ПРАВО ПОТРОШАЧА

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COLLECTIVE REDRESS IN EUROPE – A CASE FOR HARMONISED RULES?

Summary

The European Parliament and the Commission endorse a coherent approach towards collective redress. Collective proceedings affect both, the position of the individual claimant and regulatory policy interests. National policy choices for public enforcement or for private enforcement strategies by ad-hoc interest groups have to be reassessed. This paper focuses on collective redress in some Member States and the US, before the Commission's strategy is scrutinised. The horizontal approach towards harmonisation of national schemes poses a formidable challenge. Policy-makers should reconsider their stance on opt-in mechanisms and devote more attention to privately negotiated settlements with cross-border repercussions.

Key words: *collective redress, consumers, EU, European Court of Justice, class action.*

I Collective Redress – An Agenda for EU Regulatory Action?

On 2 February 2012 the European Parliament sent a message on collective redress[1]: A Resolution commends the Commission's pledge for a co-

1 European Parliament Resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress" (2011/2089 (INI), available at *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN*.

herent approach towards collective redress. Private enforcement is considered as a supplement to public enforcement. The Resolution warns that European Union (EU) initiatives should not create a fragmentation of national laws. In a legislative assessment both realistic and diffident, the national legal traditions of the Member States are emphasised and the Commission is urged to "refrain from introducing a US-style class action".

In May 2009, the Directorate-General for Health and Consumers had issued an impact analysis of consumer collective redress mechanisms[2]. The study notes a trend towards expanding consumer markets with a potential for an unprecedented amount of mass claims. The financial crisis has exacerbated the debate on adequate protection for consumers. Consumers have brought litigation against banks and other institutions selling risky financial products with allegedly too little information. Collective redress mechanisms are seen as an important device to aggregate individual claims for damages.

The Parliament's Resolution of 2012 is the most comprehensive policy endorsement of the EU's activities on private enforcement of antitrust law and collective redress in the field of consumer protection[3]. Both, the European Parliament and the Commission are operating under an assumption which calls for closer inspection. They assume that the state of collective redress in the Member States of the European requires a horizontal approach towards harmonisation and that harmonisation would solve the problems commonly associated with cross-border enforcement of collective judgements[4]. Cross-border enforcement issues are magnified[5] if collective proceedings are resolved by a privately negotiated settlement[6].

2 See DG SANCO services document (Spring 2009) on Consumer Collective Redress, available at *http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf*.

3 See the European Commission Staff Working Document, Public Consultation, Towards a Coherent European Approach to Collective Redress, Brussels 4 February 2011 (SEC(2011)173 final), available at *http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf*; and the EU Commission's Green Paper On Consumer Collective Redress, Brussels, 27 November 2008 (COM(2008)) 794 final, available at *http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf*; EU Commission, Directorate-General for Internal Policies, Collective Redress in Antitrust (European Parliament June 2012, IP/A/ECON/ST/2011-19/PE 475.120), available at *http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=74351*.

4 For policy analyses see: Bruns, "Einheitlicher kollektiver Rechtsschutz in Europa?", *Zeitschrift für Zivilprozess (ZZP)*, 125 (2012), 399 et seq.; Domej, "Einheitlicher kollektiver Rechtsschutz in Europa?", *Zeitschrift für Zivilprozess (ZZP)*, 125 (2012), 421 et seq.; Wagner, "Collective Redress – Categories of Loss and Legislative Options", 127 *L.Q.R.* 55 et seq. (2011).

5 Cf. Palmisciano, "Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs – Note", 53 *B.C.L.* 1847 (1865 et seq.) (2012); Stiggelbout, "The Restriction in England and Wales of United States Judgments in Class Action", 52 *Harv. Int'l. L. J.* 433 (54 et seq.) (2011).

6 For a general analysis see: Erichson, "A Typology of Aggregate Settlements", 80 *Notre Dame L. Rev*. 1769 et seq. (2005).

This paper will first survey the status quo of collective redress under EU legislation and the jurisprudence of the European Court of Justice. It will then evaluate collective redress mechanisms in major jurisdictions of the EU[7] and in the US before the viability of the Commission's policy approach is assessed.

