

## **XIII. Country report United Kingdom**

### **Document Control**

<i>Document</i>	<i>Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union</i>
<i>Prepared by</i>	<i>Prof. Geraint Howells</i>
<i>Interviews</i>	<i>Dr. Frank Alleweldt, Prof. Dr. Peter Rott, Rémi Béteille</i>
<i>Edited by</i>	<i>Dr. Frank Alleweldt, Dr. Senda Kara, Rémi Béteille</i>
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**1.1 Overview of collective redress mechanisms<sup>1</sup>**

**1.1.1 Collective redress mechanism 1: Representative Action**

**Summary description**

English law has long known of the representative action. These rules are now found in Part 19II of the Civil Procedure Rules. This procedure allows that where more than one person has the same interest a claim can be begun or continued by or against one or more persons who have the same interest as representatives of any other persons who have that interest. The representative can even represent parties who are not before the court. However, orders for or against non-parties can only be enforced with the leave of the court. Associations with no legal interest themselves cannot, however, act as representatives. Normal costs rules and remedies apply. Although there are indications that the interpretation of this procedure is being liberalised the requirement of a “same interest” has restricted the availability of this procedure in contract and tort cases and would not typically be used in consumer cases.

**Details**

**A. LEGAL BASIS**

Civil Procedure Rules Part 19 II

**B. COMPETENT AUTHORITY**

Ordinary courts

**C. WHO CAN INITIATE THE PROCEDURE – RULES OF STANDING**

The representative party must be someone with an interest in the case: so a trade association has been found not to have standing, *Chocosuisse Union des Fabricants Suisse de Chocolat v C. Ltd.*<sup>2</sup> The same principle would prevent consumer associations from using the procedure. However, one or more members of an unincorporated association have been allowed to sue on behalf of the association, *A. U. Ltd. v A. F. (Furniture) Ltd.*<sup>3</sup>

**D. TYPES OF DISPUTES**

The requirement of same interest has traditionally meant that the procedure cannot be used where there are claims for damages, the claims are based on separate contracts or there are separate defences. These limitations have meant that it has not been used

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<sup>1</sup> This is an update of a previous study commissioned by DG SANCO. See: Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings.*

<sup>2</sup> [1998] E.T.M.R. 205

<sup>3</sup> Times 21 September 1999

in consumer claims, but rather for example to clarify rights in relation to shares or property.

**E. MAIN PROCEDURAL RULES**

The normal Civil Procedure Rules apply. Usually representative actions bind all those represented even if they are not a party, but such orders can only be enforced by or against a person who is not a party with the permission of the court. Representatives can be appointed to represent the interests of classes within the claim or those that are unborn, cannot be found or are unascertained. There are powers to make judgments non-binding.

**F. REMEDIES THAT CAN BE OBTAINED**

The usual remedies can be obtained. In one case damages were recoverable as members allowed their watchdog professional body to recover the damages to meet the costs of future similar actions.<sup>4</sup>

**G. COSTS INVOLVED FOR THE PARTIES**

The representative party bears all the costs. The usual loser pays rule applies.

**H. AVERAGE DURATION OF THE PROCEDURE**

It is not known how long the average duration is, but as many cases are complicated one would imagine it was over a year. They are not normally used in the consumer context however.

**1.1.2 *Collective redress mechanism 2: Group Litigation Order***

**Summary description**

After years of innovating with test case procedures and using in an ad hoc fashion the representative order procedures (which is still available) the 1990 reforms to civil justice saw the UK introduce a Group Litigation Order (GLO). This introduces a flexible procedure for a register to be established where a number of claims give rise to issues under the GLO. It allows the designated judge to deal with the matters in common to the extent he or she deems this desirable. The rules are found in Civil Procedure Rules Part 19III. They are rather sparse, which at the same time is its strength (as it avoids technical satellite litigation and is flexible), but also its weakness as parties are unsure how particular judges will interpret and use the powers at their disposal.

**Details**

**A. LEGAL BASIS**

Civil Procedure Rules Part 19 III (and in relation to costs Part 48) and Practice Directions.

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<sup>4</sup> *E.M. I. Records v Riley* [1981]1 WLR 923

**B. COMPETENT AUTHORITY**

Once a GLO is made a management court is assigned. Although there is no requirement that this be the Central Registry of the High Court in London, this has usually been the case.

**C. WHO CAN INITIATE THE PROCEDURE – RULES OF STANDING**

A GLO can be made on the application of any actual or potential party or on the court's own initiative. The claims must give rise to common or related issues and there must be or be likely to be a number of issues giving rise to GLO issues.

**D. TYPES OF DISPUTES**

Although any claim can be subject to a GLO, in practice the vast majority of consumer claims have involved personal injury (typically pharmaceutical product liability claims) or claims relating to holidays.

**E. MAIN PROCEDURAL RULES**

The GLO must be understood within the general context of the Civil Procedure Rules which seek to resolve the dispute in a manner appropriate to the particular case. This is just another tool in the judge's hands. He or she can determine which aspects of the case are to be treated as group litigation issues and which are to be left as individual matters. Often the court will require a lead firm of solicitors to deal with the generic work. Case management will determine the ability of other parties to intervene.

**F. REMEDIES THAT CAN BE OBTAINED**

Full range of remedies are available, but they are not specific to group litigation.

**G. COSTS INVOLVED FOR THE PARTIES**

The court will order which costs are individual costs and which are common costs under the GLO. The party remains liable for its individual costs and severally for its portion of the common costs. The normal loser pays rules apply.

**H. AVERAGE DURATION OF THE PROCEDURE**

These cases are typically complex and, especially in the context of pharmaceutical litigation, can run for a number of years.

**1.1.3 *Collective redress mechanism 3: Competition Action*****Summary description**

This is a follow-on procedure. There needs first to have been a decision that a practice is anti-competitive by a regulator or a tribunal. Then a specified body can bring an action to recover losses suffered by consumers. The main rule is that damages should be paid to individual consumers, but if the consumers agree they can be paid to the specified body representing them. These claims are heard by the specialized Competition Appeal Tribunal.

**Details**

**A. LEGAL BASIS**

S. 47 B Competition Act 1998

**B. COMPETENT AUTHORITY**

Competition Appeal Tribunal (CAT). These are established under rules laid down by the Secretary of State.

**C. WHO CAN INITIATE THE PROCEDURE – RULES OF STANDING**

The procedure can be initiated by specified bodies that meet the following criteria laid down by the Secretary of State:

1. The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity;
2. The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interest of consumers generally or specific groups of consumers.
3. The body has the capability to take forward a claim on behalf of consumers.
4. The fact that a body has a trading arm will not disqualify it from bringing consumer group claims, provided that the trading arm does not control the body, and any profits of the trading body are only used to further the stated objectives of the body.

Affected consumers must have given the specified body permission to act on their behalf.

**D. TYPES OF DISPUTES**

This action must relate to specific infringements concerning agreements, decisions and concerted practices which have the object or effect of preventing, restricting or distorting competition, and conduct which amounts to the abuse of a dominant position. The OFT, the European Commission or the CAT must have ruled that an infringement has actually taken place. The claims must relate to the same infringement of competition law and relate to goods and services that were received by the claimant otherwise than in the course of a business. It is also possible for existing claims being taken by individual consumers to be taken over by a specified body and dealt with together.

There has only been one claim to-date with respect to price fixing of football shirts brought by Which?.

**E. MAIN PROCEDURAL RULES**

The procedure is an adversarial procedure culminating in an oral hearing. The rules are found in the Consumer Appeal Tribunal Rules 2003 S.I 2003/1372 as amended.

**F. REMEDIES THAT CAN BE OBTAINED**

Any damages awarded by the CAT will be ordered to be paid directly to the represented consumers individually. Where the CAT is satisfied that all the individuals and the specified body are in agreement, it may order the damages to be paid to the specified body.

**G. COSTS INVOLVED FOR THE PARTIES**

The applicant has to bear its own legal costs. The normal loser pays rule applies.

**H. AVERAGE DURATION OF THE PROCEDURE**

Not known. There has only been one case which settled in just under a year.

## 1.2 Overview of relevant literature

The literature review starts with an overview of current reform proposals. The next three sections are given over to the work of the three most prolific writers on this topic Hodges, Mildred and Mulheron. A more detailed overview of the relevant literature is presented in the Annex.

### □ Current reform debate

Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* report favoured introducing a representative action.

In *A Fair Deal For All* the Department of Trade and Industry (DTI) committed itself to introducing representative actions for consumers, although it noted only certain organisations may be allowed to bring such actions and the permission of the court may be required.

In *Representative Actions in Consumer Protection Legislation* the Department of Trade and Industry (DTI) built on Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* and its own consumer strategy *A Fair Deal For All*. Although still favouring in house complaints and ADR as the main means for solving disputes it recognises a role for representative actions, but to prevent inadvertently promoting a compensation culture it proposes such a procedure having certain features.

The Patent Office has issued a consultation on *Representative Actions for the Enforcement of Intellectual Property Rights*. This favours a representative action without the burden of a permission stage and without an approved list of representative actions.

Following on from the recommendations in *Improved Access to Justice – Funding Options & Proportionate Costs*, which incidentally noted the need for the special circumstances of group actions to be taken into account, the Civil Justice Council has issued a report *Improved Access to Justice – Funding Options & Proportionate Costs* in which it rejects the idea of a Contingent Legal Aid Fund (CLAF) (because the presence of CFAs will lead to adverse selection) but favours the development of a Supplementary Legal Aid Scheme (suggesting that its funding may have to come out of a levy of damages, but noting this will provide cost protection), regulated third party financing and for group actions the possibility of contingency fees.

The Civil Justice Council's 2006 Annual Report notes that it will produce a paper providing formal advice to the Lord Chancellor on the development of processes for multi party consumer redress. This will consider funding options, judicial certification and control, opt-in or opt-out, and the distribution of awards. There will be a particular focus on competition and product liability actions.

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#### □ **Hodges**

Chris Hodges is one of the leading commentators on class actions. He has a background as a defence solicitor in the field of product liability. His work *Multi-Party Actions* (Oxford, 2001) is divided into five parts; after an introduction, sections deal with managing the litigation; funding the litigation; multi-party actions in other jurisdictions (US, Canada and Australia) and a very informative case studies section where 17 pieces of litigation are analysed (often by lawyers involved in the cases).

Hodges has also produced a country report for a major Oxford-Stanford conference on Global Class Actions (Hodges, 2007). In this he describes the various systems for group litigation including those under study in this report. He provides several comments and insights. For example he comments that the GLO is not a representative form of litigation as it covers individual claims.

#### □ **Mildred**

Mark Mildred is a leading commentator on class actions in the product liability context having previously been a claimant lawyer. He writes the class action division of Miller's Product Liability and Safety Encyclopaedia which as the name suggests provides an encyclopaedic guide to the topic. Perhaps more accessible is his chapter on 'Group Actions' in Howells' *The Law of Product Liability*. His conclusions are interesting in that he feels that the English courts have gained a lot of experience in handling class action, but that management has been either by consent or the common sense of a judge. The introduction of the CPR was - he believes - a missed opportunity to establish a firm principled approach. Class actions are threatened by the public funding shortages and cost-shifting ('loser pays') rule. Mildred has also written on class action in the medical negligence context (Mildred, 1999).

