

PEOPIL
**The Pan-European Organisation of Personal
Injury Lawyers**

www.peopil.com

PEOPIL RESPONSE



**Pan-European Organisation of Personal Injury
Lawyers**

**Identification number in the Commission
register:**

3123444121-20

Public consultation

**Towards a Coherent European Approach on
Collective Redress**

To:

European Commission
"Consultation on collective redress"
Avenue de Bourget 1-3
B-1140 Brussels (Evere)
Belgium
EC-collective-redress@ec.europa.eu

From:

Pan European Organisation of Personal Injury Lawyers (PEOPIL)
Imperial House
31 Temple Street
Birmingham B2 5DB
United Kingdom

Regarding:

Consultation on collective redress

Date:

28 April 2011

Introduction

The Pan European Organisation of Personal Injury Lawyers (PEOPIL) was founded in 1996 and formally established as a not-for-profit organisation in 1998 by European lawyers to improve and promote judicial co-operation and mutual knowledge of legal and judicial systems of European jurisdictions in the field of personal injury law. PEOPIL often produces books on comparative law that examine the differences among Member States in prescription periods, damages, and other issues. However, it is difficult to keep track of the different procedural and substantive laws that are involved in cross-border harms, accidents, and sale of defective products and services. PEOPIL does not produce these comparative studies as often as it would like because of the complexities in addressing cross-border harms and the frequency of new developments in the law.

The objectives of PEOPIL are:

- To develop co-operation and networking of personal injury lawyers within Europe;
- To promote access to the legal system for consumers suffering personal injury;
- To promote higher standards of care and safety for consumers;
- To promote proper and fair compensation for all personal injury cases;
- To support and encourage the exchange of information and knowledge.

The development and expansion of PEOPIIL is based upon recognition that the issues involved in personal injury litigation frequently extend beyond the national boundaries and require an international perspective and knowledge.

The impact of EC legislation on personal injury law is growing steadily and this creates a need for knowledge of European legislation and a basic understanding of the Member States legislation in this field.

Currently the Pan-European Organisation of Personal Injury Lawyers has 550 members from 27 jurisdictions within the European Union, 11 Non-European Union jurisdictions within Europe and 6 jurisdictions outside Europe. Membership is open to legal professionals (lawyers, judges), academics and law students.

Consultation on collective redress

PEOPIL welcomes the opportunity to comment on the issue of collective redress. On a general note PEOPIL believes that collective redress can be an important vehicle to ensure both access to Justice and a fair trial for large numbers of consumers or victims who have been damaged by large scale behaviour of internationally operating businesses or otherwise affected by cross-border harm. We answer the questions, below, in the order in which they were given by the Commission.

Answers to the questions

1. *What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?*

The added value which the introduction of new mechanisms of collective redress would have for the enforcement of EU law is uniformity and efficiency. It would ensure that EU law would be enforced on a central level and in a uniform manner. New mechanisms will create greater legal certainty among all European citizens as to their substantive and procedural rights. They will have the comfort of knowing that the same procedural mechanisms and forms of relief (both injunctive and compensatory) will be available to them even if they cross borders for business, vacation, or residential purposes or whether they wish to enforce their rights under EU law or national law. This question is limited to the “enforcement of EU law” but it should not be so limited in scope. Collective redress should allow EU citizens to enforce their rights under national law as well EU law through uniform procedures applicable to both types of law. This will improve access to justice and enhance procedural legal certainty as required by Article 81(2)(e) TEU which requires “effective access to justice” for all cross-border harms and as required by Article 81(2)(f) which requires “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 ...”. At present, collective redress is available to private parties in some – but not all – of the Member States.

Consumers currently do not bring private actions, in relation to defective products and unfair trade practices under European Law. Even claims brought under the Product Liability Directive are comparatively rare on any significant scale. Consumers do not enforce their legal rights because they are unaware their rights individual and collective have been

violated. Furthermore, the financial cost of bringing litigation is unduly expensive.¹ The increasingly cross-border movement of goods and services across the EU can make it more difficult for consumers to even pinpoint the source of harm.

One means of increasing access to justice for consumers affected in this way is to make it easier to bring the scale of collective actions in which the disposal cost of claims to manufacturers or suppliers is limited and where harms (whether limited or serious) can be seen as part of a much bigger picture than an individual case where the cost of proving breach of duty or defect can be seen in a wider evidential context and can be at an overall more proportionate cost. We comment below on the appropriate scheme of funding to achieve proportionate cost: "Class actions are another mechanism for increasing access to justice in situations where many consumers have suffered the same harm."

Class actions will make it possible for more citizens to enforce substantive rights which, in turn, will create a larger body of law explaining the contours of EU and national law. Put it another way, and as quoted elsewhere in these comments, "[i]n the absence of effective procedural mechanisms for pursuing legitimate and legally cognizable claims, the full meaning of our substantive law can never be known."²

2. *Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

Private collective redress should be independent of enforcement by public bodies. Coordination between private collective redress and public enforcement would serve both the quality and efficacy of both actions. It would be improved by the exchange of relevant information between these two mechanisms. It is critical that private enforcement be allowed to operate independently of public enforcement because public enforcement is incapable of responding to all of the violations to the rights of European citizens because of insufficient resources and capabilities. There are also public confidence issues. Many of the recent claims which have been dogged by difficulties have involved the pharmaceutical industry where a number of products licensed by the regulator have later had to be withdrawn

¹ Peter Spiller and Kate Tokeley, *Individual Consumer Redress*, published in Geraint Howells, et al., eds., *HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW*, Edward Elgar Publishing Limited, Cheltenham, United Kingdom (2010), at pp. 483-485 with reference to whole paragraph.

² Wusheng Zhang, *Analysis and Introduction of US Class Action in China*, in *ZZPInt Zeitschrift für Zivilprozess International*, Wolters Kluwer Deutschland, Köln, at p.373 (2010) (quoting Prichard).

(Lipobay, Vioxx and Avandia to name three). In the United Kingdom, even where there have been Public inquiries, as with train safety public inquiries,³ there has been no action taken by the regulators. Public bodies are slower to react than individuals – often action by a public body is a trailing rather than a leading indicator.

Because public enforcement can be insufficient and dilatory, it would be a mistake to make private enforcement subsidiary to the inadequate public enforcement. An empiricist in legal research explains how public enforcement is inadequate, compromised by lobbyists, and unskilled in the task of reimbursing consumers:

In most consumer protection legal regimes, the preferred strategy for implementation is public enforcement. But the need for enforcement often outstrips the financial resources that enforcement officials and agencies have available. Where manufacturers and service providers actively oppose enforcement, they may be able to use their political influence to drastically limit public expenditures for enforcement. In extreme instances, business actors may be able to restrict agencies' power to regulate certain areas of the economy entirely. Moreover, regulatory agencies may attract personnel who served previously in the business sectors that the agencies are charged with regulating or who hope to move into such sectors after they complete their public service. Such prior history or hopes for future employment may diminish these public officials' interest in aggressively enforcing consumer protection law. In sum, both theory and experience suggest that public enforcement will often not suffice to limit violations of consumer protection law. In addition, in many instances, public enforcement agencies do not have the authority, expertise or resources necessary to design and implement programmes to reimburse consumers who have suffered losses as a result of violations of consumer protection laws.⁴

We would add that regulatory or representative public bodies often lack the awareness of individual circumstances of injury or effect which can found these claims. They are more likely to act (as in English public law) from a principled standpoint. Individual Claimants look to test the manufacturer/consumer obligation from the perspective of individual effect.

We believe that it would be a mistake, therefore, to attach private enforcement too rigidly to public enforcement. Unlike public enforcement, private enforcement is not affected by the interests of industry lobbyists or the “revolving door” in which the heads of public agencies

³ Lord Uff and Lord Cullen's Southall and Ladbrooke Grove Inquiries.

⁴ Deborah R. Hensler, *Using class actions to enforce consumer protection law*, published in Geraint Howells, et al., eds., *HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW*, Edward Elgar Publishing Limited, Cheltenham, United Kingdom, p. 515 (2010).

some day rotate through the door to work for the same industries that they are currently regulating. Private enforcement through collective redress also provides the necessary skill set that is lacking in public enforcement establishing and administering the damages awards to victims.

Private enforcement should not be subsidiary to public enforcement in any manner. The experience of the United States of America demonstrates that independent private litigation uncovers nearly half of all violations of American anti-trust laws.⁵ The American experience also demonstrates that:

“in practice, public agencies lack sufficient financial resources to monitor and detect all wrong-doing or to prosecute all legal violations.”⁶

3. *Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?*

No. These entities are already capable of acting but they are incapable of meeting the tremendous need for enforcement. The primary concern of the Commission should be providing access to justice for victims to seek redress. Consumer associations may have a self-interest in maintaining their sole competency and preserving their jobs, expertise, and primacy in the system of redress, but their institutional needs do not necessarily equate with the needs of European citizens themselves.

Consumer associations will not be keen to turn over enforcement to victims. But, victims should be allowed to file collective actions for monetary damages and they should also be allowed to form *ad hoc* organizations to seek redress, as they are allowed to do in the Dutch opt-out class settlement and class action for declaratory judgment system. Access to justice is not difficult for public authorities and associations, which already have funding and standing to go to court, but it is a severe problem for individual victims.

⁵ See Robert H. Lande and Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 905 (2008) (“almost half of the studied violations or alleged violations were uncovered solely by private counsel, and in many other cases, private counsel played a large role in uncovering and proving the offense”). In other words, private enforcement is ahead of public enforcement much of the time. If private enforcement were subsidiary to public enforcement, then roughly half of the underlying violations might never be discovered.

⁶ Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 69 (Rand Inst. for Civil Justice 2000).