1. The Status quo under EU Legislation[8]

Ideally, collective redress mechanisms in consumer law have a double thrust: They will sanction a breach of law and produce an *erga omnes* effect[9] by averting future breaches through injunctive relief or damages[10]. From the perspective of rights, collective proceedings affect both, the position of the individual consumer and the regulatory policy interest in sanctioning a breach of consumer protection law[11]. In an US context, collective redress mechanisms are marked by a discrepancy between protecting the rights of the individual member of the class and 'regulation through litigation'[12]. Somewhat accidentally, this discrepancy shines through in the EU's legislative policy which combines procedural devices with improving consumers' material rights.

The Directive 98/27/EC on injunctions for the protection of consumers' (collective) interests[13] provides for injunctive relief on a cease-and-desist basis. The infringement of consumers' rights constitutes a market distortion which qualified entities are empowered to police by bringing court action. Moreover, member States may at their discretion require the defendant to

7 The jurisdictions of the UK, Germany, Denmark, Sweden and the Netherlands have been chosen in order to demonstrate the variety of collective redress mechanisms within the national legal orders of the Member States of the EU. See Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart Publishing Oxford 2008) on consumer collective redress mechanisms in the Member States of the EU (with a primacy of public bodies or an emphasis on private sector bodies, respectively).

8 For survey see Hodges, Reform, 93 et seq.

9 See the Opinion of Advocate-General Trstenjak of 6 December 2011 in Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt, Case No. C-472/10, sub 54 et seq.; cf. Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? – Gutachten A zum 69. Deutschen Juristentag* (Verlag C.H. Beck München (2012), A 100.

10 See the analysis by Reich, *Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht – Von der "Nationalisierung" zur "Konstitutionalisierung" von Rechtsbehelfen* (Nomos Verlagsgesellschaft Baden-Baden 2012), 57 et seq.

11 Cf. Micklitz, Gutachten, A 100.

12 See the title of the book by Viscusi (ed.), *Regulation through Litigation* (AEI-Brookings Joint Center for Regulatory Studies (2002)).

13 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *O.J.* L 166/51 of 11 June 1998.

pay into the public purse or any beneficiary designated by the court. In 2004, a regulation was passed to address the cross-border dimension of consumer protection[14]. The regulation acknowledges the crucial role of consumer organisations for law enforcement, but recognises practical obstacles to fulfilling their mission. Thus national authorities for the enforcement of consumer protection laws are admonished to exchange information and to honour requests for cross-border enforcement measures. The regulation on the European small claims procedure focuses on accelerating cross-border litigation for claims not exceeding 2000 €, but does not intend to provide for mechanisms whereby a multitude of similar, small claims may be aggregated in group proceedings[15].

Historically, the Union has pursued a piecemeal approach towards comprehensive rules of procedure on collective redress. In certain fields of consumer protection, more far-reaching devices of collective enforcement raise the question whether the Commission would be justified in extending the underlying regulatory policy approach to other branches of Union law. Art. 4 of the Directive on misleading advertising requires the Member States to provide for adequate and effective means to control misleading advertising[16]. As a corollary, Member States may empower persons or organizations "regarded under national law as having a legitimate interest" in policing misleading to bring legal action[17]. This approach has been fleshed out by the directive on injunctions for the protection of consumer interests[18] which are described as 'collective interests'[19]. The directive envisages injunctive relief, to be supplemented by payments into the public purse or any designated beneficiary, if the defendant fails to comply with a court order. This is not compensation for a breach of the law; direct payments to the consumers are not envisaged. With respect to standing, the directive allows for a regulator's enforcement perspective and an approach which is reminiscent of 'regulation through litigation': Independent public bodies which have been founded

14 Regulation (EC) No. 2006/2004 of the European Parliament and the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation); *O.J.* L 364/1 of 9 December 2004.

15 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *O.J.* L 199/1 of 31 July 2007.

16 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, of 10 September 1984, *O.J.* L250/17 of 19 September 1984. Cf. Reich, 56 et seq.

17 Art. 4 (1) of the Directive 84/450/EEC.

18 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *O.J.* L 110/30 of 1 May 2009.

