COLLECTIVE REDRESS PROCEDURES–EUROPEAN DEBATES

DUNCAN FAIRGRIEVE* AND GERAINT HOWELLS**

Abstract Collective redress mechanisms for consumer claims seek both to allow legal systems to accommodate mass litigation without being overwhelmed and to enable litigation to be viable where individual claims would not be economic. The article maps a number of recent reforms and reform proposals relating to consumer collective redress at national level and comments on EU developments. It notes that there is insufficient recognition of the differences between schemes geared at managing mass litigation as opposed to those aimed at facilitating otherwise non-viable claims. There are however signs that a European style of collective redress procedure is developing, which emphasize the role of public authorities and consumer organizations as gatekeepers to collective redress. The EU is unlikely to be able to impose collective redress procedures on national civil procedures, but the EU could prompt Member States to reflect on the need for national reforms. There may be limited scope for an EU mechanism to address the problem of individually non-viable consumer claims. This would however have to address certain fundamental issues such as the opt-out mechanism, cy-près distribution and funding if consumer organizations are to be encouraged to bring such actions. At a legal doctrinal level, it is interesting to note the influence of comparative studies on policy development within Member States as well as at the EU level.

I. SETTING THE SCENE

The reform of group procedures for damages actions is a topical one with developments at both European and Member State level. The purpose of this article is to compare and contrast the position in a number of European countries and to assess the role of the European Union in both promoting reforms at a supranational level and also indirectly fostering developments in Member States. We will place these developments within the context of the broader reform of consumer law, examining if, and how, the new initiatives promote greater access to justice.

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** Professor of Commercial Law, University of Manchester and barrister, Gough Square Chambers.

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Consumer law was chosen as the focus of this analysis since this is a sphere in which there is much contemporary discussion of the need to reform collective redress procedures. In doctrinal terms, collective redress procedures have been a long-standing concern for consumer lawyers, and a major concern of modern civil procedure law has been to develop organizational responses like group procedures or encouraging representative bodies to act for consumers. Whilst collective redress is hotly debated in a wide variety of commercial law areas including competition, securities, intellectual property and tax, as well as social welfare law areas (such as child abuse cases and labour law), this article focuses on the consumer law dimension as illustrative of the broader perspective.

There have been developments at both European and Member State level. At a national level, many Member States have turned their attention to procedural reforms to enable group litigation. Typically such reforms focus on increasing access to justice by enabling courts to manage claims arising out of similar circumstances without the legal system being brought to a standstill. Equally, there may also be promotion of access to justice through the sharing of costs by claimants.

At a European level, the Commission has become increasingly interested in the issue of collective redress from perspectives of both competition law and consumer policy.[1] Having adopted an impressive array of substantive consumer law measures,[2] the Commission has now recognized that it needs to do more to improve enforcement and access to justice so that consumers feel the benefit of these laws.[3] Whilst the Commission's interest in collective redress procedures is by no means a new development,[4] action at the European level has recently focused on individual redress.[5] However, as we shall see,

[1] Both DG-SANCO and DG Competition have been active in this area, see: *Green Paper—Damages actions for breach of the EC antitrust rules* COM(2005) 672 final; and now *White Paper on Damages actions for breach of the EC antitrust rules* COM (2008) 165; and *Green Paper on Consumer Collective Redress* COM(2008) 794 final.

[2] See G Howells and T Wilhelmsson, *EC Consumer Law* (Dartmouth, 1997) and S Weatherill, *EU Consumer Law and Policy* (Edward Elgar, 2005).

[3] *EU Consumer Policy Strategy 2007–2013* COM(2007) 99 final.

[4] The history of EU involvement in these debates is well set out in European Economic and Social Committee, *Opinion on Defining the collective actions system and its role in the context of Community Consumer Law* [2008] OJ C 162/1. The response to collective consumer harm has often been regulatory in nature: the Injunctions Directive was adopted which allows government and/or consumer organizations to bring actions for breach of EC rules in order to protect the consumer interest (Directive 98/27 concerning injunctions for the protection of consumers' interests) and a Regulation has recently been enacted to promote cooperation between enforcement bodies (Regulation EC 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws).

[5] Out of court dispute resolution has been bolstered by complaints forms and recommendations promoting minimum standards for ADR schemes (Recommendations 98/275/EC: [1998] OJ L115/31 and 2001 Recommendation 2001/310/CE: [2001] OJ L109/56). Measures addressing more formal legal redress has been more tentative, but measures do exist with regard to legal aid

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collective redress mechanisms for consumers have now gained greater prominence.

One initial point which should be made at this stage is that there is a functional and qualitative difference between, on the one hand, collective redress systems that make a legal system more efficient at delivering justice in respect of claims that are already individually viable and, on the other hand, a regime intended to make viable claims that otherwise would be non-viable.[6] We see the role of European law potentially varying in both contexts. Reform of national procedures for viable claims should be essentially a matter of national concern. Resistance from national systems as well as an appreciation of the limits of the Community's constitutional powers in this field[7] have caused the Commission to act modestly: it is noticeable that the Commission has focused in many areas of legal redress on the cross-border dimension. However, this issue cannot be left entirely to national preferences, as it will arise within the Brussels Regulation[8] in the context of the mutual recognition of group action judgments (even of an opt-out character), unless it can be shown that recognition of the judgment would be manifestly contrary to public policy.[9] Moreover, there is pressure from the international business community to develop guidelines for courts to recognize out-of-court settlements.[10] There is also the parallel issue of the recognition within Europe of US class action judgments.[11]

(Decision 2001/470/EC OJ 174/25 and small claims procedures (Regulation (EC) 861/2007 OJ L 199/1).

[6] Note, 'Developments in the Law—Class Actions' (1975–76) 89 Harv L Rev 1319.

[7] H-W Micklitz, N Reich and S Weatherill, 'EU Treaty Revision and Consumer Protection' (2004) 27 Journal of Consumer Policy 367 and S Weatherill, 'The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) 13 EBLR 497.

[8] Regulation No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 entered into force on 1 March 2002. It has substituted the Brussels Convention from 1968 which has the same subject matter and continues to apply vis-à-vis Denmark. Under the Regulation, the general rule regarding recognition is laid down in Article 33(1) which provides that a judgment given in a Member State is to be recognized in the other Member States without any special procedure being required. See below.

[9] The Brussels Regulation provides for derogations from the general rule of recognition by setting out a number of situations in which a court of one Contracting State must refuse to recognize a judgment given by a court in another Contracting State, of which the first two, as outlined by in Article 34 of the Regulation are: (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

[10] On 16 October 2008, the Legal Practice division of the IBA adopted guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress. Industry is of course keen that any order be final so that defendants can at last draw a line under the litigation and not face follow-on actions in other jurisdictions.

[11] See generally, A Pinna, 'Recognition and Res Judicata of US Class Action Judgments in European Legal Systems' Erasmus Law Review 1 (2008) 31.

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Europe might at least have an interest in supporting Member States' policy by developing common principles of good practice.

As regards the bringing of claims by consumers in the competition and consumer protection fields, which otherwise would not be economically viable, we shall see that there is a greater justification for the intervention of the Commission so as to ensure the effective enforcement of its legislation.

Before entering into these debates, a word should be said on the topic of terminology. In this respect, the question arises as to whether there is a difference between class actions, group actions and public redress mechanisms (to borrow the English terminology of a recent DTI report),[12] or collective redress mechanisms (Civil Justice Council report).[13] It is in our view preferable to reserve the term 'class action' for the US-style procedure. Whilst the class action procedure can itself take a variety of forms,[14] the kernel of the concept is an opt-out procedure whereby consumers can be represented by default if given adequate notice of the action. The US version also has a formal certification stage, and the judge has the power to award a flexible range of remedies, including but not restricted to the award of damages to identified individuals. At present, no European procedure equates to the US class action.

In our view, procedures which in effect provide case management tools to handle mass litigation are best described as group actions. Public redress or collective mechanisms on the other hand may be viewed as having more explicit regulatory goals in seeking to disgorge profit gained by misconduct, although an important debate is the extent to which they should focus on allowing individual consumers to recover losses. Such mechanisms have started to be adopted in the United Kingdom in the competition law field,[15] and are now being discussed at the EU level.[16]

This terminology is important not only for clarity in legal terms, but also for the political success of European reforms. For right or wrong, it is clear that the importation of a scheme coloured by the US class action would not be acceptable.[17] As we shall see, the European response has been in general to

[12] Department of Trade and Industry (DTI), *Representative Actions in Consumer Protection Legislation* (2006).

[13] *Improving Access to Justice through Collective Actions* (Civil Justice Council, November 2008). See also R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008).

[14] For discussion of US, Australian Federal and Ontario model see R Mulheron, *The Class Action* (Hart, 2004).

[15] For example s. 47B of the UK's Competition Act 1998.

[16] See below.