#### □ **Mulheron**

Mulheron's work draws upon experience in the rest of the common law world to argue in favour of an opt-out class action. She has produced a book *The Class Action*. The focus of the book is on a comparison of class actions in US, Australia and Canada; however there is one chapter entitled "A Different Approach for England". She is critical of opt-in schemes in general and has some additional criticisms of the GLO procedure.

In Mulheron 2004a she uses the case of *Taylor v Nugent Care Society*<sup>5</sup> to demonstrate a class action is superior to a GLO. This case involved a claimant who had missed the deadline for joining the GLO and wished to proceed with an individual action. Mulheron notes the GLO is really just a "permissive joinder device" and that opt-in models such as this are the exception in the common law world. The problems demonstrated by *Taylor* could be avoided if the opt-out model were adopted.

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<sup>5</sup> [2004] EWCA Civ 51.

In Mulheron 2004b she uses the case of *Independiente Ltd v Music Trading On-line (HK) Ltd*<sup>6</sup> to show that the representative action in CPR r19.6 is developing so that the introduction of a class action may not be too dramatic from a UK perspective.

In her latest article, Mulheron, 2007, she again makes the case for Britain adopting an opt-out class action. She notes that the choice argument in favour of opt-in is often overstated; considers that cy-près schemes are not necessarily punitive and argues that an opt-out scheme need not be administratively cumbersome. She expresses support for the idea of an 'ideological representative' that has been included in three 2006 reports from the DTI on consumer matters, EC on competition cases and Patent Office on intellectual property cases.

Mulheron has recently published a research paper for the Civil Justice Council, which is likely to be highly influential in reform debates: *Reform of Collective Redress in England and Wales – A Perspective on Need*. She starts off by noting the limited use made of GLOs to-date and the relatively low opt-in rates and procedural problems such as the need to identify claimants, prepare individual pleadings, frontloading of costs, the test case versus generic issue approach, judicial attitudes to those who choose to stay outside the class, and in some cases the low recovery per class member. Also substantive issues such as limitations are raised. A range of 19 factors were identified as to why parties did not opt-in. Finally the numbers are "crunched" to demonstrate that opt-out regimes attract higher degrees of participation than opt-in regimes. The conclusion is that there is an unmet need for better redress for common grievances giving rise to monetary loss and damage to a class of claimants.

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<sup>6</sup> [2003] EHC 470 Ch

**1.3 Difficulties to obtain redress for mass claims**

This issue is subject of a complementary study<sup>7</sup> and results from the country studies are integrated therein.

**1.4 Collective actions filed so far**

The consumer-relevant collective actions on which data could be collected so far are presented in the table on the following page. In total 13 consumer relevant GLOs could be identified since the introduction of the mechanism. Please note that the data collection process is ongoing, as the only data source are solicitors, which have been separately contacted for each case to obtain information.

There has only been one action under the Competition regime, concerning football shirts, which has been settled.

For more details on specific cases, please refer to part III of this study.

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<sup>7</sup> CPEC 2008, Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Final Report (study prepared for DG SANCO).

**Table 1: Overview of cases collected – mechanism 1: Group Litigation Order**

Case number*	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
6	JMC Holidays	Whether the Defendant is liable to the Claimants, under the Package Travel, Package Holiday and Package Tour Regulations 1992 and/or otherwise, in respect of personal injury, loss and damage suffered in the course of holidays during the periods and at the Hotels set out in Schedule 12 to the Order, and if so (b) what is a proper measure of damages for such injury, loss and damage.	2000		No information available
7	JMC Holidays / Club Aguamar	(a) that the Claimants contracted with the Defendants to purchase package holidays at the Club Aguamar Hotel and stayed at the Club Aguamar Hotel between the dates set out in the schedule to the order, and (b) that the Claimants suffered gastric or other illness of various durations, and/or personal injury, and/or distress, inconvenience, loss and damage as a result of improper performance of the provision of services under the holiday contract, in respect of which the Claimants hold the Defendant liable (i) under the Package Travel, Package Holidays and Package Tours Regulations 1992, and/or (ii) by reason of breaches of the said contracts of various dates for the provision of holidays, made in writing, and within the jurisdiction of this Court, and/or (iii) by reason of the Defendant's negligence during the said period, and/or (iv) by reason of the Defendant's misrepresentations made on various dates and inducing the Claimants to enter the said contracts for the provision of holidays.	2001		No information available

Case number*	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
8	McDonalds Hot Drinks	(a) whether the Defendant was negligent in dispensing and serving hot drinks at the temperature at which in fact they did in these cases, (b) whether it was necessary for the Defendant in order to properly discharge any duty of care owed towards the Claimants, to dispense and serve their hot drinks at some lower temperature than in fact they did, and, if so, at what maximum temperature, (c) whether the cups used by the Defendant were of such unsound and /or inadequate construction as to render the Defendant's use of them for the service of hot drinks to their customers, negligent, (d) whether the lids used by the Defendant for such purposes were of such poor fit or otherwise so inappropriate as to render the Defendant's use of them for the service of hot drinks to their customers, negligent, (e) whether there was a duty upon the Defendant to warn their customers as to the risk of scalding from hot drinks, (f) if there was such a duty, whether the Defendant was in breach of it, (g) as regards the hot drinks which they produced for sale to the customers, whether the Defendant was in breach of the Consumer Protection Act 1987 because those hot drinks were "defective".	2001		No information available
14	Gerona Air Crash Group Litigation	The entitlement to damages as a result of the crash of flight BY266A at Gerona Airport on 14th September 1999, in respect of claims brought by passengers who were on that flight, in particular whether by reason of the Package Tour Regulations and by the drafting of their terms and conditions, the tour operator Thompsons were liable to pay personal injury compensation for psychiatric injury where by reason of the Warsaw Convention the airline, Britannis Airways, was not liable to pay.	2001	2007	None

Case number*	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
21	Persona Group Litigation	Whether the aid to contraception device called Persona was defective and/or not properly or adequately tested, resulting in the Claimants becoming pregnant.	2001		No information available
24	The Deep Vein Thrombosis and Air Travel Group Litigation	(1) whether the onset of deep vein thrombosis("DVT") sustained during the course of, or arising out of, international carriage by air, whether as a result of an act and/or omission of the carrier or otherwise, is capable, in principal, of being "an accident" causing bodily injury within the meaning of Article 17 of the Warsaw Convention,(2) whether a claim against an air carrier for personal injury or death alleged to have been sustained during the course of, or as a result of, international carriage by air can be brought at common law in the alternative or in addition to a claim under the applicable version of the Warsaw Convention, (3) whether the Human rights Act 1998 applies to claims brought against air carriers under the Warsaw Convention and/or at common law in relation to personal injury or death alleged to have been suffered by a passenger during the course of, or as a result of, international carriage by air and if so with what result.	2002		No information available
28	Scania 4 Series Group Litigation	Whether any person has sustained compensable personal injury as a result of driving a Scania 4 Series tractor unit from 1998 onwards, where the personal injury is alleged to arise out of a breach of duty relating to the adverse effect on the driver of the design and/or the construction and/or positioning of (i) the driver's seat or (ii) the steering wheel or (iii) the engine cowling or (iv) of any part of the driver's environment within the vehicle, or any allegation that (i), (ii),(iii) or (iv) was or were defective.	2002		No information available

Case number*	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
38	The Trilucent Breast Implant Litigation	Claims by the Claimants who had their trilucent breast implants removed prior to 6th June 2000 and who claim damages pursuant to the Consumer Protection Act 1987. Trilucent breast implants were the subject of a hazard notice from the Medical Devices Agency on the 6 June 2000 when women were advised to have them removed.	2003		No information available
40	Sabril Group Litigation	Claimants allege s/he has suffered visual field constriction (VCF) as a result of taking Vigabatrin supplied by the Defendant under the name of Sabril.	2004		No information available
48	Torremolinos Beach club Group Litigation	Pain, suffering and loss of amenity and/or diminution in value and/or loss of enjoyment of holidays and/or losses and expenses sustained by them during their stays at the Hotel Torremolinos Beach Club Hotel between October 2000 and July 2002 as a result of the Defendants' alleged breach of contracts, the Defendants' and/or suppliers of other services failure to properly perform their obligations to the Claimants in accordance with the Package Travel, Package Holidays and Package Tours regulations 1992.	2005		No information available
50	The DePuy Hylamer Group Litigation	Claimants were fitted with a Hylamer Ogee Acetular Cup during hip replacement surgery, and it is alleged in each case that the hip replacement has subsequently failed and that the Product was defective pursuant to sections 2 & 3 of the Consumer Protection Act 1987 and that its safety was less than persons generally were entitled to expect. The earlier failure of the hip replacement is asserted by the Claimants to have been caused or materially contributed to by a defect in the Product, namely that it had a greater tendency to wear than was appropriate in the light of its intended purpose and other related factors	2005		No information available

Case number*	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
51	FAC Group Litigation	Each Claimant alleges that his or her Mother was prescribed with, and ingested anti-convulsant medication containing sodium valporate while pregnant with the Claimant, and the medication prescribed and ingested during such pregnancy included a sodium valporate product, whether or not any other anti convulsant product was also prescribed and ingested during such pregnancy, and that the product or products were defective within the meaning of sections 2 and 3 of the Consumer Protection Act 1987 and article 4 of the EU Directive 85/374/EEC	2005		No information available
60	Soviva Hotel Group Litigation	Upon the claims brought by customers of the Defendants the following issues of fact arise:- To determine the scope of the Defendants' (First Choice Holidays & Flights Ltd) obligations in contract and/or tort and /or under statutory regulations; Whether the Defendants or its suppliers of services were in breach of those obligations; If so whether the Defendants' breaches of those obligations caused the Claimants to suffer injury; In the event that the Defendants are liable to the Claimants quantification of damages	2006		No information available

\*Note: Case number reflects the case number of the GLO registry. <http://www.hmcourts-service.gov.uk/cms/150.htm>

**Table 2: Overview of cases collected – mechanism 2: Competition Action**

<b>Case number</b>	<b>Name of case</b>	<b>Brief description of case</b>	<b>Year of filing of original case</b>	<b>Year of final court decision / settlement</b>	<b>Cross-border element</b>
13	Football shirts case	The claim was for loss and damage suffered by individual consumers and followed the findings made by the Office of Fair Trading and the Tribunal, endorsed by the Court of Appeal, in respect of three price-fixing arrangements involving the defendant, concluded and operated in the sale of replica football kit in 2000 and 2001.	2007	Settlement announced in 2008	None

## 1.5 Hypothetical example cases

*The following section contains data concerning the costs of 3 “hypothetical example cases”. A “hypothetical example case” is hereby understood as being an action proceeding which is “invented” on basis of existing cases, and defined through the type of individual damage suffered by a number of consumers, the sector, the category of law, the value of the case, the affected number of consumers, etc. For each case are analysed:*

- a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).*
- b) The effects on consumers who do not bring the collective action.*
- c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).*
- d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer’s fee).*
- e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.*
- f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?*

*In all cases it is assumed that claims are brought at the same court. The consumers are not in a state of poverty and are not eligible for legal aid targeted exclusively at the poor. All cases are decided after appeal.*

### 1.5.1 Case 1 - telecommunication

*Due to a technical defect, the telecommunications services provider T has miscalculated the duration of all telephone calls made by customers as being 2-3 percent longer than they were in reality, resulting in extra profits of 1 million Euro. 100,000 customers suffered damages; with certain differences as to the individual case. The consumer organisation or other intermediary preparing the claim estimates the average damage per consumer to be 1 Euro per month. The service provider claims to have repaired the defect after 10 months. Therefore the average damage per consumer could be estimated at 10 Euro.*

- If the relevant mechanism is an opt-out system: consumer organisation or other intermediary represents all consumers (combined value of claims 1 million Euro)*
- If the relevant mechanism is an opt-in system: consumer organisation or other intermediary could mobilise 1,000 consumers (combined value of claims 10,000 Euro)*

**a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).**

A representative action may be problematic as there may be too many individual variations in circumstances relating to damage. It has been mooted that a representative action could be used to decide issues of principle with individual follow on actions, but this is not used in practice for this type of claim. A consumer organisation without a legal interest in the claim could not be the representative. As we shall conclude that representative actions are not viable in any of these circumstances it may nevertheless be useful to note that if a representative action were possible in High Court the fee for starting proceedings would be £1530. A further £200 is payable on filing of allocation questionnaire (or alternative trigger) and a further £100 payable on filing of listing questionnaire (or alternative trigger) and at the same time assuming the case is allocated to the multi-track a hearing fee of £1000. The fee for an appeal is £200.