4. What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

The principles of subsidiarity and proportionality would be met by a system of EU-wide collective redress because, currently, the Member States are unable on their own to devise an “effective” system of collective redress or otherwise find a way to enable consumers and others with small claims to gain access to the courts which is consistent in effect across all Member States. Currently, the vast majority of European citizens do not have access to procedural measures to seek compensation for cross-border harms. Even if a small claims court were available, most claims would never be brought because “[t]he step to ‘go to court’ is for many people a deterrent and psychological barrier, which they will not be prepared to take for very small claims.”⁷ The 2004 Eurobarometer Survey found that 53 percent of Europeans complained at least once to a salesperson, retailer, or service provider and that 41 percent were dissatisfied with how their complaint was handled. [*Id.* at p. 46]. At the same time, the public is overwhelmingly in favor of a system that enables them to pursue redress in combination with other consumers.

A Euro Barometer survey in 2004 revealed that “seventy-six percent of those questioned would be more likely to pursue redress for an injury if they could do so in conjunction with other consumers. Specifically, 84 percent of Swedes, 76 percent of Greeks, 76 percent of Danes, 75 percent of Italians, 73 percent of Finns, and 73 percent of Dutch are prepared to defend their rights jointly with other consumers before the courts.”⁸ The 2006 Euro Barometer confirmed these findings: seventy-four percent of those polled in twenty-five Member States now stated that they would be more willing to defend their rights in court if they could join with other consumers.”⁹

⁷ Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings: Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs*, at p. 31 (January 17, 2007) (“Leuven Study”).

⁸ Directorate-General Health and Consumer Protection, *European Union Citizens and Access to Justice*, p. 36 (Oct. 2004), available at http://ec.europa.eu/consumers/redress/reports_studies/eurobarometer_11-04_en.pdf.

⁹ See Leuven Study, p. 263.

As to proportionality, we are aware that the guidelines are set out in a protocol annexed by the Treaty of Amsterdam to the EC Treaty.¹⁰ The guidelines blur the distinction between subsidiarity and proportionality. Proportionality merely requires that “the Community shall not go beyond what is necessary to achieve the objective of the Treaty.”¹¹ There is no less restrictive means than EU-wide collective redress to ensure access to justice for ordinary citizens, especially those with small cross-border claims. As shown elsewhere in these comments, the objectives pursued by collective redress are substantial: the fundamental principle of access to justice and the efficient allocation of harms and liabilities in the common market as the mirror image of the efficiency of cost achieved by manufacturers having a level playing field of competition in the cross border provision of goods and services within the EU.

The Product Liability Directive saw the creation of an EU wide scheme of redress as the price that producers had to pay to be allowed to market across borders. The success enjoyed so far by producers in resisting the development of a coherent jurisprudence of ‘defect’ capable of being enforced by the national courts of the Member States points to a reluctance by producers to be responsible for the consequences of provision of defective products and to rely on national Governments of Member States to meet the externalised costs of such defective products rather than meeting those costs themselves.

A collective redress mechanism as a part of the EU court system would be a means to redress this failure and to provide a level (judicial) playing field on which to implement meaningful collective redress for consumers.

Because Member States are unable to pass the necessary measures on their own, or in a uniform manner, the subsidiarity principle is also satisfied. The class action mechanisms in those countries which have them (e.g., Poland, Italy, Sweden, Spain, the Netherlands, Norway, Denmark, England and Wales) illustrate that vexing problems of disincentives, loser pays rule, and other difficulties make it impractical to bring collective actions for small claims. That is why so few cases have been brought, and far less than expected, under these legal regimes. A new system of litigation financing as well as a uniform procedural mechanism must be made available. Such measures are necessary to ensure access to justice and meet the requirements, as follows, of the Treaty of Amsterdam which gave the EU competence to adopt “measures in the field of judicial cooperation in civil matters having cross-border implications ... in so far as necessary for the proper functioning of the internal market.” This also includes measures such as “eliminating obstacles to the good functioning of civil

¹⁰ See Paul Craig and Grainne de Burca, *EU LAW: TEXT, CASES, AND MATERIALS*, 4th ed., Oxford University Press, Oxford, p. 155 (2008).

¹¹ *Id.* (quoting Protocol on the application of the principles of subsidiarity and proportionality, ¶¶ 1, 6).

proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.” In short, a simpler supra national institution is needed which can give Europe’s consumers a place to bring collective actions.¹²

5. *Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?*

No. It is not sufficient to merely have injunctive relief. At most, injunctive relief would prevent future harm but it would do nothing to compensative victims for past harm. It is necessary and appropriate to introduce collective compensatory redress at the EU level in order to fulfil the vision and purpose of the internal market, to shift the insurance risks to the entities that create the risks rather than on the consumers, create a more efficient allocation of resources in the marketplace, ensure uniform access to justice, provide uniform procedural rights, and establish a level playing field between Member States. The rights of an European citizen to access justice should not depend on which Member State he or she happens to live in.

The current system lacks uniformity, creates legal uncertainty, and produces an inefficient market in which companies can get their defective products to European consumers without any repercussions and without the payment of damages for injury to citizens so affected. This means inadequate, dangerous, and defective products that would not otherwise be sold or allowed to remain in the EU market and cause harm to European consumers and patients. By contrast, in the United States of America, “some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.”¹³

In an efficient market, the legal liabilities caused by mass torts are passed on to the responsible parties instead of being shouldered by millions of citizens who suffer injuries and cannot find access to justice. To create a truly efficient market in which the best, safest, and most reliable products are designed, manufactured, and sold in the European Union, the Commission must design a system for collective redress that will allow private parties to properly allocate legal liabilities to the parties that design and make defective products. The Commission should not expect ordinary people to bear all of the harm through market inefficiencies and let producers of defective products reap all of the profits whilst

¹² See generally Bojan Gavrilovic, *Access to justice and civil legal aid in the European Union*, in Sara Pennicino, *European Union and Legal Reform 2009*, CLUEB, Bologna (2010) (quoting Treaty of Amsterdam).

¹³ Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 9, 119 (Rand Inst. for Civil Justice 2000).

externalising many of the costs of their defective products to national Governments. However, that is the current state of affairs.

Victims may get nothing while public authorities only prosecute a fraction of the violations that occur whilst carrying significant amounts of cost of defective products through health and social care, benefits and state education systems.

In a properly functioning system, citizens should have the right to obtain compensation through collective redress. An empirical study in the United States of America demonstrated that 81.6 cents of every 1 USD recovered in collective redress was distributed to the victims.¹⁴ Collective redress leads to better allocation of legal liabilities to the parties who are responsible for them.

At present there is little risk to producing defective products. Under a system of collective redress, there would be an increase in deterrence to producers and a re-allocation of the liabilities. This will have an energizing effect on the entire common market. Instead of rewarding companies that produce defective products or services, those companies will be encouraged to either make proper goods or allocate their resources to more productive endeavors. Consumers will regain lost money spent on products that do not work, or cause injury food that has expired in its freshness, financial products that lose money, and other goods and services that drain household finances.

The distortions in the EU economy caused by the mis-allocation of legal liabilities, insurance, and resources threatens the very core of the EU from its starting principles as a common economic community. An empirical legal researcher has explained how faulty products and violations of competition law distort the internal market:

Violations of competition (anti-trust) law may lead to higher product prices.
Miscalculations of late fees and insurance premiums may result in modest additions to periodic payments that add up to more significant over-charges over time.
Requirements that low income consumers insure against the risk of not fulfilling all payments for property or other goods may result in charges against them for unnecessary or overpriced insurance policies. Shoddy manufacturing and inadequate management oversight may result in the marketing of products and services that do not perform as effectively as consumers reasonably anticipated. All of these instances of violation of consumer protection laws share two features: the financial losses to

¹⁴ See Myriam Gilles and Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 131 (2006).

individual consumers are relatively modest, a small increment to the price paid, relative to the product or service provided, and the financial gains to the manufacturer or service provider are usually large, because the additional profit per transaction is multiplied hundreds of thousands or millions of times over.

Private rights of action offer both a supplement to public enforcement and a mechanism for forcing the return of illegally gained profits to the individual consumers who purchased overpriced or shoddy products or services or paid improper fees or other expenses. Even where private actions are permissible, consumers are likely to absorb the costs of illegal practices by manufacturers and service providers. Class actions and other forms of collective litigation offer a solution to this problem.¹⁵

Collective redress, or class actions, is a good and necessary solution for Europe providing economies of scale for the litigation of claims.

In conclusion, collective redress should be pursued for mass torts and other claims to create a better market for consumers, correct the information and resource asymmetry between consumers and Defendants, and improve the market's allocation of liability. National Governments in particular stand to gain from the proper allocation to producers of those externalities currently borne by Governments through tax revenues. Tax revenues to which corporate producers contribute less than individual tax payers.

6. *Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?*

It must be a legally binding approach given the current disparity among Member States (some of which currently allow for collective redress and others that do not) and given the fundamental principles of access to justice and preservation of a healthy common market that are involved. Anything less than a binding measure will lead to a continuation of the disparity of procedural rights and access to justice through the EU which is an unacceptable situation and an Article 6 ECHR breach.

¹⁵ Deborah Hensler, *Using class actions to enforce consumer protection law*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW, Edward Elgar Publishing Limited, Cheltenham, pp. 516-517 (2010).

The Commission should issue a regulation to create a single court to hear collective actions involving a sufficient number of people in cross-border situations or, to save funds, the Commission should give jurisdiction to hear these claims to a division of the General Court currently based in Luxembourg. As an alternative, the Commission should issue a Regulation that provides for opt-out collective redress in all Member States. A Directive is a less preferable alternative because it would lead to too many procedural disparities in the different Member States. If, however, the Commission chooses a Directive, then it should require the possibility of opt-out collective actions, especially for small claims, to enforce any substantive law that otherwise allows for a private cause of action on the basis of national and/or EU law. Whatever measure is chosen should be binding.