[17] See for example N Andrews, 'Multi-party Proceedings in England: Representative and Group Actions' (2001) 11 Duke J of Comp and Int Law 249, who reports the view of Lord Steyn that 'English senior judges are opposed to a litigious society, that is, an over-excited tendency for citizens and businessmen to "blame and claim" by bringing actions in the ordinary courts rather than pursuing grievance procedures through political systems of democratic accountability, pressure groups, ombudsmen, arbitration, conciliation, etc. Nor, he suggested, were these judges guilty of applying an oligarchic brake on the litigation process. Instead, he said this view reflected a sense, which is widely shared within the community, of the place of civil law and of its relationship to the other organs of political and social life.' Commissioner Kuneva made her view

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refuse to accept the opt-out mechanism, and on the rare occasions it has been adopted, the focus has been on the particular problem of otherwise non-viable claims—as in Denmark[18] and Norway[19]—or the notion of an ideological claimant, ie a representative body has been introduced as in effect a trusted gatekeeper. There is a real sense that Europe does not want its market regulation to fall into the hands of profit-motivated intermediaries who have an incentive to increase litigation for its own sake. The following description of European developments thus should be read against this background.

II. DEVELOPMENTS AT A NATIONAL LEVEL

A. Scandinavian Countries

Scandinavia has been at the forefront of European developments in this field. Since the reforms in Sweden in 2003, group action legislation has been introduced in a number of countries across Scandinavia.[20]

1. Sweden

Under Swedish legislation,[21] various forms of class actions are permitted. Whilst a private individual may initiate a class action, it is also possible for organizations, such as consumer associations or a Government-appointed authority to litigate on behalf of a group of class members. From a remedial perspective, actions can be brought for injunctions and/or for monetary damages. The Act has solely a procedural impact, and leaves rules on substantive matters unchanged. The Act does not have a limited scope in terms of *ratione materiae*,[22] and so may apply to all spheres of potential litigation.

A number of pre-conditions apply to the class action procedure. Commonality is required so that the action must be based upon circumstances which are common to all class members, and there must not be substantial individual differences between the different claims in the constituency. The group must also be well-defined, and the claimant must be considered to be suitable, in terms of his interest in the matter, to represent the whole group. The class action must also be shown to be the best procedure, over and above, for instance, the test-case possibility.

The group action procedure under the 2003 reform is based on an opt-in model:[23] inclusion within the class requires an individual to make a formal

clear on this topic in a speech in Lisbon on 10 November 2007: 'To those who have come all the way to Lisbon to hear the words "class action", let me be clear from the start: there will not be any. Not in Europe, not under my watch.'

[18] See 384 below.

[19] See 385 below.

[20] See generally W van Boom and M Loos (eds), *Collective Enforcement of Consumer Law* (Groningen, 2007) 94–96.

[21] Group Proceedings Act 2002.

[22] However, group claims brought by non-profit orgnizations are limited to consumer law and environmental law.

[23] Earlier proposals had favoured an opt-out approach.

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application, after notice is given by the court. The court then compiles a list of group members who have opted in to the procedure. The group representative is empowered to make settlements on behalf of the group, but any settlement must be confirmed by the court.

The identity of the group representative is important in terms of costs. Swedish law applies the loser-pays rule and, if the group loses the case, the representative may be ordered to pay the opponent's costs, including legal fees. Whilst in normal circumstances the rest of the members of the group (other than the representative) do not similarly incur liability for costs, this position has had an impact on litigation patterns. As one commentator has pointed out: 'Unless the plaintiff is absolutely sure of winning the case, the risk of having to pay both parties' costs (including costs for counsel) in a losing action is a strong deterrent for anyone thinking about prosecuting a group action.'[24]

To date, some class actions have been instituted under the new procedures and the phenomenon has attracted media interest.[25] However, the procedure has not been utilized to the extent or in the way that was first anticipated. Only around nine claims have been brought in the five years that the legislation has been in operation and the great majority of these (eight) were actions brought by private persons,[26] rather than by organizations. Reforms have been proposed, particularly as regards the issue of funding, as well as the introduction in certain circumstances of an opt-out model.[27] An official government review has been commenced with a view to evaluating the operation of the Group Proceedings Act over the first five years of its application.

2. *Denmark*

On 1 January 2008, new rules governing group actions were introduced in Denmark.[28] The new procedures include a court approval stage in order to allow for the filtering-out of claims which are not suitable for the class action procedure. The class is represented by a court-appointed class representative, who is drawn from the class of members, or alternatively an association, or a mandated public authority (essentially the Consumer Ombudsman).[29] Other detailed rules cover issues such as class notification, time limits, legal costs and access to justice (legal aid).

[24] Per Hendrik Lindblom, 'National Report: Group Litigation in Sweden' 17–18 (available at: http://www.law.stanford.edu/calendar/details/1066).

[25] In particular as regards the group action instituted to contest the Swedish restrictions on the import of alcohol, see the dedicated website: www.euprivatimport.se (last visited 15 January 2009).

[26] For further details, see Per Hendrik Lindblom, 'National Report: Group Litigation in Sweden' 21 (available at: http://www.law.stanford.edu/calendar/details/1066).

[27] ibid.

[28] By virtue of Act No 181 of 28 February 2007.

[29] In the case of opt-out actions, only a public authority may be appointed as class representative.

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Whilst the opt-in model remains the norm under these new procedures, the legislation does allow for an opt-out approach to be adopted in restricted circumstances, essentially where the court accepts that claims cannot be expected to be brought through individual actions due to their limited size (below DKK 2,000)[30] and thus that the opt-in group action approach is deemed to be inappropriate.[31] Some further guidance has been given by the Danish Ministry of Justice:

> Examples of cases where the conditions for hearing the case as a class action according to the opt-out model would be satisfied include cases concerning claims from a large number of subscribers of a telecommunications company claiming that, for a period, the company collected rates that were higher than authorised by the standard terms and conditions and legislation and in which the individual subscriber's claim for repayment only amounts to a few hundred kroner.[32]

3. Norway

Class action procedures were introduced into Norwegian law in 2005.[33] A class action may be brought where several individuals have claims which are materially similar on a factual or legal basis and it is shown that the class action procedure is the most appropriate way of dealing with the issues.[34]

The action may be initiated by anyone who belongs to the actual class of persons who have sustained loss, or by associations, trusts, or public bodies if the action falls within the scope of their purpose and field of activity (such as the Consumer Ombudsman). There is a procedure for court approval of the action, relating to the scope of the action as well as the extent of the class members. Whilst the procedure is primarily based upon an 'opt-in' model, there is also provision for an opt-out version. If the action concerns claims or obligations which are of such a minor value individually that a separate legal action would not be viable, then the court may approve the action as an opt-out class action, provided that the individual claims making up the class are not likely to give rise to specific, non-generic, questions. Anyone who falls within

[30] According to the explanatory notes to the relevant Bill.

[31] eg where the case includes a very large number of persons so that the practical administration of opt-in notices will require a disproportionate amount of resources (see further 'New Rules on Class Actions under Danish Law' (Danish Ministry of Justice, Legal Department, 26 June 2007) 6). Under the opt-out model, the only eligible class representative is a public authority authorized for the purpose by law (ie the Consumer Ombudsman).

[32] See, further, 'New Rules on Class Actions under Danish Law' (Danish Ministry of Justice, Legal Department, 26 June 2007) 6.

[33] By virtue of the Dispute Act 2005. See generally I Backer, 'The Norwegian Reform of Civil Procedure' Scandinavian Studies in Law Vol 51 (2007) 60 et seq.

[34] Class actions are defined as follows in section 35-1(2) of the Dispute Act 2005: 'A class action is an action that is brought by or directed against a class on an identical or substantially similar factual and legal basis, and which is approved by the court as a class action.'

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the class will then be bound by the resultant judgment unless he uses his right to opt out.[35]

The court appoints a class representative from amongst those who are entitled to bring the class action. The representative keeps the class members informed of developments regarding the action. The representative is also liable for costs awarded to the opposite party but can claim reimbursement from the class members individually where this was made a condition for registration as a class member.

4. Finland

The introduction of class actions in Finland has been under discussion for a long time, with the first working group appointed in 1992. Resistance from parts of the business community delayed progress,[36] but the Act on Class Actions was finally approved by Parliament in February 2007 and came into force on 1 October 2007.[37]

The Finnish group procedure is more restrictive than its other Scandinavian counterparts.[38] Whereas in Denmark, Norway and Sweden, claimants may either be a private person, a consumer organization or a public authority (such as a consumer organisation), in Finland, the Consumer Ombudsman is mandated as the primary actor to bring the class action and act as the representative of the class.[39] Individuals have only a subsidiary right to act, namely when the Consumer Ombudsman has decided not to bring proceedings.[40] Moreover, the subject-matter of the claims under Finnish law is restricted to disputes relating to defects in consumer goods, the interpretation of contract terms or disputes between consumers and entrepreneurs regarding the sale and marketing of investment products and insurance.

B. Other European Countries

1. Portugal

Portuguese legislation on group actions is, in theory, the most liberal in Europe. The Law 83/1995 of 31 August 1995 established that a group of persons may collectively bring actions related to public health, environment, consumer protection, cultural heritage and public property.[41] In terms of civil

[35] ibid.

[36] See W van Boom and M Loos (n 20) 94.

[37] Act on Class Actions, *Ryhmäkannelaki*, 444/2007.

[38] For further information, see the Ministry of Justice, Finland: www.om.fi/Etusivu/Ajankohtaista/Uutiset/1175668512999?lang=en (last visited 15 January 2009).

