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## CLASS ACTIONS IN EUROPE?

### To opt-in or to opt-out that is the question

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#### INTRODUCTION

Policymakers and scholars in Europe have shown an increasing interest in resolving the following question: how can consumers effectively join claims for damages that they are unable to bring in court individually, in view of the complexity or costs of procedure. If many consumers with a small claim can act together they can share the costs.<sup>1</sup>

Class actions (opt out actions for damages to the benefit of a “class” of persons) are very common in the United States and in other non-European common law countries, such as Australia and Canada. In Europe they do not (yet) or hardly exist (see the few exceptions mentioned here after). Although one may say that there is a kind of creeping evolution towards class actions in Europe, there is still a general reluctance to use the term, because of some of the features of US type class actions that are very broadly disliked or unknown in Europe: the discovery process, contingency fees and even the opt-out character that is felt to be contrary to the due process of law principle. The industry is generally (and sometimes fiercely) opposed to class actions because they fear that such actions will expose them to heavy costs.

The dilemma is obvious: how to secure that consumers are compensated and businesses deterred from harming consumers while bona fide businesses are not exposed to unmeritorious claims and disproportionate costs.<sup>2</sup>

The last couple of years the debate on collective enforcement of consumer rights in Europe has gained momentum since the European Commission has shown a keen interest in the phenomenon.

As from 2006 the European Commission’s DG SANCO (health and Consumer Protection directorate-general) has commissioned studies on collective redress for consumers, while collective redress in antitrust law is now proposed by the European Commission’s DG COMP (Competition). In December DG COMP 2005 published a

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<sup>1</sup> Samuel Issacharoff, Group Litigation of consumer claims: lessons from the US Experience, 34 Texas International L.J. (1999) 135.

<sup>2</sup> Cf. About regulatory enforcement: Anthony Ogus, Better Regulation – Better Enforcement, in Better Regulation, Stephen Weatherill (ed.), Hart, Oxford, 2007, p. 109: the costs for traders arising from contraventions are significantly broader than the penalties imposed by the law. They include also the ‘hassle’ and personal inconvenience arising from encounters with the victims of regulatory contraventions and with public officials, legal and other defence expenditures, as well as any loss of market reputation resulting from the contravention being detected. The same can be said of claims for damages, especially when they involve a large number of plaintiffs, such as in class actions.

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Green Paper<sup>3</sup> and very recently (2 April 2008) its White Paper<sup>4</sup> on Damages Actions for Breach of EC Antitrust Rules.

However there is not yet EU legislation on collective actions for damages.

By contrast Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests<sup>5</sup> aims to harmonise Member States' laws on injunctions for the protection of the collective interests of consumers included in the directives listed in the annex, i.e. 13 consumer directives (unfair commercial practices, advertising, consumer credit, doorstep selling, package travel, advertising medicinal products, unfair contract terms, time sharing, distance contracts, consumer sales, e-commerce, distant marketing financial services, services in the internal market). Actions for injunctions are limited to the cessation or prohibition of an infringement. The Directive does not concern actions for damages.

Several Member States have introduced representative actions or opt-in group actions (discussed more in detail here after). Presently opt-out group actions only exist in Portugal (the first member state to have introduced them in 1995), the Netherlands (but only after an out-of court settlement between a representative group of victims and the defendant) and – to a limited extent (only where the Consumer Ombudsman acts) – in Denmark. In France and the U.K. the introduction is debated.

I shall first give a brief overview of existing laws on collective actions for damages in the EU member states, trying to classify them according to certain characteristics. In a second section I shall give an account of the ongoing debate on the introduction of US type of class actions. In a third section I will look at the initiatives at the EU level and look at the constitutional basis for legislation at the EU level. In a final section I will point out to some of the problems regarding cross-border collective actions for damages in Europe.

## **I. COLLECTIVE ACTIONS FOR DAMAGES IN THE EU MEMBER STATES**

### **I.1. Introduction**

In view of the immense variety of forms of group litigation in Europe many categorizations are possible.<sup>6</sup> The following distinction is however often made :<sup>7</sup>

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<sup>3</sup> COM(2005) 672 final.

<sup>4</sup> COM(2008)165 final and Commission Staff Working Paper accompanying the White Paper, SEC(2008) 404.

<sup>5</sup> O.J. 1998, N° L 166/51; as lastly amended by Directive 2006/123, O.J. 2006, N° L 376/36 (see consolidated text in EUR-LEX).

<sup>6</sup> See Andrea Renda e.a. (Centre for European Studies – Erasmus University Rotterdam and LUISS, "Making Antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final report, 21 December 2007, Report for the European Commission, DG COMP., p. 268.

<sup>7</sup> Jules Stuyck e.a., An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Final Report, 17 January 2007, DG SANCO website; Fabrizio Cafaggi & Hans Micklitz, Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community, EUI Working Paper, 2007, Andrea Renda e.a., footnote

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*group actions* on the one hand, i.e. actions brought by a person or an entity on behalf of a group with similar claims (which feature some but not all characteristics of US type class actions) and *joint or representative actions*, i.e. the mere bundling of several individual claims. Representative or joint actions can again be subdivided into representative actions in the proper sense, where an ex ante authorized representative body acts on behalf of a group of victims on the one hand and joint actions, where individual parties join in one procedure. Variants of joint and representative actions are test cases under German law and the joinder of claims as in the “Verbandsklage nach österreichischen Recht” (based on a transfer of claims by individual consumers to a consumer organization, VKI).<sup>8</sup>

Some member states have introduced group actions, i.e. genuine collective actions for damages, but – with a few exceptions – they are “opt-in” collective actions. The American model of opt-out class actions encounters a lot of resistance at this side of the Atlantic.<sup>9</sup>

I propose the following classification:

- *joint actions*, where individual claims are merely bundled in a single trial;
- *representative actions*, where rights are assigned to one entity that acts on behalf of the individual plaintiffs;
- *test cases*, where a judgment on one individual claim serves as a model for similar cases;
- real *group actions*, where a plaintiff acts on behalf of a group of individuals who will be bound by the outcome of the procedure if they have “opted-in” (“European” type of group action) or unless they have “opted-out” (US type of class action).