19 See art. 1 (2) of the Directive 2009/22/EC.

for protection of collective interests (i.e. consumers' interest) are entitled to sue[20]. Art. 7 of the directive expressly authorises Member States to confer more extensive rights to take court action on "qualified entities and any other person concerned". This does not foreclose class actions brought by private persons as representatives of a class, but under the directive it is not Union policy to foster this approach.

2. The European Court of Justice

It is one of the major challenges of EU law on consumer protection to calibrate the relationship between collective redress and the protection of the rights of the individual consumer[21]. This is not just issue of whether collective redress mechanisms may only be sought by organisations claiming to act in the consumer's interest or, also by private parties representing a class of claimants. The US debate on mandatory class actions and due process rights of class members in the context of a proposed settlement highlights the need to protect private interests in the face of collective efficiency considerations[22]. In the Nemzeti Case[23] Advocate-General Trstenjak noted that Member States were under a duty to protect fundamental rights and to observe the principle of proportionality[24]. On the other hand she explained that "... a collective action helps to enhance the status of the consumer at the procedural level and relieves him of the risk of costs in civil proceedings ... The successful enforcement of rights by way of collective action creates a just balancing of interests of consumers and undertakings, ensures fair competition and shows fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer"[25]. Professor Reich[26] has emphasised that Advocate-General Trstenjak considers "the acts of European Union law in the area of consumer protection law ... as part of a single, overall set of rules which complement each other"[27]. Ultimately, this requires a regulatory policy choice on the relationship between individual rights and collective proceedings[28]. It would be simplistic to relegate the argument on

20 Art. 3 of the Directive 2009/22/EC.

21 Reich, 57 et seq.

22 Cf. Campos, "The Future of Mass Tort", 159 *U. Pa. L. Rev. PeNNumbra* 231 et seq. (2011) and the rebuttal by Erichson, 159 *U. Pa. L. Rev. PENNumbra* 237 et seq. (2011).

23 See supra sub 9.

24 *Ibid*., sub 54.

25 *Ibid*., sub 41.

26 Reich, at p. 59.

27 Opinion of Advocate-General Trstenjak of 29 November 2011 in Jana Pereničová, Vladislav Perenič v. S.O.S. fiananc, spol. sro., Case No. C-453/10, sub 88.

28 Cf. Reich, 61 et seq.

opt-in or opt-out mechanisms to a mere rejection of US legal transplants in class action law[29]. As the ECJ's recognition of private claims for the breach of EU antitrust law demonstrates[30], 'regulation through litigation' is equally a challenge for EU law.

II Collective Redress Schemes in Major European Jurisdictions and the US

1. The United Kingdom (England and Wales)

English law has been reluctant to provide for collective mechanisms[31]. Currently, representative procedures exist in public law. They are based on statutes which often transpose EU consumer legislation into domestic law[32]. Apart from the traditional instruments of joinder and the consolidation of individual claims the Civil Procedure Rules provide for representative actions. Under these actions a single representative party may represent others with "the same interest"[33]. Courts do not easily find a case of "same interest"; actions are rare[34].

English statute law does not confer direct rights of action on consumers. Consumer associations may sue for injunctive relief. But most enforcement activities are undertaken by public authorities once they have received complaints from consumers. A comparable complaint mechanism has been introduced in competition law. After receiving complaints from consumers a specific consumer body is entitled to make a super-complaint to the Office of Fair Trading (OFT) which will decide on the merits of the complaints[35]. In 2007 the OFT had made a plea for introducing individual stand-alone actions

29 Cf. Reich, 53.

30 See the European Court of Justice, judgment of 20 September 2001, Courage Ltd v. Crehan, Case No. C-453/99, and judgment of 13 July 2004, Manfredi et al., Joint Cases No. C-295-298/04. See European Commission, White paper on damages actions for breach of the EC antitrust rules (SEC(2008) 404) (SEC(2008) 405) (SEC(2008) 406) / COM/2008/0165 final (Brussels 2 April 2008); Draft Guidance Paper, Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (Public Consultation) (Brussels June 2011).

31 See Mulheron, *The Class Action in Common Law Legal Systems* (Hart Publishing, Oxford 2004), 68 et seq.; Sorabji in: Fairgrieve/Lein (eds.), *Extraterritoriality and Collective Redress* (Oxford University Press, Oxford 2012), 43 (52 et seq.).