As for a new court to hear collective actions, the advantage is that it would have the expertise to hear these claims and make effective adjudications as to whether the cases have merit and should proceed. It would clearly provide all Europeans with a symbolic and identifiable source for collective redress for cross-border harms involving a sufficient number of people. It would increase access to justice since any private party, NGO, or public authority could bring a case in the court. The disadvantage is that victims would have to secure legal representation to assist them wherever the court is located. This, however, has not been a major problem in cases brought before the European Court of Human Rights. Another primary advantage is that the single court would establish a clear body of procedural and substantive case law and be provided with a body of Judges from Member States who would rapidly gain experience in this work. A present disadvantage is that because even in the UK (where the most collective actions have been started and have taken place in the last twenty years) the experience of administering and trying these cases has not been great and few lessons learnt from doing so.

If these same functions are placed with a division of the pre-existing General Court in Luxembourg then most of the benefits will still be realized but at cheaper cost since it will not require the creation of a new judicial institution.

The advantages of a Regulation are that they would provide for collective redress in the national courts of all Member States. This feature could be done simultaneously with the creation of a single and independent EU-wide court of collective redress for cross-border claims. A Regulation would provide access to justice within each Member State which would have the benefit of proximity for the victims who wish to seek redress. On the other hand, existing rules that dis-incentivize Claimants from coming forward could very well deny “effective” access to justice in national courts. A single independent EU-wide court would be able to remedy access to justice issues and create incentives for Claimants, e.g., by

abolishing the loser pays rule or by hearing claims funded through a levy on damages awarded by that court.

The advantages of a Directive are that, like all Directives, Member States would have more flexibility in transposing the requirements. However, this advantage to the Member States brings corresponding disadvantages to European citizens who would end up with slightly divergent procedural rights based on how, or whether, each Member State enacts the Directive. Because of lobbying pressures from industry, any Directive is likely to be subject to immense persuasion to water down the provisions or delay the actual date in which collective redress becomes available in any given Member State. In Sweden, e.g., the initial recommendation was for an opt-out collective redress system but political forces intervened at the Ministry of Justice and the final result was an opt-in collective redress system that is rarely used.

On the balance, and having regard to the length of time taken to implement the domestic expressions of the Product Liability Directive, we favour the speedy establishment of a new function for the General Court to undertake cross border collective actions for all EU citizens. There would be an initial cost involved in providing funding to avoid the asymmetry of existing funding scheme for Claimants but over time a levy on damages would provide a fund ensuring that collective claims could readily be brought in a consistent and effective manner by EU citizens. Aside from anything else, this would be a powerful mechanism for harmonisation of judicial thinking on interpretation of e.g. the Product Liability Directive, in a way that would give a lead both to European jurisprudence and to the jurisprudence of individual Member States. Such a division of the General Court would give individual consumers an European institution with which they could directly engage on the enforcement of individual and collective as citizens; to date too many European institutions have no meaningful engagement with those individual citizens.

7. Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

Yes, it should comply with the principle of fair trial (article 6, Treaty of Rome), the fundamental human right of access to Justice, and the general rule that where there is a wrong, there must be a remedy. Because judicial collective redress will enable parties with small claims or who are otherwise unaware that their rights are violated or unaware as to how to enforce those rights to bring claims through a representative party. This will provide access to justice that would not otherwise be available to the vast majority of consumers

injured by defective products and other citizens who suffer harm. A book on access to justice as a fundamental right has explained the linkage:

“In international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. When a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights. ... access to justice is guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration, as well as in many national constitutions.”¹⁶

Under the present system throughout Europe, there is no “effective” judicial remedy for most consumers injured by defective products. The class action mechanisms existing in Sweden, Norway, Denmark, and the Netherlands have been rarely used, indicating that the system of incentives is not working properly to provide redress for the injured consumers.

The right of access to court is not expressly written into Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but it has been read into that Article by the European Court of Human Rights.¹⁷

In the case of *Golder v. the United Kingdom*, the Court held:

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (Art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.¹⁸

As shown elsewhere in our comments, there are no judicial proceedings in the vast majority of cases in which consumers are harmed and in which European citizens suffer injuries in cross-border accidents as the result of defective products sold in cross-border business

¹⁶ Francesco Francioni, *The Rights of Access to Justice under Customary International Law*, in Francesco Francioni, ed., *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, at p. 1.

¹⁷ See Mart Susi, *Application of the Access to Court Doctrine by the European Court of Human Rights: Estonia's Concept of Comprehensive Court Protection*, in German Yearbook of International Law, Vol. 52, Dunker & Humblot, Berlin, at p. 563 (2009).

¹⁸ ECtHR, *Golder v. the United Kingdom*, Judgment of 21 February 1975, Appl. No. 4451/70, Series A, No. 18, para. 35.

transactions. Therefore, the protections of Article 1 are currently “of no value at all” to millions of European consumers without the assistance of a mechanism for judicial collective redress. This is an unacceptable state of affairs and the only remedy is a **uniform** mechanism for all of Europe rather than the piecemeal proceedings allowed by the different Member States.

Article 13 of the European Convention on Human Rights requires an “effective remedy before a national authority” and, as shown elsewhere in these comments, there is currently no “effective remedy” for the vast majority of consumers injured by small claims. The principle of access to justice requires that victims be entitled to bring their claims before a court – not simply through arbitration – and compels the Commission to consider measures for *judicial* collective redress. As one scholar has explained, “[i]n its ordinary usage, the term ‘access to justice’ is a synonym of judicial protection. Thus, from the point of view of the individual, the term would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence, and impartiality in the application of the law.”¹⁹

Article II-47 of the Charter of Fundamental Rights of the European Union upholds the right to an “effective” judicial remedy as follows:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

This expansive right to “[l]egal aid” exceeds the minimal requirements for a uniform system of judicial collective redress. Legal aid is not sufficient to represent the interests of millions of consumers with small claims, especially since many consumers are unaware that their rights have been violated. A system of private law collective redress will allow a private individual, or NGO, to bring a case on behalf of **all** the injured parties. This is a necessary feature to protect the fundamental principle that there must be an “effective remedy.”

The International Covenant on Civil and Political Rights also guarantees the right to an “effective remedy” (Article 2) and the right to “take proceedings before a court” (Article 9(4)). These rights are not being fulfilled in the European Union where millions of consumers

¹⁹ Francioni, at p. 3.

cannot afford a lawyer, or do not have legal expenses insurance, to bring a lawsuit for damages involving small (or large) claims. International law guarantees an “effective” remedy – not just any remedy – and there is no way to provide such a remedy short of an opt-out judicial collective redress mechanism applicable throughout all of the European Union.

It has been widely recognized around the world that access to justice is the foundational reason for a system of collective redress or class actions. A Chinese scholar explained why:

Access to Justice is the foundation of the class action procedure as well as its most important value, and the US class action fulfils this function in a prominent way.

Firstly, class actions can provide a procedural guarantee for the implementation of substantive law. The relationship between class actions and substantive law is most eloquently stated by the American scholar Prichard: ‘In the absence of effective procedural mechanisms for pursuing legitimate and legally cognizable claims, the full meaning of our substantive law can never be known ...’.

Secondly, class actions can overcome the obstacles relating to litigation cost. They can provide a procedural guarantee for small claims. If there were no class actions as an effective tool for the tortfeaseses, much litigation would be barred and remain outside the court door because of high litigation cost. The value of class actions in this respect can not only be seen clearly in opt-out cases, but is also revealed in opt-in cases.

Lastly, class actions are a means to guarantee the equality of procedural rights of group members who are at a disadvantage. In common cases, plaintiffs are usually at an obvious disadvantage regarding to their procedural capacity. However, once these parties pool together because of their common interests, their ‘number’ can change the structure of the litigation. This in turn enables plaintiffs to face large organizations (enterprises), which would otherwise be at a clear advantage, on an equal footing.²⁰

The United States Supreme Court has, also, recognized class actions as a useful device to give access to court for Claimants who would otherwise not be able to litigate over small claims: “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any

²⁰ Wusheng Zhang, *Analysis and Introduction of the US Class Action in China*, in *ZZP Int Zeitschrift für Zivilprozess International*, Köln, at pp. 373-374 (2010).

effective redress unless they may employ the class-action device.”²¹

Class actions make it possible for private Claimants in the United States to bring lawsuits that would not otherwise be brought at all due to the impracticability of prosecuting claims for small damages. The United Supreme Court held: “Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually ... [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.”²² The advisory committee notes to Federal Rules of Civil Procedure, Rule 23 – which is the rule governing class actions in federal courts in the United States – further clarifies that *but for* class actions, many lawsuits over small claims would never be filed due to practical constraints: “The interests of individuals in conducting separate lawsuits ... may be theoretical rather than practical” because “the amounts at stake for individuals may be so small that separate suits would be impracticable.”

The United States Court of Appeals for the Third Circuit explained that “one of the primary rationales for class actions is allowing access to courts for parties whose individual claims are so small that it would be economically infeasible to pursue them individually.”²³ The same problem of access to the courts for small claims exists in Europe, but it has not yet been resolved. Collective actions are part of the solution and need to be seen as such rather than being derided as adding to cost by producers.

What the US system does is provide access to justice and that is not just limited to the Claimants. As referred to earlier, **Lipobay**, **Vioxx** and **Avandia** are just three drug cases which have never reached courtrooms in Europe whilst in the US significant redress has been provided to US citizens arguing they have been injured by the products. In **Vioxx** the Defendant maintained it was not responsible for the injuries and deaths alleged to have arisen from its useage. The US system meant that it was able to air its defence successfully in the US Courts. In the UK and the rest of Europe the current collective redress mechanisms have prevented Claimants from bringing their claims at all.

