Towards a Coherent European Approach to Collective Redress

Consultation response – by Ariel Flavian

The response to the consultation paper questions is based on research for a PhD thesis which I am in the process of writing.

The answers refer to one or more questions listed in the consultation paper and are marked with the letter R at the beginning of each reply.

Introduction:

One cannot start relating to this consultation paper without referring to the story of the Tower of Babel. In the biblical story God caused the people building the tower to suddenly start speaking different languages so they would not understand each other. By doing so, God thwarted their plans to build a tower that would reach heaven. He also scattered the people of the city all over the face of the earth.

Now this is exactly the situation in Europe with regards to collective redress.

There are many different models of collective redress in the jurisdictions of the European Community Member States.

The terminology used for collective redress differs from one Member State to another; some Member States refer to "group actions", some refer to "representative actions," while others refer to "collective redress".

The mechanisms of the different models which operate in Europe are totally different. Some are based on an opt-in system, while others are based on the opt-out model.


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This lack of a unified and coherent system of collective redress reduces confidence and hinders free trade in the European single market and poses an obstacle to realising the European Union's potential as the largest market in the world.

The Staff Working Commission has taken on the important job of reconciling these different models and making them use the same language in order to create one coherent system of "European Collective Redress".

It is hoped that this initiative will raise the standards of trade within the European Union and will stimulate trade between Member States.

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

**R 1.**

**The Added value of Collective redress in the enforcement of European Law:**

**1. Promoting trade within the Single Market:**

The European market is probably the largest market in the world, yet it lacks mechanisms for imposing individual rights conferred by the European agreements.

Collective redress is the appropriate way to empower individuals to combat abuse from large and powerful companies. The bundling of claims creates equality between the actors in the markets and is perhaps the only way to bring together into one court proceeding a large number of small claims that involve many individuals.
In order to promote cross border transactions within the European market, individual consumers need some form of assurance that if things go wrong they have effective mechanisms to seek redress.\(^2\)

Consumer disputes require tailored mechanisms that do not impose costs and delays disproportionate to the value at stake.\(^3\)

A market with no system of collective redress is certainly less efficient and is not safe enough for consumers. Therefore, it seems that without introducing a workable system of collective redress, consumer rights in small value actions will not be addressed.

Current mechanisms employed in most Member States are not effective at all.

The evaluation study\(^4\) showed that current mechanisms, thus far, have brought little benefit for European Consumers.

Therefore, the introduction of a coherent European collective redress mechanism will improve confidence in trade between Member States and encourage consumers to shop in other Member States. Otherwise why should consumers not purchase from the U.S or from other non-EU countries?

Harmonization will provide certainty for both consumers and businesses and consumers will not be tempted to buy in only those Member States that have the best monitoring mechanisms.

2. **Better Access to Justice in NEV Suits:**

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\(^2\) Communication from the Commission on “Widening consumer access to alternative dispute resolution” Commission of the European Communities Brussels, 04.04.2001.

\(^3\) OECD Recommendation on Consumer Dispute Resolution and Redress.

Prof. Andrea Giussani uses a metaphor to explain the necessity of class actions. She claims that a civil justice system which has no system of collective redress is like a city which has no bus transportation system. In such a system, individuals with sufficient funds may use taxi services but those who cannot afford a taxi have no transportation. Similarly class actions may provide access to justice for a large group of consumers who have suffered a loss.

In the U.K in the last decade Lord Justice Woolf in his “Access to Justice Report” (which proposed changes to the English civil justice system to improve access to justice) observed that group action procedures were required since they provide expeditious, effective and proportionate methods of resolving complex multi-party litigation.

Collective proceedings are suited to small claims involving a large group of people who have all suffered a minor loss and, therefore, would be unlikely to bring proceedings on their own.

These actions are sometimes called "NEV Suits" (this abbreviation means "Negative Expected Value suits"). The phrase describes actions where the expected value for the plaintiff in pursuing the action to judgment is less than the expected litigation costs.

Consequently, if representative proceedings were not allowed in these circumstances no action would be brought against the company that caused the damage.

The bringing together of all possible claims against the same plaintiff makes the action economically justifiable and worthwhile for both plaintiffs and lawyers.

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5 Enter the damage class action in European Law: Heading towards justice on a bus – Civil Justice Quarterly 2009, 28(1), 132-140


Therefore a European collective redress mechanism is essential in areas of law, such as consumer protection, competition, environment, securities and welfare where personal actions tend to have a low value and are normally regarded as "NEV" suits.

Access to justice is also improved in collective proceedings by creating equality between the parties. Since, without bundling the claims, the defendants in these cases could take advantage of their relatively more powerful position and greater resources than individual consumers.

3. The promotion of Public Interests:

It is in the public interest that a wrongdoer should be punished for his improper behaviour. Collective redress, in the form of damages, has a deterrent effect and may prevent improper behaviour.

Consequently, introducing a class action system in certain areas of law, such as consumer protection, will certainly promote the public interest by protecting individual citizens and consumers.

4. Damages for the general public:

One other very important advantage of the collective redress procedure is that in certain cases payment of damages for the public good may be imposed on the defendant where the personal loss is very small and it is difficult or impossible to ascertain the group of aggrieved persons.

Such damages were introduced in the "Yellow Cab" class action in the State of California. In this case a taxi company which operated in San Francisco charged its passengers with excessive and unlawful payments. The court decided that since it was

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8 Daar v. Yellow Cab Co. 67 CAL. 2D 695, 433 P. 2D 732, 63 Cal RPR 724 (1967).
unlikely that the persons who suffered the losses would come forward to claim their damages, damages should be imposed on the taxi company by ordering them to lower their tariffs for a certain period. In this way the future passengers would enjoy lower tariffs and the sanction would act as a deterrent for the taxi company.\(^9\)

5. **Cy Pres Redistributions:**

Cy pres distribution, which is associated with collective redress, permits fair distribution where class members cannot be ascertained or may be used to remove an illicit gain made by a wrongdoer.

In cases where the claimed damages are lower than the actual damage caused by the misfeasor then the cy pres distribution of the remainder may reach a just result.

6. **Saving Public Funds:**

Another advantage of the collective redress procedure is that it saves the funds of public bodies which are entrusted with the goal of investigating improper behaviour. In collective proceedings there is, in fact, "privatization" of enforcement actions against wrongdoers as the responsibility moves away from public bodies and criminal proceedings towards private individuals and civil remedies.

Class proceedings have the additional consequence of saving funds for the legal system which instead of dealing with many claims in different courts may decide a massive dispute in one court action.

7. **Coherency:**

\(^9\) See also recently in the U.K Consumer Association V JJB Sports PlC (Case number 1078/7/9/07)\(^9\) where a reduction in sport shirts was enforced.
Collective redress prevents multiplicity of claims and conflicting judgments. One other advantage is that the procedure creates a res judicata decision and binds all class members. Bundling all claims into one procedure also provides certainty for defendants and may assist them in deciding whether to settle a case.

**Injunctions v. Damages for Collective Redress:**

Injunctive collective redress exists to prevent an illegal action from happening.

Collective Redress for Damages becomes a possibility after the mischief has taken place.

In the event that the Commission will allow for private collective enforcement there is a marked difference in the two systems.

Collective proceedings for damages create an incentive for lawyers to represent the injured parties because the legal action relates to high amounts which the lawyer expects to obtain a portion in any successful action. In addition the plaintiff enjoys the economies of scale which means lower costs any individual action. Therefore it is the financial incentives which gears the representatives in class action for damages.

In order to make injunctive collective redress workable a system of funding needs to be introduced and financial resources must be allocated. In contrast, in collective actions for damages the procedure itself creates the financial incentive, provided that the Commission requires Member States to incorporate contingency fees and award a share of the income to the representatives and organisations. The need for incentives will be explored in my reply to the questions about funding.

**Q 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?

R2.

1. The goals of both public and private enforcement is reaching – "Optimal Deterrence"?

It is often argued that while public enforcement is concerned primarily with deterrence and punishment, private enforcement is concerned with compensation and justice for victims. However it is clear that payment of damages may also promote deterrence.

Civil actions for damages in tort law cannot prevent a wrong from happening as they only become a possible method of redress after the tort has been committed. Nevertheless, tort actions work as a kind of market mechanism that increase the expected costs of an offence by imposing economic sanctions on the wrongdoers.¹⁰

In this respect, tort actions may have a deterrent effect similar to that of criminal fines, where the fine is often more of a deterrent than the moral implications of a criminal sanction. According to this Utilitarian approach, society is less concerned with the rights of the victim and more concerned with obedience to the law.¹¹

From this perspective actions for damages are designed to provide the optimal deterrent for the benefit of the society and thus damages are only intended as a mechanism to achieve the goals of society.¹²

Optimal enforcement is achieved when the total costs of such harmful activities to society, including the costs of enforcement, are minimised.

¹⁰ Steven Shavell, Economic Analysis of Accident. Law 186-261 (1987)
¹¹ Prof. Alon klement - The ambi of collective actions in mass tort actions: Mishpatim 34 (2) 319.
¹² General Theory Regarding the Social Value of Class Actions as a Means for Law Enforcement, Guy Halteck see: http://portal.idc.ac.il/He/lawreview/volumes/volume03/Documents/Halteck.pdf.
The goal of imposing an optimal sanction could be achieved through collective redress proceedings where the costs of enforcement are lower due to economies of scale.

2. The supremacy of public enforcement:

There are different views as to whether private enforcement could be a substitute for public enforcement or if it could act as a suitable complement to public enforcement.

In Europe, the interaction between public consumer protection agencies and private consumer associations are not homogenous and depend on the decisions of each Member State.\textsuperscript{13}

In the U.K for instance central government involvement in consumer protection issues is divided between the Department of Trade and Industry (DTI) and the Office of Fair Trading (OFT).