32 Hodges in: Hensler/Hodges/Tulibacka (eds.) "The Globalization of Class Actions", 622 *The Annals of the American Academy of Political and Social Science* 105 (106) (2009).

33 Hodges in Hensler/Hodges/Tulibacka, at p. 109.

34 Hodges in Hensler/Hodges/Tulibacka, at p. 109.

35 Hodges in Hensler/Hodges/Tulibacka, at p. 108. On the enforcement practice of the OFT: Howells, in: Van Boom/Loos, 37 et seq.

which should be brought in the absence of an official investigation[36]. The OFT could equally envisage stand-alone actions for compensation initiated by a representative organisation before an ordinary court[37]. Similar to US class action practice the OFT advocated for settlements between businesses and consumers on the basis of a pre-action protocol[38]. Moreover, the OFT felt that a Consumer Ombudsman would make an important contribution to competition law practice[39]. A year later, the Civil Justice Council published eleven recommendations for a generic collective action on an opt-in or opt-out basis[40]. In cases on collective claims for damages courts should be empowered to aggregate compensation payments[41]. However, none of these recommendations for legislative action have been enacted[42]. A complaint for individual damages under competition law before the Competition Appeal Tribunal (CAT) will only be heard if the Office of Fair Trading or the EU Commission establishes a breach: An individual plaintiff or a consumer body acting on behalf of consenting individuals has standing before the CAT[43].

The Financial Services Bill 2009 took a much more innovative approach towards collective proceedings[44]. It proposed an English class action with an opt-out scheme for domestic members and, in view of potential preclusive effects, with opt-out rights for foreign class members[45]. Regrettably, this legislative plan was never signed into law, as elections put an end to the bill. The successor government decided to retain traditional complaint mechanisms with the Financial Services Authority and the Financial Ombudsman Service[46].

36 Office of Fair Trading, Private actions in competition law: effective redress for consumers and business – Discussion paper OFT 916 (April 2007), sub. 4.7, available at *http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf*.

37 *Ibid*., sub 4.8.

38 *Ibid*., sub 7.1.

39 *Ibid*. sub 7 on "Effective Claims Resolution and the Interface with Public Enforcement".

40 Civil Justice Council, Improving Access to Justice through Collective Actions – A Series of Recommendations to the Lord Chancellor, Final Report by Sorabji/Napier/Musgrove (eds.) (November 2008), p. 5 et seq., available at *http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Access+to+Justice+through+Collective+Actions.pdf*.

41 Ibid., Recommendation 7.

42 See the assessment by Sorabji in Fairgrieve/Lein, at p. 56 et seq.

43 Hodges in Hensler/Hodges/Tulibacka, at p. 108.

44 Sorabji, in Fairgrieve/Lein, at p. 60 et seq.

45 Mulheron, in Fairgrieve/Lein, 245 et seq.; see the criticism from a due process perspective by Monestier, "Transnational Class Actions and the Illusory Search for Res Judicata", 86 *Tul. L. Rev.* 1 (68 et seq.) (2011).

46 For details see the homepage of the Financial Ombudsman Service at *http://www.financial-ombudsman.org.uk/*.

The English Group Litigation Order[47] is the reaction to a mass litigation which proved almost unmanageable because the injured parties were unwilling to assume the proportionate risk of adverse cost orders[48]. Group Litigation Orders were introduced in 1999 in order to manage claims giving raise to common or related issues of fact or law on an opt-in basis[49]. Under Rules 19.10, 10.11 the Court has discretion "to provide for the case management of claims which give rise to common claims or related issues of fact or law"[50]. A Group Litigation Order establishes a register "on which the claims managed ... will be entered" and specifies the "issues which will identify the claims to be managed as a group" under the order[51]. Parties may apply to the Court to have their claim removed from the register[52]. The judgment in the claim on the group register will be binding on the parties and may be extended to those parties who subsequently entered the register[53]. A party adversely affected by the judgment may appeal[54]. Nonetheless, parties who were entered into the group register at a later stage may not set aside the judgment or the order, but may apply to the Court that the order or a judgment will not be binding on them[55]. The Court has discretion to select a claim from the register as a test claim[56]. Group litigation orders do not modify costs rules in civil litigation[57].