8. *As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?*

²¹ *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); see also *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (class actions overcome problem of small claims “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”).

²² *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

²³ *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998).

The experience gained so far by the Member States could most certainly contribute to formulating a European set of principles. The Dutch experience demonstrates that opt-out collective actions are consistent with due process, viable, compatible with European legal culture, and capable of providing the greatest amount of compensation to the victims. The Dutch opt-out class settlement mechanism has been used to settle claims on behalf of a pan-European class in the Royal Dutch Shell case. Actually, the Dutch opt-out class settlement, in that case, was used to compensate a class consisting of investors everywhere in the world, except the United States (due to a separate class settlement), who suffered losses. It was a truly global settlement and such a device would function for pan-European settlements of cross-border harms. Denmark also has an opt-out collective action that may be brought by the Consumer Ombudsman. Spain, Portugal, and Norway also have opt-out collective redress. The opt-out mechanism should be adopted as a common principle. So should the concept that private individuals may bring their own collective actions on behalf of themselves and others. All of the Member States that permit class actions currently allow private individuals to bring the actions. If the EU provides for a common set of procedural rules enabling opt-out collective actions, then Member States might seek solutions for how to overcome the disincentives to using these mechanisms, such as the loser pays rule, lack of contingency fees, lack of conditional fees for risk in some jurisdictions, and other disincentives.

The experience of opt in actions in the UK points to the difficulty of identifying participating Claimants, publicising the existence of the action and defining its economics, in the face of an instantaneous Defendant clamour that the creation of a group or multi party action in disproportionate in cost. The other critical consideration is the time it takes to achieve a critical mass of claims – through word of mouth and/or by advertisement against a backdrop (in Product Liability Directive claims) of a very one sided limitation rule; a rule which (in England and Wales) is particularly prejudicial to child Claimants.

9. *Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?*

Enforcement of EU law, through collective redress, should function on a central level. As noted in our answer, above, to Question 8, we believe that an opt-out mechanism is essential. Opt-in collective redress can be unsuccessful, in practice. An English study for the Civil Justice Council has reported that “rates of participation under opt-in regimes, whilst variable, tends to be quite low (in some cases, less than 1%), indicating that, on occasion,

very few group members are caught in the litigation's net."²⁴ The Dutch opt-out class action, so far, has provided the largest amounts of compensation to qualifying Claimants of any system of collective redress in Europe.

Because the Defendant emphasis is always upon the 'disproportionate' costs involved in defending claims (a moot point since they all insure these claims and/or can tax deduct as business expenses the cost of litigation) it is important that the collective actions process proposed as soon as possible identifies and enfranchises the class of Claimants likely to be involved and with a qualifying need for redress. This is as important for large scale low value consumer claims as for (relatively) smaller scale but higher value claims involving serious injury. Equally, there needs to be a clear mechanism after a class within such an action is established to enable

- (a) opting out by those who do not want to be involved in a claim; and
- (b) judicial/administrative provisions to structure the class for trial of the action in whatever manner proves to be most expedient, as the evidence in the action gives a clearer insight into the causation consequences of the breach or product defect.

10. *Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?*

There are some general lessons from the collective redress systems of the Member States.

First, private parties should be allowed to issue claims.

Second, collective redress should be used to enforce any substantive law.

Third, compensatory and exemplary damages should be an available remedy.

Fourth, the opt-out mechanism should be used.

²⁴ Rachel Mulheron, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED, Research Paper for submission to the Civil Justice Council of England and Wales, p. ix (2008).

Fifth, a procedural mechanism, alone, will not lead to greater enforcement or access to justice unless difficulties of funding, are resolved.

Some examples from our experience.

(a) The Netherlands

Allows for collective actions for the purpose of establishing liability in a declaratory judgment or injunctive relief.²⁵ However, because there are no incentives for private parties or their lawyers to pursue a lawsuit for class-wide declaratory judgment, very few of these cases have been filed since the law took effect in 1994. This is due, in part, to the fact that once liability is established, class members are free to find their own legal counsel to apply for damages through individual lawsuits. The lesson that can be learned is that an EU-level mechanism for collective redress should allow the individual client(s) and lawyer(s) who filed the case to proceed into the damages phase, as well, to obtain compensation for class members.

The Netherlands also provides for opt-out class action settlements since 2005, and this mechanism has been used with success in a handful of cases.²⁶ The advantage is that it provides a means for processing claims for numerous victims at the same time while affording them with basic due process rights to challenge the settlement in court (i.e., the Amsterdam Court of Appeals) or opt out of the settlement altogether to pursue their own individual remedies or none at all. The disadvantage to this mechanism is that it may only be used for settlement purposes. In other words, a plaintiff cannot file a lawsuit and prosecute the litigation on behalf of an opt-out class. Without such capacity, there is little reason for a Defendant to enter into a settlement agreement unless the Defendant is under the threat of being held liable in another jurisdiction.

(b) Sweden

Allows both opt-in collective actions filed by private parties and representative actions filed by consumer and environmental associations. Opt-in class actions have been allowed since 2003 under the Group Proceedings Act. A private individual or organization may file suit. It becomes a class action upon filing the lawsuit. To belong to the class, individuals must write to the court to “opt in” or else they will not be considered as parties in the action. The first case was brought by Plaintiff Åberg on behalf of 700 passengers who were stranded across

²⁵ See Dutch Civil Code, Art. 3:305:a-c CC

²⁶ See Dutch Civil Code Art. 7:907-910 CC and Dutch Code of Civil Procedure Art. 1013-1018 CCP.

Europe by an airline, Air Olympic. The complaint settled for 70,000 Euros four years after it was filed.

The “father” of Swedish class actions, Per Hendrik Lindblom, has explained that the process of initiating class actions in Sweden began when the Swedish Consumer Ombudsman in the 1970s asked Prof. Lindblom about the class action system in the United States.²⁷ Prof. Lindblom researched the US system and published a book of 800 pages which led to a public consultation. Prof. Lindblom expected that opt-out class actions would be adopted in Sweden but last-minute political alterations led to the adoption of an opt-in system. The Swedish opt-in collective action has increased access to justice:

Even with very few actions, the significance of the Act is and will be considerable. One single action, which helps thousands or maybe tens or hundreds of thousands of people to enforce their legal rights, is enough to justify the Act. The goal of increased access to justice and compensation is reached. And, after all, the main influence of group actions, to be sure, is prevention or behaviour modification. It will no longer be possible – or at least, it will be more difficult – to make money by causing individually small losses to a great number of people.²⁸

The lesson to be learned is that some form of collective action is necessary for securing access to justice. Prof. Lindblom has further stated that Sweden’s opt-in system should be “supplemented with an opt-out alternative in actions involving minor claims, at least in public group actions.”²⁹

Sweden’s Group Proceedings Act allows consumer associations and environmental protection associations, alone, to bring representative actions over consumer protection or environmental issues. In the first five years of the Group Proceedings Act, however, not a single representative action was filed by a consumer or environmental protection association. We are not aware of any actions being filed in the past three years. We believe that the Commission should not make the mistake of limiting collective redress to actions filed by associations or to only one or two areas of substantive law.

²⁷ See Per Hendrik Lindblom, *The Swedish Group Proceedings Act – Introduction*, Paris, France, at p. 36 (May 10, 2005) (manuscript on file).

²⁸ Lindblom, at p. 29.

²⁹ See Per Hendrik Lindblom, *National Report: Group Litigation in Sweden*, Report for Oxford Conference on the Globalization of Class Actions From December 12 - 14, 2007 (December 6, 2007), pp. 18, 34, 36, 37, available at <http://globalclassactions.stanford.edu>.

(c) Denmark

Under a law that became effective in 2008, see Denmark's Administration of Justice Act, § 254a, allows for both opt-in class actions brought by a private party and opt-out class actions brought by the Consumer Ombudsman. The court must determine that a class action is deemed to be the best way of examining the claims. The claims must be similar, but not identical, in facts and law. Any settlements of collective actions must be approved by the court under Denmark's Administration of Justice Act § 254h. This is a useful lesson for European collective redress which should, also, require the court to approve any settlement of claims to ensure that the settlement is fair for all victims in the collective group.

Denmark's Consumer Ombudsman may file opt-out class actions if the amount of each victim's claim is no more than 270 Euros. The members of an opt-out collective action in Denmark may be required to pay legal costs up to the amount they stand to recover if the suit is successful, but they do not have to pay an additional fee as security.³⁰ The members of an opt-in collective action may be liable for both legal costs and a fee as security.³¹

In Denmark, the representative party bringing the suit has a special duty to safeguard the interests of other class members. If the representative party has conflicting interests from the rest of the class, then the court supervising the action can replace the representative on its own or at the request of one of the parties.

Denmark's collective actions were designed to increase access to justice to enforce any substantive area of law. The Danish Ministry of Justice explained:

The Standing Committee on Procedural Law finds that rules on class actions will ensure that more people will have real access to the courts and that that form of action will thus facilitate the satisfaction of justified claims.³²

The Commission should learn from Denmark's experience by similarly ensuring access to justice with collective actions.

³⁰ See Henrik Øe, *Collective redress in Danish law and perspectives at EU level*, presentation at Oxford/Stanford conference on globalization of class actions, at p.8 (December 2007), available at http://globalclassactions.stanford.edu/PDF/Danish_Conference_Presentation.pdf.

³¹ *New rules on class actions under Danish law*, at p. 12.

³² Denmark Ministry of Justice Procedural Law Division, *New rules on class actions under Danish law*, Reference No. 2006-740-0187, Document No. HAA40315 (English translation), at pp. 4-6, 8, 9, 10 (June 26, 2007).