[39] See section 4 of Act on Class Actions: 'The Consumer Ombudsman, as the plaintiff, shall have exclusive standing to bring a class action and to exercise the right of a party to the case to be heard in court.'

[40] See W van Boom and M Loos (n 20) 95.

[41] Law 83/1995. Subsequent legislation has been adopted, with only limited impact on this earlier law (eg the Law on Defence of the Consumer of 31 July 1996 (24/96)).

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procedure, the 'popular action'[42] contained in the legislation is structured as follows.[43] A private individual or an association[44] may act on behalf of all the group members concerned.[45] After lodging the claims before the court, potential claimants are notified, usually by press advertisement. In the absence of an express declaration otherwise, all persons will be covered by the class: the procedure is in effect based on the 'opt-out' model.[46]

Under the relevant procedures, the court undertakes a preliminary ruling on eligibility, thereby verifying that the claim relates to interests that are protected by the legislation, that the claim is not manifestly unfounded and that the claimant is entitled to act as the class representative. In the final decision on the merits, the judge decides on liability and then lays down rules governing quantum. Where damages cannot be individually assessed, the court has the power to fix an aggregate amount. Amounts which are owed to unidentified claimants are paid instead to the Ministry of Justice. The latter retains these amounts for three years and thereafter they are used to finance further actions.

This legislation has been subject to criticism due to perceived procedural flaws undermining its effectiveness.[47] Indeed, it has only rarely been used in practice.[48] This has partly been explained by financial considerations given that costs can be awarded against the class.[49] Other commentators have been more positive about the procedure.[50]

[42] See generally J Pegado Liz, 'Notion and Regime of the 'Popular Action' in Portugal', paper presented at the European Parliament Conference 'Group Action: Taking Europe Forward', 11 October 2007.

[43] The following draws upon the analysis of J Pegado Liz, ibid.

[44] As long as the association or foundation represents interests protected by the relevant legislation.

[45] As well as, in certain circumstances, the Public Attorney (*Ministério Público)* and the Consumers Institute (*Instituto do Consumidor*).

[46] Article 19 of the relevant legislation provides that the decisions have an effect *erga omnes*, except as regards those who exercise the right to exclude themselves.

[47] See generally J Pegado Liz, 'Notion and Regime of the 'Popular Action' in Portugal', paper presented at the European Parliament Conference 'Group Action: Taking Europe Forward', 11 October 2007.

[48] For details of the three actions undertaken, see R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008) 100. See also Hendrique Sousa Antunes, 'Class Actions, Group Litigation and Other Forms of Collective Litigation' 20 (available at: http://www.law.stanford.edu/calendar/details/1066).

[49] Capped at a level of between 10 per cent and 50 per cent of normal costs. Another explanation which has been given for the infrequent use of the procedure is the limited resources of the Portuguese Association for Consumer Protection to bring this claims, rather than due to a deficiency of the regime itself (R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008) 100).

[50] R Mulheron, ibid.

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2. Collective settlement under Dutch law

One of the best-known collective redress procedures is the Dutch settlement mechanism. Collective settlement legislation was introduced into Dutch law in 2005[51] and provides for the court approval of collective settlements whereby claimants[52] and one or more infringing parties can apply to court to declare the settlement fair and binding even on non-parties to the agreement, therefore on an opt-out basis.[53]

A number of conditions apply to the collective settlement procedure. The representative entity must be sufficiently representative of the interests of those for the benefit of whom the agreement was concluded. The representative nature of the body is determined by means of a number of criteria, such as the other activities performed by the organization to promote the interests of the injured parties and the number of aggrieved persons who have joined the organization. The Amsterdam Court of Appeal will also review whether, in the circumstances, the amount of compensation agreed in the settlement agreement is reasonable.

The Act introduces the notion of 'damage scheduling', under which compensation is awarded to claimants not on the basis of their personal characteristics, but rather on the basis of the characteristics of the subclass/group of which the individual claimant is a member.[54] This approach is designed to make it possible for a tailor-made settlement to be put in place.

As mentioned above, the collective settlement procedure is premised on an opt-out method. The settlement is widely publicized and those who wish to do so must elect to opt out within a judicially-decided period of time.[55] Anyone who has not done so within the relevant timeframe is deemed to be bound by the settlement even if he/she did not know about it.[56]

The collective settlement legislation was designed primarily to apply to mass exposure and mass disaster personal injury claims (arising from the DES drug damage claims).[57] The second case, the Dexia settlement, instead

[51] The Collective Settlement of Mass Damage Act has been incorporated in Articles 7:907–7:910 of Book 7 of the Dutch Civil Code.

[52] Organized together in the form of a non-profit organization or 'representative entity'.

[53] Parties who do not wish to be bound by the settlement agreement can so declare within a term to be determined by the court.

[54] See further D Lunsing Scheurleer and Ianika Tzankova 'Way of the future' (IFLR, October 2007).

[55] A number of claimants chose to opt out of the Dexia settlement (relating to mis-sold retail investment products) and pursued individual claims. Interestingly, the District Court of Amsterdam has since given judgment in a series of individual cases, in which it sets out a model for compensation that is very different to that laid down by the court-approved settlement.

[56] By way of example, in the aforementioned Dexia case, the settlement mediated by former Central Banker Wim Duisenberg was declared binding by the Amsterdam Court of Appeal on 25 January 2007 and consumers had to opt out by 31 July 2007.

[57] See further Cees van Dam, 'Dutch case law on the EU Product Liability Directive' in D Fairgrieve (ed), *Product Liability in Comparative Perspective* (CUP, Cambridge, 2005) 135–137.

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related to financial services (retail investment products) and the ongoing Royal Dutch Shell cases arose from a securities action due to the overstatement of the company's oil and natural gas reserves between 1997 and 2003. The latter case was submitted for court approval on 11 April 2007 and is of some interest due to its cross-border nature (the settlement aims to achieve a worldwide settlement, excluding only US claimants). Europe-wide notification of the procedure was undertaken in May 2008,[58] and a hearing took place in November 2008 before the Amsterdam Court of Appeal to consider the petition for a binding declaration.

Whilst the Dutch system does in some ways resemble US-style 'court approved opt-out class settlements', it should be underlined that the *initiation* of damages claims for mass torts is not possible in the Netherlands. Under Dutch law, it is possible for a foundation *(stichting)* or an association to initiate collective action to protect similar interests of other persons,[59] but under such a procedure it is not possible to seek monetary compensation.[60]

3. *France*

Discussion about group action reform has occurred periodically in France over the past decades and the latest manifestations of this phenomenon stem from an initiative of President Jacques Chirac in 2005.[61] President Chirac's proposal, immediately interpreted as an attempt to introduce US-inspired class actions into the French system, is in fact simply the latest manifestation of a recent trend of transplanting legal techniques into the French system. Recent criminal justice reforms have introduced the common law technique of plea-bargaining (*plaider coupable*)[62] and there is currently a debate about injecting adversarial aspects into the French system of criminal justice.

a) Current procedural backdrop

Procedures for collective redress are not unknown in France. Two pre-existing mechanisms should be mentioned: collective interest actions *(action d'intérêt collectif)* and joint representative actions *(action en représentation conjointe)*.

[58] See, eg Financial Times (International Edition) 20 May 2008.

[59] To the extent that the articles of association promote such interests.

[60] Section 3 : 305*a* (3) Civil Code. However, claimants may seek injunctive relief or a judicial declaration that the defendant is liable for the damage it has caused.

[61] In a New Year address on 4 January 2005, President Jacques Chirac surprised commentators by announcing an initiative to introduce into French law collective actions for damages claims: 'We also have to give consumers the means to enforce their rights: today they are deprived of such rights because, taken separately, none of the injuries they incur is significant enough to cover the cost of a judicial action. This is why I am asking the government to put forward an amendment of legislation in order to allow groups of consumers and consumer associations to bring collective actions concerning wrongful practices undertaken on some markets.' (authors' translation).

[62] See generally I Papadopoulos, *Plaider Coupable: La pratique américaine, Le texte français* (PUF, 2004).

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Collective interest actions allow for certain consumer associations to bring claims where there has been an infringement of the so-called 'collective consumer interest'.[63] Use of this procedure has however been rare. Any claim to recover damages for loss caused to the 'collective interest of consumers' is open solely to *accredited* consumer associations and any damages awarded will be made to the consumer association itself for the loss caused to the 'collective consumer interest.'[64] This latter notion is distinct from the loss caused to individuals, and generally represents only a modest sum awarded by the courts.[65]

The other procedure, known as joint representative actions, could have had a broader impact. Similarly to the previous action, the claim is restricted to 'accredited associations', and is available in consumer-related matters.[66] However, unlike the previous procedure, the joint representative action is taken in the *individual interest* of consumers: the action can be brought where 'several identified individuals have suffered individual harm, caused by the same professional person or body and which have a common origin'. The utility of this action has however been strictly circumscribed by the need to receive individual written instructions from the claimants for all procedural steps. Individual loss must also be shown on the part of all claimants.

b) A brief history of the recent proposals

To put into effect President Chirac's initiative, a working group of consumer association representatives, business representatives and jurists was created in April 2005. After wide consultation, the working group completed its work in late 2005, with the publication of a report.[67] This report sets out in some detail the comparative law position (including the US, Sweden, Portugal, Quebec and England), as well as identifying potential types of action that could be introduced. As a consensus was not reached by the members of the group on the desirability of introducing a class action into French law, no specific recommendation was made.

c) Legislative initiatives

In early 2006, two legislative Bills were submitted to the Senate and National Assembly, both proposing a two-stage group action procedure, with

[63] See Article 421-1(1) of the Code de la Consommation.