English law on aggregating litigation contains little information on how to structure settlement negotiations and to protect minority interests. However, the Companies Act of 2006 authorises collective settlement mechanisms[58] which are reminiscent of reorganisation plans under US bankruptcy

47 The most recent case with a Group Litigation Order is Visteon UK Ltd. on employees' pension rights under the Ford contributory pension scheme: Ch. Order of 20 December 2012, available at *http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders/visteon-glo*. For a list of Group Litigation Orders between 1999 and 2010 see *webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm*.

48 Fairgrieve/Howells, "Collective redress procedures – European debates", *I.C.L.Q.* 58 (2), 379 (394 et seq.) (2009); Hodges, Reform, 53 et seq.

49 Hodges, in: Hensler/Hodges/Tulibacka, at p. 109 et seq.

50 Rules of Civil Procedure, Part 19 III Group Litigation, available at *http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19*. See overview by Andrews, "Multi-Party Litigation", in 10 *IUS Gentium* 167 (178 et seq.) (2012).

51 Rule 19.11 (2).

52 Rule 19.14.

53 Rule 19.12 (1).

54 Rule 19.12 (2).

55 Rule 19.12 (3).

56 Rule 19.15.

57 Hodges, in: Hensler/Hodges/Tulibacka, at p. 109 et seq.

58 See Mann Group plc. v. Mann Strategic Holdings [2012] EWCH 4089 (Ch); Re Rodenstock [2011] EWHC 1364 (Ch); Re La Seda De Barcelona [2010] EWHC 1364 (Ch);

law[59]. A scheme of arrangement to restructure a company in distress may be imposed once a court has given its approval and 75 per cent of the creditors accept the scheme which affects their rights[60]. Creditors, who do not file a claim or an objection before the Court-imposed deadline expires, will lose their rights[61].

2. Germany

Germany is not a class action country[62]. But German law of procedure has a tradition of almost 50 years of collective redress where consumers' organisations are entitled to sue for injunctive relief against unfair trading practices and standard terms in consumer contracts[63]. This role has intensified in the face of EU legislation which envisages law enforcement activities by public authorities[64]. While representative actions constitute law enforcement by consumer organisations in their own right, a law reform of 2007 empowered consumer organisations to bring actions based on an infringement of rights of individual consumers: In order to facilitate a test case or a group action, consumers can now cede their rights to the consumer organisation which will bundle and enforce them as if those rights were its own ones[65]. Under unfair trading law, consumer organisations may skim the profits from a defendant who has deliberately breached the law[66]. However, this procedural device is largely ineffective as the courts insist on the defendant's *mens rea*[67].

Trimast Holding Sarl. v. Tele Columbus [2010] EWHC 1944 (Ch); Re TDP plc [2008] EWHC 2334 (Ch). For a private international law perspective: Thole, "Sanierung mittels Scheme of Arrangement im Blickwinkel des Internationalen Private– und Verfahrensrechts", *Zeitschrift für Gesellschafts– und Unternehmensrecht (ZGR)*, 1/2013, 109 (111 et seq.).

59 See infra sub II.5.

60 See §§ 895, 899 (1) of the Companies Act of 2006; Financial Services Authority (FSA), FSA process guide to decision making on Schemes of Arrangement (July 2007).

61 FSA, FSA process guide to decision making on Schemes of Arrangement.

62 For a survey of collective redress mechanism in German business law: Möllers/Pregler, "Zivilrechtliche Rechtsdurchsetzung und kollektiver Rechtsschutz im Wirtschaftsrecht", 176 *ZHR* 144 (146 et seq.) (2012).

63 Micklitz, Gutachten, A 96 et seq.

64 Micklitz, Gutachten, A 97.

65 See judgment of the Hamburg Appeal Court (Oberlandesgericht) of 30 January 2013 (Case No. 13 U 211/09); Press Release of Verbraucherzentrale Hamburg of 12 January 2011, 'Sammelklage gegen die Allianz'.