One of the drafters of the law, Prof. Erik Werlauff, explained how collective redress in Denmark may be used for a variety of cases on behalf of consumers, investors, and victims:

Other examples of where Danish provisions of class actions would be relevant have been mentioned, e.g. a huge Danish case about roof materials that crumbled (the Eternit case, reported in *Ugeskrift for Retsvaesen* (UfR) 1989:1108 H); the tragic cases for the Danish haemophiliacs that had been treated with HIV infected blood on public hospitals (UfR 1996:1554 Ø); compensation claims for flight tickets (no printed case law); unlawful fees collected by banks (the Laan-&-Spar case, UfR 2003:1581 H); cases on unlawful price trusts (the Løgstør case; no printed case on the question of compensation); cases on uncomplete prospectus stock emission (the Hafnia case, cf. below). Other examples could be mentioned – and common for these are that the case will either be dropped if no provisions on class actions exist, or the case will be more expensive and/or conducted in a less “powerful” and efficient manner if the individual consumer etc. has to initiate and conduct his or her own case.³³

Denmark’s procedural mechanism may be used to enforce a broad array of substantive laws on behalf of both consumers and businesses, e.g., where businesses have paid an improper tax to the government.

There has been at least one opt-in class action filed in Denmark on behalf of investors who were paid an unfair price for their shares. However, BEUC reported, in 2010, that no collective action has yet been filed.³⁴ Either way, it is clear that there have been very few cases, probably because the representative plaintiffs are required to pay legal costs as a security and additional legal costs up to the amount they wish to recover. There are no incentives for lawyers to file these collective actions. This is a lesson, also, for the Commission that collective actions will not increase access to justice unless they are accompanied by changes in incentives and risks.

(d) Norway

Has allowed for private parties to file both opt-in and opt-out collective actions since 2008 through the Act Relating to Mediation and Procedure in Civil Disputes, 17 June 2005, no. 90. Any substantive law can be enforced under these procedures. Collective actions may be

³³ See Erik Werlauff, *Class actions in Denmark – from 2008*, Report Prepared for Oxford Conference on the Globalization of Class Actions, at pp. 1-2 (Dec. 12 – 14, 2007), available at <http://globalclassactions.stanford.edu>.

³⁴ See BEUC, *Contry Survey of Collective Redress Mechanisms: Where Does Collective Redress For Individual Damages Exist?*, Ref.: X/067/2010 – 16/09/10, p. 3 (July 2010), available at http://www.groupaction4consumers.eu/docs/Country%20survey_Traffic%20Lights.pdf.

brought on behalf of a class sharing identical or substantially similar facts and law. The court must approve the complaint as a class action. The court also determines whether the case should proceed as an opt-in class action or an opt-out class action. The courts allow a case to proceed as an opt-out class action if the amounts or interests are so small that a considerable majority of them would not be brought as individual actions.³⁵

In Norway, the primary intention in creating class actions was to improve access to justice for people who could not otherwise bring a claim:

The Ministry states that mass production and mass delivery of goods and services can lead to many small claims from several consumers against the same business, and that experience has shown that such claims are very rarely resolved, although they may have a strong foundation. Individual lawsuits are too costly, and the rules about joinder of parties and the options of a joint hearing have not been utilized for such small claims in practice. The consequence of this situation is that legislation set to protect consumers is not enforced. The Ministry emphasises the need for access to court also for small consumer claims, both to protect the claim of the individual litigant and to ensure compliance with legislation. The Ministry states that the option of class actions will lower the threshold to the courts. It is one of the motivating factors for introducing class actions to Norway to enable litigants with claims that they would otherwise not be able to bring to court, to have access to court. Furthermore, the risk of a class action will be an incitement for businesses to comply with the law, and will provide consumers as a group with negotiation leverage. Another advantage of class actions is that compliance can be ensured through civil lawsuits, and thereby reduce the need to pursue perpetrators through administrative means or criminal prosecution. It is financially favourable, both from a party and a society point of view that many like claims are determined in one verdict.³⁶

The Norwegian Ministry predicted that the class action device would be used across-the-board for various types of substantive claims: "In addition to consumer claims, the Ministry predicts that there may be scope for class actions for lawsuits concerning discrimination."³⁷

Norway's opt-out class actions are not viable, in practice; because of disincentives such as the representative plaintiff's responsibility to pay for the costs of the litigation including the attorney's fees to the Defendant under the loser pays principle. A private person is not likely

³⁵ See Act Relating to Mediation and Procedure in Civil Disputes, 17 June 2005 no. 90, § 35-7(1)(a).

³⁶ Camilla Bernt-Hamre, *Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts*, prepared for Oxford Conference on the Globalization of Class Actions, pp. 7-8 (Dec. 12 – 14, 2007), available at <http://globalclassactions.stanford.edu>.

³⁷ *Id.* at 9.

to be willing to serve as a representative plaintiff seeking 100 Euros for his or her particular claim if he or she might be liable to pay 20,000 Euros or more in attorney's fees to the Defendant. The Commission can learn from this model by ensuring that representative plaintiff's are not liable under the loser pays rule for the Defendant's costs and expenses. Norway's opt-in class action is also not viable because it requires each person who opts in to the opt-in class to contribute money for the costs. A person who lost 10 Euros to 100 Euros is not likely to be willing to contribute the same or greater amount to litigation.

(e) United Kingdom

The Courts of England and Wales provide for opt-in collective action through a Group Litigation Order. Since 2000 it has been possible in England and Wales to create Group Litigation Orders in relation to a series of claims with a common cause of action

- (a) "to provide access to justice where large numbers of people who have been affected by another's conduct but individual loss is so small that it makes an individual action economically unviable;
- (b) provide expeditious, effective and proportionate methods of resolving cases where individual damages are large enough to justify individual action but where the number of Claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure
- (c) achieve a balance between the normal rigor of Claimants and defendants to pursue and defend cases individually and the interests of a group of parties to litigate the action as a whole in an effective manner."

These cases can involve *personal injury claims* (arising from disasters, industrial diseases), medical investigation or treatment or the consequences of using a defective product, financial loss (mishandling investments, publicising misleading information or fraud on minority shareholders) or *damage to property* (landlords failure to repair or nuisance claims arising from a common cause).

It is also clear that claims can be brought against UK based parent companies of multinational companies arising from the actions (or inactions) of those companies subsidiaries in other jurisdictions which lack:

- appropriate funding;
- legal representation;
- suitable expert advice; and

- established court procedures for group litigation³⁸

The main problems with what otherwise can be a satisfactory mechanism for collective actions can be summarised as:

- (a) the management of these claims and
- (b) their cost

Because these group actions are opt in rather than opt out unless they relate to a close temporal event (e.g. a transport crash) it will often take time to define the Claimants participating in the action whilst from the point of first notification, the Defendant(s) lawyers are preparing the Defendant's position. Because of this – and their command of the evidence which will be the focus of the Trial, they are quickly able to define what they want for their client in the management of the case. The Claimant side, preoccupied with defining participation and in establishing funding on the basis of very general information about the case is at an immediate disadvantage. What therefore tends to happen is that the Defendant will propose to the Managing Judge a timetable for the claim that is designed to make the claim a competition of resources rather than a mechanism to establish the substantive issues in the case at a proportionate cost.

In England and Wales the relative scarcity of these actions allied to the concentration of the Defendant representation into relatively few firms, means that few Judges have the experience to be able to manage these actions in a way that avoids them becoming competitions of resources. In addition, the unhesitating use by Defendant lawyers of the Appeal Courts to determine procedural issues at whatever cost, makes responses to Orders which do not conform to the wishes of the Defendant lawyers in these cases.³⁹

The 'loser pays' rule is the other component of this competition of resources. Claimants need **either** to be legally aided (thought the Legal Services Commission in which case they are insulated against the effects of costs orders in favour of corporate Defendants **or** to be supported by Conditional Fee Agreements with 'after the event' insurance arrangements.

Because as yet the claims experience of insurers in these cases is limited, they are very wary of involvement in other than the most straightforward cases. Unfortunately, the recent

³⁸ Lubbe v Cape Plc (2000) 1 WLR 1543).

³⁹ O'Byrne v Sanofi Pasteur MSD Ltd (2006) 1 WL 1606, 2009 ECJ) being an example

Green Paper on Legal Aid does not envisage the continuation of funding for group actions because the track record of Claimants over the last twenty years has been poor.

In short therefore it can be seen that any EU wide mechanism for collective action must:

- (a) avoid the problems associated with creating the class within the action by adopting an 'opt out' rather than 'opt in' approach;
- (b) avoid establishing procedures which enables the Court process to be driven into a competition of resources; it follows that such a Court must;
- (c) avoid the 'loser pays' rule whilst providing the means for Claimants readily to use the Court whilst funding appropriate representation and expertise to support them; and
- (d) needs to have a cadre of Judges whose job it is to try substantive issues in these cases so as to derive maximum proportionate benefit from them

11. *In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?*

One defining feature is a common set of procedural principles for instituting collective action that are available to all European citizens. Judges should be empowered to supervise the conduct and settlement of the collective actions and, accordingly, the responsible judges must be specially trained in how to manage collective actions.

The Commission should consider the creation of a European Court of Mass Tort Claims but, due to the expense, these functions could be placed under the jurisdiction of the General Court in Luxembourg to deal with jurisdiction over cross-border mass tort accidents with a sufficient number of victims. The opt-out mechanism should be available. A single court will enhance efficiency and produce a specialized bar, as in the Amsterdam Court of Appeals, with access to independent experts to evaluate any settlement. A specialized court would avoid the problem in England and Wales where there are not enough judges with adequate training to handle collective actions.

Regardless of the venue, anyone with standing should be able to initiate legal proceedings, e.g., a private lawyer with an injured client, a consumer association, or a national government. There should be a role for stakeholders: consumer associations, government authorities, and individual consumers should be able to review settlements and comment on

their terms, and the court should take these comments into consideration in deciding whether to approve the settlement.