This is a rough classification. National legal systems mentioned under one heading could in many cases perhaps have been classified under another heading. I shall only give some examples.

## **I.2. Joint actions**

The lightest form of collective action is the procedure where several individual plaintiffs with a similar claim bring an individual action before the same court and where either from the outset (one writ of summons is served on behalf of each of the individual plaintiffs against a common defendant) or later in the procedure (e.g. by an order of the court) the claims are examined jointly. Such systems exist in most of the member states and in the judicial system of the EU (joinder of cases before the ECJ

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6, p. 268; Cristopher Hodges, Global Class Actions Project Summary of European Union Developments. , paper for..

<sup>8</sup> See Andrea Renda e.a., footnote 6, p. 269.

<sup>9</sup> See Astrid Stadler , Group Actions as a remedy to Enforce Consumer Interests” in Fabrizio Cafaggi & Hans-W. Micklitz (eds.), New Frontiers in Consumer Protection, forthcoming..

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or the CFI).

### **I.3. Representative actions**

A representative action is one that is introduced by an organization, a state authority or an individual on behalf of a group of individuals, who are not parties to the procedure, but duly represented.<sup>10</sup>

An example of a representative action in the consumer field is the “action en représentation comjointe” in France (Article L 442-1 of the Code de la Consommation). Soliciting adhesions is restricted. A representative consumer organization can bring an action against the same defendant on behalf of several (at least two) individual consumers.<sup>11</sup>

This procedure does not seem to have been very successful. The reasons for the lack of success seem to be the burdensome character of the procedure: each victim has to give a mandate and its cost: no insurance company being prepared to insurance them.<sup>12</sup>

A comparable regime exists in the field of investor protection (Article L 452-2(3) of the Monetary and Financial Code).

More success was obtained in Austria with the “Sammeklage nach österreichischen Recht”. In 2001 a number of individual claims were transferred to the Association for Consumer Information (Verband zur Konsumenteninformation, VKI) which then brought these claims on its own behalf. Subsequently this procedure was used frequently. It seems that the success of these actions is also due to the intervention of a finance company working on the basis of a contingency fee.

The GLO (Group Litigation Order) in the UK has been described as a case management umbrella under which a conglomeration of individual actions is managed. Since its introduction in 2000 the GLO regime has been used in 62 cases. The rate of participation of group members has been low, typically with opt-in rates of less than 30%. Collective actions for damages are mainly brought in care home abuses and environmental damage.<sup>13</sup>

### **I.4. Test Cases**

In Germany, as a reaction to the large number of lawsuits in the Telekom shares case, a model law (for a pilot phase of 5 years) was enacted in 2005.<sup>14</sup> The ‘KapMuG’ KapitalanlegerMustergesetz, Capital Investors’ Model Proceeding Act)

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<sup>10</sup> Hans.-W. Micklitz – Astrid Stadler, “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, EBLR, 2006, p. 1481.

<sup>11</sup> See Véronique Magnier, Class Actions, Group Litigation & Other Forms of Collective Litigation, France, Paper for: The Globalization of Class Actions”, Stanford/Oxford Conference, Oxford, December 12-14, 2007.

<sup>12</sup> Jules Stuyck e.a., footnote 7,

<sup>13</sup> Rachael Mulheron, Reform of Collective Redress in England and Wales: A Perspective of Need, A Research Paper for submission to the Civil Justice Council of England and Wales, 2008.

<sup>14</sup> See on this law: Hans-W. Micklitz, Collective private enforcement of consumer law: the key questions”, in Willem van Boom & Marco Loos, Collective Enforcement of Consumer Law, Europa Publishing, Groningen, 2007, p. 14-15.

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applies to cases where a series of investors suffer a similar damage as a result of misleading statements on securities or bad performance of a contract resulting from an offer of securities. Where there are several plaintiffs, they can file a motion, with the defendant, for a test case decision. An electronic claim register is established to facilitate “opt- ins”. The court (the competent court of Appeal, Oberlandesgericht) then chooses one plaintiff whose case it will decide. The other individual lawsuits are suspended until judgment in the test case is rendered. The other plaintiffs are not parties to the procedure but they can intervene. The judgment can be appealed before the Federal Supreme Court (Bundesgerichtshof). The common factual and legal questions decided in the test case are more or less binding on the other plaintiffs. The effectiveness of this law has been put into question. Often the other plaintiffs, who only “intervene,” wish to assert their rights. If they become active it may be hard to come to a model decision.<sup>15</sup>

### **I.5. Opt-in Group Actions**

Opt-in group actions exist in Denmark, Sweden, Finland and Italy (and the UK if the GLO is qualified that way).

The *Swedish* Group Proceedings Act of 2002 was adopted after a report of a Government Commission on Group Actions from 1995. The starting point was the US system of class actions. The conclusions of the Report and the Swedish Act however did not follow the US example.<sup>16</sup>

The Act applies to all areas of civil law. Group actions are brought in district courts designated by the Government. The law distinguishes private group actions which can be brought by a member of a group, organization group actions which can be brought in the consumer and environmental area’s only, by non-profit organizations and, finally, public group actions which can be brought by the Consumer Ombudsman and the Environmental Protection Agency only.

In all the three forms of group actions the plaintiff can petition for injunctions as well as for damages. Normal rules on causation in tort law and calculation of damages apply.

There is no certification process but class actions are only admissible if they fulfil conditions comparable to those of Rule 23 of the US Federal Rules of Procedure: numerosity, communality, superiority, suitability.