In theory a GLO may be made, but given the small individual losses this might not be considered appropriate. In a group litigation all the claims are individual but will often be co-ordinated by a firm of solicitors.

The most likely way forward is for a test case approach. One complicating factor is that the small individual losses might require the case to be heard by a small claims court. If it is obviously an important test case the court may allocate to another track. This has important costs implications for in the small claims track the loser pay rule does not normally apply.

The ongoing challenge by the OFT to current account bank charges is being brought by the OFT in the High Court for a declaration. However this is only possible because the banks have agreed to this procedure.

Consumers may well find the best way to obtain redress is through Otelo (The Office of the Telecommunications Ombudsman).

**b) The effects on consumers who do not bring the collective action.**

Only a representative action would bind other consumers. Especially in the small claims courts it is quite common for different courts to come to different conclusions as indeed seems to be the case with the bank charges case. A High Court decision although not strictly binding on other parties will be highly persuasive, especially if it is seen as a test case.

**c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).**

See table

- d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer's fee).**

See table.

- e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.**

See table.

- f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?**

There is a loser pays principle.

Whether bringing a test case or acting as a representative the consumer bringing the claim will normally be liable for the other party's costs if the claim is unsuccessful. In very limited circumstances a protective costs order can be made when a claim is being brought in the public interest – this has not typically been applied to consumer claims.

Usually a party is only liable for costs on a standard basis (which means that he is only liable for proportionate costs and any costs where there are doubts about reasonableness and proportionality will be disallowed). It is possible for the order to be made on the more general indemnity basis in exceptional circumstances. Importantly if the case is brought in the small claims track costs are not normally recoverable except for limited fixed costs such as issue fee, limited costs related to party and witness attending court and up to £200 for an expert fee.

**Table 3: Estimates regarding hypothetical example case 1 - telecommunications**

	<b>Estimated court fees</b> [national currency]	<b>Estimated lawyer's fees</b> [national currency]	<b>Other costs, if any</b> [national currency]	<b>Public support</b> that is available [national currency]	<b>Estimated time</b> involved	<b>Comments</b>
<b>Collective redress: Group Litigation Order</b>						
<i>For each individual consumer</i>	n/a				[in hours]	
<i>For intermediary filing the action</i>	n/a				[in full-time staff working days]	
<b>Individual redress (through ordinary court procedure)</b>						
<i>For each individual consumer</i>	To start proceedings in small claims track £30 and if a hearing is needed £25. The fee for an appeal from a small claims case is £100.	£30,000 (assuming £200 per hour x 150 hours). Large firms may work for this fee in novel cases despite their normal fees being higher.	£2,000 expert evidence	There is unlikely to be public funding	Consumers would simply have to attend lawyer and provide information – approx one day. Court attendance optional if using lawyer.	Costs in English legal system do not depend upon size of claim. Appeals are expensive and not a matter of course.
<b>Individual ADR:</b>						
<i>For each individual consumer</i>	None	Lawyers would not normally be used	Free	There is unlikely to be public funding	[in hours]	

**1.5.2 Case 2 – financial services**

*Enterprise E released a third tranche of shares (230 million shares, 60 Euro per share). Following this, the value of the shares decreased rapidly during the next three years (to 10 Euro per share), leading to a loss in shareholder value of 11.5 billion Euro. Shareholders claimed that they had been victims of false information (considerably overestimated property; concealment of the burdensome acquisition of a foreign competitor) contained in the company's prospectus when the shares were put on the market. 15,000 investors bring their claims to the court, with an average value of the claim being 7,000 Euro each. The combined value of the claims is therefore 105 million Euro.*

**a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).**

This is probably not suitable for a representative action as although all shares are affected in the same way there will be different issues of causation and reliance. It may also be possible to use a GLO if the parties sued individually but this is not guaranteed. 7000 Euro may be slightly above or below the £5000 small claims limit, depending on the exchange rate. At the time of finalising this report, it was just above and the case analysis proceeds on this basis – this affects the court costs and liability for other party's costs.

**b) The effects on consumers who do not bring the collective action.**

Consumers who do not bring a collective action would still be able to bring a claim but their case may be stayed until the collective dispute was resolved. Arguably it may be an abuse of process to keep bringing actions against a defendant that have already been litigated.

**c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).**

See table

**d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer's fee).**

See table

**e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.**

See table

- f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?**

There is a loser pays principle.

When acting as a representative the consumer bringing the claim will normally be liable for the other party’s costs if the claim is unsuccessful. In very limited circumstances a protective costs order can be made when a claim is being brought in the public interest – this has not typically been applied to consumer claims.

When acting under a group litigation order the court will normally divide orders for costs between the individual costs and the common costs of the group.

Usually a party is only liable for costs on a standard basis (which means that it is only liable for proportionate costs and any costs where there are doubts about reasonableness and proportionality will be disallowed). It is possible for the order to be made on the more general indemnity basis in exceptional circumstances.

**Table 4: Estimates regarding hypothetical example case 2 – financial services**

	<b>Estimated court fees</b> [national currency]	<b>Estimated lawyer's fees</b> [national currency]	<b>Other costs, if any</b> [national currency]	<b>Public support</b> that is available [national currency]	<b>Estimated time</b> involved	<b>Comments</b>
<b>Collective redress: Group Litigation Order</b>						
<i>For each individual consumer</i>	n/a				[in hours]	
<i>For intermediary filing the action</i>	n/a			There is unlikely to be public funding	[in full-time staff working days]	
<b>Individual redress (through ordinary court procedure)</b>						
<i>For each individual consumer</i>	The fee for starting proceedings would be £225. A further £200 is payable on filing of allocation questionnaire (or alternative trigger) and a further £100 payable on filing of listing questionnaire (or alternative trigger) and at the same time assuming the case is allocated to the multi-track a hearing fee of £1000. In a GLO the allocation and listing fees are not required and as the hearing fee becomes payable when the listing fee is payable presumably that also is waived. The fee for an appeal from High Court is £200, and from county court £120.	£750,000 (assuming £250 per hour x 3000 hours). Large firms may work for this fee in novel cases despite their normal fees being higher.		There is unlikely to be public funding	Consumers would simply have to attend lawyer and provide information – approx one day. Court attendance optional if using lawyer.	Likely to last a number of years.
<b>Individual ADR</b>						
<i>For each individual consumer</i>	n/a				[in hours]	

### 1.5.3 Case 3 - tourism

*The tour operator T advertised on its website a “last-minute package” called “4-star” in which the consumers were supposed to be offered services in various hotels on various locations (Greece, Tunisia, etc.) in the 4-star category. However, the hotels were in very bad shape and in spite of the request of consumers no other accommodation was provided. The tour operator also categorically rejected all written claims of consumers for compensation. The only argument of the trader for rejection was that last-minute arrangements meant lower quality of services. About 500 travellers are affected, of which 200 claim a refund of 250 Euro each (which is 10% of the total price of the package). The combined value of the claims is therefore 50,000 Euro.*

**a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).**

As the fact patterns are likely to be different a representative action may not be appropriate. The most likely way forward would be a test case or GLO. The complication is that the individual claims would fall within the small claims limit. If GLO ordered it would be moved to another track.

**b) The effects on consumers who do not bring the collective action.**

Consumers who do not bring a collective action would still be able to bring a claim but their case may be stayed until the collective dispute was resolved. Arguably it may be an abuse of process to keep bringing actions against a defendant that have already been litigated.

**c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).**

See table

**d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer’s fee).**

See table

**e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.**

See table

**f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?**

There is a loser pays principle.

Whether bringing an individual case or test case the consumer bringing the claim will normally be liable for the other party's costs if the claim is unsuccessful. In very limited circumstances a protective costs order can be made when a claim is being brought in the public interest – this has not typically been applied to consumer claims.

When acting under a group litigation order the court will normally divide orders for costs between the individual costs and the common costs of the group.

Usually a party is only liable for costs on a standard basis (which means that it is only liable for proportionate costs and any costs where there are doubts about reasonableness and proportionality will be disallowed). It is possible for the order to be made on the more general indemnity basis in exceptional circumstances. Importantly if the case is brought in the small claims track costs are not normally recoverable except for limited fixed costs such as issue fee, limited costs related to party and witness attending court and up to £200 for an expert fee.

**Table 5: Estimates regarding hypothetical example case 3 – tourism**

	<b>Estimated court fees</b> [national currency]	<b>Estimated lawyer's fees</b> [national currency]	<b>Other costs, if any</b> [national currency]	<b>Public support</b> that is available [national currency]	<b>Estimated time</b> involved	<b>Comments</b>
<b>Collective redress: Group Litigation Order</b>						
<i>For each individual consumer</i>	n/a				[in hours]	
<i>For intermediary filing the action</i>	n/a				[in full-time staff working days]	
<b>Individual redress (through ordinary court procedure)</b>						
<i>For each individual consumer</i>	To start proceedings in small claims track £45 and if a hearing is needed £50. The fee for an appeal is £120.	£20,000 (assuming £200 per hour and 100 hours work). Large firms may work for this fee in novel cases despite their normal fees being higher.		It is unlikely public funding would be available.	Consumers would simply have to attend lawyer and provide information – approx one day. Court attendance optional if using lawyer.	Costs in English legal system do not depend upon size of claim. Appeals are expensive and not a matter of course.
<b>Individual ADR:</b>						
<i>For each individual consumer</i>	ABTA – £72.85	Not usually involved			One day maximum as it is a written procedure usually just completing a form	

Note: court fees are based on Guide to *Civil Proceedings Fees* — From 1 October 2007, found at [http://www.hmcourts-service.gov.uk/docs/fees/Guide to Civil Proceedings Fees October-2007.doc](http://www.hmcourts-service.gov.uk/docs/fees/Guide_to_Civil_Proceedings_Fees_October-2007.doc)

## 1.6 Effectiveness and efficiency of collective redress mechanisms

### 1.6.1 *Effectiveness of collective redress mechanism 1: Representative Actions*

#### Objectives

#### **1. Does the collective redress mechanism fulfil the objectives of the national law which introduced it?**

Many commentators have noted that representative actions have the potential to address collective concerns. It is unlikely that they will be invoked in consumer cases, because the need for there to be the same interest makes it questionable whether it can be applied to damage claims or where different contracts have been used or where there are potential defences. Although the compromise has been suggested of the representative action deciding the general questions with follow-on individual actions this has not been invoked in practice. Indeed the point has been well made that the vagueness of the criteria is a major obstacle to persons being willing to risk engaging with this strategy. Furthermore the requirement that the representative has a personal interest in the claim makes it inappropriate as a mechanism brought by consumer organisations. They would have to support a member or other litigant to bring the case.