[64] See also the parallel action available to approved associations of shareholders or investors in respect of wrongful acts harming the 'collective interest of investors' (Article L 452-1 of the Monetary and Financial Code).

[65] See *Lamy Droit Economique* (Paris, 2007) para 5153.

[66] See also the parallel action available in the financial services sphere: Article L 452-2 of the Monetary and Financial Code).

[67] Groupe de travail sur les actions collectives à l'occasion des litiges de consommation, *Rapport sur l'action de groupe* (16 December 2005).

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consumers acting through accredited consumer organizations.[68] None of these Bills made it to the Statute book.

Renewed impetus was given to the process with the drafting of governmental legislation introduced into Article 12 of the *Bill in Favour of Consumers (Projet de Loi en faveur des consommateurs)*.[69] Group actions under the Bill could be commenced only by accredited consumer associations, and included a two-stage procedure. In the first phase, the judge was to decide on the issue of liability, whilst during a relatively complicated second stage, individual consumers acted in order to recover damages, initially by means of direct negotiation with the defendant, and subsequently by means of further legal proceedings. The Government thus opted for a whole-heartedly 'opt-in' model, with individuals required to act on their own behalf in the second stage of the procedure. This latter point had incurred the displeasure of consumer groups who criticized the perceived inefficiency of the two-stage proposed system. Other aspects of the proposals also ensured that the model was strictly circumscribed. The scope of the action was restricted to pecuniary loss arising from non-performance of a defendant's contractual obligation in sales of goods or provision of services causing damage to a group of consumers. Crucially, the Bill specifically excluded personal injury, thereby greatly reducing the scope of potential claims. The legislation was also aimed at relatively small claims, with a cap to be laid down by governmental decree, mooted at a level of €2000 damages per individual. However, the Bill was officially withdrawn from the parliamentary agenda on 31 January 2007 for lack of parliamentary time due to the Spring 2007 presidential and legislative elections.

During these elections, presidential candidate Nicolas Sarkozy sent out mixed messages on group action reform. He declared early in 2007 that he was 'reticent' about the introduction of class actions into France.[70] However, the theme of class actions subsequently re-appeared in a more favourable light as one of Mr Sarkozy's campaign proposals, albeit couched in somewhat vague terminology.[71]

On becoming President, Mr Sarkozy appointed as his Minister for Tourism and Consumer Affairs, Luc Chatel, a supporter of class action reform and

[68] See *Proposition de loi* de M Luc CHATEL *visant à instaurer les recours collectifs de consommateurs*, n° 3055 registered at the National Assembly on 26 April 2006 and *Proposition de loi tendant à* créer *une action de groupe*, registered at the National Assembly on 13 March 2007, n° 3775.

[69] N° 3430, registered on 8 November 2006.

[70] '*Je m'inscris vraiment en faux contre la judiciarisation et la pénalisation du droit économique français*' Confédération Générale des Petites et Moyennes Entreprises, 24 January 2007 ('I am really against the introduction of excessive criminal and legal procedures in respect of French financial law.')

[71] 'Il y a des progrès à faire en matière de respect des droits des consommateurs à l'égard de certains services. J'entends bien y concourir. Il nous faut encore du temps de concertation pour y aboutir. Mais il faudra que nous parvenions à instaurer une formule d'actions de groupe' (see *L'Ordinateur Individuel* (6 March 2007)).

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sponsor of an earlier parliamentary Bill.[72] In his official 'mission letter' addressed to the Minister of Finance, Christine Lagarde on 11 July 2007, President Sarkozy instructed Mme Lagarde to 'create a group action *à la française*'.[73] Other developments illustrate a growing momentum in favour of some sort of reform.[74] On current thinking, it would seem that the reforms will be included in the planned Bill on the decriminalisation of commercial law (*dépénalisation du droit des affaires*) during 2009. However, much of course depends upon the architecture of the procedure which is ultimately adopted.

4. *Italy*

The Italian Consumer Code has recently been amended in order to introduce new group procedures,[75] entering into force at the end of June 2008. Under the new system, consumer associations may bring damages claims collectively for tort liability, unlawful commercial practices or anti-competitive behaviour, and contract terms. Based on a multi-phase procedure, the new group action commences with an initial admissibility review,[76] followed by notification of admissible actions so as to allow interested parties to opt in. In a further stage of proceedings, a judge will decide on the issue of liability and issue a decision of declaratory value only. The judge will also determine the criteria for the calculation of quantum.[77]

Within 60 days of the service of the decision, the defendant company may make a payment proposal to the relevant persons. If no such offer is made, or if the offer is refused, then the judge shall appoint a conciliation committee (*camera di conciliazione*)[78] to examine and resolve the issue in dispute concerning quantum. Alternatively, there is an out-of-court settlement procedure, before public or private dispute resolution bodies. Concerns have been expressed about the new procedures, particularly the complexity of the

[72] See *Proposition de loi de M Luc Chatel visant à instaurer les recours collectifs de consommateurs*, n° 3055 registered at the National Assembly on 26 April 2006.

[73] 'Avec le secrétaire d'Etat chargé de la Consommation et du tourisme, vous serez particulièrement vigilants en ce qui concerne les prix dans les grandes surfaces, les pratiques bancaires, les nouveaux services. Vous créerez une action de groupe à la française.'

[74] Two recent Commissions have proposed the creation of new group procedures under French law. See *Rapport de la Commission pour la Libération de la Croissance française: sous la présidence de Jacques Attali* (2008), Decision 191, 'Introduire les Actions de Groupe' 144; *La dépenalisation de la vie des affaires: groupe de travail présidé par Jean-Marie Coulon* (2008) 89 (group action as a corollary to the limitation of criminal offences in the consumer sphere). However, there have less enthusiastic views; see, eg Pierre Simon, 'Action de Groupe, Attention Danger' *Le Tribune* (11 February 2008).

[75] Article 140; *bis* of the Consumer Code.

[76] Analysing, inter alia, whether there are prima facie grounds for the claim or not, whether there is commonality of interest and that there are no conflicts of interest between claimants.

[77] Or, where possible, a minimum amount payable to each consumer.

[78] The *Camera di Conciliazione* is composed of a claimant-appointed lawyer, and a defendant-appointed lawyer, and is chaired by a lawyer appointed by the president of the court.

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conciliation and settlement procedures. The new procedure has not introduced any refined case management procedures for mass claims, which may well be difficult to accommodate within the existing civil procedure framework.

5. *Germany*[79]

Under German law, as elsewhere, it is possible to join together similar claims by means of a simple joinder procedure.[80] However, this approach suffers from the disadvantages traditionally associated with what is essentially a multitude of individual lawsuits.[81] Germany has been in the lead in developing skimming-off actions in the field of competition law.[82] However, the issue of more relevance in the current context is the new test-case procedure applying to securities litigation. Legislation came into effect in Germany on 1 November 2005, with the objective of facilitating the resolution of group actions in securities litigation by means of a test-case process.[83] It was a response to the courts being flooded by the Deutsche Telekom case in which 15,000 individuals swamped the Frankfurt Regional Court.[84] Under this new procedure, where several claims have been brought for damages due to wrong, misleading or omitted information on the capital markets, the claimant and the defendant in each lawsuit may choose to adopt a procedure whereby the courts will determine the common factual and legal questions in the actions by means of a test or lead case, the decision in which will have binding effect on all the other claims.

The Higher Regional Court (*Oberlandesgericht*) has exclusive jurisdiction as regards the choice of the representative test claimant, as well as the generic issues of litigation to be resolved. During the trial of the test case, the other related first instance proceedings are suspended, and the affected parties are considered to be third-party interveners in the test case procedure. Once a decision has been reached in the test case, the court will issue a representative order which is binding upon all related cases, although only to the extent that it concerns generic issues. Any individual questions of fact and law, such as quantum, can be dealt with by the court of first instance. A list of all current proceedings under the Act on Lead Cases of Private Investors

[79] On this, see Hans-W Micklitz and Astrid Stadler, 'The Development of Collective Legal Actions in Europe, especially in German Civil Procedure' [2006] European Business Law Review 1473.

[80] § 147 ZPO, German Code of Civil Procedure.

[81] Micklitz and Stadler (n 79).

[82] See s 10 Competition Law 3 July 2004 and s 34a Act Against Restraints on Competition as amended on 15 July 2005. See P Gottwald 'On the Extension of Collective Legal Protection in Germany' (2007) CJQ 484.

[83] *Kapitalanleger-Musterverfahrensgesetz (KapMuG)- The Law Governing Test Cases in Capital Investment.*

[84] It is reported that after settlement negotiations failed the trial started in April 2008 and is expected to last 10–15 years, C Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart, 2008) 78.