The big difference with Us type of class actions is that the Swedish group action is based on opting in. Group representatives are empowered to settle on behalf of the group. However group members are not bound by the settlement unless it is approved by the court. The loser pays principle applies. Contingent fees are not allowed but plaintiffs can conclude a “risk agreement” with the lawyer in which  
In the period 2002-2007 nine cases have been brought under this Act.<sup>17</sup>

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<sup>15</sup> See Hans-W. Micklitz, preceding footnote, p. 16.

<sup>16</sup> See Per Hendrik Lindblom, National Report: Group Litigation in Sweden, Paper for “The Globalization of Class Actions”, Oxford Conference, December 12-14, 2007.

<sup>17</sup> See Per Hendrik Lindblom, footnote 16, p 21.

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In *Finland*, though initially considering to adopt the Swedish model, it was decided to limit the opt in collective action by the Ombudsman. This “Act on Class Action” came into force in October 2007.<sup>18</sup>

In *Italy* Legge Finanziaria per il 2008, Articles 445-449 has introduced an “azione collettiva risarcitoria” (collective action for compensation), inserting a new Article 140bis in the Consumer Code. The action can only be brought by registered consumer associations. The procedure is based on an “opt-in”.

In *Denmark* the Act n° 181 of 28 February 2007 on group actions entered into force on 1 January 2008. Group actions can be brought by a member of the group, a private organization or a public authority, such as the Consumer Ombudsman. The model is based on an opt-in. However for individual claims not exceeding DKK 2,000 (EUR 270) a public authority can bring an action under an opt out model.<sup>19</sup>

h fees are based on an hourly rate with the provision that the rate will be doubled or trebled if the action is successful and reduced to half if it is not.

An association is sometimes established with the aim to present the claims of the members in a particular case. A well known example is the *Skandia* case. This case concerned the illegal transfer of money between the parent company Skandia AB and other subsidiaries to the detriment of 1.2 million private insurance policy holders of the subsidiary Skandia Liv. To make the procedure more manageable the association Föreningen Grupptalan mot Skandia was founded. The group action was financed by the membership fees and a risk contract with the lawyers.<sup>20</sup>

### **I.6. Opt-out group actions or class actions**

As such opt-out class actions do not exist in Europe, with the exception of Portugal, in the Dutch procedure on the collective settlement of mass damage 2005 and to a limited extent, since 1 January 2008, in Denmark (i.e. where a public authority, such as the Consumer Ombudsman, acts).

In *Portugal* a general law on “people’s actions” (acção popular) has been adopted in 1995.<sup>21</sup> Such action is an action in the collective interest of those harmed. Individual victims as well as the Public Prosecutor and the Instituto do Consumidores (Consumer Protection Agency) can initiate proceedings. The Agency does not seem to use this power, preferring to refer matters to arbitration.<sup>22</sup> There is little information on this procedure, but apparently some Portuguese law firms claim to be experts in this field.

As the title of the Dutch law indicates this law does not establish a group action in court but provides for the possibility of a collective settlement, a settlement between a group of plaintiffs, represented by an association, on the one hand, and the

<sup>18</sup> Andrea Renda e.a., footnote 6, p. 274.

<sup>19</sup> Hendrik Oe (Danish Consumer Ombudsman), Collective Redress in Danish Law, Oxford/Stanford Conference on the Globalization of Class Actions, Oxford, December 2007.

<sup>20</sup> Andrea Renda, footnote 6, p. 271.

<sup>21</sup> Lei 83/95.

<sup>22</sup> Jules Stuyck e.a., footnote 5, at p. 275.

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defendant on the other. The settlement is then confirmed by the court. The judgment is binding on all members of the class that have not opted out.

In Denmark, as indicated here above, the Consumer Ombudsman (and some other public bodies) can now bring opt-out actions for damages.

## **II. THE RELUCTANCE TO INTRODUCE CLASS ACTIONS (IN CONSUMER LAW) IN EUROPE**

The short overview given here above has shown that group actions as they presently exist in a certain number of EU member states (Sweden, Denmark, Finland, the UK, Portugal, Italy, the Netherlands, but also Spain and to a certain extent some other member states) are essentially based on an "opt in". The judgment is only binding on those consumers who have expressly opted in, i.e. declared that they want to be represented and therefore to be (or can be deemed to be) bound by the judgment awarding damages collectively. In the recent Dutch law there is a real opt-out (the Dutch law being based on a collective settlement, between an organisation acting on behalf of a class of potential plaintiffs, that is consecutively confirmed by a court judgment). Denmark has only recently introduced a limited opt-out system, i.e. to cases brought by a public body.

The debate however is ongoing.

In *France*, the last three years the scholarly debate<sup>23</sup> has been accompanied by reform proposals. In April 2006 Luc Chatel, MP, made a proposal in the French Assemblée générale, which was based on an opt out. Soon later the French government proposed a bill in the same vein, but it was withdrawn before the presidential elections of May 2007. It was said that a new bill would be introduced by the new government after the elections. French industry is very much opposed to the idea. The point of view of MEDEF, the federation of French industry, has been expressed eloquently by Ms Joëlle Simon, MEDEF's legal director, in her paper for the Leuven 2007 Conference.<sup>24</sup>

In the *United Kingdom* (England and Wales), Rachael Mulheron has pleaded consistently for the introduction of opt-out class actions along the lines of the systems existing in other common law countries.<sup>25</sup>

Mulheron's advocacy is based on solid comparative and empirical research.<sup>26</sup>

The main reasons for the negative attitude against US type of class actions can be summarized as follows.

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<sup>23</sup> See in particular Serge Guinchard, "Une class action à la française?" Recueil Daloz, 2005, 2180-2186.

<sup>24</sup> Paper for: The Consumer Law Compendium; A, New Era for European Consumer Law? Leuven, 21 September 2007, forthcoming in European Business Law Review.