The OFT takes the view that private enforcement is complementary to public enforcement as the latter is more suitable for detecting wrong actions and the former has a deterrent effect on businesses due to the magnitude of the possible damages.\textsuperscript{14}

Professor Christopher Hodges, who is a U.K expert on collective redress, has advocated a new approach\textsuperscript{15} preferring public enforcement to civil enforcement, mainly because class action proceedings are costly and dangerous to the economy.

The basis of the new approach is based on the Hampton Report\textsuperscript{16} on reducing enforcement burdens on businesses and the Macrory Report on penalties policy,\textsuperscript{17} both of

\textsuperscript{15} From Class Actions to Collective Redress: A revolution in Approach to Compensation, Civil Justice Quarterly 2009 page 41
\textsuperscript{16} P. Hampton, Reducing administrative burdens: effective inspection and enforcement (HM Treasury, 2005)
which are not directly connected to "collective redress", but which Professor Christopher Hodges considers a good starting point for his new and innovative approach.

The Macrory report encouraged settlement of infringements through restorative justice – a process where those most directly affected by a wrongdoing come together to determine what needs to be done to repair the harm and prevent a reoccurrence.

Professor Hodges considers public enforcement to be a better system than private collective redress because it involves lower costs (no intermediaries such as lawyers and class representatives) and quicker procedures (and no class action excesses and abuses). Therefore, he suggests that before introducing a new private collective redress system, the outcome of the public regulatory mechanism should be examined.

In the meantime this approach has been strengthened by the recent European Regulation on Consumer Protection Cooperation which allows named national authorities to request an authority in another Member State to act on an infringement, albeit that this enactment does not provide for consumer compensation.

Public enforcement has some clear advantages, apart from lowering costs.

These advantages include the special powers of discovery which are invested in the hands of public enforcers.

Public enforcers appear to be more objective and will look at the general good of enforcement whereas private enforcers may look at their own pocket.\(^{18}\)

Private enforcement has a smaller range of sanctions and the damages claimed generally cover the individual losses of the plaintiffs who brought the action. In contrast, public

\(^{17}\) R. Macrory, Regulatory Justice : making sanctions effective (HM Treasury, 2006).

\(^{18}\) The Relationship between Public Antitrust Enforcement and Private Actions for Damages Wouter P.J. Wils World Competition, Vol. 32, No. 1, March 2009
fines have the potential to be set at levels which cover the full damage inflicted generally and therefore will serve better as a deterrent to future wrongdoing.

In addition, settlements agreed between a plaintiff and defendant may only result in small sums that do not act as a deterrent.

Furthermore the U.S system, where private claimants have been said to act as a "private attorney general" has been heavily criticized, at least insofar as civil rights actions are concerned.  

Professor Coffee in his article criticised the idea of a private attorney general and noted that lawyers may have different incentives to those of their clients, which could result in either poor representation (where plaintiffs' lawyers sell out their clients) or excessive litigation (because the parties to the litigation do not bear the costs).

In addition, Professor Michael Selmi concluded from a survey conducted of high-profile employment class actions with large settlements, all of which were brought by private plaintiffs’ lawyers, that class actions produced only modest financial benefits for class members, despite the fact that the remedial focus of the cases was monetary relief.

Therefore he reached the conclusion that one of the few things that these cases accomplished was enriching the lawyers that were involved and in addition the lawyers had no substantial benefit in deterring future wrongdoing.

Public enforcement is probably best for society. However, in practice public authorities have generally, thus far, shown a lack of competence. It should be borne in mind that

20 A New Vision of Public Enforcement Michael Waterstone 92 Minn. L. Rev. 434 2007-2008
public bodies are working under budget constraints and thus may not be able to deal with all cases brought to their attention. Therefore, the way in which cases are selected for enforcement and the investment of time and effort in preparing cases may also be biased towards more prestigious cases, rather than focusing on market correction.

Thus it seems that public enforcement should be given preference over private enforcement, albeit that, due to its poor record of achievements to date, it should not be the sole enforcer.

My recommendation is that private actions for collective redress should be allowed only when there is no intervention by a public authority. Private claims for damages should be an additional and possibly a suitable complement to public enforcement.

3. How to Co-ordinate Public and Private Enforcement:

As indicated above, I would argue that private actions should only be used as a supplement to public enforcement.

It seems that the English approach, which distinguishes "follow on" actions from "stand-alone" actions in competition cases, should be adopted as the basis of the new collective redress model.

According to this system, private claims for damages can take two different forms. Firstly, they can be conducted in the aftermath of public enforcement, so called “follow-on” suits, or they can take place where no public action has been taken, referred to as “stand-alone” suits.

This mechanism makes it clear that public enforcement is superior to private enforcement as it avoids the risks of unmeritorious claims and extortion of defendants.

It should be made clear that follow on actions are not sufficient on their own and they must be supplemented with stand alone actions which will be used where the relevant public enforcer fails to take proceedings within the specified time limit. This approach does not shut the door completely to private actions.

In my opinion, the best solution would be to bring every action to the desk of the relevant public body and a private person could only bring a representative stand alone action if the public body decided within a reasonable period of 60 days not to commence group proceedings. The stand alone actions would be treated with caution and the representatives would have to comply with conditions of finance and the viability of each case on its merits. The application for a stand alone action would undergo a filtering process to allow the action to be certified.

With regards to public enforcement, it seems fair that a private individual or organisation that refers the matter to a public body should be remunerated with a share of any financial award in return for initiating the process that led to compensation for the group's members.

**Q 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?**

**Q. 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).**

**Q 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?

Q 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?

R3.
R22 (see sec. 1).
R 33, 34 (see sec. 5).

1. Who Should Act as a Representative in Collective Redress Cases:

Before examining whether to strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law, one must first address the question of representation.

Collective redress actions may be represented in court by private representatives, public representatives, or associations.

Most European Member States prefer organisational or public agents, rather than private representatives, to lead the group action.

**In Portugal:** standing in "popular actions" is granted to individuals (having personal interest in the claim), associations (even those who don’t have a direct interest in the claim, albeit that their memorandum and articles are related to the interests that they are pursuing in the popular action) and local authorities on behalf of their citizens.²⁵

**In the Netherlands**²⁶ **France**²⁷ and **in Spain:** only associations may initiate collective claims.²⁸ The associations may be individual victims (groups of consumers), and

²⁵ Article 2 paragraphs 1 & 2.
²⁶ The Dutch Civil Code (art. 3:305a-c CC) (IBurgerlijk Wetboek)
²⁷ Under the Consumer Code Article L. 421-1 *Action for collective interests of consumers* regarding actions under the Royer act introduced the "Action for collective interests of consumers and action en
consumer associations can also initiate the procedure to defend their members’ interests, as well as its own interests and the general interests of consumers.

**In Spain:** actions may be brought by consumer organisations or by groups of consumers, even if they set up an ad hoc association in order to bring an action.

**In Sweden and Denmark:** all three types of agencies (public, organisational and private) are allowed to bring an action.

**In Italy:** until recently representation in collective redress actions was only granted to public bodies and organizations. However, under a new law individuals are also allowed to bring collective redress actions.

Individual consumers were excluded under the former bill which was to come into force in 2009. However, the previous provision entitled ad hoc associations to bring actions, even small associations set up for the sole reason of representing a single case, which could be seen as granting representation to individual consumers.

The new Italian Act introduced a significant new provision which states that each member of the group, who is a consumer or an end user, may bring an action.

The performance of organisations depends on their resources and the powers granted to them. In the U.K for example the only organisation which was granted the power to bring representative actions is “Which?”. However, in most cases “Which?” preferred to refer the matter to the Office of Fair Trading rather than take action itself.

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représentation conjointe des consommateurs (joint actions) under article L. 422-1 of the French Consumer Code

28 According to Section 11 (1) LEC
29 Article 136 of the Consumer Code
30 Article 140 of the Consumer Code
32 Article 140 bis, paragraph 1.
2. **Types of organisations:**

The first category is an organisation based on membership, such as the Football Association.

The second category is an organization with a broad purpose, such as a consumer organisation.

The third type of organisation is an ad hoc organisation which is formed in order to bring an action following a certain event.

Generally the articles of associations should be examined before certifying the standing of an organisation.

Some jurisdictions require additional elements, for example, a minimum number of members\(^{33}\) or length of operation.\(^{34}\) In addition, some jurisdictions require that an association is not for profit\(^{35}\) and in some jurisdictions ad hoc groups formed specifically to bring an action can also be claimants.\(^{36}\)

3. **The Preferred Agency**

Professor Rachel Mulheron uses the phrase "ideological claimant" when referring to "a body that has a special expertise or background that enables it to be an appropriate and adequate class representative."\(^{37}\)

\(^{33}\) E.g. Denmark.
\(^{34}\) E.g. Denmark.
\(^{35}\) E.g. Portugal.
\(^{36}\) E.g. Netherlands.
However, relying on the results of a survey carried out by the European community, it seems that consumers prefer private collective redress mechanisms, followed next by independent organisations rather than public authorities.

"The views of European citizens about the role of consumer support bodies have not changed much over the last two years.

76% (+2) of European citizens would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing. People in new Member States (63%) feel less strongly about this issue.

64% (-2) of European citizens have confidence in independent consumer organisations to protect their rights as consumers. This view has the strongest support in the Netherlands (87%) and Denmark (82%)

Public authorities that can protect the rights of consumers are trusted by 54% (-2) of European citizens. The Nordic countries, where such institutions have existed the longest, have the most confidence in their public authorities, while citizens in the new Member States are the most dubious". 38

This research should lead to a switch in the mind of European legislators who emphasise public or organisational collective redress.

The National Consumer Council (NCC) expressed its concern that the effect of limiting representative actions to organisations would be that class actions would have little use in practice.

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The NCC also expressed its doubt that consumer organisations would be prepared to bear the financial risks and whether the procedure would be likely to exclude valid consumer claims.\textsuperscript{39}

The NCC noted that most consumer organisations and trading standards departments have very limited budgets, which may make them reluctant to take on such cases.