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(*Kapitalanleger-Musterverfahrensgesetz, KapMuG*) is now available online.[85]

There has been some critical appraisal of the law. It has been pointed out that the third party intervener procedure may well lead to a complication of the overall claims, as parties are entitled to participate in the procedure, and make their own submissions.[86]

A final point to mention is the attempt in the legislation to head off the bringing of securities claims against German issuers before US courts. The legislation confers exclusive jurisdiction in securities litigation to the courts of the country where the issuer's registered office is located. Claimants would therefore need to litigate in Germany when seeking recovery of monetary damages from a German issuer in connection with securities matters.

The securities legislation was deliberately introduced for a limited period of five years. It may then be repealed, retained or extended. Gottwald notes that Hans Micklitz and Astrid Stadler have presented a comprehensive draft of an 'Act governing legal actions taken by associations, test cases and group proceedings'.[87] However, Gottwald doubts that there will be the political will for such reform.[88]

6. *England & Wales*

The above survey of continental European law shows how group procedures, originally a creature of the common law,[89] can be transplanted into a civil law context. The reader is no doubt curious as to the position with regard to the common law jurisdictions within Europe. No such procedures exist in either Ireland[90] or (the mixed system of) Scotland,[91] although reforms to introduce them have been proposed. In England the position is more nuanced, for whilst there is no class action that in a formal sense compares with the US-style opt-out class action, there have been some interesting developments and proposals for reform.

Reform to English civil procedure for mass litigation was prompted by the Opren[92] litigation. This involved an anti-arthritic drug causing injury mainly

[85] Admissible applications for this process are publicly announced by the District Court in a special complaint registry, which can be accessed on the internet: http://www.ebundesanzeiger.de (last visited 15 January 2009).

[86] Micklitz and Stadler (n 79). See also H-W Micklitz, 'Collective Private Enforcement of Consumer Law: the Key Questions' in Boom and Loos (n 20).

[87] *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft*, Schriftenreihe des Bundesministeriums für Verbraucherschutz, Reihe A Heft 507 (2005) 1419 et seq.

[88] ibid.

[89] R Mulheron, *The Class Action* (Hart, 2004).

[90] See Irish Law Reform Commission, *Consultation Paper on Multi-Party Litigation* (2003) and *Report on Multi-Party Litigation* (2005).

[91] R Barker, ID Willock and JJ McManus, *Multi Party Actions in Scotland* (Scottish Office Central Research Unit, Edinburgh 1994) and National Consumer Council and Scottish Consumer Council, *Representative actions in consumer protection legislation* (2006).

[92] *Davies v Eli Lilley & Co* [1987] 1 WLR 1136.

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to the elderly and leading to claims for relatively small amounts. Traditionally such litigation was conducted using legally-aided lead cases in order to avoid the loser-pays rule, but this practice was challenged and the judge held that everyone should bear a proportionate risk of adverse costs orders. Many of the elderly were understandably not willing to risk their homes and savings in the litigation and the case was on the verge of collapsing when a wealthy benefactor, Geoffrey Bradman, offered to underwrite the victims' costs whereupon the case settled quickly. This prompted reflection on how well the English approach of muddling through with ad hoc test case strategies worked, which as part of the Woolf reforms[93] led to the introduction of the Group Litigation Order (GLO) in Part 19III of the Civil Procedure Rules.

The GLO is a flexible procedure allowing for a register to be established where a number of claims give rise to issues under the GLO. There are no certification criteria that need to be established and the court can even make such an order on its own initiative, although in all cases the consent of the head of the respective branch of the judiciary needs to be obtained. However, the GLO is best viewed simply as an extension of the case management philosophy that underpins the Woolf reforms and allows the designated judge to deal with the matters in common to the extent he or she deems this desirable. There are few formal rules and directions to the judge. This is at the same time the strength of the procedure (giving it flexibility and avoiding satellite litigation), but also its weakness as parties are unsure how particular judges will interpret the discretion and use the powers at their disposal.[94] A key issue in practice is whether the judge agrees to test general liability issues (as usually advocated by claimant lawyers) or requires individual cases to be fully worked up. There have to date been 64 GLOs.[95] The largest cohort have involved allegations of child abuse in care homes, but consumer claims in products liability and package travel have also featured.

However, the biggest problem remains funding. The Legal Services Commission has encountered some setbacks in this respect with expensive product liability actions that never reached court despite staggering sums being expended, and now has a cash limited fund (£3 million per annum) for such complex mass litigation. The Civil Justice Council has recently started to engage seriously with the debate about funding,[96] and its resultant Report recommends that properly regulated third-party funding be recognized as an acceptable option for mainstream litigation. The Council came out against a Contingency Legal Aid Fund, but in favour of a Supplementary Legal Aid Scheme under which a percentage would be taken out of costs or damages in successful cases and used to offer costs protection in future litigation. It also

[93] Woolf, *Access to Justice, Final Report* (1996).

[94] M Mildred, 'Group Actions' in G Howells, *The Law of Product Liability* (Butterworths Lexis-Nexis, 2007).

[95] http://www.hmcourts-service.gov.uk/cms/150.htm (last visited 15 January 2009).

[96] *Improved Access to Justice – Future Funding of Litigation Costs* (2007).

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favours considering the introduction of full-blown contingency fees with claimants paying a percentage of damages to lawyers in such cases. Most people advocating contingency fees would view them as a funding mechanism of last resort. Care needs to be taken with such a policy for UK damages levels are not as generous as those in the US and even in the US contingency fees are not used for class actions. However, it is heartening to see that fundamental access-to-justice issues relating to funding are now being addressed.

The one mechanism that does have potential to be used as an opt-out procedure is the representative action found in Part 19II of the Civil Procedure Rules. This procedure allows a representative to act where more than one person has the same interest in a claim. The representative can represent parties who are not before the court, but orders for or against non-parties can only be enforced with the leave of the court. This cannot be used to promote a representative organization procedure because associations with no legal interest themselves cannot act as representatives.[97] Nevertheless, following *Prudential Assurance v Newman Industries*[98] there was hope that this might be the basis for an English version of class actions with generic issues being decided by representative procedures with individual follow-on actions.[99] However, this has not materialized. Although the courts have shown some flexibility and commentators have expressed some optimism that there is scope for expansion of these actions, it seems likely that the lack of guidance in the rules and doubts about whether such procedures may be applied to damages claims[100] mean that its potential is unlikely to be realized.[101] The procedure started life as a mechanism for ascertaining feudal rights and seems best suited to determining fixed rights (such as shares or tenancy agreements). In any event normal costs rules apply so the representative has to bear the full burden of litigation making such a rule unattractive in many consumer claims.

The United Kingdom has one particular procedure in competition law that is of interest, namely the collective redress procedure in s 47B of the Competition Act 1998.[102] This is a collective redress follow-on action for consumers once an infringement of competition law has been established by the regulatory authorities or the courts. Such actions can only be brought by consumer organizations recognized by the Secretary of State as meeting set critieria. Moreover, its effectiveness is hampered by not being an opt-out

[97] *Chocosuisse Union des Fabricants Suisse de Chocolat v Cadbury Ltd* [1998] ETMR 205.

[98] [1980] 2 WLR 339.

[99] J Jolowicz, 'Representative Actions and Damages—A Compromise Solution?' (1980) 39 Cambridge Law Journal 237.

[100] And also the related issue of whether causation issues or individual defences might arise.

[101] See R Mulheron, 'From Representative Rule to Class Action: Steps Rather Than Leaps' (2005) 24 Civil Justice Quarterly 424–449; J Seymour, 'Representative Proceedings and the Future of Multi-Party Actions' (1999) 62 MLR 564–584; J Seymour, 'Justice and the Representative Parties Rule; An Overriding Interest?' (2005) 25 Legal Studies 668.

[102] See O Dayagi-Epstein, 'Representation of Consumer Interest by Consumer Associations—Salvation for the Masses?' (2007) 3 Competition Law Review 209.

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procedure with damages being in principle awarded to named individuals.[103] The Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual), but this is unlikely to happen frequently as few individuals will be motivated to sign up and then sign away their rights to individual compensation. Indeed, in the one case to date brought under the provisions, when the consumer organization *Which?* sued JJB Sports over price-fixing of football shorts, it proved to be very hard to persuade many consumers to make the effort necessary to recover modest amounts of compensation; highlighting that if market regulation, deterrence and profit-skimming are motivations for such laws then opt-out solutions are necessary.[104] *Which?* had originally sought exemplary damages, indicating that if organizations are to bring such cases they need an inducement to do so: if it is not to be exemplary damages it might be some type of *cy-près* scheme.[105]

In 2002 the Lord Chancellor's Department (as it was then called) published a report entitled *Representative Claims: Proposed New Procedures* in which it favoured introducing a representative action. The successor Department for Constitutional Affairs concluded that whilst there was general support for representative claims they should be taken forward in specific legislation for particular types of cases where there is evidence to support the introduction of such provisions. There is much to be said for this approach. The collective dimension takes on different forms in different contexts and there may be a need to gear the regime to the particular context. In recent times, the UK Government has become very engaged with this debate and, in the consumer context, policy was developed further in *Representative Actions in Consumer Protection Legislation*[106] where it recognizes there is a role for representative actions. The crucial debating points are about who can bring the claim and on behalf of whom. The Government fears inadvertently promoting a compensation culture and so proposes that claims should only be brought by representative associations (that are of good reputation, have the ability to handle the case and have the well-being of consumers, rather than profit, at the centre of their ethos) and be brought on behalf of named consumers.