<sup>25</sup> Rachael Mulheron, Justice Enhanced: Framing an Opt-Out Class Action for England, (2007) 70(4) MLR 550-580.; see also her Report for the Civil Justice Council, 2008, mentioned in footnote 11,

<sup>26</sup> See already Rachael Mulheron, *The Class Action*, Hart, Oxford, 2004;

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*First*, class actions would favour the pursuit of non collective interests (in clear the private interests of plaintiff lawyers) and encourage non-meritorious claims.

*Second*, the (costly pre-trial) discovery procedure on which class actions are based, is foreign to national procedural traditions.

*Third*, the system of contingency fees, explaining the success of American class actions, is contrary to public order.

*Fourth*, the opt-out would be at variance with the “due process” requirement of Article 6 ECHR since a person who was not heard in court could be bound by the outcome of the procedure. This is speculation. The question has not been decided by e.g. the European Court on Human Rights and it is far from certain that an opt-out system with sufficient guarantees for individuals (like an efficient notification system) would violate the due process of law principle.

From the business side (e.g. MEDEF) it is also said that US type class actions are not serving compensation of victims (which they merely should), but they are a means of punitive prosecution in order to have business disgorge profits unduly made.<sup>27</sup>

Rachael Mulheron<sup>28</sup> from her side has identified the following disadvantages of opt-in group actions, explaining why (in England) they have not been very successful:

- 1) the sheer task of identifying all group members at the outset, the barriers to litigation that some group members never surmounted in time and the low value recoveries per group member;
- 2) procedural problems (that may be peculiar to the English system but occur in varying degrees in other member states:<sup>29</sup> frontloading, the judicial attitude towards those who do not opt-in, limitation periods etc..)

Finally, with regard to financial initiatives to make collective actions work, it should be observed that all member states have rules governing the allocation of costs in civil proceedings, which aim to determine which party will bear the costs. The rule generally applicable is the “loser pays” principle (often with a limitation of costs which can be recovered).<sup>30</sup> For those who start class action the risk of having to bear the costs of the defendant if one loses is certainly a deterrent to bring such actions in the first place.

The private attorney model, taking the risk on the basis of a contingency fee certainly creates a financial incentive, but there may be other, including an exception to the “loser pays principle” where class actions are brought on behalf of consumers, subject to a certification system at the level of the entities authorised to bring an action and/or at the level of the concrete action (*prima facie* examination of the possibility that the action has a chance to succeed).

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<sup>27</sup> Joëlle. Simon, footnote 24..

<sup>28</sup> Civil Justice Council Study, footnote 25, p. 16 et seq.

<sup>29</sup> See Jules Stuyck e.a., footnote 7, , p..261 et seq.

<sup>30</sup> Commission Staff Working Paper accompanying the Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008)404 (the White Paper is COM(2008)165 final). Both documents are dated 2 April 2008., para 252.

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Still about (pre-)financing group actions, mention should be made of the system developed in Austria: the VKI concludes an agreement with a finance company that re-finances the costs of procedure. In case of success the company retains 1/3 of the proceeds. This is in fact a contingency fee agreement with a non lawyer.

**III. INITIATIVES AT THE EU LEVEL**

**III.1. (Not yet) an EU initiative in the Consumer Field**

After the Leuven Study of 2007, DG SANCO has commissioned two new studies on collective actions for consumers. The first one is an "evaluation study", focusing specifically on collective redress in the EU. This study will evaluate the effectiveness and efficiency of existing collective redress mechanisms and assess whether consumers suffer a detriment in those member states where collective redress mechanisms are not available. It will also examine the existence of negative effects for the single market and distortions of competition. The second study is a "problems study" and will provide more information on the key problems faced by consumers in obtaining redress for mass claims, and will analyse the consequences of such problems for consumers, competitors and the relevant market.

The Commission will obviously not take any initiative before it will have analysed the results of these studies.

In the meantime DG SANCO has launched a public consultation on the benchmarks for an EU initiative in this field, benchmarks that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers:

- 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

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instance to amount to punitive damages;<sup>31</sup>

- 5) one outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by 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 action;
- 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.

### **III.2. Claims for damages in case of infringements of the EC Antitrust Rules**

DG SANCO has liaised with DG COMP. The Latter has now presented its White Paper on Damages Actions for breach of EC antitrust Rules.<sup>32</sup>

In antitrust law things seem to move on more rapidly than in other fields of EU law, in particular consumer law.

This has to do with the specific constitutional basis of EU antitrust law and the importance of EU antitrust policy.

Let's recall that Articles 81 and 82 of the EC Treaty (here after "EC")<sup>33</sup> prohibit respectively restrictive agreements and practices and abuse of a dominant position. Art. 81(2) expressly provides that agreements that are forbidden under Article 81(1) are null and void. Since the entry into force (on 1 May 2004) of the new implementing (procedural) rules of Regulation 1/2003 the Commission has no monopoly anymore to grant "exemptions" on the basis of Article 81(3) for those agreements that fulfil certain conditions (in brief: agreements that do restrict competition but are efficient). National Competition Authorities (NCA's), member states courts and the Commission can fully apply Articles 81 and 82. The objective of EU competition policy is not only to ensure effective competition and thus to raise (consumer) welfare, but also to foster market integration. State barriers to intra-

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<sup>31</sup> It should be observed that in *Manfredi* (see footnote 44) the ECJ has expressly mentioned punitive damages as a possibility at the national level.

<sup>32</sup> See footnote 31.

<sup>33</sup> Which will become the "Treaty on the Functioning of the European Union" if and when the Treaty of Lisbon (December 2007) will enter into force (possibly at the beginning of 2009).

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Community trade have to be struck down on the basis of the internal market provisions of the Treaty (free movement of goods, persons, services and capital); barriers to trade between member states raised by businesses are contrary to the antitrust rules.

In its famous *Courage*<sup>34</sup> judgment the European Court of Justice (ECJ) recognized the right of victims of antitrust infringements (violations of Articles 81 and 82 EC) to be compensated.