66 Micklitz, in: Van Boom/Loos, *Collective Enforcement of Consumer Law – Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Europa Law Publishing Amsterdam (2007)), 13.

67 Micklitz, Gutachten, A 100.

In 2005 the German legislator was forced to part with its mistrust of collective action schemes, initiated by individual plaintiffs suing for damages. After the German telecommunications had been partly privatised investors alleged that relevant information had been withheld from the capital market at the time investment decisions were made. More than 17,000 individual actions for damages were filed paralysing a local district court[68]. A law was passed on Test Case Proceedings in Capital Market-related litigation[69]. In its current form the law is a bundling device whereby parallel proceedings on a similar factual setting will be stayed until a test case has been decided[70]. However, investors who have a similar claim, but have not filed their action yet, may join the test case proceedings and the statute of limitations will be tolled[71]. The test case will only focus on conditions precedent to a legal claim, both negative and positive, or on legal issues[72]. The local court of appeal will decide on the issues giving rise to the test case[73]. The decision will be binding on those participants who joined the test case proceedings. Once the test case ruling has become unappealable, the stay on the parallel (individual) proceedings will be lifted automatically and each case will have to be decided on the basis of the test case ruling[74].

Test case proceedings are triggered by an application for a test case ruling. The local court has discretion to choose the lead plaintiff for test case proceedings[75]. Test cases proceed on an opt-in basis. Those who opt-in will be registered and the local court of appeal publishes a notice to alert other potential participants. Those participants who have not been recognised as lead parties are entitled to make submissions. Submissions by participants will only be recognised to the extent they do not conflict with declarations by the lead parties[76]. The test case ruling is binding on the lead parties and the other participants[77]. *Res judicata* applies and the test case ruling may only be

68 See Möllers/Pregler, 176 *ZHR* 144 (148) (2012).

69 Kapitalanleger-Musterverfahrensgesetz KapMuG, current version of 19 October 2012, BGBl. I 2182. For a critical assessment of the 2005 version of the law: Halfmeier/Rott/Feess, *Kollektiver Rechtsschutz im Kapitalmarktrecht* (Frankfurt School Verlag, 2010), and Möllers/Seidenschwarm, "Der erweiterte Anwendungsbereich des KapMuG", *NZG* 2012, 1401 et seq.

70 §§ 5, 8 of the Law.

71 §§ 10 (2), 11 (1) of the Law; see: Wigand, "Zur Reform des Kapitalanleger-Musterverfahrensgesetz (KapMuG)", *AG* 2012, 845 (846).

72 § 2 (1) of the Law.

73 § 16 of the Law.

74 § 22 (4) of the Law.

75 § 9 (2) of the Law.

76 § 14 of the Law.

77 § 22 (1) of the Law.

disregarded under very limited circumstances[78]. The law expressly authorises the parties to settle their dispute by a court-approved settlement which will take effect if less than 30 per cent of the participants (who are not the lead parties) opt-out of the settlement[79].

The original 2005 version of the Test Case Law was found to be too restrictive as it applied only to certain proceedings for damages. The 2012 amendment of the law takes a broader approach towards issues qualifying as test case under capital-market related civil litigation[80]. The 2012 law has a sunset clause. By 2020 the legislator will have to decide whether the current bundling devices deserve a more comprehensive treatment ushering in a general system of collective redress for individual claims for damages.

3. Scandinavian Countries[81] (Denmark and Sweden)

Denmark introduced class actions in 2008[82]. Under the Administration of Justice Act actions are conditioned upon a common claim and Danish venue for all the claims[83]. Under Danish law the class action mechanism is regarded as the most appropriate device for filtering small claims. A class action will only be admitted if the members of the class can be identified[84]. Class actions supported by private plaintiffs operate on the basis of an opt-in mechanism[85]. Danish law makes a clear distinction between private class actions and those where a public authority acts on behalf of the class as the representative of consumers (e.g. the Consumer Ombudsman) or other citizens[86]. Public authorities representing a class are entitled to opt-out thereby avoiding *res judicata* effects which they deem detrimental to the general interest[87]. If class action proceedings are to be concluded by a settlement, a court approval is necessary. They court will examine whether the settlement will discriminate among class members or is otherwise unfair[88].

