member States, where there are multiple consumers with a very small claim, especially where the business is not willing to solve the problem through direct negotiation. In common law jurisdictions, individual consumers have standing to commence group claims, whereas in continental jurisdictions there is a preference for consumer organizations or arms of government to bring actions rather than individuals.<sup>50</sup> No homogeneous criteria and thresholds exist that require the authorities to act against a business systematically harming consumers. Although some Member States are experimenting with collective actions, in many States consumers may have no means to obtain redress. [The Study does not say this, but it would follow from this view that the cross-border position is ripe for harmonisation.]

The Report identifies that a principal issue is the extent to which decisions are binding on group members, or non-group members.<sup>51</sup> Hence the use of a test case *on its own* may offer few advantages in some situations. It also discusses the opt-in versus opt-out debate, concluding that article 6 of the ECHR and constitutional principles guaranteeing access for each citizen to a judicial decision-maker are widely understood to form an obstacle to the opt-out approach in Europe.<sup>52</sup> It notes that claimants who opt-in bear up-front costs before the merits have been assessed, and this may be a significant disincentive to initiating an action,<sup>53</sup> whereas for opt-out the potential members need only be notified once a settlement has been proposed. [It does not identify that opt-out only works where claimants are not subject to loser-pays.] It notes that opt-in “assists the defendant in knowing the size of the pool of potential claimants” [but does not note that this is in some cases essential for reasons of insurance and requirements of sound business management]. The Report concludes that there are many factors (several relating to costs) that determine whether a collective action is practical and effective, but opt-out is probably a decisive factor.<sup>54</sup>

**Actions for injunctive relief** are the most uniform area considered, because of the existence of harmonisation through the Injunctions Directive 98/27.<sup>55</sup> This mechanism is considered important because of pursuing matters of public interest, given the inability of individuals to take action to correct infringements of collective consumer interest.<sup>56</sup> The tradition of enforcement by public bodies is

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<sup>49</sup> Para 384.

<sup>50</sup> Para 396.

<sup>51</sup> Para 419 et seq.

<sup>52</sup> Para 380 and 400-406. Opt-out collective mechanisms only exist in Portugal and the Netherlands (the latter being limited to a mere declaratory judgment after a settlement has been agreed).

<sup>53</sup> Para 434.

<sup>54</sup> Para 440.

<sup>55</sup> The *OFT v Duchesne* case is (the only one) cited as a cross-border success, but it is said that injunction procedures falling within the scope of the Directive are popular and widely applied in Austria, Belgium, Finland, Germany, Hungary and Sweden. The procedure is no popular in 10 other States: para 477.

<sup>56</sup> Para 443.

strong in Scandinavia, Ireland and the UK, but the Directive has resulted in public bodies taking an important role in enforcement in many Member States.<sup>57</sup> Certain shortcomings are identified in the Injunctions Directive: the scope of an injunction is limited to the territory of one Member State; businesses can defy enforcement by changing one aspect of violation or changing their corporate identity, and individuals can escape.<sup>58</sup> Costs issues are not covered in the Directive, and most States apply the ‘loser pays’ rule.<sup>59</sup> The costs may be too high and may deter consumer associations, and procedures are subject to the delays inherent in normal court procedures.

In the competition field, the Commission published a Green Paper in December 2005 that revealed an intention to facilitate private damages claims, especially through a collective mechanism, in furtherance of a policy of increasing enforcement of antitrust regulatory law, for which the authorities felt they had insufficient resource.<sup>60</sup> The Commission relied on a study that found that the number of damages claims and judgements in mss’ courts is “low” and “totally underdeveloped”, although nearly all Mss do have civil litigation systems under which damages claims may be brought.<sup>61</sup>

The Green Paper raises an extensive range of issues. The main questions that are pertinent to examining the relationship with civil litigation systems are whether there should be special rules on access to documentary evidence (e.g. through the introduction of discovery rules, that would be foreign to civil law traditions, and through access to evidence held by authorities); whether there should be special rules on burden and standard of proof; whether there should be a requirement to prove fault; how expert evidence should be obtained; whether the rules on causation need to be clarified to facilitate damages actions; whether new rules should govern how damages should be defined and calculated; whether damages should include some punitive element, such as double damages;<sup>62</sup> whether there should be a defence that loss has or should have been, mitigated by the claimant (e.g. through the “passing-on” defence or a restriction on a claimant’s standing to bring a claim); whether special procedures should exist for bringing collective actions;<sup>63</sup> whether claimants should be insulated from the costs risk, both of funding claims and of liability for opponents’ costs if the claimants lose; how

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<sup>57</sup> Para 454. Individual consumers are entitled to bring injunction proceedings in Belgium, Czech Republic, Denmark, Slovakia and Slovenia but this “is not a general trend among MSs”. MSs are entitled to examine whether the purpose of the qualified entity justifies its bringing an action in a specific case (art 4(1)) and to require parties only to start proceedings after having consulted with the defendant or both the defendant and a relevant public body (art 5(1)) but there is no general trend to implement this (Finland and UK have). Actions for damages in injunction proceedings are only available in Sweden, although moral damages may be awarded in Greece.