The Court recalls that the Treaty has created its own legal order. Community law is intended to give rise to rights to individuals. Community law has precedence over national law.<sup>35</sup> Furthermore Article 81 EC is a fundamental provision that is essential for the functioning of the internal market. Evidence of this can be found in Article 81(2) EC: an agreement contrary to this provision is automatically void.<sup>36</sup> An agreement that is null and void by virtue of Article 81(2) has no effect as between the contracting parties and cannot be set up against third parties.<sup>37</sup> Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned.<sup>38</sup> Finally the ECJ recalls that it has held that Articles 81(1) and 82 EC (the prohibition of abuse of a dominant position) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard.<sup>39</sup>

It follows from the foregoing considerations, that any individual can rely on a breach of Article 81(1) EC before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.<sup>40</sup>

As regards the possibility of seeking compensation for the loss caused by a contract or by conduct liable to restrict competition, the Court recalls that national courts must ensure that provisions of Community law within their jurisdiction take full effect and must protect the rights which they confer on individuals.<sup>41</sup> (“effet utile” principle). The full effectiveness of Article 81 would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by a conduct liable to restrict competition.<sup>42</sup> Actions for damages can indeed make a significant contribution to the maintenance of effective competition in the Community.

There should not therefore be any absolute bar to such an action being brought by a party to a contract or to a conduct liable to restrict competition.<sup>43</sup>

However the Court immediately recalls the procedural autonomy of the Member States, i.e. the right to lay down the procedural rules for bringing such actions, subject to the respect of the principles of equivalence (i.e. these rules should not be

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<sup>34</sup> Case C-453/99, *Courage v Crehan* [2001] ECR I-6297.

<sup>35</sup> See paragraph 19 of the Judgment.

<sup>36</sup> With reference to Case C-126/97, *Eco Swiss* [1999] ECR I-3055, paragraph 36.

<sup>37</sup> With reference to Case 22/71, *Béguelin* [1971] ECR 949, paragraph 29.

<sup>38</sup> With reference to Case 48/72, *Brasserie de Haecht II* [1973] ECR 77, paragraph 26.

<sup>39</sup> Case 127/73, *BRT and Sabam* [1974] ECR 51, paragraph 16; Case C-282/95 P, *Guérin Automobiles v Commission* [1977] ECR I-1503, paragraph 39.

<sup>40</sup> Paragraph 24 of the judgment.

<sup>41</sup> Paragraph 25 of the judgment with reference to Case 106/77, *Simmentahl* [1978] ECR 629, paragraph 16 and Case C-213/89, *Factortame* [1990] ECR I-2433, paragraph 19.

<sup>42</sup> Paragraph 26 of the judgment.

<sup>43</sup> Paragraphs 27 and 28 of the judgment.

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less favourable than those governing similar domestic actions) and effectiveness (i.e. these rules should not render impossible or excessively difficult the exercise of the rights conferred by Community law).<sup>44</sup>

In *Manfredi*<sup>45</sup> consumers claimed compensation for the damage they suffered as a result of a price fixing cartel that had been condemned by the Italian competition authority.

The Court confirms that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.

*Courage* however gave little guidance as to the nature of the loss in case of competition infringements and the problem of causation.<sup>46</sup>

*Manfredi* clarifies that it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. Confirming the principles of effectiveness and equivalence the Court also ruled that it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

For consumers the right to damages in case of violations of Articles 81-82 EC opens important perspectives. The consumer will often be the last link in the chain of damage will effectively suffer a prejudice without being able to pass it on someone else.

On the other hand the prejudice of an individual consumer will often be very low (e.g. a price cartel that has led to a small price increase) not justifying individual legal proceedings.

This raises, again the question of group actions.

In *Courage* and *Manfredi* the ECJ has thus recognized the right of victims of antitrust violations to claim compensation, whether they are party to a restrictive agreement (like in *Courage*) or not (like in *Manfredi*).

The judgment in *Courage* has prompted the Commission to commission a study on damages actions for breach of EC antitrust rules and later on its Green Paper on the

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<sup>44</sup> Paragraph 29 of the judgment.

<sup>45</sup> Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi e.a. v Lloyd Adriatico Assicurazioni SpA* e.a. [2006] ECR I-6619.

<sup>46</sup> See Jules Stuyck, annotation of *Courage*, in ERCL 2005, 229, at p. 235-237.

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subject (2005).<sup>47</sup> Very recently (April 2008) the Commission published its White Paper and accompanying Staff Working Paper in the same subject.<sup>48</sup>

The Commission considers with respect to collective redress, that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. Individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved.

As a result, many of these victims currently remain uncompensated. At the rare occasions where a multitude of individual actions are brought in relation to the same infringement, procedural inefficiencies arise, for claimants, defendants and the judicial system alike.

The Commission therefore suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust:

- representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either

- (i) officially designated in advance or

- (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and

- opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

The White Paper only mentions representative actions and opt-in collective actions for consumers. US type class actions are not as such rejected, but not proposed. In the Commission Staff Working Paper accompanying the White Paper<sup>49</sup> the Commission mentions that excesses in US class actions have often been mentioned, and that the risk of importing these excesses in Europe was raised. The Commission however notes that the overall legal context in the US, which goes well beyond the mere class action mechanism, is very different from the one in Europe. US class actions in antitrust cases are characterised by a combination of features that is very specific to the US, including the jury pre-trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees agreements and an opt-out mechanism. The introduction in Europe of features similar to one or some of these features may not produce the same effects. For instance the introduction of opt-out mechanisms in Portugal and the Netherlands is not reported to have led to similar excesses.

It would thus seem that the Commission's DG Competition has not totally ruled out the possibility to introduce opt-out class actions with regard to antitrust violations to

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<sup>47</sup> COM(2005) 672 final.

<sup>48</sup> COM (2008) 165 final and SEC(2008) 404.

<sup>49</sup> SEC(2008)404.

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the benefit of consumers and businesses.