#### **2. Has the mechanism enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis?**

Representative actions are not used by consumers.

#### Incentives provided

#### **3. a) Does the mechanism ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?**

Question not relevant as the procedure is not used by consumers.

#### **3 b) Does the mechanism have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?**

It could have this effect as it would cover even parties not present before the court, although they would then have to claim individually. However, for above stated reasons it is not used by consumers.

#### **3 c) Does the mechanism provide incentives and sufficient opportunity for out-of-court settlement?**

Consideration of mediation is part of general civil procedural rules.

#### **4. Does the mechanism discourage the introduction of unmeritorious claims? Is there a “gatekeeper procedure” to certify whether a collective action is admissible to the court or not. If yes, how does it work?**

The court may direct that someone cannot act as a representative and so to that extent can control admission to the procedure.

### **Accessibility**

**5. Is the mechanism easily accessible to consumers?** [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]

The procedure is not easily accessible. In addition to the difficulties of invoking the procedure (especially by consumer organisations), it follows the normal court procedures which are expensive and, if the case is lost (or even certain aspects of the case are lost), the representative has normally to meet the costs of the other party (or part of costs if only certain interlocutory matters are lost).

**6. What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if the case is lost?**

Litigation costs are at least the same in a representative action as in individual redress. Indeed there may be even increased costs associated with satellite litigation surrounding the representative action. However, the total costs are likely to be less than if every consumer litigated individually, although there may still be a need for some individual aspects to be litigated (or negotiated) such as damage levels. The representative bears the risk of having to pay the other party's costs if the case is lost.

### **Financing and distribution of proceeds**

**7. Are actions under the mechanism financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the party that brings forward a collective action (the intermediary<sup>8</sup>), are contingency fees/conditional fees<sup>9</sup> allowed? What is the risk of the intermediary if a case is lost?**

Obtaining legal representation can be problematic for consumers and these matters are not addressed by the representative action. As noted above the intermediary (i.e. the representative) bears the full costs if the case is lost. It is unlikely that public funding would be available (except for serious product liability claims) but conditional fees are now a common feature of the English legal landscape. The problems with conditional fees relate to lawyers being unwilling to take on complex cases (given maximum uplift if successful is 100%) and the problems of accessing After-the-Event Insurance to cover the other party's costs.

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<sup>8</sup> A collective action is usually brought forward by an intermediary, that organises the action on behalf of consumers. This can be a public intermediary (e.g. an ombudsman), a representative organisation as intermediary (e.g. a consumer organisation) or private intermediaries (e.g. a private law firm/an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

<sup>9</sup> Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

**8. Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?**

The system still assumes individual distribution of damages. *E.M. I. Records v Riley*<sup>10</sup> is cited as an example where damages could be recovered as members had agreed that the representative could recover the sums to suppress future breaches of copyright. In principle it might be possible to develop a cy-près approach from this. However, this is unlikely to be practical given that consumers are a more disparate grouping than the record companies involved in that claim.

**1.6.2 Efficiency of collective redress mechanism 1: Representative Actions**

**Length of proceedings**

**9. Is the length of the proceedings under the mechanism reasonable for consumers, consumer organisations, public bodies, and the defendants?**

A representative action is likely to be a complex legal procedure. It may be impossible to avoid this as it is connected to general rules of civil procedure.

**Costs for consumers, consumer organisations and public bodies**

**10. Are the costs related to bringing an action under the mechanism for consumers, consumer organisations and public bodies proportionate to the amount in dispute?**

Civil litigation costs are high in the UK and are likely to deter representative claims in many cases.

**11. Does the mechanism minimise litigation costs for consumers?**

No, the representative action does not alter general principles of litigation costs.

**Costs for businesses**

**12. Information costs: Does the mechanism impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?**

There is no evidence available in this respect.

**13. Litigation costs and related insurance costs: Are cost for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?**

There is no evidence available in this respect.

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<sup>10</sup> [1981]1 WLR 923

**14. Is the *economic impact* on traders against whom actions have been brought under the mechanism proportionate to the alleged harm caused by the trader's conduct?**

There is no evidence available in this respect.

**15. Does the mechanism lead to the *closing down* of businesses?**

There is no evidence available in this respect.

**Competitiveness and investment flows**

**16. Does the mechanism have an impact on the competitive position of EU firms in comparison with their non-EU rivals?**

There is no evidence available in this respect.

**17. Does the mechanism provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)**

There is no evidence available in this respect.

**1.6.3 *Added value of collective redress mechanism 1: Representative Actions***

**18. What is the added value of the collective redress mechanism(s) compared to individual judicial redress and ADR schemes, i.e. what is achieved by the mechanism(s) that is not achieved by individual redress?**

The representative action has the potential to streamline litigation so that consumers do not have to litigate separately, courts are not overwhelmed with litigation and businesses manage to achieve a clear outcome and avoid ongoing litigation. The problem is that for reasons set out above it is not practical to use it in consumer claims.

**19. Please estimate, what percentage of consumers who were represented in the collective redress cases would likely have undertaken individual redress through ordinary court procedures if no collective redress system was in place (e.g. none, 10%, 50%)?**

Question not relevant as the procedure is not used by consumers.

**1.6.4 Effectiveness of collective redress mechanism 2: Group Litigation Order**

**Objectives**

**1. Does the collective redress mechanism fulfil the objectives of the national law which introduced it?**

It is necessary to first determine what the purpose of the GLO is. It is not a pure consumer collective redress option and is certainly not an opt-out mechanism - claimants need to claim and be entered on the register. It is part of the general Civil Procedure Rules and is best viewed as an additional case management tool for the judge. It is meant to streamline procedures and allow cases to be handled more effectively. The lack of a certification stage prevents satellite litigation as occurs in US, but the downside is that the broad discretion and lack of rules leaves practitioners unable to predict how individual judges will view the idea of making a GLO and how they will act once an order has been made.

**2. Has the mechanism enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis?**

Probably most cases would have in any event been brought using a test case strategy.

**Incentives provided**

**3. a) Does the mechanism ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?**

The limited evidence available from interviews gave no indication that the mechanism would have a major impact on the ways companies operate.

**3 b) Does the mechanism have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?**

Skimming off the profit gained from the incriminated conduct is not relevant for this procedure.

In terms of a deterrent effect in general it can be concluded that the mechanism achieves this to the extent, but only to the extent that private law rules have a deterrent effect. The fact that the rule assists in making access to justice more effective may accentuate any deterrent effect of the private law. It is too early to draw definitive conclusions. The answer may well vary from one context to another. In relation to package travel where liability is rarely disputed the likelihood of having to defend a well (and fairly easily) organised mass claim will most probably be factored into by holiday companies. In the products liability field the only successful mass claim was that brought by those infected with Hepatitis C from Blood. The defendant National Blood Authority was an emanation of the state and as no private company has yet lost such a mass claim in court its impact is still being speculated on.

In addition, the fact that information on settlement and damages awarded is not made publicly available and that the number of high profile cases with significant media

coverage remains limited may also suggest that the mechanism has a limited deterrent effect.

**3 c) Does the mechanism provide incentives and sufficient opportunity for out-of-court settlement?**

The GLO itself does not provide incentives for out-of-court settlement but the civil procedural rules provide in general incentives for settlement before trial, promote mediation and alternative dispute resolution. In the course of managing the case, the parties are encouraged to settle and to reduce the area of disagreement. This applies generally to the civil procedural rules, and not specifically to the GLO. In this respect, the GLO may be seen as a "last resort litigation approach". The environment in which GLOs operate (e.g. important litigation costs and difficulty to secure funding for claimants) may also be viewed as encouraging settlement.

**4. Does the mechanism discourage the introduction of unmeritorious claims? Is there a "gatekeeper procedure" to certify whether a collective action is admissible to the court or not. If yes, how does it work?**

There is no general certification stage, but the use of a GLO is at the discretion of the judge and this can be considered to have a gatekeeping effect. There is a further gatekeeping procedure by which if minded to make a GLO the judge must send details of the action explaining why a GLO is appropriate to either the Lord Chief Justice, the Vice-Chancellor or Head of Civil Justice who has to give their consent. Also, the "loser pays" principle limits the introduction of unmeritorious claims.

**Accessibility**

**5. Is the mechanism easily accessible to consumers?** [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]

The procedure is not easily accessible in the sense that consumers will tend to need legal representation. By their nature GLOs usually involve complex litigation and the management of such litigation will require legal expertise.

**6. What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if the case is lost?**

Litigation costs are at least the same in a GLO as in individual redress. Indeed, there may be even increased costs associated with satellite litigation surrounding the GLO. However, the total costs are likely to be less than if every consumer litigated individually, although there may still be a need for some individual aspects to be litigated (or negotiated) such as damage levels. Costs orders follow the traditional rules with the loser paying the costs of the successful party. In group litigation costs orders will usually be divided between common costs and individual costs. A paying claimant is liable for his individual costs and will also normally be severally liable for an equal portion of the common costs.

**Financing and distribution of proceeds**

**7. Are actions under the mechanism financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the party that brings forward a collective action (the intermediary<sup>11</sup>), are contingency fees/conditional fees<sup>12</sup> allowed? What is the risk of the intermediary if a case is lost?**

Obtaining legal representation can be problematic for consumers and these matters are not addressed by the GLO. Of the cases covered by GLOs the drug product liability claims are likely to be funded by the Legal Services Commission. However, its budget for such high cost civil cases is limited to £3M per annum and so it is hard to secure funding with cases being subject to affordability reviews. It is unlikely that public funding would be available (except for serious product liability claims) but conditional fees are now a common feature of the English legal landscape. The problems with conditional fees relate to lawyers being unwilling to take on complex cases (given maximum uplift if successful is 100%) and the problems of accessing After-the-Event Insurance to cover the other party's costs. The only intermediary in such cases is a solicitor who would only be personally liable for costs in exceptional circumstances.

**8. Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?**

The procedure envisages damages being paid to individual claimants. Compensation is awarded on the basis of individual loss/individual claims. There is presently no right for the lawyer to recover a percentage of damages (as under a contingency fee), but this is being considered in some contexts.

**1.6.5 *Efficiency of collective redress mechanism 2: Group Litigation Order***

**Length of proceedings**

**9. Is the length of the proceedings under the mechanism reasonable for consumers, consumer organisations, public bodies, and the defendants?**

A GLO is likely to be part of complex legal procedure. It may be impossible to avoid this as it is connected to general rules of civil procedure.

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<sup>11</sup> A collective action is usually brought forward by an intermediary, that organises the action on behalf of consumers. This can be a public intermediary (e.g. an ombudsman), a representative organisation as intermediary (e.g. a consumer organisation) or private intermediaries (e.g. a private law firm/an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

<sup>12</sup> Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

**Costs for consumers, consumer organisations and public bodies**

**10. Are the costs related to bringing an action under the mechanism for consumers, consumer organisations and public bodies proportionate to the amount in dispute?**

Civil litigation costs are high in the UK and are likely to deter many consumer claims. The GLO may save some costs by allowing the claimants to share common costs, but it is unclear that this would be any less than if a test case strategy was adopted.

**11. Does the mechanism minimise litigation costs for consumers?**

Interviewees who answered this question considered that the GLO minimises litigation costs for consumers in so far as economies of scale exist. Other than this it does not alter general principles of litigation costs.