The powerful disincentive of the 'loser pays' rule in the UK should be taken as an object lesson by European Legislators; there needs to be a means of funding established – we favour a mandatory charge on damages awarded to Claimants – to fund a Hong Kong style Legal Aid Scheme on top of either Legal Expenses and/or Conditional Fee arrangements between lawyers and the Claimants.

The system should allow for opt-out collective actions for monetary damages and injunctive relief. The opt-out mechanism is the best way to provide compensation to a large number of victims and, also, the best way to provide some deterrence to Defendants who otherwise break the law for profit. The opt-out provide a greater amount of compensation than the opt-in system. Previously, the Commission's impact study unfairly criticized the opt-out mechanism as problematic and foreign to European legal culture. However, these arguments have no basis.⁴⁰ Indeed, a handful of European countries already use the opt-out mechanism for collective redress including the Netherlands, Norway, Denmark, Spain, and (the oldest to use the opt out since 1995) Portugal.⁴¹

The procedural mechanism should be available for the enforcement of any substantive national or EU law including anti-discrimination laws, environmental laws, consumer protection laws, and others. Scholars have criticized the Commission's prior focus on collective redress for only consumer protection. For instance, one author wrote:

Recent political initiatives in a growing number of Member States are meant to improve collective redress beyond mere injunctions. The idea is to set up representative actions and groups actions – the soft version of the much debated US class actions. However, all of these activities are focusing on consumer law, in the sense of protecting the economic interests of consumers by way of private law, the law on financial services, unfair competition law and marketing practices law. The existing statutory provisions or those under review deliberately exclude environmental protection matters from their scope of application.⁴²

⁴⁰ See Robert Gaudet, *Turning a Blind Eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience*, EUROPEAN COMPETITION L. REV., Vol. 30, Issue 3, pp. 107-117 (2009).

⁴¹ See Rachael Mulheron, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED, Research Report for the Civil Justice Council, at pp. viii, 159 (2008), available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf.

⁴² Hans-Wolfgang Micklitz, *Collective Action of Non-governmental Organisations in European Consumer and Environmental Law*, in Richard Macrory, ed., REFLECTIONS ON 30 YEARS OF EU ENVIRONMENTAL LAW, Europa Law Publishing, Groningen, 2006, at pp. 458-459.

We agree that collective redress should not be restricted in subject matter but should be used to enforce various laws including environmental laws. This is particularly true since many mass torts involve environmental disasters.

12. *How can effective redress be obtained, while avoiding lengthy and costly litigation?*

A system should be organized to function in an efficient manner, while providing both parties with a fair trial and access to justice. Parties should be encouraged to settle meritorious collective actions, and courts should review the settlements for fairness. At the start of the collective action, a court can make an early determination as to whether the lawsuit should proceed on behalf of an entire group of victims or only on behalf of the single representative plaintiff.

It should also be empowered to determine whether compulsory ADR should be a component part of the process in any individual action.

13. *How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?*

Advertising on the internet and in newspapers should play an important role. This should be done as soon as a EU collective action is recognized or certified by the central Court or institution and through information held by the Defendant. If the Defendant is a service provider that maintains records with contact information, then that same information may be used to notify members of the collective action by any reasonable means including email, regular mail, or other methods.

14. *How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?*

A lead counsel, in each country involved, should be appointed. If a single court is created to hear cross-border harms, or if these functions are situated in the General Court, then a single collective action can represent the interests of all parties across the EU. Even if the collective action is filed in a single Member State or in different Member States, a single action can represent victims across the EU. Existing principles such as *lis pendens* can prevent a

multiplicity of actions from proceeding at the same time in different courts with different results.

The experience in the UK is that any group of Claimants needs to have one firm leading representation; in a sufficiently complex (either as to numbers or issues) case that lead firm may be implementing the views of a wider group of lawyers. The critical concern is that the mechanism of representation allows a clear decision making process on behalf of those Claimants. Large committees of lawyers running Group Actions add to cost by taking time to reach consensus on procedural and strategic issues. Representation needs to be by as few firms of lawyers as possible.

15. *Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?*

This judicial mechanism can create entrances to ADR in situations of multiple claims. An active role of the judiciary will challenge the parties involved to look at the possibilities of ADR.

16. *Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?*

The problem is that many forms of ADR do not work properly unless both parties fully agree to participate. However, we agree that ordering ADR needs to be part of the judicial stock of remedies.

17. *How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?*

There should be some freedom for the parties involved to settle their own disputes. However, the courts may also exercise some control, as they do in some Member States with collective actions, to ensure that absent class members (i.e., victims in the group whose claims are championed by a representative plaintiff) are treated fairly in any settlement. In the United Kingdom, claims involving children and those under a disability cannot be compromised without judicial approval of proposed awards. We regard approval of such claims as essential whilst recognising that claims on behalf of adults with capacity would in normal circumstances, not need such oversight.

18. *Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?*

No.

19. *Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?*

No.

20. *How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?*

Abusive litigation, on both sides, should be avoided. Safeguards can be found in the judiciary control of the procedure, both in the acknowledgment or certification of collective actions and the quality of the process. In other words, the judge must perform an important role, as in ordinary litigation, in applying the law to ensure that frivolous claims are dispatched while allowing meritorious claims to proceed as collective actions. No special rules are needed within the law in this regard. However, it may be useful to give specialised training to judges handling cases of this nature. In the Netherlands, the opt out class settlements are handled solely by the Amsterdam Court of Appeals so that those judges can gain specialized training and experience in handling those types of cases. We recommend the same kind of training. If the Commission were to established an EU-level court for collective actions, as we recommend, or otherwise give jurisdiction to the General Court over cross-border collective actions, then the General Court will naturally develop the necessary expertise to handle collective actions.

We advocate a specific cadre of Judges be applied to these claims with a specifically defined role in defining the substantive elements in any claim and trying those elements in the shortest practicable time at the most appropriately proportionate cost.

To an extent, this question wrongly assumes that “abusive litigation” is somehow more likely to result from collective actions than from ordinary litigation. This is incorrect. Collective actions do not lead to “abusive litigation” because they must satisfy all the same standards as ordinary litigation. Prof. Deborah Hensler, an empirical legal researcher comments that:

Policy-makers worry that increasing financial incentives to bring representative lawsuits and reducing the risk of adverse costs will fuel “frivolous litigation.” But despite anecdotes about “US style class actions”, there is little evidence from the US that a large fraction of certified class actions are frivolous; indeed, recent evidence from Rand regarding consumer class actions against insurance companies suggests that the judiciary effectively screens out non-meritorious suits.⁴³

As discussed more fully below in our response to Question 24, judges will play an important role (as Prof. Hensler suggests they do in the US) in “screen[ing] out non-meritorious suits.”

In the United States of America, class action settlements are supervised by courts to ensure they are fair to all of the class members. In addition, a very important role is played in the process by “objectors” who are members of the class that examine a settlement, on their own, and have the right to appear in court at a hearing to object to the terms of a settlement. Their right is established in Rule 23(h)(2) and Rule 23(e) of the United States Federal Rules of Civil Procedure. However, this right is often not exercised because objectors have little incentive to pay a lawyer to file professional objections that will not necessarily lead to a greater return for the objectors, especially if their claims are small.

The Commission could improve upon the American system by allowing members of a collective action to file objections to any settlement. Going further than the United States, the Commission should allow a limited number of objectors to recover some compensation for their time and energy in objecting to problematic aspects of any settlement. There may be other incentives to encourage objectors to step forward. Their participation will ensure better treatment, at settlement, for themselves and other members of the group.

21. *Should the “loser pays” principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?*

The “loser pays” principle exists in a variety of forms. The principle in its full form (where the loser pays the full costs of the other side) will be an obstacle for access to Justice for

⁴³ Deborah Hensler, *Using class actions to enforce consumer protection law*, in Geraint Howells et al., eds., *HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW*, Edward Elgar Publishing Limited, Cheltenham, p. 534 (2010).

consumers and victims, as it has been in Norwegian and UK collective actions. Exceptions to such a principle should be justified in a case which is lost by consumers or victims. Consumers and victims cannot bear the full risk of such a principle.

22. *Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).*

The right to bring a collective action should not be reserved for only certain entities. The Court should recognize or certify the entities involved as representative of the interests and interested parties involved. The Eurobarometer Survey of 2004 indicated that European citizens “trusted” their own barristers as much as consumer associations.⁴⁴ Therefore, citizens should not be restricted to seeking redress only through consumer associations. From a socio-cultural perspective, European citizens will be comfortable seeking redress through private lawyers.

23. *What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?*

The judge should have an active role, both in deciding relevant matters and in looking for solutions through ADR. The courts should decide, on a case-by-case basis, on the representative character of the entities involved.

24. *Which other safeguards should be incorporated in any possible European initiative on collective redress?*

This question wrongly presupposes that “safeguards” are needed to protect against some type of abuses or excesses that are not described. The debate over collective redress has often featured inaccurate statements and references to the U.S.A. legal system as one given to “abuses” and the “coercion” of Defendants. This is not only inaccurate, but it is also unsupported by any empirical or legal evidence. Collective actions will not require special safeguards because they will not pose special problems.

⁴⁴ See Directorate-General Health and Consumer Protection, *European Union Citizens and Access to Justice*, p. 40 (Oct. 2004), available at http://ec.europa.eu/consumers/redress/reports_studies/eurobarometer_11-04_en.pdf.

The experience of the USA indicates, based on empirical studies, that class actions settle at the same rate as individual litigation.⁴⁵ The settlement rate for certified class actions is similar to ordinary lawsuits: roughly 70 percent of cases in federal courts end in pretrial settlement.⁴⁶ In other words, class Defendants are no more likely to enter into settlements than individual litigation Defendants.