There is also some criticism that the use of associations as plaintiffs will raise the costs of such actions. Hans-Bernd Schaefer writes that, "In case of legal actions taken by associations, the agency chain is lengthened and consequently there is room not only for the pursuit of self-interests by the lawyers, but also of the association and its personnel. Additionally, the association cannot only partially distance itself from the interests of the injured, but can also be influenced by other interests including those of the lawyer."\textsuperscript{40}

However, the author does qualify his opinion in cases where the right of associations to sue is limited to those associations that can prove they are controlled by the injured parties, since the members will be more likely to monitor the behaviour of the association and its lawyers. Likewise, it is also thought that associations that have been in existence for a long period of time will perform better.

Organisations also have to prove their independence and intention to pursue the wish of their members to obtain real damages.

The organisation has to prove that it has resources which are independent from government, because governmental control is less favoured by the public when dealing with damages rather than fines.

\textsuperscript{39}“Representative actions – The National Consumer Council response to the DTI 7/2006 Consultation.”
\url{http://www.scotconsumer.org.uk/publications/responses/resp06/re09rac1.pdf}

\textsuperscript{40}The bundling of similar interests in litigation: the incentives for class action and legal actions taken by associations- Hans-Bernd Schaefer, European Journal of Law & Economics 2000 page 183.
Furthermore, organisations that have a proven track record of bringing successful actions should be given preference over ad-hoc associations that are formed only to bring a specific action.

Another requirement that should be enshrined in an association's claims is that the association may get some agreed profit from the actions.

Therefore associations should be allowed to maintain capital in order to obtain excellent expert advice and consult properly before bringing the action.

Associations have better means of finance than private persons and therefore they may bear the risks of losing individual lawsuits.

4. How to Strengthen the Role of agencies:

In line with my previous recommendations it seems that public enforcement should be given preference in collective redress actions.

Therefore, relevant public bodies should be entrusted with the role of bringing collective redress actions in addition to their regular powers of investigation and prosecution. These public bodies should include the attorney general in each Member State.

With regards to follow on actions and stand alone actions, these may be brought by all forms of organisations provided that the associations are sufficiently competent to do so.

In order to assess competence, the courts should examine their articles of associations. The association must have in its objects the goal of defending injured people of the kind who are members of the represented group.

The number of members should not be less than a minimum number set by the Commission.
The organisation should have the required resources to deal with the action and with its financial possible outcomes therefore an organisation that was established in the aftermath of a certain event would not comply with this requirement.

Organisations in specific areas should be acknowledged by the community institutions and licenses should be given on a tender basis in every Member State.

I would suggest that the Commission requires each Member State to license competent organisations in accordance with specific criteria, for example, relative to the number of citizens, for example, for every 10 million citizens, or by division to sectors, for example, consumer organisations for goods or for internet sales and these organisations would be able to bring collective redress actions.

Such organisations should have a co-operation agenda in cross border cases, which would include publishing important information, such as:

1. New cases of collective redress;
2. Complaints about businesses;
3. Any abuse of collective redress cases;
4. Relevant judgments;
5. Compromise in collective redress cases;
6. Distribution of damages to class members; and
7. Licensed collective redress authorities and organizations;

(hereinafter referred to as "relevant information").

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41 The relevant information and co-operation may be monitored by community central organisations such as BEUC and ANEC.
The relevant information should appear in internet websites where all relevant information on collective redress cases should be published. Registration would be mandatory immediately on submission of every collective redress case in order to prevent multiplicity of actions and in order to allow centralized information in this respect.

5. In which Areas Should These Agencies Operate?

The areas where agencies should be empowered to bring collective redress actions are those that suffer from under-enforcement. These are the NEV suits which were mentioned above.

5.1 Consumer protection cases are generally regarded as NEV suits as the majority of consumer protection cases are for low sums and involve many consumers.

Consumers are weak when compared with business and surveys show that consumers are not willing to go to court for small damages and are reluctant to complain.”

A survey which analysed consumer behaviour in Canada showed that Canadian households generally preferred to handle their own minor problems without the assistance of any third parties. 70% of the households who were examined did not complain at all and of the 70% who did complain 28% had no success in their complaint. These figures lead to the conclusion that 50% of the complaints were not remedied at all.

Looking in greater depth at the issue of complaints it is clear that the low number of complaints concerned minor grievances up to 37 Dollars.


Only a small number of consumer disputes (up to 5%) reach the judicial decision stage, while the rest are settled prior to legal action.

The survey shows that the vast majority of minor consumer disputes are not pursued and, only on rare occasions, will such transactions reach the stage of legal proceedings. It seems that most consumer disputes are dealt with either by negotiation or internal complaints procedures.

Similarly a more recent Eurobarometer survey\(^44\) showed that:

Most Europeans do not take a further action if they are dissatisfied with the way their complaint was handled - The majority of European respondents (51\%) whose complaints were not dealt with in a satisfactory manner did not take any further action.

76\% (+2) of European citizens would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing. People in new Member States (63\%) feel less strongly about this issue.

……30\% of European consumers think that it is easy to resolve disputes with sellers/providers through the courts. Again, in this case, residents in the new Member States are much less inclined to trust the courts to resolve such disputes.\(^9\)

The European Community in its Green Paper on Consumer Collective Redress\(^45\) (November 2008) mentioned that the main barriers to consumers enforcing their rights are the cost of litigation and the complexity of procedures:

\(^44\) Special Eurobarometer 298 October 2008 – see page 54.  
\(^45\) http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf
These barriers are, in particular, high litigation costs and complex and lengthy procedures. One out of five European consumers will not go to court for less than EUR 1000. Half say they will not go to court for less than EUR 200.

According to this survey many consumers view the lack of proper legal procedure as the most important challenge in European cross border trade and when asked what problems they might encounter when shopping cross-border, consumers rated highest the difficulties of resolving problems (33%).

There also seems to be a lack of faith in current systems that discourage complaints and therefore prevent consumers from obtaining redress.

A study by the UK Office of Fair Trading on consumer detriment shows that only 62% of consumers harmed complain on average in the UK and this percentage drops to 54% for purchases less than GBP 10 Pounds.\textsuperscript{46}

5.2 **Employment** – This is also an area where there is inequality of power, namely between employees and their employers. It is also a matter of policy to protect the rights of workers and their free movement in the Community.

5.3 **Environment, Competition, Securities, Welfare** – are all areas where there is a strong policy argument favouring intervention and allowing collective redress in appropriate cases. (In all of these areas there are a large number of injured parties, normally small personal damage and inequality of power between the plaintiff and the defendant).

5.4 **Claims Against the State:**

\textsuperscript{46} http://www.oft.gov.uk/advice_and_resources/publications/reports/consumer-protection/
Another very interesting and very appropriate field for collective actions is the defense of citizens’ rights against their states.

Governments may be sued in judicial review proceeding, however, these actions only deal with the administrative side of governmental decisions and not with damages caused by governmental actions.

Public bodies which are controlled by the state are not likely to sue the government in collective proceedings. Thus it is crucial to allow representative organisations or private independent bodies to bring such actions against the state or local authorities.

States and local authorities operate in the economic markets, they monitor the economy and they have duties which they are expected to carry out for the good of their citizens. States and state bodies may act unlawfully or may levy unlawful minor payments from individuals.

Other possible grounds for bringing collective actions against States (apart from unlawful collections of different duties) are:

- **Negligence in supervising markets e.g. on collapse of banks.**

- **Negligence in taking actions against wrongdoers.**

- **Negligence in implementing community directives.**

- **Unlawful demand of taxes.**

- **Failure of a Member State to implement a European Community measure**
Such a failure may result in the liability of the State to compensate individuals who have suffered loss caused by such a failure to implement. This may be also a cause for collective redress.

The Member States of the EC are under an obligation to implement these directives in their domestic legal orders. The EC treaty envisages that Directives will become part of national law through national implementing measures.\(^47\)

The failure to implement a Commission measure may result in payment of damages\(^48\) and an individual may impose such a right if there is a sufficiently serious breach of a superior rule of law for the protection of the individual\(^49\) and provided that certain conditions are met.\(^50\)

Non-implementation of binding European Law may result in serious harm to many of the EC Member States’ citizens.

Therefore, to my mind, there is very strong argument for allowing private organisations representing civil rights to bring collective redress cases against a Member State that has failed to comply with an implementation duty which has had a sufficiently serious effect on the group of injured people.

It is important to include such claims against Member States in the scope of the suggested European collective redress mechanism to enable members of the European community to challenge their state in court.

If such collective proceedings are not permitted then it seems that individuals will not be able to challenge their state on an equal footing in court proceedings.

\(^{47}\) Article 226 (ex 169) – 228 (ex 171), Article 227 (ex Article 170)


\(^{50}\) Francovich and others V Italian State cases c-6 & c-9/90 [1991] ECR 1-5357
It should be noted that under Italian Law no. 15 of 4 March 2009 (known as the "Brunetta law") there are new principles and criteria for a class action to be brought against public/government entities and public services providers who harm interests that are deemed legally relevant to many users or consumers.

The Italian Legislative Decree of 20 December 2009 no. 1985, which laid down provisions for the implementation of class actions against public bodies, formally entered into force on 15 January 2010 although actual implementation is still subject to further legislation.\(^{51}\)

**Q 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?

**Q 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?

**Q 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?

**Q 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 level? What should these principles be? To which principle would you attach special significance?

**R 4+5+ 6 + 7:**

1. **Setting Principles is Not Enough:**

\(^{51}\) Class actions in Italy – Clifford Chance. 
http://www.cliffordchance.com/publicationviews/publications/2010/01/class_action_in_italy.html

see also: Twenty years of administrative reform in Italy Franco Bassanini Chairman, Cassa Depositi e Prestiti S.p.A. 
http://www.astrid-online.it/Riforma-deI/Studi-e-ri/Bassanini_Review_Economic_Conditions_Italy_3_09.pdf
It seems that the imposition of collective redress (particularly in damages actions) should not be left to broad principles that will leave the implementation to Member States.

At the moment there is great confusion in the matter of collective redress in Europe and even the terminology used is different from one Member State to another.