**Costs for businesses**

**12. *Information costs*: Does the mechanism impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?**

There is no evidence indicating that the GLO imposes requirements on businesses that lead to additional information costs.

**13. *Litigation costs and related insurance costs*: Are costs for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?**

Based on the limited evidence available from the interviews it can be concluded that litigation costs and insurance costs for businesses related to GLOs do not seem to be a particular concern for businesses. On the contrary, GLOs may be viewed as being beneficial for businesses, as they may decrease litigation costs by offering businesses the opportunity to deal with multiple similar cases only once.

**14. Is the *economic impact* on traders against whom actions have been brought under the mechanism proportionate to the alleged harm caused by the trader's conduct?**

There is no evidence available in this respect.

**15. Does the mechanism lead to the *closing down* of businesses?**

The mechanism does not seem to have led to any closing down of businesses so far.

**Competitiveness and investment flows**

**16. Does the mechanism have an impact on the competitive position of EU firms in comparison with their non-EU rivals?**

Business representatives considered such an effect to be unlikely.

**17. Does the mechanism provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)**

Business representatives considered such an effect to be unlikely.

**1.6.6 *Added value of collective redress mechanism 2: Group Litigation Order***

**18. What is the added value of the collective redress mechanism(s) compared to individual judicial redress and ADR schemes, i.e. what is achieved by the mechanism(s) that is not achieved by individual redress?**

What this mechanism provides are additional case management tools for the judge. If used effectively they should allow for the more effective resolution of disputes, but this will depend on the use the judge makes of the procedures.

**19. Please estimate, what percentage of consumers who were represented in the collective redress cases would likely have undertaken individual redress through ordinary court procedures if no collective redress system was in place (e.g. none, 10%, 50%)?**

Probably this mechanism does not affect the number of consumers seeking redress, it just enhances the procedures. If the procedure did not exist there would most likely be a test case strategy adopted.

**1.6.7 Effectiveness of collective redress mechanism 3: Competition Action**

**Objectives**

**1. Does the collective redress mechanism fulfil the objectives of the national law which introduced it?**

There has only been one case so far and that involved price fixing of football shirts. That case has been settled, but the only details of settlement publicly available are that the defendants agreed to pay the legal costs of Which? who brought the action and have set an undisclosed sum aside to compensate consumers. A scale of damages between £10 and £20 has been agreed for each shirt with compensation payable for the next year. It is understood that only several hundred consumers had registered their claims. This scenario suggest that Which? may be reluctant to bring such claims in the future.

**2. Has the mechanism enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis?**

Yes. It would certainly have been unlikely that such claims would be brought on an individual basis. However, it should be noted that the consumers who obtained compensation represented only a tiny percentage of the consumers who were affected by the damage. The low level of participation may be explained by the following factors:

- The need to provide a proof of purchase;
- Consumers had to register;
- The consumer organisation could not say at the outset what consumers could obtain if they registered;
- More generally, consumers might not be interested in seeking redress for low value claims.

**Incentives provided**

**3. a) Does the mechanism ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?**

This is the theory behind the mechanism, but the experience of the football shirts case is unlikely to provide a strong deterrent against undertaking highly profitable anti-competitive behaviour.

**3 b) Does the mechanism have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?**

The procedure provides for the normal remedies and any skimming off of profits simply results from the impact of normal rules. It is provided that any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim must be awarded to the individual concerned; but the tribunal may, with the consent of the

specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual).

So far, there are no indications for a possible general deterrence effect of the mechanism. As has been stated before, the experience of the football shirts case is unlikely to provide a strong deterrent against undertaking highly profitable anti-competitive behaviour.

**3 c) Does the mechanism provide incentives and sufficient opportunity for out-of-court settlement?**

There appear to be no formal rules on this in the Rules of the Competition Tribunal, presumably because normally it does not principally conduct such types of redress litigation.

**4. Does the mechanism discourage the introduction of unmeritorious claims? Is there a “gatekeeper procedure” to certify whether a collective action is admissible to the court or not. If yes, how does it work?**

This is a follow-up procedure. There has had to be a determination that the conduct was anti-competitive which limits the situations when claims can be brought.

**Accessibility**

**5. Is the mechanism easily accessible to consumers? [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]**

The competition action appears to be easy to access for consumers in case that a claim is brought by a specified body. However, the length of proceedings, low levels of compensation and difficulties to provide proof of purchase for low value products such as T-shirts or milk may result in a low level of interest from consumers.

**6. What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if the case is lost?**

There are no risks and no costs for the consumers under the competition action. All risks and costs are borne by the specified body.

**Financing and distribution of proceeds**

**7. Are actions under the mechanism financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the party that brings forward a collective action (the intermediary<sup>13</sup>), are contingency fees/conditional fees<sup>14</sup> allowed? What is the risk of the intermediary if a case is lost?**

The procedure depends upon the intermediary (such as Which?) being prepared to bring such cases. There is no public support. Where a claim is brought by the specified body it will be potentially be liable for costs on the usual basis. However, as the practice must have already been found to be anti-competitive and the only issue is proof of individual losses this may give such bodies confidence to bring these claims. Nevertheless there is little incentive for the specified body as potential claims reportedly are often not worthwhile from its own perspective. Internal costs for the intermediary (e.g. staff costs etc.) may also be viewed as a significant deterrent to bring claims under the competition action. The only case so far was brought on a conditional fee basis and the willingness of a major law firm like Clyde & Co to take on this case was no doubt explained by the novelty of such a procedure. It must be a matter of conjecture whether such actions will be possible in the future.

**8. Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?**

It is provided that any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim must be awarded to the individual concerned; but the tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual).

In the football shirt case a sum of money has been set aside based on an estimate of how many people will claim (this has not been made public). The Which? web-site states that this may not be enough if too many consumers claim, but that all who have registered to-date will receive up to the maximum compensation of £20.

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<sup>13</sup> A collective action is usually brought forward by an intermediary, that organises the action on behalf of consumers. This can be a public intermediary (e.g. an ombudsman), a representative organisation as intermediary (e.g. a consumer organisation) or private intermediaries (e.g. a private law firm/an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

<sup>14</sup> Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

**1.6.8 Efficiency of collective redress mechanism 3: Competition Action**

**Length of proceedings**

**9. Is the length of the proceedings under the mechanism reasonable for consumers, consumer organisations, public bodies, and the defendants?**

Which? sent its “letter before action” on 7 February 2007 and the case was settled in January 2008. It is difficult to predict how long the procedure will last especially if cases need to be litigated.

**Costs for consumers, consumer organisations and public bodies**

**10. Are the costs related to bringing an action under the mechanism for consumers, consumer organisations and public bodies proportionate to the amount in dispute?**

No figures are available. Certainly the costs of bringing a claim for not more than a few hundred consumers to recover a maximum of £20 each would not be proportionate, but if set against the entire losses suffered by consumers including those who did not claim then the costs might be more proportionate.

**11. Does the mechanism minimise litigation costs for consumers?**

Consumers do not bear any costs under a competition action. All the costs are borne by the intermediary.

**Costs for businesses**

**12. Information costs: Does the mechanism impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?**

There is no evidence available indicating that the competition action imposes requirements on businesses that lead to additional information costs.

**13. Litigation costs and related insurance costs: Are cost for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?**

There is no evidence available indicating that the competition action leads to unreasonable litigation and related insurance costs for businesses (taking into account the generally high level of litigation costs).

**14. Is the economic impact on traders against whom actions have been brought under the mechanism proportionate to the alleged harm caused by the trader's conduct?**

There is no evidence available pointing to unproportionate economic impacts on the trader.

**15. Does the mechanism lead to the closing down of businesses?**

The mechanism has not led to any closing down of businesses so far.

**Competitiveness and investment flows**

**16. Does the mechanism have an impact on the competitive position of EU firms in comparison with their non-EU rivals?**

Business representatives considered such an effect to be unlikely.

**17. Does the mechanism provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)**

Business representatives considered such an effect to be unlikely.

**1.6.9 *Added value of collective redress mechanism 3: Competition Action***

**18. What is the added value of the collective redress mechanism(s) compared to individual judicial redress and ADR schemes, i.e. what is achieved by the mechanism(s) that is not achieved by individual redress?**

This provides a mechanism through which consumer associations can assist consumers to recover damages caused by anti-competitive practices which they would probably not have the incentive to recover on their own initiative.

**19. Please estimate, what percentage of consumers who were represented in the collective redress cases would likely have undertaken individual redress through ordinary court procedures if no collective redress system was in place (e.g. none, 10%, 50%)?**

It is unlikely that any individual consumers would have sought redress. This is underlined by the fact that even when Which? took the initiative and consumers only had to register a claim and have proof of purchase relatively few appear to have done so.

## 1.7 Overview of alternative procedures for consumers

### 1.7.1 *Individual court action*

#### **Is there any data available on the number of consumers seeking individual redress through ordinary court procedures?**

Judicial statistics show that 47,521 claims were disposed of by way of small claims procedure in 2005. Under this procedure, individuals can bring claims up to £5000, without lawyers. Clearly many of these would not be consumer claims and indeed research indicates that consumers are more likely to find themselves as defendants than claimants in small claims procedures.

Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking individual redress through ordinary court procedures?

Estimates gathered during the interviews range between £50 and £250 (65 to 325 Euro).

### 1.7.2 *Individual action – ADR scheme(s)*

#### **Is there an ADR scheme(s) for consumer cases?**

There are various ombudsmen schemes, the most important of which is the Financial Ombudsman Scheme (FOS). The services of the Ombudsman are free for consumers and decisions are made within a set amount of time. The decision of the Ombudsman is highly influential on companies, but not binding for consumers; i.e. consumers still have the possibility to go to court if they are not satisfied with the decision.

There are also numerous ADR schemes based on arbitration. Some, but by no means all, of these operate under Codes approved by the OFT. In the UK, all the spectrum of ADR mechanisms is encouraged to be used before going to court. As a result, a lot of cases may not go to court due to the availability of ADR schemes.

Additional means of obtaining redress for consumers may include:

- Mediation
- Small claims court
- National mediation helpline
- Arbitration schemes in different sectors (travel, financial services)
- Pre-action protocols (whose aim is to resolve disputes before they go to court - "pre-litigation stage")
- Codes of practise
- Retailers' return/exchange services, refund policy

These ADR mechanisms/regulatory mechanisms were considered to be in some cases more efficient than collective redress mechanisms. ADR mechanisms, stronger enforcement regimes and more safety may also be viewed as a preferred mean of obtaining redress by consumers, compared to collective redress mechanisms.

**Is there any data or an evaluation report available on the consumer relevant use of the ADR scheme(s)?**

The FOS handled 627,814 initial enquiries and complaints from consumers in 2007 (year ended 31 March) – of which 1 in 6 turned into cases requiring the involvement of adjudicators and ombudsmen. It is free of charge for consumers to use FOS.

This table shows how quickly cases were resolved:

Year ended 31 March	Resolved within 3 months	Resolved within 6 months	Resolved within 9 months	Resolved within 12 months
2007	34%	61%	76%	85%
2007 (excluding mortgage endowment complaints)	51%	81%	89%	92%
2006	32%	59%	75%	85%
2006 (excluding mortgage endowment complaints)	43%	74%	84%	89%
2005	32%	64%	80%	90%
2005 (excluding mortgage endowment complaints)	42%	72%	82%	88%

Source review of 2006-7 available at <http://www.fos.org.uk/publications/ar07/dealt.html#a6>. There appear to be no figures on the amounts of awards.