Difficulties also arise, on the other hand, if an indirect purchaser invokes the passing-on of overcharges as a basis to show the harm suffered. Purchasers at, or near the end of the distribution chain (like consumers), are often those most harmed by antitrust infringements, but given their distance from the infringement they find it particularly difficult to produce sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain. The Commission proposes to lighten the victim's burden and suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

In the case of joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain, national courts are encouraged to make full use of all mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law.

Antitrust law is basically public law and the discourse on private enforcement is rather new. In consumer law we have seen the opposite phenomenon. Where consumer law was traditionally a matter of private law enforcement, at least in a certain number of member states, the Community positively promotes public enforcement (albeit - for the time being - limited to cooperation) through the adoption of Regulation 2004/2006.<sup>50</sup>

There is however something common in the general EU approach to enforcement of consumer rights on the one hand and private enforcement (for consumers) under EU antitrust law on the other. While collective actions are recognized as a necessity (see also Directive 98/27 on injunctions), the EU seems to distrust private attorney actions (like US class actions). The right to bring cross-border actions for injunctive relief in the consumer interest is only given to entities designated by the member states (i.e. public bodies or recognized representative consumer associations). Likewise in its White Paper on actions for damages the Commission proposes to limit the possibility of collective actions for damages of consumers to entities officially designated in advance or certified on an *ad hoc* basis by a Member State (which, it must be recognized gives an opportunity for a certain flexibility) and to opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action. In the accompanying Staff Working Paper the Commission marks a clear preference for actions by consumer associations (and public bodies) rather than for private actions (initiated by lawyers like in the US).

### **III.3. The Political Future of collective actions for consumers in Europe: an Initiative at the EU Level? When?**

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<sup>50</sup> See critically on this Regulation: Roger van den Bergh, Should consumer protection law be publicly enforced?" in Willem van Boom & Marco Loos eds.), *Collective Enforcement of Consumer Law*, Europa Publishing, Groningen, 2007, p. 177 et seq.

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The Commission intends to publish a Communication on consumer collective redress in December 2008. This Communication will be used to consult on the options that are available in relation to consumer collective redress. Following this consultation, the Commission will consider whether, and if so, to which extent an initiative on consumer collective redress is necessary at EU Level.<sup>51</sup>

If an initiative were to be taken by the EU legislature the question arises whether the Treaty contains a proper legal basis.

**III.4. Is there a Basis in the Treaty for EU Legislation in the Field of Collective Actions for Damages?**

Three legal bases in the EC Treaty should be considered.

*Firstly*, Article 95 EC enables the EU legislature to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

In a certain number of judgments, in particular *Tobacco advertising*<sup>52</sup>, the ECJ has drawn some important limits to the use of Article 95 EC. The Court held that the measures referred to in Article 95 EC are intended to improve the conditions for the establishment and functioning of the internal market. That article does not vest in the Community legislature a general power to regulate the internal market. This judgment has casted some doubt on the constitutionality of minimum harmonization.<sup>53</sup> In *Tobacco advertising*<sup>54</sup> however the Court accepted that recourse to Article 95 EC as a legal basis does not presuppose the existence of an actual link with free movement between the Member States *in every situation covered by the measure* founded on that basis. As the Court has previously pointed out, to justify recourse to Article 95 EC as the legal basis, what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market.

It can certainly be argued that the harmonisation of existing national laws concerning consumer redress is intended to improve the conditions for the establishment and functioning of the internal market. Indeed consumers in several member states may be affected while existing national laws very often do not permit a collective action to be brought on behalf of consumers from other member states and, furthermore, where this is possible, disparities in the law governing such actions, are liable to deter consumers from buying certain goods in other Member States. The paradigm

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<sup>51</sup> Staff Working Paper, SEC(2008) 404, p. 22, paragraph 63.

<sup>52</sup> Case C-376/98, Germany v Parliament and Council, [2000] ECR I-8419.

<sup>53</sup> See S. Weatherill, "The Constitutional Competence of the EU to Deliver Social Justice", European Review of Contract Law, 2006, 136 et seq.

<sup>54</sup> Case C-380/03, Germany v European Parliament and Council, [2006] ECR I-11573.

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of the confident consumer which is underlying Community initiatives in the field of substantive consumer law<sup>55</sup> can in other words also justify harmonization in the procedural field.

Directive 98/27/EC on injunctions for the protection of consumers' interests is also based on Article 95 EC.

Obviously Article 95 EC is a possible legal basis for a directive introducing rules on collective redress including the award of compensation, at least where there is a cross-border element.

A strong argument pleads for a EU competence, under Article 95 EC, to enact legislation on collective consumer redress *that is not limited to cross-border actions*. In the field of collective consumer redress actions which are *prima facie* "national" will often have a cross-border dimension (because consumers from other member states will also have suffered damage). Therefore, by contrast to what is possible for individual consumer claims (see e.g. Article 3(1) of Regulation 861/2006 on small claims procedures: "*For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised*") a strict limitation to cross-border cases might prove impossible (especially in class actions where the plaintiff acts for a class of consumers) or totally inefficient (a cross-border action would be limited to consumers residing in other member states than the member state where the action is brought, while the majority of the victims will typically be consumers from the forum). Eventually a directive limited to cross-border situations (e.g. as defined in the small claims regulation) would not secure the useful effect of the principle of proper consumer redress as confirmed by the ECJ, in *Océano Grupo*<sup>56</sup>, *Mostaza Claro*<sup>57</sup> and *Manfredi*<sup>58</sup>.

*Secondly*, title IV of the Treaty "Visa, asylum, immigration and other policies relating to free movement of persons" relates more broadly to the progressive establishment of an area of freedom, security and justice. Article 61 provides i.a. for the adoption of measures in the field of judicial cooperation in civil matters as provided for in Article 65.