The term collective redress (used by the European Commission) may include all kinds of models (for example opt in models as well as opt out models of collective redress).

Several Member States use collective redress proceedings merely as a form of gathering claims (e.g. the Group Litigation Order (GLO) in England) other Member States introduced representative actions (either where the representative sues in its own capacity (e.g. France\(^{52}\)) or where the representative sues on behalf of its members\(^{53}\) (French joint actions). There are also models of test cases and for skimming of profits (e.g. Germany).

In addition to the general confusion, it seems that broad principles may contradict traditional jurisdictions in several Member States. For example, the French principle called “nul ne plaide par procureur” (noone shall plead by proxy), or the prohibition which exists in numerous Member States against contingency fees or payment to lawyers by non clients.

It should be borne in mind that the majority of Member States have already introduced a model of their own which in most cases is different from other models. If those Member States try to adapt their own mechanism to the broad principles that the Community drafts, there will not be a unified coherent procedure and consumers may feel more confident in purchasing goods in certain Member States rather than

\(^{52}\) Actions for collective interests of consumers under the Royer act 1973
\(^{53}\) French Action en représentation conjointe des consommateurs (joint action).
others. Some states’ models may be more workable than others and cross border trade within the community will not be as safe as it should be.

It seems to me that the European Community should provide for a binding procedure that includes a unified registry, opt-out mechanism and incentives for lawyers and representatives as elaborated in the table included in my response to questions 8, 9 and 10.

2. The European Regulation on collective redress

It seems that there must be a clear and effective regulation on collective redress to be adopted by all Member States.

The regulation must be sufficiently clear and should be directly applicable to individuals in all Member States, otherwise the Community will run the risk of inconsistent implementation.

3. The Injunction Directive 98/27/EC:

In 1998 the E.C Commission introduced Directive 98/27/EC empowering consumer organisations\(^{54}\) to apply to courts in fellow Member States for an injunction against an infringement of any of a number of consumer trading Directives, covering areas such as misleading advertising, unfair contract terms, consumer credit, package holidays and consumer guarantees, committed in the organisation’s own state by an entity in another Member State.

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Unfortunately, since then only two cross-border cases have been brought, the main reason being the financial risk for the entity which is bringing the case as well as the complexity of national injunctive proceedings.\(^5\)

Directive 98/27/EC lacks basic provisions on the implementation of collective redress, including an opt out mechanism, claims by individuals and a mechanism for settlements. The basic features of collective redress will be explained in the following questions.

Therefore it seems that directive Directive 98/27/EC could not be the basis of a collective redress model.

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**Q 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?

**Q 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 legal tradition and the legal orders of the 27 Member States?

**Q 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 particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

**Q 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?

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1. Are There any Good Current practices in Europe?

There are some very good ideas in Europe; however, there is no workable model to be implemented in full.

An examination of the relatively few claims that were brought in the different jurisdictions reveals that all models fall short of producing their goals in defending the weaker party.\(^56\)

<table>
<thead>
<tr>
<th>Country</th>
<th>No of Collective actions</th>
<th>Year of introduction of collective proceedings</th>
<th>Average per annum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Austria</td>
<td>15</td>
<td>2000</td>
<td>1-2</td>
</tr>
<tr>
<td>2 Bulgaria</td>
<td>5</td>
<td>2006</td>
<td>1-2</td>
</tr>
<tr>
<td>3 Denmark</td>
<td>1</td>
<td>2008</td>
<td>1</td>
</tr>
<tr>
<td>4 Finland</td>
<td>0</td>
<td>2007</td>
<td>0</td>
</tr>
<tr>
<td>5 France(^57)</td>
<td>196</td>
<td>1992</td>
<td>11</td>
</tr>
<tr>
<td>6 Germany</td>
<td>29</td>
<td>2004</td>
<td>6</td>
</tr>
<tr>
<td>7 Greece</td>
<td></td>
<td>2007</td>
<td></td>
</tr>
<tr>
<td>8 Italy</td>
<td></td>
<td>2009</td>
<td></td>
</tr>
<tr>
<td>9 Portugal</td>
<td>6</td>
<td>1995</td>
<td>Less than 1</td>
</tr>
<tr>
<td>10 Spain</td>
<td>49</td>
<td>2000</td>
<td>5</td>
</tr>
<tr>
<td>11 Sweden(^58)</td>
<td>8</td>
<td>2003</td>
<td>1</td>
</tr>
</tbody>
</table>


\(^{57}\) Most claims are organisational claims for injunctions.

\(^{58}\) Prof Lindblom claims that the Act did not meet its expectations.
This data may be compared with other models which are now operating in the world. For instance in Canada at least 287 proposed class proceedings were filed in Ontario between 1993 and April 2001. This means that in one of the three districts that incorporated the system of class actions about 35 class actions were filed each year according to that data.

In Israel during the period starting from the introduction of the mandatory class action in March 2007 and until the end of December 2009 a total of 649 cases were reported (about 38 of them predate March 2007). Thus in the above period 611 new class action motions were submitted (and reported in the registry).

In other words the Israeli market which is based on a population of 7 million tends to submit almost 18 claims each month. This shows that the Israeli market is overloaded with class actions and hence its filtering system needs some improvements.

<table>
<thead>
<tr>
<th></th>
<th>Netherlands</th>
<th>3</th>
<th>Less than 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>U.K</td>
<td>14</td>
<td>1-2</td>
</tr>
</tbody>
</table>

The expectations were that about 10 actions would be brought every year and that the majority of the actions would be brought by organisations and by public sector claimants, such as the Consumer Ombudsman.

It was presumed that due to the financial risks none of the actions would be initiated by individual members of the groups.

The number of group actions was lower than expected.

Only twelve cases were brought in the first five years since the enactment.

One action was brought by the Consumer Ombudsman.

None of the actions were submitted by organisations.

Eleven cases were submitted by group members (though part of them was assisted by organisations).

The data is based on Professor Per Henrik Lindblom’s overview of the Swedish system.


W.A. Bogart, Jasminka Kalajdzic and Ian Matthews. (see there at page 15 and footnote 66 ).

http://www.stanford.edu/search/?q=class%20actions&cx=003265255082301896483%3Axq5n7qoyfh8&col=FORID%3A9&ie=UTF-8&sa=Search&as_sitesearch=www.law.stanford.edu#1027
Thus far I have argued that there is no single mechanism in Europe that could serve as the model for the proposed new European collective redress mechanism. However, there are certain common principles which are shared by different European jurisdictions.

2. The Proposed Features of an effective and workable Collective Redress Mechanism:

The suggested provisions are based on the existing provisions in some jurisdictions which I examined throughout my PhD research and are shown in the following table:

<table>
<thead>
<tr>
<th>Sec</th>
<th>provision</th>
<th>Details</th>
<th>examples</th>
</tr>
</thead>
</table>
| 1   | Aims of the Act                | 1. To enable better access to justice, especially to those who may otherwise face difficulties in applying for court proceedings.  
2. The enforcement of the law and discourage breaches of the relevant legislation.  
3. Remedies for breach of the relevant legislation.  
4. Efficient management of legal proceedings. | Israel⁶⁰      |
| 2   | Definitions                    | **Class Action**: the U.S phenomenon of opt-out collective redress, but may also be led by organisations or public claimants on behalf of a large group of | U.K The Government’s Response to the Civil Justice |
people who may remain passive until the fund of damages is divided; the class itself is defined even if the members are not identified. Therefore, in the European context this term may be divided into three categories: the opt-out private class action and the opt-out organisational or public class action

**Collective Action**: a general term for any civil litigation seeking to secure collective redress.

**Collective redress**: compensation, awarded to a number of persons who have suffered the same or similar wrong.

**Follow-on Action**: a civil action brought, following a conviction in court or a conviction in a disciplinary proceedings.

**Group action**: a group of personal actions which are grouped into one action using an opt-in mechanism.

**Group litigation order (GLO)**:

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62 Group Litigation Order is used in the U.K under **CPR Rule 19.11**
Representative action: generally used as synonym for collective action, most apt and commonly used to describe the situation where a representative body or person (also sometimes known as an ideological claimant) has the right to bring an action on behalf of a class or group of which it is not itself a member. The only current example is the U.K. follow-on representative action that can be brought under the Competition Act 1998.

The term can also apply to representative party actions where one member of a class can pursue an action on behalf of others with a common interest who are not before the court, as under CPR 19.6 in England and Wales.

Cy-pres Distribution: The distribution of the funds remaining after the class members have claimed their share.
| **Opt-in:** the requirement in a collective action that individual litigants actively elect to take part in the litigation as members of the represented group. An individual who does not opt-in does not benefit from the outcome of the collective action.  
**Opt-out:** The mechanism that enables some representatives to represent a whole group of members without having their actual authority. |
|---|---|
| **3** The scope of the Act\(^{63}\) (for example the Act relates to consumer protection law which is the most frequent collective redress) | The Act will define as widely as possible which enactments and transactions constitute consumer protection law or employment provisions, or environment, or securities etc. For example, with regards to consumer protection, the Act may provide that the scope  
| **63** There are several examples of wide scope of actions in Europe e.g. Portugal where the Popular action (Article 1 (2) of the 83/95 Law) has wide grounds including public health, the environment, quality of life, consumer rights, cultural heritage and the public domain.  
In France the scope includes Consumer law, Investors related matter, Environment and the Protection of health. In Spain the scope includes consumer matters, investors and compensation actions following criminal proceedings. In Italy the scope includes consumer law, anti discrimination cases and even some actions against the state. |
of the Act shall refer to the following directives and transactions:

**Directives:**


<table>
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<tr>
<th></th>
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<th>93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.</th>
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<tbody>
<tr>
<td>4.</td>
<td>Council directive 88/378 on the approximation of the laws of members states concerning the safety of toys</td>
<td></td>
</tr>
</tbody>
</table>

7. COUNCIL DIRECTIVE of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC).


Directive 87/102 for the approximation of the laws regulations and administrative provisions of the members states concerning consumer credit.