A 1996 study by the Federal Judicial Center found that class and nonclass settlement rates were comparable, that Defendants had a reasonably prompt chance to test the merits, and that there was no objective evidence that settlements were coerced.⁴⁷

The Federal Judicial Center found that, in one-third of the cases studied, class action Defendants obtained judgments on motions that terminated the class action “litigation without a settlement, coerced or otherwise.”⁴⁸ Over two-thirds of *certified* class actions (which were certified as classes by courts under Rule 23) examined in the study were the subject of rulings on Defendants’ Rule 12 motions to dismiss, Rule 56 motions for summary judgment, or both which led the researchers to conclude that these motions and the court’s case management “greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.”⁴⁹

Industry lobbyists frequently assert that collective actions will cause abuses and the creation of a litigation culture. They offer no empirical support for these assertions and they do not cite any sociological studies to support their contentions about the “legal culture”. Indeed, published studies and empirical research indicate that collective actions will pose no threat to the existing legal culture in Europe.

The International Academy of Comparative Law conducted its Seventeenth Congress and reported its findings. As part of the preparations for the Seventeenth Congress, a survey was mailed out to experts in various countries. The survey (much like the present survey which

⁴⁵ See Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357, 1401-1402 (Oct. 2003); Robert G. Bone and David S. Evans, *Class Certification and Substantive Merits*, 51 Duke L.J. 1251, 1285 n.129 (Feb. 2002).

⁴⁶ *Id.*

⁴⁷ Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at pp. 7-10, 32-34, 60-62, 89-90 (Fed. Judicial Ctr. 1996), <http://ftp.resource.org/courts.gov/fjc/rule23.pdf>; Thomas E. Willging and Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-650 (2006).

⁴⁸ Willging, *Empirical Study*, at p. 34.

⁴⁹ Willging, *Empirical Study*, at p. 61.

we are answering) posed 35 different questions on the topic of access to justice.⁵⁰ One of the questions asked was, “Is there a stigma in suing in your society? Is there a stigma in being sued?”⁵¹ The answers indicate that Europeans are comfortable with litigation and that they would not be afraid of collective redress:

A vast majority of reporters, including from France, Germany, Italy, Belgium, Greece, the Netherlands, India, and Italy clearly state or imply (US) that there is no social stigma whatsoever in suing or being sued in a civil action. The social stigma is registered in Japan as “there are some tokens suggesting evidence of such a stigma,” in China (mostly in the countryside) where someone suing or being sued is likely to be subject to “humiliation and dishonor” affecting the whole family, clan, and even in laws.⁵²

The empirical evidence, although limited, suggests that European culture is comfortable with litigation. By contrast, Japanese and Chinese culture is not. However, the Commission is not considering collective redress for Japan or China so their culture of stigma is not relevant but it does help to show a useful contrast between cultures. It is important that the Commission realizes that collective redress is consistent with European legal culture.

The International Academy of Comparative Law reported that problems in providing “access to justice” should be seen in the context of today’s mythology of a “litigation explosion”. The International Academy noted that the concept of “access to justice”, although popular in the literature of the 1970s, had been “substituted by a quite opposite and almost certainly ‘invented’ problem, that of ‘litigation explosion.’”

Accordingly, “the solution to the flood of litigation was closing the doors of adversary justice to everybody, in particular to weaker market actors and the development of a new ‘industry’, that of ADR governed by the ideology of harmony and social peace. ... To be sure, closing the doors of justice to the non-wealthy constituted a further empowerment of the strong economic actors and because there is no legal venue relatively open to the average individual, powerful market actors became free not to confront the social consequences of their actions.”⁵³

⁵⁰ See Ugo Mattei, *Access to Justice: A Renewed Global Issue?*, in Katharina Boele-Woelki & Sjef van Erp, eds., *GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW*, Eleven International Publishing, Utrecht, pp. 407-408 (2007).

⁵¹ *Id.* at p. 407.

⁵² *Id.* at 390.

⁵³ *Id.* at pp. 386-386.

With the Treaty of Lisbon and the Treaty of Amsterdam and the evolving case law of the European Court of Human Rights, “access to justice” is taking a greater priority for European citizens.

The United States of America is often held up as an example of supposed abuses fostered by class actions. For instance, in a press release issued by the Commission, on 4 February 2011, it was alleged that collective redress “needs to be clearly distinguished from so-called ‘class actions’ that are common under the US legal system” and that the “Commission firmly opposes introducing ‘class actions’ along the US model into the EU legal order, or creating incentives for abusive litigation.”⁵⁴ However, the US model is quite effective and should not be rejected out of hand. All of the elements of “collective redress” are the same as the elements of “class actions” and the two terms are synonymous.

The prejudices against USA class actions reflected in the Commission’s press release and other statements are not supported by evidence. Empirical studies show that class actions play a useful and important role in providing access to justice over small claims. The United States Supreme Court has held that:

“[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”⁵⁵

In the United States of America, class actions make it possible for private Claimants to bring lawsuits that would not otherwise be brought at all because of the impracticability of prosecuting claims for small damages. The United Supreme Court held:

“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually ... [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.”⁵⁶

The advisory committee notes to Federal Rules of Civil Procedure, Rule 23 – which is the rule governing class actions in federal courts – further clarifies that *but for* class actions, many lawsuits over small claims would never be filed due to practical

⁵⁴ See *Commission seeks opinions on the future for collective actions in Europe*, IP/11/131 (4 February 2011).

⁵⁵ *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (class actions overcome problem of small claims “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”).

⁵⁶ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). See also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (“A critical fact ... is that petitioner’s individual stake is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all”).

constraints: “The interests of individuals in conducting separate lawsuits ... may be theoretical rather than practical” because “the amounts at stake for individuals may be so small that separate suits would be impracticable.”

Because many victims are not aware of violations causing small damages, class actions in America “enable even the unaware to be joined in lawsuits instituted on their behalf.”⁵⁷ This is also true in Europe. The difference is that collective redress is widely available in America to address market distortions and require Defendants to disgorge some of their unlawful profits. There is little use or availability of collective redress in Europe. As a result, these violations enrich Defendants and diminish the wealth of ordinary citizens.

The United States Congress passed the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1) (2005) which modified, slightly, the laws on jurisdiction so that class actions seeking a certain amount of monetary damages and with minimal diversity among the parties may be transferred to federal court rather than being litigated in state court. The result is that more class actions are now heard in the federal courts where judges are appointed, rather than elected, and the parties expect better adjudication.⁵⁸ In the Act, the Congress affirmed that “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a Defendant that has allegedly caused harm.”⁵⁹ There is no serious debate in America over the utility of class actions. In America, class actions are widely accepted and appreciated despite the criticisms vocalized by some corporations and their lobbyists and lawyers.

A task force organized by the United States Court of Appeals for the Third Circuit, (a high-level court beneath only the United States Supreme Court), concluded that class actions have served an important role since at least 1966:

What was thought to be true in 1966 [when Rule 23 was revised] appears to be true today: namely, that the interests of justice are well served by class actions that vindicate rights that might otherwise go unprotected and that spare courts the burden of handling numerous lawsuits, some small and some not so small, arising from a

⁵⁷ Joshua D. Blank and Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 12 (2005).

⁵⁸ The Act also discouraged coupon settlements in which class members receive coupons to buy more products, at a discount, from the same defendant. Now, if there is a coupon settlement, the plaintiff's lawyers have to wait until all of the coupons are redeemed (or used by the class members) so the court can determine their value to the class and, then, base the award of attorney's fees (“no cure-no pay”) on the actual value of redeemed coupons.

⁵⁹ *Id.*

common set of facts. Over the last 35 years, the American legal system has handled a variety of class actions involving an enormous array of claims. In many situations, the class action has been successful in identifying public harms, discovering a substantial percentage of likely victims, making the party responsible for the harm rectify much of the damage caused, and distributing damages among the injured parties.⁶⁰

Contrary to the Commission's unfounded accusations of "abuse" in America, the evidence and official governmental conclusions in America are that class actions play an integral role in ensuring access to justice, deterrence, and distribution of damages.

Empirical research published by the impartial Federal Judicial Center in the United States of America confirms that many small claims would never be pursued in American courts, at all, if it were not for the Rule 23 class action procedure:

"Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied."⁶¹

Class actions in America "were designed not only to compensate victimized members of groups ... , but also to deter violation of the law, especially when small individual claims are involved."⁶²

Collective redress in Europe should serve the same dual functions. Public agencies do not have the experience or skills to distribute damages to victims in Europe, which indicates the necessity of private enforcement.

As for the so called frivolous litigation, Rule 11 of the United States Federal Rules of Civil Procedure requires any lawyer filing a lawsuit in an American federal court to attest that the lawsuit "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and that "the claims, defenses, and other legal contentions therein are warranted by existing law" and that there is 'evidentiary support' for the allegations."⁶³ Breaches of this rule may be enforced with fines and sanctions. In other words, it is against the federal rules for any party to file a frivolous

⁶⁰ Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (2002).

⁶¹ Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 7* (Fed. Judicial Ctr. 1996).
<http://ftp.resource.org/courts.gov/fjc/rule23.pdf>.

⁶² Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 4:36, at 314 (4th ed. 2002).

⁶³ See Fed. R. Civ. P., R. 11(b).

lawsuit in American court such safeguard would be a critical element of the proposed jurisdiction we outline in this paper.

Before an American federal trial court reaches the question of whether a case should be certified as a class action under Rule 23, Defendants typically file a motion to dismiss at an early stage before any discovery has been conducted. Rule 12 of the Federal Rules of Civil Procedure allows a Defendant to dismiss a complaint that fails to state a claim. Defendants have further opportunities to defeat an American class action by defeating the motion for class certification, filed under Rule 23, such that a lawsuit never becomes a class action. The parties generally conduct limited discovery on issues relevant to class certification before the trial court decides whether to certify a class or not. The discovery may be limited to, e.g., whether the representative plaintiff (or class representative) has claims that are typical of the claims of the class members.