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<sup>55</sup> See Thomas Wilhelmsson, "The principle of legitimate expectations as a basic principle of Community private law", in Paasivirta and Rissanen (eds.), *Principles of Justice and the Law of the European Union*, Helsinki, 1995, p. 325 et seq.; Wulf.-Hnning Roth, "Berechtigte Verbrauchererwartungen im Europäischen Gemeinschaftsrecht", in Hans Schulte-Nölke and Reiner Schulze (eds.), *Europäische Rechtsangeichnung und Nationale Privatrechte*, Baden-Baden, 1999, p. 45 et seq.

<sup>56</sup> Joined cases C-240/98 to C-244/98, [2000] ECR I-4941.

<sup>57</sup> Case C-168/05, [2006] ECR I-10421.

<sup>58</sup> Joint cases C-295/04 to 298/04, [2006] ECR I-6619.

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Article 65 states that measures in the field of judicial cooperation in civil matters “*having cross-border implications*” are to be taken in accordance with Article 67 and *in so far as necessary for the proper functioning of the internal market*. These measures “shall include” (c) “eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.” Article 67 contains the rules for decision making pursuant to Article 65.

The Treaty of Lisbon, signed on 13 December 2007,<sup>59</sup> will replace Article 65 by a Chapter 3 Judicial Cooperation in Civil Matters and a new Article 65 (of what shall be called the Treaty on the Functioning of the European Union). According to the first paragraph of the new Article 5 the Union shall develop judicial cooperation in civil matters *having cross order implications*, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. According to the second paragraph the EP and the Council shall adopt measures, *particularly when necessary for the proper functioning of the internal market*, aimed at ensuring (...) (e) effective access to justice; (f) the elimination to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 65 post Lisbon is broader than Article 65 in its present wording in the following respects: (i) the express reference to the possibility of approximation of the laws and regulations of the Member States in the areas referred to i.a. in paragraph 2; (ii) the inclusion, in the list of areas in which measures can be taken of effective access to justice. By contrast Article 65 post Lisbon maintains the limitation to matters having cross-border implications.

It can be noted that the recently adopted Regulation 861/2007 establishing a European Small Claims Procedure,<sup>60</sup> which refers to Article 67 as its legal basis, is limited to cross-border cases, although the initial Commission proposal covered both cross-border and domestic small claims procedures.

It is submitted that “matters having cross-border implications” in Article 65 (present and future) shall be interpreted broadly. The aim of the Article is to ensure that citizens would not suffer any inconvenience from the fact that a civil litigation is not restricted to his Member State of residence. In that sense a cross-border case is one where there is a legal issue relating to goods or persons outside the borders of that Member State.<sup>61</sup> The reference to “in so far as necessary for the proper functioning

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<sup>59</sup> O.J. 2007, N° C 306/62.

<sup>60</sup> O.J., 2007, N° L 199/1.

<sup>61</sup> See also C. Callies – M. Ruffert, EUV/EGV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, 3<sup>rd</sup> ed., Beck, München, 2007, comments to Article 67, para 7 and further references.

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of the internal market” is another limitation of the scope of Article 65 (present and future). The adjective “proper” does not appear in Article 95. However that difference should not lead to a stricter scope of application of Article 65 than Article 95. It has even been submitted that the scope of Article 65 is broader than that of Article 95, since Article 65 does not only require measures to ensure the functioning of the internal market but also the adoption of measures ensuring that the internal market functions properly. The EU would therefore be competent under Article 65 where there is an involvement of goods or persons that are present in another Member State.<sup>62</sup> In other words, the reference to the internal market in Article 65 does not add to the “cross-border” requirement.

With regard to the limitation of Article 65 EC to matters having cross-border implications what has been said above concerning Article 95 applies here as well. Cross-border situations in the field of collective redress cannot be effectively isolated.

*Finally*, Article 153(3)(b) EC should be mentioned. This article allows the EP and the Council to adopt measures which support, complement and monitor the policy pursued by the Member States in the field of consumer protection.

This provision has hardly been used. Indeed only Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers has been adopted on this basis, all other consumer law directives having been adopted on the basis of Article 95 EC.

Contrary to e.g. Article 152 on health protection that expressly excludes harmonisation, Article 153 allows Community legislation that has a substantive impact on national law, including harmonisation of laws but measures to be taken under Article 153(3)(b) do not include full harmonisation of national law. Indeed according to Article 153(5) measures adopted pursuant to paragraph 4 (i.e. 153(3)(b)) shall not prevent any member state from maintaining or introducing more stringent protective measures, provided such measures are compatible with the Treaty.

Some authors have advocated a more intensive use of Article 153(3)(b). They argue that the condition in Article 153(3)(b) that the Community measures “support, supplement and monitor” the policy pursued by the member states” will easily be fulfilled since all member states have today an own body of consumer law.<sup>63</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> Norbert Reich, “A European Contract Law or an EU Contract Law Regulation for Consumers,” *JCP* 2005, 383; Hans-W. Micklitz, “The relationship between National and European Consumer Policy –

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Community legislation on collective actions would certainly support and supplement measures of substantive and procedural law existing in the member states to protect consumers and therefore Article 153(3)(b) would seem to be a proper legal basis for EU legislation harmonising national laws on collective redress for consumers, but necessarily limited to minimum harmonisation.

A final word should be said on subsidiarity. In areas which do not fall within its exclusive competence – like consumer protection (see also Article 2C, TFUE, post Lisbon) - the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, better be achieved by the Community (Art. 5(2)EC, introduced by the Treaty of Maastricht with effect in 1994). This principle has led to the withdrawal or amendment of a certain number of Commission proposals in the field of consumer protection.<sup>64</sup>

Legally speaking the principle of subsidiarity does not seem to be an important limit for Community action in the field of consumer protection. The present state of European consumer law suggest very strongly that effective consumer redress cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, better be achieved by the Community than merely at member state level. In addition, in the field of collective consumer redress, as explained here above, cross-border and non cross-border cases cannot effectively be distinguished. As a result, if an action at the Community level is necessary for cross-border cases (which can certainly not be put into doubt) such an action will necessarily have to relate to domestic actions as well.