Transactions:
1. An action of a customer
against a dealer having contractual relations or even without any contract made between them.

2. An action against an insurance company or agent in relation to a contract of insurance or benefits having contractual relations or even without any contract made between them.

3. An action against a bank in relation to matters between banks and customers whether having made business between them or even without having any business.

4. An action relating to restrictive practices and fair trading.

| 4 | **Claims against the States** | Possible grounds for bringing collective actions against the | Europe\(^{64}\) and Italy |

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\(^{64}\) The idea of claims against the state is based on the principles of the Francovich case.
States are:

Unlawful collections of different duties

Negligence in supervising markets e.g. on collapse of banks.

Negligence in taking actions against wrongdoers.

Negligence in implementing community directives.

A failure to implement a binding Regulation or Directive may result in the liability of the state to compensate individuals who have suffered loss caused by such failure of implementation where the breach is sufficiently serious and relates to a superior rule of law for the protection of the individual.

| 5 | Potential Plaintiffs | Representative organisation, state bodies, representative who has a personal interest in the action | Israel, Sweden, Portugal |

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65 Where there are individual representatives then the Act also requires a personal cause of action.
<table>
<thead>
<tr>
<th></th>
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<th>Italy</th>
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<tbody>
<tr>
<td>6</td>
<td>Class counsel</td>
<td>The Court will check the experience, knowledge, resources and work done in the case.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>U.S Federal Rule 23 G</td>
</tr>
<tr>
<td>7</td>
<td>Preference to public enforcement</td>
<td>The claimant should serve a copy of the claim on the relevant ombudsman and the attorney general and a private action may only be introduced if they do not indicate that they are going to bring collective proceedings.</td>
</tr>
<tr>
<td>8</td>
<td>Replacement of class lawyer and/or the group's representative</td>
<td>If the court finds that the representative or the class counsel are not adequate but the claim seems to be meritorious it may order their replacement and appointment of a replacement</td>
</tr>
<tr>
<td>9</td>
<td>The mechanism opt-out or opt-in (in certain)</td>
<td>The default position should be applying the opt-out mechanism.</td>
</tr>
</tbody>
</table>

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66 Sec 8 of the new Israeli Class actions Act 2006  
67 Article 16 (3) of Law 83/95  
68 Article 14 of the 83/95 Law provides that every plaintiff may represent on his own initiative and without the need for a mandate or express authorization, all the other of the rights in question unless those members of the class with the same interest decide to opt-out.  
69 Article 15 sets the procedure for class members to opt out.  
Article 19 of the 83/95 law provides that the judgment in the action binds all the members of the class members except those members who opted out.  
69 The Norwegian "Dispute Act" sec. 35-4(2)(b) exemplifies another mechanism where the court has to decide in each case whether to proceed on an opt-in basis or on an opt-out basis. A class action can proceed on an opt-out basis only if the claims meet the following two criteria:
The opt-in mechanism should be applied only on the occurrence of the following circumstances:

1. Where there is a reasonable probability that many of the class members will submit claims for the same cause of action.
2. Where the amount of each action is substantial, including negligence claims.

| 10 | Prerequisites | Superiority of the collective procedure over other procedures, numerosity of the class members and common questions of fact or law. There are reasonable grounds to believe that the action will be decided in favour of the class. The class is represented adequately and in good faith. | Israel\(^{70}\) U.S\(^{71}\) Norway\(^{72}\) |
| 11 | The application for certifying the class action | In the certification procedure the court has to decide the following | Israel, U.S\(^{73}\) and U.K |

(a) The claims on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions.

(b) The claims are not deemed to raise issues that need to be heard individually. The Norwegian model is less preferable, in my opinion, since it lacks the certainty for representatives who will not be interested in leading an opt-in action which is not financially viable.

\(^{70}\) Sec 8 of the Israeli Act.

\(^{71}\) Federal Rule 23 (b) of the Act.

\(^{72}\) Sec 35(2) of the Dispute Act. (However the Norwegian model lacks reference to the question of merits).

\(^{73}\) U.S Federal Rule No 23 (c)
| 12 | Appeal on certification | Appeal on certification should only be permitted with leave of the court within a certain period. Subject to the general rule that an appeal on certification should be permitted only on the existence of extraordinary circumstances | Israeli case law |
| 13 | Compromise | Each compromise has to be approved by the court and examined by an expert to determine whether it benefits the class. Class members and the attorney general (public prosecution) may object to the suggested compromise. | Israel, Netherlands, CAFA U.S\(^{74}\), Israel Portugal |
| 14 | Voluntary Dismissal | A representative plaintiff or the | Israel\(^{75}\) and |

\(^{74}\) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.
<table>
<thead>
<tr>
<th></th>
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<th>group lawyer is not allowed to discontinue the action without the permission of the court</th>
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<tr>
<td></td>
<td></td>
<td>The representative wishing to cancel a claim must produce an affidavit to explain why he wishes to terminate the legal proceedings.</td>
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<tr>
<td></td>
<td></td>
<td>In the case of voluntary dismissal, the court is allowed to order dismissal of the case as requested or to proceed with the action by appointing a new representative plaintiff or a new class lawyer.</td>
</tr>
</tbody>
</table>

|   |   | The court shall exempt applications for class actions from court fees.  
The principle should remain that the losing party pays the other party's expenses, but for exceptional circumstances where the action raises important public issue. |
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<tbody>
<tr>
<td>15</td>
<td>Court Fees and costs</td>
<td>The court shall require the Surety.</td>
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<table>
<thead>
<tr>
<th></th>
<th></th>
<th>16 Surety</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>The court shall require the Surety.</td>
</tr>
</tbody>
</table>

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75 Sec 16 of the 2006 Class Action Act

76 In Portugal, according to article 20 the plaintiff in Popular Actions is exempted from prepayment of costs. If the action fails the judge will determine the costs which will be low probably between 10% - 50% of normal costs.
representative claimant to deposit a surety in order to cover the possible expenses of the defendant. If the class action is dismissed the representative will not be asked to pay more than the deposited fund.

| 17 | Exemption in follow on cases | There is a full exemption from the requirement to deposit a surety if the action follows the conviction of the defendant in criminal or disciplinary proceedings. |

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77 Section 254e (7) of the Danish Act.
78 In the U.K, protective cost orders may allow claimants in certain cases, to apply to the court for the costs of the action to be capped or for them to be indemnified against costs entirely. These orders are intended to be exceptional and to recognise that some types of litigation are in the public interest and should not be constrained by cost pressures on the claimants.
| 18 | Calculation of Damages | The courts may provide that damages should be based on an individual basis either on a stipulated sum or a sum subject to examination before apportionment or on a cumulative basis to the class as a whole. Where the court orders that each member be invited to prove his own damage, the court may provide criteria as to the division of the uncollected damages. If the court finds that distribution of damages to class members is not practical in the circumstances of the case then it may order payment of damages in favour of the class in general or in favour of the general public. | Israel 79 |
| 19 | Distribution of damages | The court may appoint a trustee in order to verify the distribution of funds. The court shall order the payments of costs for the distribution process. Each decision of such a trustee is subject to appeal to the court. | Israel |

79 Section 20 of the 2006 Act
| 20 | Incentives for the representative and the class lawyer using contingency fees. | Criteria for deciding the counsel and/or representative claimant share of the income: The benefit of the action to the class or to the general public, the complexity of the procedure, the way the action was managed, the damages that were approved compared to the damages Claimed. | Israel[^80] |

| 20 | Funding | Funding may be arranged by setting a class action fund where each successful claimant shall pay a share. Section 27 of the Israeli law provides that a special fund should be formed in order to finance class actions. |

[^80]: Under section 22 (C) the Israeli court may, in its final judgment, decide in special circumstances to award the plaintiff or the class lawyer a financial reward taking into account the following criteria:
1. The extent of work that the representative had to take upon himself and the risks which the representative had to take.
2. The benefits that the action brought with it.
3. The importance of the action to the public.

[^81]: Under French Law, a lawyer cannot engage in professional work solely on a "no win no fee" basis. Moreover, French lawyers are allowed to get payment only from their clients. Similar provisions exist in some other jurisdictions. In Spain the view of the Consejo General de la Abogacía Española, which is the Spanish bar, is that contingency fees may be used but an engagement on a "no win no fee" basis is forbidden. In Sweden the normal rule of loser pays expenses applies. "No win no fee" arrangements with lawyers are not allowed but the law allows for risk management agreements.
<table>
<thead>
<tr>
<th></th>
<th>The effect of the judgment</th>
<th>Binds all the class members, even those who did not join, apart from opt in cases where the judgment binds only those members who electively joined the action.</th>
<th>Spain&lt;sup&gt;82&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>Notice</td>
<td>Notice must be given of the certification and of suggested compromise and the judgment. Notice does not have to be personal to be regarded as effected</td>
<td>Israel U.S&lt;sup&gt;83&lt;/sup&gt; and Spain&lt;sup&gt;84&lt;/sup&gt;</td>
</tr>
<tr>
<td>23</td>
<td>Registry</td>
<td>The state registry of class actions should include information of every application filed, any decision in the action, any notice to the class members including voluntary dismissal and compromise judgments.</td>
<td>Israel U.K CJC recommendations draft rules no 19/25 Norway Canada – Ontario Netherlands&lt;sup&gt;85&lt;/sup&gt;</td>
</tr>
<tr>
<td>24</td>
<td>Competent Courts - State or European Court</td>
<td>New jurisdictional rules on class actions and removal from state courts to special European court for class action</td>
<td>U.S CAFA</td>
</tr>
<tr>
<td>25</td>
<td>Changing the rules of ethics</td>
<td>Setting new rules for advertising class action, changing the rules of ethics</td>
<td></td>
</tr>
</tbody>
</table>

<sup>82</sup> Art 221 and 519 LEC  
<sup>83</sup> Sec 23 c (2)  
<sup>84</sup> Section 15 of the LEC  
<sup>85</sup> Article 1017 CCP
solicitation and conflicts. Allowing contingency fees in class proceedings, subject to court approval.