The National Consumer Council, the Scottish Consumer Council[107] and the Office of Fair Trading (OFT)[108] all responded positively to the consultation on representative actions, but were disappointed that consideration had not been

[103] Section 47B(6) of the Competition Act 1998.

[104] R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008) 38–46.

[105] See generally R Mulheron, *Modern Cy-près Doctrine: Applications and Implications*, (Cavendish UCL Press, London, 2006).

[106] (2006). See also for parallel developments in other sectors Patent Office, *Representative Actions for the Enforcement of Intellectual Property Rights* (2006).

[107] *Representative Actions in Consumer Protection Legislation* (2006).

[108] *Representative Actions in Consumer Protection Legislation—A Consultation Response by the Office of Fair Trading* (2006).

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given to individual-led representative actions. We believe the OFT made a vitally important comment when it concluded such an opt-in scheme would not address the problem of unidentified victims or where individual detriment was too small.

The question of representative actions is also being taken up by the Civil Justice Council, where their deliberations seem to focus on a general representative action and the link to the Government's sectoral initiatives is unclear. A research paper on the reform of collective redress in England and Wales compiled by Professor Rachael Mulheron was submitted to the Civil Justice Council ('CJC') in 2008.[109] The research aimed to examine whether there was an 'evidence of unmet need' for reform of civil procedure, and if so, propose substantive reforms to address the lacunae. The research work was particularly informed by the experiences in Europe and in the Commonwealth, though the US position was excluded given the many socio-legal differences 'with which many English judiciary members, practitioners and law reformers feel inherently uncomfortable'. The author concluded that there was indeed a 'gap' in the collective redress mechanisms available in England and Wales: ''something more' is required to facilitate the litigation and testing of widespread grievances, in circumstances where, presently, these grievances are not being addressed nor compensated.'[110]

Professor Mulheron proposed the introduction of an opt-out regime of a generic type. Whilst access to justice and judicial efficiency would be enhanced by the introduction of such a regime, Professor Mulheron noted, however, that it would be necessary to draft it in a measured fashion, and include in-built safeguards.[111] In particular, the court would only permit an action to proceed on an opt-out basis if this were preferable to the other procedural mechanisms presently available to litigants.[112]

In response to the paper, the CJC submitted a series of recommendations to the Lord Chancellor in late 2008. The CJC recommended that a generic collective action should be introduced,[113] to be based on an opt-in or opt-out basis. A wide range of representative parties would be able to act, including designated/ad hoc bodies and class members. The new procedure would include a judicial certification process, as well as an enhanced form of case management by specialist judges. In case of an opt-out action, the court would

[109] R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008). Whilst the opinions expressed in the Paper were specifically stated to not necessarily represent the views of the Civil Justice Council, the Research was said to have been undertaken to assist the Civil Justice Council in its consideration of possible reform of the collective redress mechanisms presently available in England and Wales.

[110] ibid 157.

[111] ibid 157.

[112] ibid.

[113] See *Improving Access to Justice through Collective Actions* (Civil Justice Council, November 2008). It envisages that sector-specific collective actions could be introduced to complement the generic action, but remains unclear whether there will be the political desire to introduce both a specific regime for consumers and a generic action.

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have the power to aggregate damages and any unallocated damages from such an award could, in appropriate cases, be subject to *cy-près* distribution.[114] In terms of costs, the report concludes, however, in favour of maintaining the full cost-shifting rule which would clearly constitute a continuing break on the bringing of claims.

As a whole, this makes for a very ambitious package. Unsurprisingly, therefore, it is concluded that it would be desirable for any changes to be introduced by primary legislation. It remains to be seen how the UK Government reacts to the recommendations.

7. Comparative Conclusions

The national reports give a snapshot view of developments at a domestic level in respect of the civil procedure governing mass damages claims. These procedures are clearly on the reform agenda across Europe. Whilst similar policy goals underpin many of the initiatives, the solutions that have been adopted (or proposed) are in many ways radically different. Nonetheless, before we analyse this from a comparative law stand-point, it is interesting to identify one common thread which has appeared throughout these reforms, namely the desire to find a model which is distinct from that of the US class action, and which draws upon more specifically European concepts.[115] Indeed, it should not be overlooked in the debate about collective procedures that the policy response in European countries to the mass claims which have littered North American court rooms—asbestos, contaminated blood, vaccination damage—has often been by means of the creation of dedicated statutory funds in Europe.[116] This phenomenon partly reflects differing transatlantic views of the appropriate roles of central authorities with regard to compensation for mass damage as compared to bipolar litigation through the courts. Where litigation has occurred in Europe, the criminal justice system has often been given a predominant role. Indeed, consumer protection goals in continental Europe are often pursued by means of the criminal law,[117] though admittedly a civil claim can often accompany the criminal proceedings.

[114] eg to a Foundation or Trust.

[115] See, eg R Mulheron, *Reform of Collective Redress in England and Wales*: *A Perspective of Need* (a research paper for the Civil Justice Council, February 2008); S Guinchard, 'Une *Class Action* à la Française ?' Dalloz 2005.2180; L Gaudin, 'L'Introduction d'une Action de Group en Droit Français: Présentation du Projet de Loi en Faveur des Consommateurs' *Les Petites Affiches*, 17 January 2007, N°13, 3.

[116] For a Franco-British study of the operation of such schemes, see D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press, 2003) Chap 8. See also on this, Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective products* (2004).

[117] See J Calais-Auloy and F Steinmetz, *Droit de la Consommation* (7th edn, Paris, 2006) para 18: 'Numerous obligations imposed on traders for consumer protection purposes are accompanied by criminal sanctions.' (author's translation).

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Different socio-legal traditions are thus a backdrop to the ongoing reform efforts, which partly explains why the solutions adopted are so diverse. A comparative analysis of the various elements is thus instructive. One issue—which on many occasions tends to overshadow the broader debate—is that of opt-in/opt-out mechanisms. Few countries in Europe have explicitly embraced the more radical opt-out model and, where it has been adopted, those countries have generally restricted its scope (such as Norway and Denmark).[118] Concerns have rightly been made about the potential for litigation excesses in an unfettered opt-out model, and in some countries there are constitutional obstacles as well. In Sweden, the initial reform promoted by Per Hendrik Lindblom, was modified in favour of an opt-in solution during the legislative procedure in order to avoid constitutional problems that would otherwise have arisen in respect of the original opt-out version.[119] In France, Guy Canivet, when Lord Chief Justice of France, adopted a generally favourable attitude to the introduction of broad group action procedures, but nonetheless argued that an opt-out regime would run contrary to fundamental elements of French law.[120] He cited the following reasons which militated against such an approach: the right to choose whether to bring legal proceedings or not, and if so, to elect one's legal representative; the French maxim of '*nul ne plaide par procureur*' (prohibition on actions by proxy); rights of defence; the French concept of *autorité de la chose jugée* (res judicata) and constitutional law guarantees.[121] From that perspective, it is therefore interesting that the European Commission in its recent *White Paper on Damages Actions for Breach of the EC Antitrust Rules* does not entirely rule out the opt-out option. We shall discuss this further below.

Secondly, there has been an inclination in the recent reforms across Europe in favour of the adoption of a form of gate-keeper to the procedure so as to safeguard against vexatious claims. In the recent opt-in models adopted in Europe, and a fortiori in respect of the opt-out versions, one finds such a role played by consumer associations or public bodies (Ombudsman). Indeed, the recent Italian reforms illustrate a continuing preference in Europe for the consumer-association model. That inevitably results in the need to address issues relating to the calculation of damages and their ultimate distribution.

[118] The one exception is Portugal where the opt-out model is potentially broadly available but which has had only limited application for the reasons mentioned above 8.

[119] See comments on this in Hans-W Micklitz and Astrid Stadler (n 79).

[120] A detailed analysis may be found in G Canivet, 'Des Obstacles Juridiques à L'action de Groupe', paper delivered at the conference on 10 November 2005 on the topic of 'Pour de Véritables Actions de Groupe: un accès efficace et démocratique à la justice.' See also G Canivet, 'Introduire l'action collective est une évolution inéluctable' *La Tribune* (16 May 2006).

[121] On the impact of the case law of the French Constitutional Council, as well as that of the European Court of Human Rights, see S Guinchard, 'Une *Class Action* à la Française?' (Dalloz, 2005, 2180). One decision in particular of the French *Conseil Constitutionnel* is seen by some as presenting a serious obstacle to an opt-out system: *Conseil Constitutionnel* N°89-257 DC of 25 July 1989 (group action by a trade union). See, Guinchard, ibid, and *contra* S Cabrillac, 'Pour l'Introduction de la Class Action' *Les Petites Affiches*, 18 August 2006, N°165, 4.

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The French collective interest action procedure *(action d'intérêt collectif)* has rarely been used because the damages, restricted to the amorphous notion of the 'collective interest of consumers', and awarded to the consumer association itself, have generally only represented a modest sum awarded by the courts.[122] Proof that the consumer association model provides an effective gate-keeping role may be found. In Sweden, which to some extent represented pioneering reform[123] in Europe in this sphere, fewer claims than were anticipated have actually been launched and those that have are predominantly by private persons.