The analysis here above has shown that the Treaty contains three possible legal bases for an EC Directive on collective redress for consumers, including claims for damages: Article 95, Article 65 and Article 153(3)(b).

It has also been shown that since in the area of collective actions cross-border and non cross-border cases cannot be distinguished in an effective manner without putting into jeopardy the attainment of the objective of a truly internal market where consumers are confident, the EU would seem to be competent not only to enact enforcement rules for cross-border situations, but also for domestic situations.

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Challenges and Perspectives”, *Yearbook of Consumer Law*, 2008, 35 et seq. (at 60-61); Norbert Reich & Hans-W. Micklitz, *The Basics of European Consumer Law*, Centro de Formação Jurídica e Judiciária, 2007, 42.

<sup>64</sup> See H.-W. Micklitz & S. Weatherill, “Consumer Policy in the European Community: Before and After Maastricht”, *Journal of Consumer Policy*, 1999, p. 285 et seq., p. 306-307.

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#### **IV. SOME PROBLEMS REGARDING CROSS-BORDER COLLECTIVE LITIGATION**

Cross-border litigation in it self is complex, because apart from substantive questions, questions of international jurisdiction and enforcement and the law applicable have first to be addressed.

In case of collective actions these issues are even more complex.

I shall only briefly indicate which problems may arise in this respect for collective actions in Europe (leaving aside the problems relating to international collective litigation involving European and non European jurisdictions such as where European victims participate in US class actions or non European victims join a group action in an EU Member State).

The easiest question is that of jurisdiction.

On territorial competence in case of multi-state litigation in the EU the Brussels Regulation (Regulation 44/2001) provides as a basic rule that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State (Article 2(1)).

In matters relating to contracts a person domiciled in a Member State may, in another Member State, be sued in the courts of the place of performance of the obligation in question (Article 5(1)(a)).

In matters relating to tort, delict or quasi-delict, competence is with the courts of the place where the harmful event occurred or may occur.

A person domiciled in a Member State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (Article 6). This hypothesis however does not concern group actions.

The Regulation contains specific provisions for specific kinds of contracts.

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For certain consumer contracts,<sup>65</sup> Article 16 provides for the following rules: a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled and proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

These rules would not seem to hamper the introduction of a collective action on behalf of consumers from different member states against a common defendant in one member state. However if in a Member State a (public) body has standing to bring an action for damages on behalf of consumers that body will not automatically have standing in other member states (unlike what is the case under Directive 98/27 where this right is specifically recognized to bodies designated by the relevant Member State).

Where consumers of different member states have suffered a non contractual harm (e.g. a product liability case or a claim for damages for an antitrust infringement) courts of different member states may be competent, but the consumers will still have the possibility to sue before the courts of the residence of the defendant.

At the level of the law applicable things get more complicated.

Where consumers from different Member States are involved in a collective action for damages the law of more than one Member State may be applicable.

This is true both for contractual and non contractual claims.

*First*, with regard to contractual claims there is the Rome I Convention, to be replaced by the Rome I Regulation.<sup>66</sup> The principle is that parties freely choose the law applicable. For certain consumer contracts (basically where the consumer is passive) the contract is governed by the law of the country where the consumer has his habitual residence. Thus in actions involving consumers from several member states several national laws may be applicable.

*Second*, the Rome II Regulation (Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations<sup>67</sup> provides basically that the law applicable is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. However where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Furthermore, still pursuant to that Regulation, In case of product liability the law applicable to a non-contractual obligation arising out of damage caused by a product

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<sup>65</sup> Defined in Article 15: in short certain instalment sales and credit contracts and contracts where the consumer has shopped in another country while remaining passive.

<sup>66</sup> see proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ...)

<sup>67</sup> O.J., 2007, N° L 199/40.

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shall be the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that, the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that, the law of the country in which the damage occurred, if the product was marketed in that country. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under the preceding rules. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Finally, the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

Without going into a detailed analysis of these rules, it will be clear that in a given situation involving consumers from different Member States law from different Member States may apply.

In its Staff Working Paper appended to its White Paper the Commission briefly discusses the possibility to apply the *lex fori*. In that case one substantive law would apply. But that may not be the most generous law for the victims.

Obviously these questions merit still a lot of study.

Finally the question of enforcement may be very difficult. According to Regulation 44/2001 judgments rendered by the court of a Member State have to be recognized and enforced in other member states, but rules on e.g. the distribution of damages (e.g. to persons who were not party to the procedure) do not exist.

## **GENERAL CONCLUSION**

In the Member States of the EU the prevailing model of collective redress for consumers is still based on explicit representation or at least on an opt-in. Opt-out class actions only exist in Portugal, in Denmark, but limited to certain public agency actions, and in the Netherlands in the framework of an out-of-court collective settlement.

In some Member States, especially in the U.K. and France the introduction of opt-out group actions is debated.

The European Commission is not contemplating the introduction of class actions at the EU level.

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The reluctance in Europe to introduce US type of class actions is largely based on a certain – right or wrong – perception of how these actions operate in the US.

The majority of Europeans at the academic and political levels (at least those who have spoken so far) do not seem to like US class actions because they reject the private attorney model (the image of the greedy lawyer).

European industry is generally opposed because they fear to be confronted with higher costs.

The advantages for defendants of group litigation (a one stop shop) have generally been underestimated in Europe.

The debate is complex. There are issues of standing and due process of law, allocation of costs and financing (incentives), problems of private international law, the question of filters against unmeritorious claims and also the question whether private enforcement or public enforcement should be preferred. In all these respects there are differences between the 27 Member States.

While arguably the Treaty contains a sufficient legal basis (or even several legal bases) for EU legislation in this area, the many differences between the laws and the judicial cultures and traditions of the member states make the prospect for such legislation rather remote. The debate promises to take many more years.

Leuven, 15 May 2008