3. The Israeli Model as a Case Study:

The main reasons for the Israeli model being a unique case are:

The way the model was built. In short it began with an English approach and was then influenced by the U.S system, before forming its own legal identity.

The number of claims is certainly an issue, since there has been a flood of claims following the introduction of the new legislation in Israel.

The Israeli model differs from the U.S, U.K and Canadian model in that class actions are enshrined in new legislation and do not form part of the civil rules of procedures.

The Israeli model is derived from the old and unused British provision for "representative actions". Later on the Israeli legislator moved towards a more American-influenced approach.

In its second stage the Israeli regime was changed and class actions were introduced in targeted areas such as consumer protection, environment, banking, securities and competition. However, this experiment failed as actions which had multiple causes of action and involved several areas of law (e.g. consumer and company law), were dismissed.

The current Israeli model was finally established in 2006 when a new and modern Class Action Act was enacted. The Israeli Act has wider scope than any similar class action
enactment. For example, the equivalent U.S. provision, Rule 23 of the Federal Rules of Civil Procedure, has eight sections whereas the Israeli law has 45 sections.

At the time that it was enacted, the Israeli law was considered the best "blend" of the various class action models. However, it took more than three years of use to reveal the weaknesses of the new Act.

The Israeli model covers almost all the necessary elements of class actions. It is an opt-out model, albeit that it caters for claims on an opt-in basis in specialist cases, such as large individual damages.

It deals with prerequisites fairly, has excellent solutions for compromises such as expert advice, it allows cy pres distribution and it recognises the rights of representatives to obtain a share of the profits, which is in essence the heart of private enforcement.

The new Israeli Act brought with it a flood of actions. More than 646 actions were brought between March 2007 and the end of December 2009.

After a few years of practical experience, certain deficiencies of the Israeli model are apparent and the main problem is that the new law made collective redress actions too accessible and brought an influx of claims.

However, as I have previously mentioned, by giving preference to public enforcement an overwhelming tide of claims could be averted. This idea is based on the British distinction between "stand alone" and "follow on" actions. In addition, it would be helpful if representatives had to establish their financial means (for a good example see the Danish requirement for surety of expenses).

It should also be borne in mind that the Israeli model, as it currently stands, is not suitable for European consumers because of essentially geographical reasons. Indeed, EU consumers are scattered into different Member States each of which has its own legal jurisdiction.
It seems reasonable when shaping the new European model to look at recent U.S trends, especially the Class Actions Fairness Act, which was aimed inter alia at combating the diversity of legal decisions between the US states.

The use of the U.S model does not require a sharp turn from the Israeli system for class actions, because the latter is heavily influenced by the U.S model.

Although there are many differences between the EU and Israel, which mean that the Israeli system cannot be directly transposed into the EU, the experience of the Israeli model is instructive for a variety of reasons. Firstly, it is up to date and secondly EU scholars and lawmakers can study its successes and failures, particularly as the Israeli system is deemed much more reasonable than the US model. In my opinion, the Israeli model is perhaps the best up to date opt-out model and although it is flawed, I have tried to combat those deficiencies in the new model proposed in the table above.

**Q 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?**

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

**R20 +R24**

**The safeguards which I advocate for are:**

Giving preference to public bodies and organisational groups as enforcers.

Requiring financial surety from the representative.

Imposing a certification process to filter unmeritorious claims, during which the judge would have to look at the prerequisites.

Requiring notice for all class members for all crucial stages of the trial.

Allowing judicial control over compromises, voluntary dismissal of the action. Supervision on compromises should include employment of expert evidence.
Keeping an online registry – including all crucial stages of the action (in court and in European-related organisations)

Supervision on damages collections.

The power to replace representatives.

The power to divide into subclasses.

Yet again I would like to stress that having safeguards is not enough. In order to have an effective model some good incentives should be incorporated. With no incentives the mechanism will not be effective.

**Q 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?**

**R21**

1. **The loser pays principle in act:**

It should be noted that European jurisdictions share common views in this area.

1.1 **The Normal rule:**

The normal rule should remain that the loser pays the reasonable expenses of the winning party.

This rule operates rigorously in countries like France and Italy.

**In Italy** as a general rule, the losing party should pay his counterpart the costs of proceedings, as stated in Section 91 of the Italian Civil Procedure Code. This provision deter potential plaintiff since the loser may have to bear the heavy cost of expenses and there are no incentives to the class representative and lawyers.⁸⁶

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⁸⁶THE GLOBALIZATION OF CLASS ACTIONS ITALIAN REPORT BY PROF. ELISABETTA SILVESTRI
**In France:** The common principle with regards to costs in France is that the loser takes the risk of having to pay a part or the totality of the opponent’s costs, according to the judge’s decision (Article 700 of the Code of Civil Procedure); this is called the “cost risk.”

2. **Leaving room for concessions:**

There are jurisdictions that allow some concessions with regards to the rigid rules of costs payment.

**In Portugal** According to Article 20 the plaintiff in Popular Actions is exempted from prepayment of costs. If the action fails the judge will determine the costs which will be low (probably between 10% - 50% of normal costs).

The amount of costs depends on the financial situation and the reasons for the dismissal of the action.

Article 21 of the Portuguese law provides that the judge in the case will decide on the legal costs, depending on the complexity and the amount in question.

With regards to Consumer Popular Actions, Article 18 of Law 24/96 provides that plaintiffs in these cases are exempted from costs and from pre-payment of stamp duty.

A different approach is taken in **Sweden,** albeit that the results of this approach do not provide any real encouragement for collective redress proceedings.

The general rule is that the losing party has to pay the winning party’s costs and attorney’s fees, except in small claims cases not exceeding €2,000.

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**87** Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters FRANCE by Véronique MAGNIER1(see at page 5).

Under the Group Proceedings Act (Section 8 Para. 5), the plaintiff must meet conditions for adequacy of representation to be accepted as a group representative. The requirements include having the “financial capacity” to prosecute a group action.

The rule was designed to protect group members and defendants, as well as the court to a certain extent. In order to prosecute an acceptable case, the plaintiff must be able to pay the ongoing costs of litigation in advance.\(^88\)

**In Spain** The basic principle is that the loser pays the expenses (with a limit of one-third of the amount of the claim payable) as fees for lawyers and solicitors, expert witnesses and certain public officials, which are included in the concept of “costas”\(^89\).

There is no doubt that the loser pays principle is an important safeguard as the representative has to elect very carefully whether to put forward a case because they may be liable to pay expenses to the other party.

However, the judge in each case may decide to exempt payment or even reward the losing party with expenses in cases where the action has brought public benefit. For example, where the activities of the plaintiffs (even those activities taken before the legal action was commenced) brought the violating behaviour to an end.

For Example, in Israel under **section 22 c of the 2006 Class Actions Act** the court may reverse a cost order and grant the losing party an award of its costs from the winning party after considering the following factors:

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\(^88\) The Globalization of Class Actions, Oxford Conference, December 12–14, 2007
National Report: Group Litigation in Sweden. Per Henrik Lindblom
Professor Emeritus of Civil and Criminal Procedure, Uppsala University, Faculty of Law.

\(^89\) GROUP LITIGATION IN SPAIN NATIONAL REPORT Pablo Gutiérrez de Cabiedes Hidalgo
1. The extent of work that the representative had to take upon himself and the risks which the representative had to take.
2. The benefits that the action brought with it.
3. The importance of the action to the public.

3. **The Advantages of the surety Requirement**

The Danish invented new rules relating to payment of costs. The main one is the requirement of depositing a surety.

Representatives and class members (in opt in proceedings) are required to provide security for costs.

In the event that the action fails then they are not required to pay legal costs over and above the amount specified under Section 254e(7) of the Act, namely, the security provided plus any sum owing to the class member as a result of the case.\(^90\)

In an opt-out action members of an opt-out collective redress action can only be ordered to pay the amount of money which they stood to recover had the proceedings been successful.\(^91\)

A similar approach is taken in the U.K in relation to protective cost orders which permit claimants in certain cases to apply to the court for the costs of an action to be capped or for them to be indemnified against costs entirely.

These orders are intended to be exceptional and to recognise that some types of litigation are in the public interest and should not be constrained by cost pressures on the claimants.\(^92\)

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\(^90\) Class actions in Denmark – from 2008 Prof. Erik Werlauff, dr.jur., Aalborg University

\(^91\) The Danish Consumer Ombudsman Henrik Øe Leuven Brainstorming event on collective redress–29 June 2007.

\(^92\) Representative Actions and Restorative Justice: A Report for the Department for Business
The requirement of surety has an advantage and a disadvantage.

The disadvantage is that the surety requirement may reduce the number of representatives that may bring just actions.

The advantage of this requirement is that it adds certainty to the procedure and the extent of expected costs is known to the representative from the outset.

4. Final summary on the loser pays principle:

High Court fees may deter plaintiffs from bringing class actions, but low court fees do not act as an incentive to bring class actions.

As seen above, the relatively small number of actions that have been brought in European Member States (even those which have a system of concession on costs) demonstrates that lowering costs has not provided a real incentive for the submission of class actions.

This conclusion is best exemplified by the Portuguese model which is an opt-out model with a system of lowering court fees. However, without real incentives the Portuguese system remains almost totally unused.

There is a suggestion to give the trial judge the discretion to cancel the principle of loser pays the expenses in class action cases. This recommendation aims to reduce the danger of plaintiffs losing the case and paying huge expenses to the winning party, which is normally a big company that employs very expensive lawyers.

In order to be effective, such a ruling should be dealt with in the preliminary stages of the case, prior to filing a defense.
A much more simple and useful provision is the Danish requirement of surety (similarly the U.K idea of protective cost orders which, if given a wider scope would have the same effect as the Danish provision), which may reduce the number of unmeritorious claims and may deter representatives from bringing unsound actions.

However, although this requirement addresses the fear of high costs, it does not operate as an incentive for the submission of collective redress actions.