When class certification is denied, the lawsuit may proceed as an individual action but is generally dismissed since most plaintiffs do not wish to prosecute an individual claim over small damages. If an action is certified as a class, then the trial court will appoint class counsel and a class representative, both of which have fiduciary duties to look after the best interests of the class. After class certification, the parties engage in discovery of evidence on the merits. After some discovery, either party may file a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A Rule 56 motion presents Defendants with an opportunity to win judgment in their favor on the basis of non-disputed facts.

In the event that the parties wish to settle a class action in the United States, the trial court must review the terms of the settlement to make sure they are fair, adequate, and reasonable. Class members must have an opportunity to object to the terms of the settlement. If the trial court overrules their objections and approves the settlement, then class members have the right to appeal the order approving the settlement and, thereby, ask the appeals court to reverse the settlement for being unfair, unreasonable, and inadequate, e.g., in the way funds are distributed or in the amount of relief offered to class members.

Empirical research demonstrates that Defendants in American class actions are not coerced into settlement at all. In fact, among 564 cases in which plaintiffs sought class certification in a data set of insurance class actions from 1992 to 2002, researchers found that only 14 percent (78 out of 564) of those cases were actually certified by the courts as class actions.⁶⁴ In total, 86 percent of the 564 cases were never even certified as classes. In addition, 37

⁶⁴ See Nicholas Pace et al., ANATOMY OF AN INSURANCE CLASS ACTION, at p. 2 (Rand Corp. 2007), available at http://www.rand.org/content/dam/rand/pubs/research_briefs/2007/RAND_RB9249.pdf.

percent of the attempted class actions were defeated by a pre-trial court decision in favor of the Defendants. Further, 27 percent of attempted class actions were voluntarily dismissed by the plaintiffs. The data indicate that the most likely result of filing a class action lawsuit in the United States is that it will be dismissed.

In another empirical study, researchers examined 231 American class actions filed in federal courts on the basis of diversity jurisdiction (i.e., cross-border parties). The researchers discovered that the most common result for these cases was voluntary dismissal by the plaintiffs. Specifically, plaintiffs dismissed their own class actions in 38 percent of the studied cases.⁶⁵ Parties proposed class settlements in only 9 percent of the cases. Twenty percent of the cases were terminated when courts ruled on a motion. The experience of the United States, therefore, indicates that Defendants are not coerced into settlements by class actions.

The United States has a federal system with two levels of government, much like the EU has both the EU level institutions and the Member States with their own national governments. The United States has a central government in Washington, D.C. with its own centralized federal court system with the United States Supreme Court at the top of the appeals hierarchy and lower level trial courts located in the various states. At the same time, each state has its own state government with its own state-wide court system for the application of state laws. Any given state will contain both state courts and federal courts with their different jurisdictions.

In addition to lawsuits in United States federal courts, class actions may also be pursued in American state courts under state laws providing for collective redress. A handful of states in the United States do not permit class actions in their state courts but, even in those states, parties may still prosecute class actions in federal courts residing within the same states, as long as there is jurisdiction for the federal court to hear the claim.

By analogy, one possible model for the EU is to establish a centralized court under the General Court jurisdiction to hear cross-border claims but, simultaneously, permit parties to litigate collective actions within the national courts of Member States. This will create a two-tier system, as in the United States, and it could be that if a given lawsuit in a national court takes on certain elements (e.g., victims file suit in the national courts of two or more Member States) then the centralized court would have the option to take jurisdiction, at the request of one or both of the parties.

⁶⁵ See Emery Lee and Thomas Willging, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS, at p. 2 (Fed. Judicial Ctr. 2008), available at <http://ftp.resource.org/courts.gov/fjc/cafa1108.pdf>.

Also, it should be noted that American class actions may be brought to enforce any substantive law. Rule 23 was reformed in the 1960s with the express purpose of making it easier for African-Americans and other minorities to seek redress for racial discrimination. The famous case, *Brown v. Board of Education*, which de-segregated public schools in America was decided in 1954. It was a class action on behalf of African-American pupils. More recently, discrimination claims still constitute about 10 percent of all federal class actions in the United States. Such cases often seek both injunctive relief and monetary damages. They are widely perceived as being socially useful since the victims of gender or racial discrimination, e.g., in the workplace, are not likely to bring individual claims due to the threat of workplace retaliation.

Rule 23(b)(3) opt-out class actions for monetary damages are not the only type of class action in the United States. The United States also features opt-in class actions under the Fair Labor Standards Act. The Federal Rules of Civil Procedure also provide for Rule 23(b)(2) class actions for injunctive relief from which class members cannot opt out because, if they did, then different individual lawsuits could render different judgments that might conflict with one another on the issue of declaratory or injunctive relief. There is also the possibility to certify a class action under Rule 23(b)(1) without any chance to opt out if the Defendant has a limited fund that would be incapable of satisfying multiple individual judgments.

25. *How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?*

Abusive litigation should be avoided on both sides. The subject of funding needs to be addressed appropriate in order to establish access to Justice for consumers and victims. A certification process of a collective action and the representative bodies involved can be envisioned. During this process funding can be decided.

A fund should be created for these purposes. The administrative costs for a collective action and its costs for legal representation, on the Claimants side, should be financed from this fund under supervision of the Court. A losing Defendant should make payments into this fund.

26. *Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?*

Yes, they would. They can be important to ensure access to justice for consumers and victims. Abuse of procedure should on both sides be avoided. Whether the procedure is abused or not is an entirely different matter which has to be decided on the merits of the case itself. As noted in the answer to question 25, above, various associations in the United States have been able to fund themselves through charitable donations as well as “no cure-no pay” attorney’s fees won from their successful cases. A similar arrangement would work in the EU if the laws were to provide incentive for European lawyers through the award of some conditional fee or success fee that accounts for the risk of loss and rewards lawyers who take the risk of pursuing a case, losing, and receiving no pay.

In the United States, this is done by awarding a “multiplier” on top of the “lodestar” of lawyers who succeed in enforcing particular statutes that provide for the payment of attorney’s fees to the plaintiff in the event of success. The “lodestar” is the number of hours worked multiplied by the relevant hourly or billable rate. The courts must ensure that only a fair and reasonable “prevailing market rate” is applied and they may not rubber stamp whatever rate is quoted by the plaintiff’s lawyers unless there is some proof that the hourly rate is in accordance with the “prevailing market rate.” On top of this “lodestar”, the courts in America typically award a “multiplier” such as 1.5 which effectively pays the lawyers one and a half times their normal rate as a reward for the risks they took in possibly not getting paid at all as well as for their success on behalf of their clients.

In Europe, success fees or conditional fees are already common in many Member States and they operate much like the American “lodestar” multiplied by a “multiplier.” Such a mechanism would be effective across the EU to give some modest incentive to lawyers who pursue collective redress. The payment of these fees would come from the Defendant who either loses the collective action or agrees to settle the claims. In sum, there would be no public funding and the mechanism would be entirely financed by private funding from culpable Defendants as well as risk taking lawyers who are willing to take the risk of not getting paid, at all, if they lose. Such a system also encourages plaintiffs to work more efficiently and to file only those cases that are the most meritorious.

27. *Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?*

In our answer to question 25 we have suggested that the costs of proceedings should be paid from a fund under the supervision of the Court.

28. *Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?*

It should be noted that Article 81 requires “effective access to justice” which means access to courts that is practical and not just possible in theory. This requirement is not currently being met.

29. *Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?*

No. Traditional rules on jurisdiction and recognition and enforcement of judgments will suffice for collective actions.

30. *Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?*

No. It may be that a given national court, or a specialized court in Luxembourg, will have to apply the different laws where the consumers-victims reside, which might involve the laws of different Member States, but such application would not be particularly difficult.

31. *Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?*

Online providers of goods and services should be subject to collective redress under the same rules and laws and procedures that apply to traditional producers and service providers. There is no reason to draw a distinction between online and traditional providers.

32. *Are there any other common principles which should be added by the EU?*

As noted earlier, effective access to justice via courts should be added to this consultation. This issue is particularly important for small and cross-border claims.

33. *Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?*

We are assuming that consumer protection includes patient protection in cases of defective pharmaceutical products. If not, it should be extended to that area. DG Justice and Home Affairs should also be involved since it has competence to pass measures under Article 81 TEU for civil reform to address cross-border harms. Those parts of the Commission which regulate environmental protection should also be involved. Article 81(1) TEU states:

“The Union shall develop judicial cooperation in civil matters having cross-border implications ... Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.”

Further, Article 81(2)(e) – (f) TEU states:

“the European Parliament and the Council acting in accordance with the ordinary legislative procedure, 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 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 ...”

As noted elsewhere in these comments, the collective redress systems in the Netherlands, Norway, Denmark, Spain, Sweden, England and Wales and the United States of America, and other nations are not limited by subject matter. Nor should an EU wide system be limited in subject matter.

34. *Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?*

It should be general in scope so that victims can use collective redress to enforce different substantive laws. It is necessary to make it generally applicable to all substantive laws in order to fulfil the principle of effective access to justice. Article 81(2)(e) TEU is not limited to any particular field of substantive law but guarantees “effective access to justice” for all cross-border claims. Having access to justice does not turn upon the type of claim that a party seeks to enforce. In addition, the internal market will benefit from allowing private parties to seek collective redress for employment discrimination, breach of contracts, torts,

competition law violations, and other violations. Each of these violations distorts the common market for goods, services, and employment.

There is also a market for legal services. Consumers of legal services, i.e., the victims, should not have to shop around Member States to find access to justice. It should be made available to them in every Member State or through a centralized court.