Arbitration schemes are organised by several bodies - one of the most important being the Chartered Institute of Arbitrators. They run the important travel industry scheme for ABTA. Fees for that vary between £72.85 for claims worth up to £3,000 to £164.50 for claims worth £10,000-25,000. It is difficult to obtain data on ADR procedures.

**Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking redress through an ADR scheme?**

Interviewees provided little information in this respect.

**1.8 ANNEX**

***Annex 1: Country literature on collective redress***

- ❑ N. Andrews, "Multi-party Proceedings in England: Representative and Group Actions" (2001) 11 *Duke J of Comp and Int Law* 249
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- ❑ Brooke LJ (ed), *The White Book Service 2007 -Civil Procedure* (Sweet and Maxwell, 2007)
- ❑ Civil Justice Review, *Report of the Review Body on Civil Justice* (1988, Cm 394).
- ❑ Civil Justice Council *Improved Access to Justice – Funding Options & Proportionate Costs* (2005)
- ❑ Civil Justice Council, *Improved Access to Justice –Future Funding of Litigation Costs*, (2007)
- ❑ M. Day and J. Kelleher, "Lessons from MMR and the Future of Group Litigation Funding" (2005) *Journal of Personal Injury Law* 98
- ❑ O. Dayagi-Epstein, "Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?" (2007) 3 *Competition Law Review* 209
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- ❑ M. Harvey, Case Comment (2007) *Journal of Personal Injury Law* C91
- ❑ C. Hodges, *Multi-Party Actions* (Oxford, 2001)
- ❑ C. Hodges "Global Class Actions Project Country Report: England and Wales" available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/England\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/England_Legislation.pdf) (2007)
- ❑ Department of Trade and Industry (DTI) *Representative Actions in Consumer Protection Legislation* (2006)
- ❑ G. Howells and S. Weatherill, *Consumer Protection Law* (Ashgate,2005)
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- ❑ P. Jolly, "Counting the cost of Settlement" (2004)*Law Society's Gazette*, 31
- ❑ D. Kell, "Evolution of Representative Actions" (1993) *Lloyd's Maritime and Commercial Law Quarterly* 306

- ❑ Law Society's Civil Litigation Committee's Report *Group Actions Made Easier* (1995)
- ❑ Laws LJ et al, Civil Court Service 2007 (Jordans 2007)
- ❑ Legal Aid Board, *Report on Proposals to the Lord Chancellor relating to the Legal Aid aspects of Multi-Party Actions*(1991)
- ❑ Legal Aid Board, *Arrangements for Multi-Party Actions* (1992)
- ❑ Legal Aid Board, Issues arising for the Legal Aid Board and the Lord Chancellor's Department from multi-party actions (1994)
- ❑ Legal Aid Board, *When the price is high* (1997)
- ❑ Legal Aid Board, *The Funding Code* (1999)
- ❑ Lord Chancellor's Department Consultation Paper on *Access to Justice- Multi-Party Situations; Proposed New Procedures* (1997)
- ❑ Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* (2001)
- ❑ J. Michaelson and A Pollack (2007) 151 *Solicitors Journal* 1008
- ❑ M. Mildred "Case comment" (2003) *Journal of Personal Injury Law* C155
- ❑ M.Mildred, "Group Actions" in Butterworth's Medical Negligence (1999)
- ❑ M. Mildred, "Case Comment" (2004) *Journal of Personal Injury Law* C67
- ❑ M. Mildred 'Group Actions' J. Miller, *Product Liability and Safety Encyclopaedia* (Butterworths, looseleaf).
- ❑ M. Mildred, 'Group Actions' in G.Howells, *The Law of Product Liability* (Butterworths Lexis-Nexis, 2007)
- ❑ R. Mulheron, *The Class Action* (Hart, 2004)
- ❑ R. Mulheron, 'Some Difficulties with Group Litigation Orders – and why a Class Action Is Superior' (2005) 24 *Civil Justice Quarterly* 40-68 (Mulheron 2004a)
- ❑ R. Mulhern 'From Representative Rule to Class Action: Steps Rather Than Leaps' (2005) 24 *Civil Justice Quarterly* 424-449 (Mulheron 2004b)
- ❑ R. Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550-580.
- ❑ R. Mulheron, Reform of Collective Redress in England and Wales – A Perspective on *Need*, Research Paper for Civil Justice Council (2008)
- ❑ National Consumer Council *Group actions – Learning from Opren* (1988)
- ❑ National Consumer Council and Scottish Consumer Council, *Representative actions in consumer protection legislation* (2006)

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- ❑ J. Robbins, “It’s Multiparty – Cry if you Want to” (2005) *Litigation Funding* 2
- ❑ B. Roche and K. Thirlwall, “Group Action: Seeking Justice in Numbers” (2005) *Personal Injury Law Journal* 5
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- ❑ J. Seymour, “Justice and the Representative Parties Rule; An Overriding Interest?” (2005) 25 *Legal Studies* 668
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- ❑ K. Uff, “Representative and Shareholders’ Derivative Actions in English Law” (1986) 5 *Civil Justice Quarterly* 50
- ❑ K. Uff, “Recent Developments in representative Actions” (1987) 6 *Civil Justice Quarterly* 15

- K. Uff, “Legal Aid Board Consultation Paper on Multi-Party Actions” (1990) 9  
Civil Justice Quarterly 23

## ***Annex 2: Detailed literature review***

The civil procedures for class or group litigation are found in Part 19 of the Civil Procedure Rules (CPR). Those of most concern to us are found in Part 19 III Group Litigation Orders (GLO); whilst Part 19II covers the representative action, which is a procedure that has traditionally not been viewed as appropriate to consumer claims where there are individual contracts, possibly separate defences and individual damage claims. There is also a special procedure under s. 47B of the Competition Act 1998.

The literature review starts with a review of the literature on the traditional forms of collective action and the various key proposals for reform. The next section looks at current reform proposals. Key works of civil procedure and consumer protection dealing with these issues are then cited. The next three sections are given over to the work of the three most prolific writers on this topic Hodges, Mildred and Mulheron. Selected key additional contribution notes are then noted. Finally the limited literature on the new competition action is noted.

### **□ Traditional forms of collective actions**

The *Opren* litigation highlighted the difficulties the English legal system had with regard to class or group actions, especially as regards funding such litigation given the costs sharing rules. In response to that the National Consumer Council issued a report *Group actions – Learning from Opren* which set out the pros and cons of group or class actions and recommended a new procedure. Also in 1988 the Civil Justice Review recommended the Lord Chancellor to study the need for extending the availability of representative or class action or the establishing of other procedures where there are large numbers of litigants. A guide to how group actions could be operated was produced by the Working Party of the Supreme Court Rules Committee. The Legal Aid Board which was responsible for public funding of group litigation made a number of contributions to the debate (1991, 1992, 1994, 1997, 1999).

Lord Chancellor's Department Consultation Paper on *Access to justice- Multi-Party Situations; Proposed New Procedures*. This had foreseen a certification hearing with requirements of at least 10 claimants with claim arising out of same or similar circumstances, a substantial number of claims giving rise to common questions of fact or law and the interests of justice being served by a MPS procedure. The register would be established and run by lead solicitors. It raised the question of whether it should be an opt-in register or if there should be a presumption of an opt-in with opt-out being allowed in appropriate cases. It also consulted on its proposal that the judge should have to approve any settlement. It raised for consultation the issue of how subsequent litigation by claimants not part of the MPS should be handled. These proposals were based on the Law Society's Civil Litigation Committee's Report *Group Actions Made Easier* as amended in the light of the Woolf report. Obviously the final GLO operates somewhat differently, with for example no certification hearing or requirement of a minimum of 10 members.

Jolowicz found in *Prudential Assurance v Newman Industries*<sup>15</sup> a potentially useful compromise whereby the representative action could be used for a declaration that members of a class are entitled to damages, but individuals still have to go on and prove their individual damages thus avoiding the excesses of the US class action. Kell notes that the courts are willing to allow representative actions even where there are separate contracts<sup>16</sup> and argues that even if separate defences arise the court could use case management tools to deal with that rather than abandon the representative action. He also notes that courts have discretion to impose costs even on non-parties so the orthodox view that the representative should bear all the costs need not prevail. However he notes the courts would be likely to take into account a party's involvement in the case so that a party that did not know of an action and did not participate was unlikely to be hit with a costs order.

Uff (1986) surveys the development of representative actions. Noting that the original rather generous rules had become tighter due to case law developments at the beginning of the twentieth century, but there were some signs of the rules becoming more generous again – i.e. *Prudential Assurance v Newman Industries* – but also noting that this can be used against public interest groups as well as promoting public interest litigation.<sup>17</sup> He also discusses the problems of moving from a representative to a class action. These include costs (loser pays rule and payment of solicitor and own client costs) and *res judicata* issues. In a follow-up article he describes his tone in the previous article as sceptical about the adaptability of the representative action to class actions. He has also written (1990) a note of the Legal Aid Board Consultation Paper on Multi-Party Actions and notes that because of their own favoured position the board do not deal with the indemnity rule. He suggests without repealing this rule there are unlikely to be many more class actions, but suggests there is no logical reasons for repealing it for representative actions without making a comparable change in individual litigation.

Andrew has provided a review of representative actions, consolidation of claims, GLOs and notes that the UK prefers GLOs to representative actions. He suggests the pros and cons of both are finely balanced, but notes Lord Steyn's comments at the Geneva conference (where the paper was presented) that UK senior judges are opposed to a litigious society. On representative actions he notes a case which held a trade association could not represent its members as it had no interest itself.<sup>18</sup> He conjectures that the reasons why UK is viewed as a "procedural backwater" is because there can be no claim for damages at large. He notes Jolowicz's hope that a two-stage process – declaration followed by damages action – but comments that there has been no large increase in such litigation. However, he notes one case where damages were

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<sup>15</sup> [1980] 2 WLR 339

<sup>16</sup> *The Irish Rowan* [1991] 2 QB 206 and *Bank of America National Trust and Savings Association v Taylor* [1992] 1 Lloyd's Rep 484.

<sup>17</sup> *Michels (Furriers) Ltd, v Askew* (1983) 127 SJ 597

<sup>18</sup> *Chocosuisse Union des Fabricants Suisse de Chocolat v Cadbury Ltd.* [1998] E.T.M.R. 205

recoverable as members allowed their watchdog professional body to recover the damages to meet the costs of future similar actions.<sup>19</sup> He also cites an example where the defendant paid the costs of a declaratory action and benefited from closure.<sup>20</sup>

Tur writing back in 1982 provides a good survey of the general theoretical need for collective redress, notes the problems with the representative action (despite some more liberal developments) and advocates the introduction of an opt-out class action and seeks to draw on continental experience of using consumer organisations.