**Q 23 What role should be given to the judge in collective redress proceedings?**  
**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 to a case-by-case assessment by the courts?**

The role of the judge in collective proceedings is much more complicated than in other regular two party actions.

The judge needs to look at the interests of the represented group and there are a few stages at which he can intervene and use his discretion.

**A. On certification:**

1. The judge has to decide the supremacy of the collective proceedings over and above any other proceedings.
2. The judge has to decide whether the case on its merits may be decided in favour of the class members.
3. The judge will have to decide if there is a group of members that may be represented.
4. The judge has to decide whether there are common questions of fact or law that are suitable to be tried together.
5. The judge has to decide whether the representatives (class counsel or group representatives) are acting in good faith and whether the counsel has the required
expertise. (In the model that I recommended above, the judge would have to be convinced that the relevant public authority had had an opportunity to represent the class).

6. In the event of multiple actions, the judge will have to decide which action should proceed and who will act as the representatives of the class. The judge may also order joinder of actions.

7. In the European context, the judge will also have to consider jurisdictional issues.

8. After deciding these questions affirmatively in favour of the class, the judge then has to define the causes of action and the remedies that will be pursued and give court orders in the managerial aspect of the case.

9. The judge will give orders with regards to division into subclasses.

10. The judge will give orders with regards to the mechanism to be used i.e. opt in or opt-out.

11. The judge will have to define the class and order that appropriate notice be given to class members. After notice is given, the judge will have to set the time limit for members to join in opt-in proceedings or the opt-out period in opt-out proceedings.

12. If the judge decides that collective redress should not proceed then a decision on costs should be given at that stage. It should be borne in mind that the judge may order low costs, or even costs in favour of the class, in cases where the action has brought public benefit, for example, where the violating act came to an end as a result of the action.

**B. On voluntary dismissal, Compromise:**

1. A decision to approve a voluntary proceeding or a compromise should be the subject of a rigorous procedure.

2. The representatives of both sides should provide affidavits confirming that there are no other benefits or payments except those which are mentioned in the agreement.

3. **In voluntary dismissal** the judge will have to decide if there is a good and proper cause of action and, if this is the case, then the judge will have to decide whether
other representatives should be appointed to take the case forward. Appointing new class counsel may be by way of an auction subject to experience and good practice.

4. **In compromise agreements** the court will decide if someone should check the suitability of the agreement and its benefit to the class and who that person should be. A compromise which is not suitable should not be approved.

5. In both cases the judge will have to order the publication and order notice to the class members and certain relevant public bodies e.g. the attorney general of the state and, in cross border cases, the appropriate Commissioner in the Community and relevant organisations, such as consumer groups.

6. The judge will conduct a hearing where any objection may be raised by any body or class members and an expert opinion should also be heard.

7. The judge may order a certain period for opting out or opting in according to the case.

8. In its final decision the court should refer to costs, payment to the representatives and distribution of damages following the judgment.

**C. Judgment:**

1. The court will have to decide who will be the members of the class that will benefit from the action.

2. The court may have the authority to decide in appropriate cases, where there are unidentifiable class members, that all or a share of the damages should be paid to the general public, for example, by way of price reduction.

3. The court may order that part of the damages will be paid to a certain fund that operates in the relevant field.

4. In its final decision the court should refer to costs and to the share that will be paid to the representative, bearing in mind the time spent, the complexity of the action, the contribution of the action to the general public or to the class members.

5. The court may appoint trustees to ensure the fair distribution of funds.

6. The court will have to decide how each member will have to prove his damage and how the damages should be distributed.
7. The court may give orders for the distribution of the uncollected funds (cy pres distribution).

8. The court will order publication and notice for class members to come forward and collect their damage.

9. The court will have to order a time limit for collection and distribution prior to distributing the remainder.

Q 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?

Q 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?

Q 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?

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

R 25 + 26 + 27 + 28

Funding collective redress Proceedings:

The required incentives to encourage class actions are high fees for representatives (lawyers and organisations) and lower costs. Another pillar is securing funding by third party finance, either a by a special fund for collective actions or by use of third party finance.

1. Lowering costs:

If the representative is expected to pay high court expenses than there is a reasonable chance that he might abandon the action.
This may contribute to a lack of enforcement, especially in NEV suits where there is a negative value of the actions.

In Europe the matter of lowering costs in order to encourage collective proceedings is still controversial and was discussed in my reply to question 21.

In general, I favour the Danish idea of a surety in order to reduce the risk that an unlimited amount of costs will be imposed on representatives.

2. Attorney's Fees in Class Proceedings

Lawyer's fees are the real engine to class actions and to private litigation. Fees to private lawyers are the incentives for any workable and effective model.

Fees may be based either on a percentage of the class recovery within a “no win-no fee” framework (either on contingency percentage of the outcome or on contingency payment of hourly fees which will not be paid if the action fails), or on a lodestar fee agreement, which is based on an hourly fee agreement with an uplift, which reflects the risk factor.

The advantage of the hourly fee is that it encourages the lawyer to invest efforts in the action. Otherwise the lawyer may be less likely to invest effort in order to maximize his gain.

However there is also criticism of the lodestar fee arrangement because it may create a perverse incentive for the lawyer to delay the legal process.93

In Europe most jurisdictions have not adopted this necessary measure.

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In Italy until quite recently there was a prohibition on lawyers’ contingency fees.

However, the statutory provision prohibiting contingency fees in Italy was abrogated by Law Decree of 4 July 2006, No 223.94

However, the Italian Lawyer’s Code of Conduct contains the principle that ‘fees have to be proportionate to the activity carried out.’

It seems likely that the benefit will relate to the lawyers’ effort (say, a multiple of usual fees) and not to a percentage of damages recovered i.e. a lodestar agreement.

Under French Law a lawyer cannot engage in professional work solely on a "no win no fee" basis. Moreover French lawyers are allowed to get payment only from their clients.95

Complementary fees (“success fees”), whereby fees become conditional on liability, are occasionally accepted, but this complement can only represent a small proportion of the total fees.

In Spain the Supreme Court (Civil section) has acknowledged the validity of contingency fee agreements ("pactum de quota litis") between lawyers and clients, although the scale of permissible agreements needs clarification. The view of the Consejo General de la Abogacía Española, which is the Spanish bar, is that contingency fees may be used, but an engagement solely on a "no win no fee" basis is forbidden. The result is that contingency fees may be used only as long as a minimum fee to cover the costs of the legal advice is agreed.96


95 Article 11.3 of the French Bar rules (regiment Interior National).

In **Sweden** "No win no fee" arrangements with lawyers are not allowed but the law allows for risk management agreements.

These agreements are based on an uplift of the hourly fee paid for the lawyer in case of success, but they are not based on paying a share of the action proceeds to the lawyer or the representative. The defendant is only bound to pay the customary fee and is not bound by the risk agreement. Group members are bound by risk agreements only if such agreement is approved by the court.

**In Portugal:** There are no provisions allowing payment of a share of the damages in the action to the lawyers or to the plaintiffs.

**The Problems with Lawyers Fees:**

It seems that private lawyers, whilst indeed seeking private gain, also serve the public good. Notwithstanding that lawyers’ gains are sometimes obtained at the price of members’ loss.

The problem of fee structure arises mainly due to collusive settlements that award class members mere coupons while providing attorneys with large monetary fees.\(^7\) There are even settlements known as "sweetheart deals," whereby the court is misled to believe that the benefit of the settlement to the class is higher than it is in reality.

Looking at the issue of attorney's fees, it seems that there is a conflict of interest between the class and the lawyer or class representative in most collective redress proceedings.

It is the class representative or the class lawyer who bears the costs of litigation, including payments for expert evidence, court expenses, photocopies and hours of work.

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These representatives can expect at the end of the day to obtain only a share of the outcome of a successful action. Therefore, the class representative and the litigator are interested in obtaining a compromise, even when it is not the optimal outcome for the group.

Professor Klement\textsuperscript{98} has stated the problem as follows:
Assuming that the expected litigation costs for obtaining a compromise are 10, whereas the expected costs of a full procedure are 100, and the expected fee is 10\% of either outcome, whether settlement or judgment. If the value of the action is estimated at 2000, then the representative’s expected profit for pursuing a ruling (10\% of 2000 minus 100 expenses) comes to a total of 100. If, however, the procedure ends in a lower compromise of 1100, then the representative’s profit is equal to the profit that would have been obtained by pursuing a judgment.

However, in the same case, the class itself could have earned 1800 on judgment but only 990 on the compromise, which is the outcome preferred by the class lawyer.

Hans-Bernd Schaefer\textsuperscript{99} argues that there is a direct link between a lawyer’s effort in the case and his readiness to settle the case.

If the lawyer works on the basis of a contingent fee, then there are reasonable expectations that the amount of work invested will not exceed the expected fee.\textsuperscript{100}

**Structuring Lawyers Fees:**

It is very difficult to create a coherent structure for lawyers’ fees.

\textsuperscript{98} Prof. Alon Klement - The Ambits of Collective Actions in Mass Tort Actions – Mishpatim 34 (2) 319 (in Hebrew).
\textsuperscript{99} The bundling of similar interests in litigation: the incentives for class action and legal actions taken by associations Supra no 1
In order to deal with this issue Macey and Miller\textsuperscript{101} suggest that the action should be sold in an auction either to a lawyer or to any person who will own the action. According to this suggestion the trial judge will conduct the auction and if the original lawyer who brought the proceedings is replaced they will be compensated. The auction system is more suitable in cases where a few actions are brought on the same cause.

The advantage of this system is that it reduces agency costs. The winning bidder will not look for collusive settlements, on the contrary, they are expected to prosecute the action to the very end and maximize class profits.

Another advantage is that there is no conflict of interest that can be solved in this way because the lawyer who won the right of action is acting solely in his own interest and will invest the effort which is also in the best interest of the client.

Furthermore, the winning bidder is not likely to prefer quick or unfavourable out of courts settlements because he would like to maximise his profits.