Another common factor that can be seen in the new reforms is that of a multi-phase procedure whereby there is some form of admissibility hurdle for the claimants to surmount. Again, the exact architecture for such a filter-system varies considerably in the different systems,[124] but nonetheless responds to the understandable desire for an earlier review by the court of claims subject to the procedure.

A final point concerns the scope of the collective redress procedures. It has already been noted that these procedures have a potentially wide application and could cover areas as diverse as consumer claims, competition law, product liability, securities law, personal injury, intellectual property and tax as well as social welfare law. Some of the recent reforms at a national level have been given a broad ambit, such as in Sweden where the legislation does not have a limited scope in terms of *ratione materiae*. However, this is generally rare and most new procedures have a delimited scope, such as in Italy,[125] Finland,[126] Portugal[127] and Germany (securities claims). The rationale for these limitations does vary somewhat, but in many cases it is explained by a desire not to unleash an uncontrolled number of claims. Clearly, if the procedures are ultimately shown to work adequately, there is potential for the scope to be extended.

III. THE EU RESPONSE

Domestic interest in law reform has been accompanied by significant developments at a European level. A number of European institutions have

[122] See *Lamy Droit Economique* (Paris, 2007) para 5153.

[123] See Hans-W Micklitz and Astrid Stadler, 'The Development of Collective Legal Actions in Europe, especially in German Civil Procedure' [2006] European Business Law Review 1473.

[124] Some systems follow the pattern of a two-stage procedure with an initial admissibility filter followed by an examination of the merits (see for instance Portugal). The new Italian procedure, however, adopts a more complex model.

[125] Restricted to tort liability, unlawful commercial practices or anti-competitive behaviour, and contract terms.

[126] Restricted to defects in consumer goods, the interpretation of contract terms or disputes between consumers and entrepreneurs regarding the sale and marketing of investment products and insurance.

[127] Restricted to public health, environment, consumer protection, cultural heritage and public property.

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undertaken initiatives in this sphere.[128] In its Consumer Policy Strategy for 2007–2013 (adopted in March 2007), the Commission underlined the importance of consumer redress, indicating that it would consider 'action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU anti-trust rules'.[129] The topic was given considerable publicity when the Austrian presidency of the EU chose to hold on 24 February 2006 a conference on 'Effective Legal Redress—The Consumer Protection Instruments for Injunction and Group Damages'.

As a preliminary data-gathering exercise, the European Commission has commissioned a number of studies on this topic. The University of Leuven has recently completed a study on alternative means of consumer redress, which includes an overview of the national legal provisions on collective redress.[130] The Commission commissioned two studies focusing specifically on collective redress in the EU. One was an *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* and the other a *Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems*.[131] It was found that 326 consumer collective redress actions had been brought in the 13 States that had collective redress mechanisms. The overall conclusions seem to be that so far the impact on businesses has been quite benign, but that consumers have only had limited benefits with a series of problems making it difficult to use such mechanisms, with the cost of litigation being the main concern.

A series of events on collective redress has also been initiated by the European authorities. The Commission organized a brainstorming event in Leuven on 29 June 2007, bringing together representatives of all stakeholders to discuss the reform of collective redress procedures. Discussions focused on a number of topics, such as whether current arrangements for consumer redress create barriers to the EU internal market, the potential implications of any future EU initiatives and the advantages and disadvantages of current national systems for redress in Member States.[132]

[128] For an initiative of the European Economic and Social Committee, see *Own-initiative opinion on Defining the collective actions system and its role in the context of Community consumer law*, EESC 1143/2007.

[129] *EU Consumer Policy Strategy for 2007–2013*, COM(2007) 99 Final, 11.

[130] This study is available at http://ec.europa.eu/consumers/redress/collect/index_en.htm (last visited on 15 January 2009).

[131] Both are available at http://ec.europa.eu/consumers/redress/collect/index_en.htm (last visited on 15 January 2009).

[132] A summary of this event can be found at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm (last visited on 15 January 2009).

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At a conference organized by the Portuguese Presidency in November 2007,[133] Commissioner Kuneva launched a consultative process on collective redress to take place during the first half of 2008.[134] In her conference speech, Commissioner Kuneva proposed a series of benchmarks which could be used to evaluate whether legal systems provided satisfactory redress for consumers.[135] Indeed, Kuneva asserted that 'it seems rather obvious to me that a number of problems currently exist', referring to the fact that '[a]lmost half of the Member States have at present systems of collective redress—the rest do not.' If action was taken at a European level to remedy this situation, Kuneva did not necessarily envisage a 'fully-fledged legislative initiative.' Commissioner Kuneva gave examples of the possible options, which 'range from a market-led approach to the establishment of an out-of-court collective redress scheme; a convergence process leading to the extension of Member States' collective redress schemes to consumers from other Member States or a EU consumer collective redress scheme.'

The proposed benchmarks are as follows:[136]

1. The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.
2. It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.
3. The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the 'loser-pays' principle.
4. The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.
5. One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by

[133] 'On the Way to Collective European Action?' November 9–10, organized by the Portuguese Presidency, with the support of the European Commission.

[134] Commissioner Kuneva, 'Healthy Markets Need Effective Redress', Concluding speech at Conference on Collective Redress (Lisbon, 10 November 2007). For further details, see the paper of Commissioner Kuneva which is available at: http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_10112007_en.pdf (last visited on 15 January 2009).

[135] ibid 5–6. Commissioner Kuneva underlines that the bench-marks are provisional only, and are to be 'fine-tuned' in discussion with stake-holders.

[136] See further http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

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traders or service providers concerned is desirable—for instance by skimming off the profit gained from the incriminated conduct.
6. The introduction of unmeritorious claims should be discouraged.
7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.
8. The information networking preparing and managing possible collective redress actions should allow for effective 'bundling' of individual actions.
9. The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.
10. Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

This has now been followed up with a Green Paper on *Consumer Collective Redress.*[137] This provides a range of options from doing nothing through to proposing an EU judicial collective redress procedure. One reading of this is that all options are still open including introducing a European collective procedure, but the contours of such a procedure are still unclear and there seems to be no clear understanding of the best way to drive the agenda forward. Unless a clear direction emerges after the consultation, the way forward is likely to be found in the two middle options of promoting cooperation between States and using a mix of policy instruments; but these are themselves not very clearly defined approaches.

In explaining the option of improving cooperation between Member States, the Green Paper contains a useful discussion of the opening up of national procedures to consumers in other Member States. This could be achieved by national entities protecting consumers in other Member States, but as the Green Paper notes there is probably a lack of enthusiasm at the national level to invest resources in protecting foreign consumers. Another approach would be to allow representative bodies, say those notified under the Injunctions Directive, to bring such actions in other Member States. However, there may be resentment if States have to allow access to representative bodies from states that do not reciprocate by allowing such actions in their own system. The Commission also talks about adapting its recommendations on alternative dispute resolution to cover collective redress. This must be a good thing if it can be made to work, but of course such voluntary procedures should not be a substitute for workable legal procedures. In this respect, its suggestion that small claims procedures be opened up to class actions seems to fail to understand the issues fully. Mass small claims are not suitable for such simplified procedures, because by their very nature they are complex procedurally. Small claims courts would be overwhelmed. Moreover, in a loser-pays

[137] COM(2008) 794 final.

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system, consumer representatives may need to rely on recovering costs, which is often rightly excluded in small claims procedures. The Green Paper also discusses amending the Consumer Protection Cooperation Regulation[138] to give authorities the power, following a finding of an intra-community infringement, to require traders to compensate consumers harmed. Whilst such a power may be useful, overstretched enforcement authorities may well not prioritize seeking compensation for individuals, especially if linked to the concept of intra-community infringements. Moreover, if traders challenge such orders, there will presumably need to be a recognizable form of action in the Member States which does not exist for every such infringement—witness the debate in United Kingdom as to whether there should be a private remedy for unfair commercial practices.[139]

The European Commission has also been active in the competition law sphere. Following the Ashurst study[140] which illustrated that damage actions for breach of competition law are underdeveloped in Europe, the Commission published a Green Paper in December 2005 in order to stimulate debate and elicit feedback on a number of possible options which could facilitate private damages actions.[141] The Commission suggested, inter alia, that consideration should be given as to whether a form of collective consumer redress should be available.

In the resultant White Paper, the Commission suggested a combination of two complementary mechanisms of collective redress.[142] On the one hand, representative actions, would be 'brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims.'[143] On the other hand, there would also be individual collective actions, in which victims aggregate claims into one single action. Whilst the Commission expressly concluded that the latter should be premised on an 'opt-in' model, there would seem to be room, albeit limited, to interpret the representative actions as potentially opt-out, through the reference in the previous citation to 'identifiable victims'. The relevance of the parallel developments at a European level were also pointedly noted in the White Paper: 'These suggestions on damages actions in the field of antitrust are part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU and may develop further within this context.'[144]

[138] [2004] OJ L 364/1.

[139] See, Law Commission's Preliminary advice to the Department for Business, Enterprise and Regulatory Reform, *A Private Right of Redress for Unfair Commercial Practices?* (November 2008).