Seymour (1999) takes as her starting point the Lord Chancellor's Department Consultation Paper on *Access to justice- Multi-Party Situations; Proposed New Procedures* as an opportunity to review the representative action procedure. She notes that whilst the formal bar on using representative actions to recover damages has been removed in practice the separate defences reason for denying the action will usually be sufficient. She argues the tests of "common interest, common grievance and relief of its nature beneficial to all" are too vague and where private individual rights are at stake there is no guidance with there always being the possibility of the separate defence issue being raised. She sees the courts as being concerned with the *res judicata* affects of such orders. If the Lord Chancellors Department's proposal to have an opt-in register is adopted she suggests the only difference between this and the test case approach is the need to formally make a claim. If *res judicata* extends beyond those on register this will provide an unacceptable compromise of existing procedural safeguards. She also comments that defendants may complain about their right to have disclosure against all members of the group being affected. She notes the crux of the argument is costs. Whilst the proposal notes costs should not fall on a single party, she notes costs sharing will make parties less likely to join in or increase chance of opt-outs. She calls for closer consideration of the Australian Federal and Ontario system. In later article she argues that to comply with the overriding interest principle the "same interest" should be based on finding "a common question of law or fact."

In Scotland the class action topic had been raised by the Scottish Consumer Council (1982). The topic was studied in depth by the Scottish Law Commission (1994.1994) but in 2000 it rejected the introduction of a multi-party situation. The Scottish Consumer Council still maintains there is a need for a class action procedure (2003). In Scotland there is no such procedure, but parties can assign their claims.

#### □ **Current reform debate**

Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* report favoured introducing a representative action. It proposed there be a permission stage, but that this be simply in writing unless it was refused or the defendant objected to such an order being made. The claim would have been made on behalf of a group that may or may not be named, but where the individuals would have a direct cause of action. The applicant would have had to provide the court with a list of those who they

<sup>19</sup> *E.M. I. Records v Riley* [1981]1 WLR 923

<sup>20</sup> *Equitable Life Assurance Society v Hyman* [2000] 2 WLR 529

represent, where individuals can be easily notified they should have the right to opt-out. Rules and criteria for the eligibility to be a representative would be set out in the rules. The remedies would be the same as if individuals had brought the claim themselves, with an invitation to comment on whether damages to unnamed claimants should be reconsidered in the future. It sought views on whether the costs rules should be modified and in particular whether organisations should be able to apply for a no costs order or an order that it is not liable when bringing an action against the government or plc. In the end the successor department, the Department for Constitutional Affairs, concluded that whilst there was general support for representative claims they should be taken forward in specific legislation for particular types of cases where there is evidence to support the introduction of such provisions.

In *A Fair Deal For All* the Department of Trade and Industry (DTI) committed itself to introducing representative actions for consumers, although it noted only certain organisations may be allowed to bring such actions and the permission of the court may be required.

In *Representative Actions in Consumer Protection Legislation* the Department of Trade and Industry (DTI) built on Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* and its own consumer strategy *A Fair Deal For All*. Although still favouring in house complaints and ADR as the main means for solving disputes it recognises a role for representative actions, but to prevent inadvertently promoting a compensation culture it proposes such a procedure having certain features. The claims should only be brought by representative associations (that are of good reputation, have the ability to handle the case and have the well being of consumers rather than profit at the centre of their ethos). Furthermore it suggests such actions should only be brought on behalf of named consumers (one objective being to be to give firms the option of replacing or repairing the faulty goods which it states may be better for all). It would prefer the representative action to cover all consumer to business infringements without the need to list specific rules or separate areas of consumer law. It also raised the question of whether consumers within the small claims limit should have to use that procedure and whether a minimum level of individual detriment should be set in representative actions. It raised without resolving the issue of when cases are sufficiently similar and the scale of damages sufficiently large to justify such actions. It does not address funding issues other than to say that it does not foresee a role for the public purse, but rather looks to consumer or other interested groups to lead this activity. It also comments that during consultation Birmingham Trading Standards Department estimated there could be 10-20 cases per year in their area suitable for representative actions.

The National Consumer Council and Scottish Consumer Council responded positively to the DTI consultation on representative actions, but were disappointed that consideration had not been given to individual led representative actions. The OFT also supported representative actions as increasing access to justice, promoting judicial efficiency and inducing behavioural change. Yet it felt the DTI had proposed too many safeguards. Under its alternative model for instance, claims could be brought by a

designated body or if not there would be a permission stage, but it considered having both filters as in DTI model was not necessary. It also considered it would not address the problem of unidentified victims or where individual detriment was too small.

The Patent Office has issued a consultation on *Representative Actions for the Enforcement of Intellectual Property Rights*. This favours a representative action without the burden of a permission stage and without an approved list of representative actions. The court would have the power to dismiss an action if it considers it inappropriate. It believes the new right should be introduced through primary legislation.

Following on from the recommendations in *Improved Access to Justice – Funding Options & Proportionate Costs*, which incidentally noted the need for the special circumstances of group actions to be taken into account, the Civil Justice Council has issued a very interesting report *Improved Access to Justice – Funding Options & Proportionate Costs* in which it rejects the idea of a Contingent Legal Aid Fund (CLAF) (because the presence of CFAs will lead to adverse selection) but favours the development of a Supplementary Legal Aid Scheme (suggesting that its funding may have to come out of a levy of damages, but noting this will provide cost protection), regulated third party financing and for group actions the possibility of contingency fees.

The Civil Justice Council's 2006 Annual Report notes that it will produce a paper providing formal advice to the Lord Chancellor on the development of processes for multi party consumer redress. This will consider funding options, judicial certification and control, opt-in or opt-out, and the distribution of awards. There will be a particular focus on competition and product liability actions. We note below Mulheron's research for the Council on unmet need for collective redress.

#### □ **Practitioner texts**

As regards the CPR rules there are several heavyweight tomes used by practitioners that explain the rules and analyse relevant practice directions and court decisions. These include the White Book (Brooke LJ ed.), Green Book (Neuberger, Lord ed.), Brown Book (Laws LJ et al) and *Blackstone's Civil Practice 2008* (Rose ed.) There are various guides written for students studying to take solicitors or bar exams that will make brief reference to group litigation. One exception is (O'Hare and Browne), but they only spend one page on GLOs in the chapter on parties to actions.

#### □ **Consumer law texts**

Some of the consumer law texts books deal with the topic of class actions in more detail. For instance, Howells and Weatherill contrasts the private initiative model with the consumer organisation and public agency model and provide some comparative context and policy discussion as well as outlining the brief history of class action in the United Kingdom and discussing representative actions and GLOs in outline. It is noted that the hallmark of the GLO is its flexibility which also engenders uncertainty. The problems of funding are noted as are the need for innovative damage solutions in group actions. Ramsay notes the distinction between viable and non-viable claims and suggests deterrence is the only justification for such non-viable claims. He also notes

the argument that class actions can be legal blackmail, but counters that the conditions in the UK are very different from those in the US. He comments after discussing the GLO and representative action that the UK does not have a true class action procedure, but reviews recent reforms intended to extend representative actions.

□ **Hodges**

Chris Hodges is one of the leading commentators on class actions. He has a background as a defence solicitor in the field of product liability. His work *Multi-Party Actions* (Oxford, 2001) is divided into five parts ; after an introduction, sections deal with managing the litigation; funding the litigation; multi-party actions in other jurisdictions (US, Canada and Australia) and a very informative case studies section where 17 pieces of litigation are analysed (often by lawyers involved in the cases). Hodges' defendant colours are evident in some of the arguments that are advanced. Hence after noting the flexible procedures he focuses in on the two main approaches to such litigation. One approach favoured by claimants is to focus on the generic issues, the alternative favoured by defendants is to ensure that individual cases are viable. He favours the latter and suggests it is becoming the norm. Linked to this is the question of whether master pleadings can be allowed, which he argues the courts are increasingly reluctant to accept. Although it is noted everything depends on the context of each piece of group litigation. He describes a lot of mass litigation being 'lawyer-led.' He discusses the need for strict controls to be placed on the criteria for entry on the register; the role of advertising and the possibility to strike out procedures that are unjust for defendants. He also discusses the need for restraint regarding disclosure if this is not to overburden defendants. There is not space here to do full justice to the range of issues addressed in this significant work. Its focus is however for the most part on the high level personal injury (product liability) type case.

Hodges has also produced a country report for a major Oxford-Stanford conference on Global Class Actions (Hodges, 2007) In this he describes the various systems for group litigation including those under study in this report. He provides several interesting comments and insights. For example he comments that the GLO is not a representative form of litigation as it covers individual claims. He notes that only 6 out of the 200 and odd High Court judges will handle GLOs with one senior judge in each region for smaller local cases. He returns to his point about claimants (and the Legal Service Commission preferring generic issues), but notes that the courts have refused to turn the cases into public enquiries. However, he notes that it is dangerous to attempt to codify a single approach to all cases. He suggests product liability claims will raise individual issues, whereas disaster claims may turn on similar facts. However he counsels that in practice a default 'predominance' test applies as experience has shown in some contexts that individual cases cannot be taken as representative of the group. He notes claimant lawyers see access to funding as the major barrier to justice and discusses the absence of contingency fees, 100% cap on success fees and the loser pays rule. He notes that after some high profile unsuccessful expenditure by its predecessor the Legal Aid Board (i.e £40M on benzodiapene) the Legal Services Commission is wary of investing in complex group litigation. He notes one county court

case where the judge capped costs on both sides to £215,000. He notes that product liability claims have mainly failed before trial with a few settlements, but the GLO has spread to other areas including in the consumer field holiday and transport cases which have successfully settled. He believes that despite some criticism of the inherent uncertainty with GLOs they are a success and there is no strong call for their reform. As regards representative actions he notes that some view consumer organisations as both ineffective and inappropriate regulatory enforcement actors. On reform he comments on the need to establish there is a need for such representative actions and fears of lawyer-led litigation, despite the evidence being there is no increase in litigation. He notes this is likely to lead to the government introducing various safeguards – only designated consumer organisations having standing, need for individuals claiming to be named, court permissions and consumer associations paying loser costs. He seems to suggest the answer to large problems where there are small losses may be public enforcement, with private restitution being part of the sentencing process or simply ignored as a waste of money if costs involved are too high.

□ **Mildred**

Mark Mildred is a leading commentator on class actions in the product liability context having previously been a claimant lawyer. He writes the class action division of Miller's Product Liability and Safety Encyclopaedia which as the name suggests provides an encyclopaedic guide to the topic. Perhaps more accessible is his chapter on 'Group Actions' in Howells' The Law of Product Liability. After a brief introduction he undertakes a comparative tour looking at the class action in the US, Canada and Australia. The English representative action is outlined. A section then looks at the development of the class action in England through the case law. He then provides a very thorough analysis of the GLO procedure noting at the outset that the structure set out in the *Access to Justice* report was abandoned at a late stage in the rule making process. The GLO is a very discretionary procedure with few strict hurdles that need to be overcome should a judge be minded to make such an order. Mildred's study highlights the key issues and blends practical analysis with reference to case law. His conclusions are interesting in that he feels that the English courts have gained a lot of experience in handling class action, but that management has been either by consent or the common sense of a judge. The introduction of the CPR was - he believes - a missed opportunity to establish a firm principled approach. Class actions are threatened by the public funding shortages and cost-shifting ('loser pays') rule. Indeed this latter rule means that the financial as well as legal viability becomes an issue and may be construed as making litigation oppressive when only modest amounts of damages are at stake. Mildred has also written on class action in the medical negligence context (Mildred, 1999).