<sup>58</sup> Para 478.

<sup>59</sup> Each party pays its own costs in Finland, Poland and Latvia, and the party who brings the case bears the costs in Greece: para 473.

<sup>60</sup> Green Paper: Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005; Commission Staff Working Paper: Annex to the Green Paper ‘Damages actions for breach of the EC antitrust rules’, SEC(2005) 1732, 19.12.2005.

<sup>61</sup> D. Waelbroeck, D. Slater and G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Ashurst, 2004).

<sup>62</sup> In USA, triple damages may be awarded.

<sup>63</sup> This gives rise to difficult issues of standing (the classic debate is over opt-in versus opt-out mechanisms), quantification of damages, and distribution of damages.

private and public enforcement systems could be integrated, so as to achieve consistency in approach; what substantive law should apply; and whether limitation periods should be suspended or altered.

Competition Commissioner Kroes criticised the US system as having excessive and undesirable consequences, and said that she wished to produce “a competition culture and not a litigation culture” and therefore the Commission was expressly not proposing to introduce class actions or contingency fees.<sup>64</sup> However, a barrage of objections from business interests met the Green Paper, arguing that excessive and costly litigation would inevitably result and would harm, rather than enhance, the European economy. Academic opinion ranges across a wide spectrum, from supporting European harmonization<sup>65</sup> to questioning whether empirical evidence supports any need for dramatic change, and to concern over the inevitable adoption of American litigation culture.<sup>66</sup>

The current position is that studies of empirical need for mechanisms and of cost-effectiveness are being undertaken for the Commission in both the competition and consumer protection areas. The Commission has announced that it will issue a White Paper on the competition proposals around the end of 2007. In contrast, on the consumer protection side, there is a ‘period of reflection’ and discussion with stakeholders. This difference in urgency between the two areas may reflect the situation that the Commission acts as a regulatory enforcement authority in competition but not in consumer protection. In the latter case, the enforcement system is based on mutual recognition between the Mss, and the Commission has a somewhat limited coordinating function.<sup>67</sup> In the former case, however, there is considerable frustration at a growing workload, perceived insufficient resources, ongoing serious infringements of competition law, and sensitivity to criticism by comparison with the largely privatized enforcement position in USA.

The debate is influenced by two large recent cases. The first was settlement of actions by a class of individual European shareholders against Royal Dutch Shell, which was coordinated with a class action brought in USA but was settled under the Dutch Class Action Settlement Law.<sup>68</sup> The second case was the imposition of a record fine by the UK Office of Fair Trading on British Airways for infringements under a fuel surcharge cartel,<sup>69</sup> which raises the possibility of associated civil damages actions. Governmental

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<sup>64</sup> See Speech by Commissioner N. Kroes at the Harvard Club, 22 September 2005. The Green Paper avoids references to class actions and contingency fees.

<sup>65</sup> H-W Micklitz and A Stadler, ‘The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure’, [2006] EBLR 1473-1503; Eilmansberger

<sup>66</sup> W. P. J. Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ *World Competition* (2003) 26(3), pp 473-488; C. Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’ *Common Market Law Review* 43: 1381-1407, 2006; N. Reich

<sup>67</sup> Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364/1, 9.12.2004.

<sup>68</sup> Press release: ‘Shell settle reserve-related claims EU & non-US investors’ Royal Dutch Shell, April 11, 2007.

<sup>69</sup> Press release, Office of Fair Trading, 1 August 2007. British Airways was fined £121.5 million by the British authorities, and a similar amount by the US Federal Trade Commission. The case came to light as a result of the authorities’ “leniency programme”, an arrangement that encourages voluntary notification of breaches of regulatory

and parliamentary opinion is also influenced by the opening of leading American claimant and defence class action firms in Europe, and the presence of some of the former's Lear jets.

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law, in return for lesser sanctions. Another cartel member, Virgin Atlantic, notified the authorities and was not fined, but may still be exposed to civil damages claims.