78 § 22 (2) and (3) of the Law.

79 See § 17 (2) of the Law.

80 Söhner, "Das neue Kapitalanleger-Musterverfahrensgesetz", *ZIP* 1/2013, 7 et seq.

81 See on the enforcement of consumers' collective interests by regulatory agencies in Scandinavian countries: Viitanen, in: Van Boom/Loos, 83 et seq.

82 Werlauff, in: Hensler/Hodges/Tulibacka, 202.

83 *Ibid.*, at p. 203.

84 *Ibid.*, at p. 203.

85 *Ibid.*, at p. 204 et seq.

86 *Ibid.*, at p. 204.

87 *Ibid.* p. 204.

88 *Ibid.*, at p. 207.

The Swedish Group Proceedings Act was the first of its kind in Europe[89]. Swedish legislators take pride in having modelled collective redress mechanisms on US patterns for class actions[90]. The Swedish Act requires that a group litigation arises must have a reference to civil law, consumer law or environmental law[91]. Standing may be obtained within the framework of individual group actions (class actions), public group actions and organizational group actions[92]. Individual group actions (class actions) may be initiated by a plaintiff who is a member of the group and has at least one claim to which the action relates. Organizational actions are confined to litigation under consumer law and environmental law. An organizational action in consumer law may be brought by an affiliation of consumers or wage-earners against a tradesperson who, in the course of business, offers goods, services, or other utilities to consumers primarily for private use. In environmental law, non-profit organisations and some professional organisations dedicated to conservation of nature and environmental protection are entitled to commence group proceedings for injunctive relief or compensation for the impairment of the environment[93]. Public group actions are reserved for specified government authorities such as the Consumer Ombudsman[94]. Swedish class action law operates on an opt-in basis and members of a group must make an application to the court to be included[95]. The court ruling is binding on all members who opted in. *Res judicata* applies as if a member had personally sued[96]. As under US class action law[97], the group representative has power to negotiate a settlement with the defendant. The settlement will be binding on the other members of the group after a court has issued an appropriate order.

Swedish law applies the English rule on costs[98]. The representative of the group will have to bear the cost of the proceedings (including the defendant's costs), if the group action is lost. Conversely, a group member faces a financial risk only where an intervention had been declared. Current Swedish rules of procedure provide for an agreement on cost between the group representative and an attorney, contingent on liability, but not linked to a

89 On the legislative history of the Act: Nordh, "Group Actions in Sweden: Reflections on the Purpose of the Need for Reforms, and a Forthcoming Proposal", 11 *Duke L. J. Comp. & Int'l. L.* 381 et seq (2001).

90 Nordh, "Group Actions – The Swedish Experience (2005)", available at *http://www.courdecassation.fr/IMG/File/judge_nordh.pdf*.

91 Lindblom, in: Hodges, in: Hensler/Hodges/Tulibacka, 231 (234 et seq.).

92 *Ibid*., at p 234 et seq.; Nordh, Group Actions.

93 Nordh, Group Actions.

94 Nordh, Group Actions.

95 Lindblom, in: Hodges, in: Hensler/Hodges/Tulibacka, 231 (235 et seq.).

96 *Ibid*., at p. 236.

97 See infra sub II.5.

98 *Ibid*., at p. 236.

quantum. If a settlement is reached and the attorney's fees will be paid out of the settlement, court approval is mandatory[99].

4. The Netherlands

Dutch law combines collective action schemes to be brought by interests groups with in an innovative scheme for a collective settlement for claims against defendants in mass tort cases[100]. Under the Civil Code an association or foundation representing a group of persons with a similar interest may seek injunctive relief against a defendant. This has created a market for special purpose organisations, but does not resolve the fundamental policy issue why damages may not be claimed in collective redress proceedings. The new Dutch law on collective settlements in mass damages cases creates an intriguing interface between representative actions, out-of-court settlements and the right to opt-out[101]. Under the law, representative organisations or ad-hoc organisations representing potential plaintiffs are intended to negotiate a settlement so settle mass tort claims[102]. Once a settlement has been reached by the representative organisation and the alleged responsible party, the court will announce a hearing and notify known parties[103]. The court is empowered to approve or reject the settlement, but may not modify *sua sponte* the terms of the settlement[104]. Once the court approves the settlement, it will be binding on the group of affected parties unless an opt-out is declared within a specified period[105].