[140] Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules* (31 August 2004).

[141] *Green Paper: Damages Actions for Breach of the EC Antitrust Rules* (Com(2005) 672 final).

[142] *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM(2008) 165 final).

[143] ibid 4.

[144] ibid 4.

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Critique of the EU Approach to Collective Redress

The European Union's engagement with collective redress is likely to differ depending upon whether such procedures concern viable or non-viable claims. Where claims are viable (as in the product liability context) and the procedures simply help the court manage the disputes it is likely that Europe will leave this for the most part to national legal systems. National procedural law is resistant to outside influences and one can imagine that Europe will be content to ensure that nationals from other member states have the same rights to participate in national procedures subject to the rules on jurisdiction. Indeed activity in this area is most likely to be based on Article 81(2) of the Treaty on the Functioning of the European Union which would allow legislation on, interalia:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
[. . .]
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

However, this competence is usually restricted to cross-border matters leaving purely domestic procedures undisturbed.

Again, the European authorities may have no choice but to become more involved if legislation like the Dutch collective settlement legislation spreads further. In principle such Dutch court orders should, under the Brussels Regulation, be recognized by other Member States courts without any special procedure.[145] There are some exceptions to this, for instance, if this would oust the special jurisdiction given to consumer contracts.[146] However, the most important question is whether States that object to opt-out class actions can refuse to recognize and enforce them on the ground that to do so they would be 'manifestly contrary to public policy'.[147] The European Court, whilst acknowledging that each State is allowed its own conception of public policy, nevertheless strongly supports the principle of free movement of judgments and has shown itself willing to review public policy arguments. In *Krombach v Bamberski*[148] it held that recognition and enforcement could only be refused where this would be 'at variance to an unacceptable degree with the legal order . . . in as much as it infringes a fundamental principle and amounts to a 'manifest breach of a rule of law regarded as essential in the legal order'. It might be anticipated that some States, such as France,[149] may contend that

[145] Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, Reg 33(1).
[146] Reg 35(1).
[147] Reg 34(1).
[148] Case C-7/98 [2000] ECR I-1395.
[149] See discussion above 400.

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opt-out class actions/settlements were unacceptable to this extent. Certainly whilst the public policy exception is a narrow one, given that most States would claim their procedures complied with the Article 6 right to a fair trial under the European Convention on Human Rights, it has been invoked successfully on some occasions.[150] It is certainly arguable that opt-out class actions might infringe fundamental values as it can involve your case being brought to court without your direct involvement. Especially in the cross-border context national courts may wish at least to review the notice requirements; ability to challenge the use of the class action procedure or ability of individuals to contend that they should not be bound by it or have their own representation. In this respect something like the IBA Guidelines might be useful to courts,[151] but if the European authorities want to assist the development of such collective redress procedures it might wish to establish its own recommendations of good practice for procedures—as it does in the ADR context—so as to assist national courts in having the confidence to recognize and enforce such judgments.

The benchmarks so far put forward by the Commission, seem rather more directed towards the second scenario of non-viable claims. Indeed the first benchmark explicitly refers to cases which could not be pursued on an individual basis. It seems likely that a European model will rely upon public agencies or accredited consumer organizations as a gatekeeper to a system of collective redress aimed at skimming off profits (see fourth benchmark).[152] This is most likely to be introduced into competition law, but the Commission may well be tempted to extend it to breaches of consumer law where there is collective harm, and if so, then an amendment to the injunctions directive[153] might be a convenient mechanism for this. The recent Green Paper focused on extending traders' powers under the Consumer Protection Cooperation regulation, but acting under the Injunctions Directive seems more appropriate as it covers both public bodies and potentially consumer organizations and there may be more scope to define the nature of the legal basis for redress in this context.

One feature of the solutions aimed at addressing non-viable claims is that they tend to be based on sectors like consumer and competition policy. This may be a desirable approach as these different areas often have unique features of both substantive law and regulatory infrastructure which affect the choice of optimal redress mechanisms.

Selecting the criteria for any gatekeeper will be a complex task. Across Europe there are a wide array of organizations responsible for consumer

[150] For example, in *Maronier v Larmer* [2002] EWCA Civ 774; [2002] 3 WLR 1060 where a case was reactivated after 12 years and the time for appeal had passed without the defendant being notified.

[151] See (n 10) above.

[152] G Howells, 'Collective Actions—the Role of Agencies and Organisations' in F Cafaggi and H-W Micklitz, *New Frontiers of Consumer Protection* (Kluwer, forthcoming).

[153] Directive 98/27/EC: [1998] OJ L166/51.

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protection. The Scandinavians of course rely heavily on their ombudsmen; but even in these countries such public organizations are not likely to prioritize the recovery of damages for consumers. This is why calls for the future reforms to give public authorities a central role are probably idealistic.[154] That is not to say that public authorities should not have a role to play in promoting access to collective redress. They should work in partnership with consumer organizations and the collective redress procedure may even be a follow-on measure after the State has brought proceedings for infringement of consumer law norms.

In Germany, the State sponsors consumer organizations. In most countries, consumer organizations are not so well-funded. Some countries have one or two well-organized and funded consumer organizations, others have a plethora of consumer organizations and the chance of suing for collective redress may even act as a spur for more to be established, which would certainly not be welcomed by the Commission. Whilst one would not want this to become a charter for bounty-hunters dressed up as consumer activists, equally, there is a risk that such a mechanism will not be used in practice if consumer organizations cannot be incentivized to invoke the procedure. On occasions consumer organizations may see it as part of their mission to bring such actions to serve their members or highlight issues. However, if this is to become a significant feature of consumer protection enforcement it is likely that *cy-près* rules may be needed (as envisaged in benchmark 10).[155] Its viability will also probably require it to be an opt-out scheme. Changes to funding mechanisms will most probably be needed either by providing additional sources of state funding (which is probably unlikely), using greater involvement of third party funders[156] or establishing a fighting chest reserve of funds from previously successful cases.[157] Modification of the loser-pays rule may also be necessary to encourage such litigation.

The European authorities need to decide whether this type of action for non-viable claims is to become part of the architecture of European enforcement. Moreover, it needs to decide why it wants to introduce such collective redress. In contrast to the debate in the United Kingdom, where restorative justice language is used to focus on the need to get damages to named individuals, the European model seems more focused on deterrence and

[154] Hodges (n 84).

[155] See above 404.

[156] This seems to be the key to the success of Austrian consumer organizations who have brought over twenty collective redress cases funded by third party insurers who accept 20 per cent of the damages: German consumer organizations seem to be going down the same route. See F Cafaggi and H-W Micklitz, *Administrative and Judicial Enforcement in Consumer Protection: The Way Forward*, available at http://cadmus.iue.it/dspace/handle/1814/3//browse-date at 14 (F Cafaggi and H-W Micklitz [n 152]).

[157] Section 194 of the Legal Services Act 2007 allows costs order to be made in pro bono cases with the money going to the Access to Justice Foundation. Although collective consumer claims are not normally pro-bono claims the idea of a Foundation with a fighting fund for future cases could be borrowed, financed by a levy on costs awarded in collective actions.

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skimming off profits (benchmark 5) but rejects punitive damages (benchmark 4). If Europe adopts such a collective redress model it may not have imported the US class action, but it would be a recognition that the traditional European preference for regulatory solutions needs to be bolstered by increased private litigation.[158]

IV. CONCLUSIONS

We have seen that the modification of the civil procedure governing mass damages claims is high on the reform agenda at both a European and a national level. Whilst the European Commission's initiatives in this area were initially viewed as bold and innovative, reforms at a national level have themselves developed in recent months at an increased momentum. Indeed, the need for political compromise at a European level and the reluctance of national authorities (and certain stakeholders) to accept incursions into core areas of civil procedure may well result in the national reforms ultimately outpacing the European efforts.

From the perspective of comparative law, it is striking that the reform efforts at both a national and supranational perspective are being accompanied by a heightened degree of awareness of developments within other legal systems. Comparative law has influenced both the policy debate in favour of the need for reforms as well as the resultant debate about what exact amendments should be made to civil procedure, with foreign examples featuring prominently in the discussion about the architecture of reform.[159] It remains to be seen whether a distinctly European model will eventually emerge, but it is clear that the reform work at a domestic level is no longer focused on narrow national lines, and is increasingly influenced by external legal references. In this relatively untried area of civil procedure reform, Europe is well placed to promote reform and reflect on experiences. It is probably too early for a general EU-wide class action procedure to emerge, although specific targeted rules in the competition and consumer context might be justified.

[158] For contrast between the US and EC approaches see G Howells and T Wilhelmsson, 'EC and US Approaches to Consumer Protection—Should the Gap be Bridged?' Yearbook of European Law 1997 207. With specific reference to the current debates on collective redress see F Cafaggi and H-W Micklitz (n 156).

[159] For two prominent examples see in relation to England and Wales the impressive study undertaken by Rachael Mulheron (*Reform of Collective Redress in England and Wales: A Perspective of Need* (a research paper for the Civil Justice Council, February 2008) and the French working group on the reform of group actions (*Rapport sur l'action de groupe* (16 December 2005)) both of which rely heavily upon comparative law analysis.

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