Some commentators offered an auction procedure to be followed in such cases.\textsuperscript{102}

However, it seems that the most important factors when appointing a new class lawyer are the class request and the expertise of the lawyer.

**Summary:**

Lawyer fees should be high enough to encourage lawyers to act as entrepreneurs.


\textsuperscript{102} The Bundling of Similar Interests in Litigation: the Incentives for Class Action and Legal Actions taken by Associations, Hans-Bernd Schaefer, European Journal of Law & Economics 2000 page: 184
The Israeli provision which provides that lawyer fees should be weighed against the lawyer’s contribution and success is correct and acts as an incentive for lawyers to take on proper cases as class lawyers.

On lawyer replacement an auction may be appropriate unless the class representative provides a suitable lawyer which will take further the idea of the representative plaintiff.

3. Other Means of Funding

Funding may take various forms\(^{103}\):

**Third party funding** may be possible in schemes offering “after the event” insurance and therefore it is very expensive and might be difficult to obtain from formal insurers.

Third party finance may also be obtained from organisations that prefer to fund litigation, rather than to institute proceedings in the name of the organisation.

As suggested in the CJC report in the U.K on future funding, this area should be subject to regulations and supervision.

**Funds:** Funding may also be raised from funds that are established especially to finance class actions.

Legal aid in Member States should be extended to class action funding or special legal aid schemes should be set to finance collective redress.

A good example for special collective Redress funding is the new system in Israel

According to Section 27 of the Israeli Law, a special fund should be formed in order to finance class actions.

Although the Act was enacted in 2006 the fund was formed in 2010 and published its criteria for funding class actions.

The Fund allows applications for class action finance from the outset to the different stages of the case.

The fund receives applications from organisations which have been in existence for at least 12 months prior to the application and that operate legally.

Individuals may also get finance from the fund provided that their personal fund shows the need for finance.

The personal applicant should not act for political causes and should not be bankrupt. He should also be clear of prior relevant criminal convictions.

The finance covers usually up to 50% of the expenses, but in special circumstances the finance may reach even 90% of the expenses. However, there is no finance to cover lawyer's fees.

The finance is limited to 80,000 NIS (approx 15,000 Euros) or 80% of the actual costs, whichever is the lower.

**The applicant should pay back to the fund any sums received on occurrence of the following:**

The claim was successful and the applicant received his expenses.

The applicant (or his lawyer) was replaced.

The applicants decided to voluntarily dismiss the action.
The applicant provided the fund with misleading information.

The fund should get some governmental support. However, it can also be funded by successful class actions, for example where class members have failed to collect their percentage of an award or by judges ordering that a percentage of damages should be paid to the fund in order to finance future claims.

Calls to set up such a fund were also raised in the U.K.\textsuperscript{104}

4. Should Representative Entities Enjoy Part of the Proceeds:

This answer must be answered affirmatively.

Representative entities bear the risk of losing the action and paying the costs and thus exhausting their finance on a wrongly chosen action and thus they may fail to finance justifiable actions.

Furthermore if those entities rely on public funds then they will lose their independence.

If the entity bears only costs then it is not expected to be enthusiastic about financing or representing as many necessary actions.

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

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

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

R 29 + R 30 + R 31

1. Regulation No 44/2001 on jurisdiction and recognition and enforcement of judgments:

It is extremely important to allow consumers from one Member State to pursue their rights against traders in another Member State.

The possibility of cross-border redress will certainly empower and encourage trade amongst Member States and is, therefore, in line with the Community's interests.

At the moment there is much confusion about how to pursue actions for cross border trade.

Duncan Fairgrieve and Geraint Howells refer in their recent article\(^{105}\) to Regulation No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 entered into force on 1 March 2002.\(^{106}\)

Under the Regulation, the general rule regarding recognition is laid down in Article 33(1) which provides that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required.

The Brussels Regulation provides for derogations from the general rule of recognition by setting out a number of situations in which a court of one contracting state must refuse to


\(^{106}\) It has substituted the Brussels Convention from 1968 which has the same subject matter and continues to apply vis-à-vis Denmark.
recognize a judgment given by a court in another contracting state, of which the first two, as outlined in Article 34 of the Regulation are:

(1) If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

(2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

The authors suggest that there should be mutual recognition of group action judgments, even in opt-out models in other Member States, unless it can be shown that such judgment contradicts public policy.

However it seems to me that the existence of these regulations will not have any affect on the use of collective redress proceedings within the Member States.

Fair Collective redress proceedings must leave group members with the opportunity to take part in the proceedings themselves and not only in the enforcement of the judgment.

Class members have to get notices and must have the opportunity to have their say in crucial developments in the proceedings, such as compromise or dismissal.

Furthermore, if the proceedings are different in each Member State then it is likely (looking at past experience in the U.S prior to CAFA which will be discussed later on) that most collective redress cases will be brought in the most favourable forum or a few members states will come to be regarded as "collective redress havens".
Therefore the Community has to allocate part of its efforts to looking for a new model for setting jurisdictional rules in collective redress proceedings that have cross border elements.

In the recent Green Paper on collective redress \(^{107}\) it was suggested, with regards to cross-border cases, that the Regulation on jurisdiction \(^{108}\) would be applicable to any action including an action brought to court by a public authority, if it is exercising private rights (e.g. an ombudsman suing for consumers). Representative actions would have to be brought to the trader's court or the court of the place of performance of the contract (Art. 5 (1)).

The Green Paper also suggests that the court would have to apply the national laws of the various consumers to contractual obligations (Art. 6 Rome I Regulation) in cases where consumers come from different Member States. \(^{109}\)

This would cause practical problems in cases concerning consumers from many different Member States. A solution would be to introduce an amendment to the rules imposing the law of the trader in collective redress cases.

Other options mentioned in the Green Paper are the application of the law of the market most affected or of the Member State where the representative entity is established.

In similar situations in the area of product liability (Art. 5 Rome II Regulation), \(^{110}\) a choice of law agreement after the damaging event occurred (Art. 14 (1a) Rome II Regulation) would help.


Regulation Brussels I sets out the basic principle that jurisdiction should be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality.

Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before a court.

This principle is subject to a few exceptions in certain areas, such as insurance, employment and contracts concluded by consumers.\textsuperscript{111}.

The question is whether the existing rules are suitable for collective proceedings. It seems that the developments in the U.S have shown that there must be a "supervising" court, such as the federal courts, in order to lend coherency to the proceedings and the judgments in collective redress actions which vary from one state to another.

\textbf{2. Preventing Incoherency between Member States by Setting New Jurisdictional Rules by implementing some of the CAFA ideas.}

With regards to the competence of Member States’ courts, due to the current incoherency in the views relating to collective redress there will be diversity of decisions and conflicting judgments amongst member states.[

\textsuperscript{111} There are also areas of exclusive jurisdiction mentioned in the Regulation:

Rights in rem in immovable property or tenancies of immovable property: the courts of the EU country in which the property is situated;

The validity of the constitution, the nullity or the dissolution of companies or other legal persons, or of the validity of the decisions of their organs: the courts of the EU country in which the legal person has its seat;

The validity of entries in public registers: the courts of the EU country in which the register is kept;

The registration or validity of patents, trade marks, designs or other similar rights: the courts of the EU country in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place;

The enforcement of judgments: the courts of the EU country in which the judgment has been or is to be enforced.
Thus cases should be tried in each Member State only with the supervision of the E.C.J. However, cases which concern complicated issues or large financial outcomes must be tried directly in a new section of the European court for first instance cross border collective redress.

In the U.S the fact that each state dealt in the past with class actions differently caused a lot of harm. There were courts that awarded higher damages than others. Against this background, the U.S adopted a new mechanism for coherency between Member States in the new Class Action Fairness Act ("CAFA").

In George Bush’s speech of February 18, 2005 he emphasised the bad practices that the state courts system may engender:

Lawyers who represent plaintiffs from multiple states can shop around for the state court where they expect to win the most money. …

In Madison County, Illinois juries have earned a reputation for awarding large verdicts. The number of class-actions filed in Madison County has gone from two in 1998 to 82 in 2004 -- even though the vast majority of the defendants named in those suits are not from Madison County. Trial lawyers have already filed 24 class-actions in Madison until February in 2005.

Before CAFA lawyers were able to drag defendants from all over the country into sympathetic local courts, even if those businesses have done nothing wrong. Many businesses decided it was cheaper to settle the lawsuits, rather than risk a massive jury award.

Therefore the new Act included provisions relating to jurisdiction.

For example, CAFA includes provisions that have the effect of widening the scope of federal courts’ jurisdiction to deal with class actions and with mass actions in general (over 100 plaintiffs).

Defendants obviously prefer to litigate their case in the federal courts.

It seems that CAFA may be very important as a potential model for the European Community unified Class Action suggested model.

**CAFA’ introduced new jurisdictional rules**\(^{113}\) – by creating jurisdiction for classes with more than 100 class members if:

- At least one class member is diverse from at least one defendant; and
- More than $5 million in total is in controversy, exclusive of interest and costs.

The idea of the Act is to direct all large sum cases to the federal Courts.

**CAFA also introduced New Removal Rules**\(^{114}\)

a. In diversity cases that fit within the jurisdictional requirements of CAFA, any defendant, including in-state defendants can remove;

b. Any defendant can ask to remove even if all defendants do not consent (thus there is no need to obtain the consent off all the defendants)

c. There is no one year limit on the timing of removal; and


\(^{114}\) These rules are in fact liberalization of the conventional rules.
d. District court decisions to remand are reviewable if review is sought within 7 days and must be decided within 60 days of acceptance (with a possible 10 day extension).\textsuperscript{115}

3. **Harmonisation of collective redress Mechanism in cross Border Cases:**

It seems that coherency may only be reached by harmonisation of collective redress mechanisms.

The mechanism is likely to be interpreted differently between the different Member States.

Therefore, in the case of cross border litigation the plaintiffs may use the most convenient venue.

In order to prevent diversity in cross border action the Commission should impose a system of supervision over first instance courts with a possible referral to the court of Justice to decide on points of law.