□ **Mulheron**

Mulheron's work draws upon experience in the rest of the common law world to argue in favour of an opt-out class action. She has produced a book *The Class Action*. The focus of the book is on a comparison of class actions in US, Australia and Canada; however there is one chapter entitled "A Different Approach for England". She starts

out by noting the comment that class actions are not for England and counters this by arguing that the class action is indeed more flexible than English commentators have suggested, incorporates court case management and does not require that all parties receive the same determination. She notes that fears that class actions will bring US style litigation may be overplayed and cites Australia and Canada as jurisdictions with similar cultures to England that have adopted the procedures without great problems. She compares the representative action with the class action procedure. Noting the limitations of the representative action such as the requirement for the “same interest” meaning it is not permissible where there are separate contracts, where different defences are not permissible and where there is separate damages or separate relief. However she notes the requirements are being relaxed from a “same interest” test to a “common ingredient” test and that there are signs that the representative action is being relaxed in other ways such as in relation to separate contracts, separate defences and ability to award damages. She then draws out some more similarities with the class action – formation of sub-classes, treatment of numerosity and identity and tests for superiority. However, rather than develop the representative action she notes that the UK has preferred a new technique the “Group Litigation Order” (GLO). She is critical of opt-in schemes in general and has some additional criticisms of the GLO procedure. At first it was not clear whether individual claims had to be pleaded (although it was later clarified that they should be). There is no requirement that criteria be established for entry onto group register. There is a lack of clarity about how the cases should be handled with a lot discretion left to the individual judge. There is a requirement to obtain the consent of the Lord Chief Justice or Vice-Chancellor, but no guidance is given as to how they should decide on what basis to allow the GLO to be made. The requirement for there to be “related” issues of fact is unclear. The preferability criterion is described as purposeless as the alternatives are even less helpful. Key features are also missing such as the requirement that settlements be judicially approved and the ability to award damages on an aggregate, average, pro rate or proportional basis. She also wonders whether the test case approach favoured is compatible with human rights, consistent with pre-action protocols and ignores the fact that there may be better ways of handling the case. She is also concerned about the discouragement to appeal arguing that this is the complex type of litigation that does need judicial overview of general principles. She notes the academic arguments in favour of more specificity in the GLO procedure and clearly looks forward to further reform of the GLO procedure.

In Mulheron 2004a she uses the case of *Taylor v Nugent Care Society*<sup>21</sup> to demonstrate a class action is superior to a GLO. This case involved a claimant who had missed the deadline for joining the GLO and wished to proceed with an individual action. The Court of Appeal held that it was disproportionate to strike out the claim, but his action was subject to the case management powers of the courts which include giving priority to the group litigation. Mulheron notes the GLO is really just a “permissive joinder device” and that opt-in models such as this are the exception in the common

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<sup>21</sup> [2004] EWCA Civ 51.

law world. The problems demonstrated by *Taylor* could be avoided if the opt-out model were adopted. The opt-in model is criticized for front loading legal costs. She also points out that those who choose not to opt-in, but rather go it alone, are subject to the risk that the court will prioritise the group, although it is not always sure the group is a majority of the affected persons. She notes possible conflicts between the opt-in model and limitation periods; with art 6 of the ECHR if test cases unduly delay justice in individual cases and with pre-action protocols which require all claimants to give sufficient concise details. She notes concerns about introducing US style class actions. However, she claims some of the concerns are unfounded. She argues that fears that class actions will not be certified because of the diversity of claimants are not justified given that commonwealth schemes have shown themselves flexible enough to deal with (i) discrete issues, (ii) differentiate between generic and individual issues and (iii) make determinations in individual cases linked to individual circumstances. She recognizes there are fears about importing the US class action, but suggests these are overstated due to other factors in the civil litigation context making it unlikely they will have the same effect in UK. Furthermore she claims the US is not as problematic as stated and it should be remembered that class action are indeed intended to increase the ability of seeking redress for perceived wrongs. She concludes by noting the Lord Chancellor's Department's proposals for reform of representative actions and the debate on whether such a change could be achieved by a rule change or whether primary legislation was needed.

In *Mulheron 2004b* she uses the case of *Independiente Ltd v Music Trading On-line (HK) Ltd*<sup>22</sup> to show that the representative action in CPR r19.6 is developing so that the introduction of a class action may not be too dramatic from a UK perspective. Representative actions have traditionally been restricted by the need to show the "same interest" was affected (thus excluding personal injury claims and claims involving separate contracts); but the case law has relaxed this to become "common ingredient" or "community of interests". The contract rule has been relaxed at least for defendants; having separate defences need not be an obstacle to using the procedure and ways have even been found to circumvent in some circumstances the problems caused by individual damages needing to be assessed. She explains these changes by the need to react to the new test of "overriding interest" in the Civil Procedure Rules. She draws some comparisons between the representative action and class actions. Both have minimal numerosity requirements. In both it is possible to have class descriptions rather than identify individuals. A preferability/superiority test is applied under both. In both procedures the representative alone represents the class, but sub-classes can be created. No express mandate is required to be bound by a representative action or opt-out class actions. But she contends modern class actions provide numerous additional benefits (judicial approval of settlements, aggregate assessment of damages, cy-près etc). She advocates the introduction of such a regime through primary legislation rather than rule change.

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<sup>22</sup> [2003] EHC 470 Ch

In Mulheron, 2007, she again makes the case for Britain adopting an opt-out class action. She notes that the choice argument in favour of opt-in is often overstated; considers that cy-près schemes are not necessarily punitive and argues that an opt-out scheme need not be administratively cumbersome. She expresses support for the idea of an 'ideological representative' that has been included in three 2006 reports from the DTI on consumer matters, EC on competition cases and Patent Office on intellectual property cases, but notes that a number of issues still need to be considered and advises, based on Canadian experience, that the standing rules be drafted positively rather than left to cover only situations where other redress is not possible. In advocating an opt-out scheme she believes certain brakes are desirable to conform to the proportionality principle in the Civil Procedure Rules, namely a certification stage, a preliminary merits test and a strict *res judicata* doctrine.

Mulheron has recently published a research paper for the Civil Justice Council, which is likely to be highly influential in reform debates: *Reform of Collective Redress in England and Wales – A Perspective on Need*. She starts off by noting the limited use made of GLOs to-date and the relatively low opt-in rates and procedural problems such as the need to identify claimants, prepare individual pleadings, frontloading of costs, the test case versus generic issue approach, judicial attitudes to those who choose to stay outside the class, and in some cases the low recovery per class member. Also substantive issues such as limitations are raised. A range of 19 factors were identified as to why parties did not opt-it. These covered social and psychological reasons; reasons related to the defendant; procedural reasons and economic reasons.

In looking to discover why collective actions are not being brought she first looks inward at the problems of lack of private enforcement of claims for anti-competitive conduct and unfair terms (the section on unfair terms is considered in more detail below in the section seeking to identify unmet need). She also notes the decline in public funding of group litigation. Comparisons are then made with the opt-out procedures in Australia and Canada as well as in Portugal and elsewhere in Europe to show that in these systems more claims are being brought with higher participation rates. The problem of adding on to US class actions is also noted as well as cases being identified where action has been brought elsewhere with no equivalent litigation in England and Wales. To illustrate the problem of mass individual litigation the bank charges litigation is noted as is the plethora of Employment cases and the fact GLO litigation still involves a mass of individual claims. Finally the numbers are "crunched" to demonstrate that opt-out regimes attract higher degrees of participation than opt-in regimes. The conclusion is that there is an unmet need for better redress for common grievances giving rise to monetary loss and damage to a class of claimants.

#### □ **Shorter comments**

Day and Kelleher discuss the funding of groups actions and comments include the need for public funding of exceptional public interest cases and doubts that CFAs will be available for any but the strongest group cases. The suggestion is made that group actions might be subject to an inquisitorial scheme akin to the Financial Services Ombudsman. Robbins notes the problems of obtaining legal aid for groups actions and

the lack of After Event Insurance that restricts CFAs. Roche and Thirlwall give advice on how to manage group litigation. Michaelson and Pollcack discuss how group actions could be used in the context of fraudulent television competitions. Mildred 2004 discusses the case of *Taylor*<sup>23</sup> where a claimant who had not been allowed to join a group action was allowed to proceed with his individual case and Mildred queries what is the point of not allowing such persons who come along after the cut-off point not to join the class. Harvey discusses a Court of Appeal case that held generic costs could be recovered under a CFA where no proceedings had been brought and hence to cost-sharing order made. Jolly refers to costs capping in group litigation. Mildred 2003 also discusses this issue of cost-capping in the light of the organ retention case<sup>24</sup> noting the difficulty of achieving proportionality as well as remembering that the proposal to require defendants to make good a shortfall in claimant's available monies had not been introduced. Scott notes the increased use of pre-emptive costs orders and notes a specific regime for them had been proposed in consultation on representative actions. Stutt of the Legal Services Commission reviews funding including commenting that SLAS may be an important future development.

□ **Competition law**

The new powers to bring representative actions in the Competition Law field are of course mentioned in competition law text books like (MacCulloch and Rodgers and Whish). Dayagi-Epstein has written a wide ranging article on consumer representation in competition law including discussion of s. 47B Competition Act 1998. What is interesting is her critique of the problems consumer associations face when bringing such actions, such as allegations about their lack of legitimacy in representing consumers, shortage of resources and potential agency problems given that consumer associations' objectives may not be aligned with that of consumers (for example, if the association is offered a favourable settlement awarding them damages). She also makes a valuable contrast between consumer and competition law cases. In competition law the evidence is hard to discover for consumers, but in many consumer cases it is in the public domain e.g. advertising. She also advocates that there should be a stand alone procedure – as well as the current follow on procedure – for despite the high burden of proof it creates a self help mechanism and reflects recognition that consumers are active participants in the market. Hodges (2007) also describes this procedure and notes that there is a reluctance for individual consumers to sign up with the Consumers Association to seek recovery with regard to the replica football kits case being brought.

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<sup>23</sup> *Taylor v Nugent Care Society* [2004] EWCA Civ 51

<sup>24</sup> *A, B and Others v Leeds Teaching Hospitals NHS Trust, The Matter of the Organ Transplant Litigation*, [2003] EWHC 1034

***Annex 3: Collective redress in Scotland***

The situation in Scotland has been described by the Ministry of Justice to Civic Consulting in a mail as follows:

There are no formal procedures for class actions in Scotland, but there have been instances of litigation involving multiple claimants arising from the same cause of action, which was managed on an informal basis with claims being grouped and dealt with together.

A 1996 Scottish Law Commission (SLC) report concluded that the informal arrangements for handling class actions were not always satisfactory, in particular, there may be difficulty in applying a decision in an informal test case to actions made by other individuals in similar circumstances. The majority of respondents to the SLC were in favour of the introduction of a special procedure for multi-party actions. The SLC recommended that a special procedure for multi-party actions should be introduced, but no action has been taken on the report.

The Scottish Civil Courts review (Gill) - due to report in May 2009 – is looking at multi-party actions. The Review's consultation document notes at paragraph 6.93 that there are growing demands from consumer interests, and from Europe, for procedures for representative and class actions.

The Scottish Government is considering the recommendations. Summary cause and small claims data are available from the Scottish Court Service website, [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk). The upper limit for a small claim is now £3,000 and there is no lower limit.

The Scottish courts fund in-court mediation pilots in Glasgow and Aberdeen and these are under evaluation. The advice scheme in Edinburgh Sheriff Court had 68 cases that went through the mediation process in the 12 months to August 2007 and 53 were resolved.

***Annex 4: Organisations interviewed***

- Ministry of Justice
- Department for Business, Enterprise and Regulatory Reform (BERR)
- Confederation of British Industry (CBI)
- WHICH? (consumer organisation)
- 1 Lawyer involved in collective redress
- 1 Judge involved in collective redress

Date of interviews: February 2008