5. The US Class Action (Federal Rules of Civil Procedure)

Class actions[106] in the United States are part and parcel of a comprehensive system of consolidated or coordinated group litigation, both on state

99 *Ibid*., at p. 236 et seq.

100 Tzankova/Van Lith, in: Fairgrieve/Lein, 67 (68 et seq.); Tzankova/Scheurleer, in Hodges, 149 (152 et sq.).

101 Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands", 8 *J. L. Econ. & Pol'y* 549 (561 et seq). (2012).

102 *Ibid*.

103 Cf. Amsterdam Court of Appeal, Case No. 200.070.039/01, decision of 12 November 2010 (In the Matter of Scor Holding (Switzerland) AG, Zurich Financial Services Ltd., Stichting Converium Securities Compensation Foundation and Vereniging VEB NCVB).

104 Tzankova/Van Lith, in: Fairgrieve/Lein, 67 (72 et seq.).

105 See Wouter/De Clerck/Rotenberg/Douglas-Henry, "International Class Actions: Will the Centre of Gravity Shift from the US towards Europe?", 9 (3) *European Company Law* 174 (176) (2012).

106 See the case studies in: Hensler/Pace/Dombey-Moore/Giddens/Gross/Moller, *Class Action Dilemmas – Pursuing Public Goals for Private Gains* (RAND Institute for Civil Justice 2000).

and federal levels[107]. This includes joinders, consolidation of mass claims and multidistrict litigation. Moreover, bankruptcy proceedings contribute to the insight in collective proceedings since they merge creditors' claims into mandatory system of downscaling if the debtor's funds are insufficient. Pre-packaged reorganisation plans play an important role in staving off formal bankruptcy proceedings[108]. Courts approve pre-packaged reorganisation plans after a majority vote of the creditors. Very often, reorganisation plans are administered by trusts which adjudicate the value of claims or manage assets[109]. Trusts may also be set up in tort cases where the multitude of claims is such that the tortfeasor has sought bankruptcy protection and his funds or insurance liability proceeds have to be distributed evenly[110].

Under the Federal Rules of Civil Procedure[111] the certification as a class action is conditioned on a list of criteria which potential representatives of a class have to establish in order to act on behalf of individuals they have never met in person[112]. A class may only be considered as a class if a joinder is impracticable due to the number of potential claimants (numerosity)[113]. Moreover, the issues to be judged in a group proceeding have to concern questions of law and fact common to the class (commonality)[114] and the claims and defences to be raised must be typical of the class (typicality)[115]. The adequacy criterion is essentially dictated by fairness and due process considerations. The quality of the representatives (which under certain circumstances may be lead plaintiffs) and their attorneys are to protect the (future) class members' rights to be fairly and adequately represented (adequacy)[116]. Damage cases

107 See the introduction to aggregate litigation in Nagareda, *The Law of Class Actions and Other Litigation* (Thompson/Reuters, Foundation Press, New York 2009), 1 et seq.; on class actions for mass torts: Niemic/Willging, "Effects of Amchem/Ortiz on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules" (Federal Judicial Center 2002), available at *http://www.fjc.gov/public/pdf.nsf/lookup/amchem.pdf/$file/amchem.pdf*; on the law and economics of US class actions: Scherer, in: Backhaus/Cassone/Ramello (eds.), *The Law and Economics of Class Actions in Europe – Lessons from America* (Edward Elgar, Cheltenham 2012), 27 et seq.

108 See Case/Harwood, "Current Issues in Prepackaged Chapter 11 Plans of Reorganization and Using the Federal Declaratory Judgment Act for Instant Reorganization", 1991 *Ann. Surv. Am. L*. 75.

109 2007 *Ann Surv. of Bankr. Law* 4.

110 See e.g. Rosenthal, "Toxic Torts and Mass Torts", 63 *SMU L. Rev.* 845 (847) (2010).

111 Federal Rules of Civil Procedure (as of 1 December 2012), available at *www.uscourts.gov/uscourts/rules/civil-procedure.pdf*.

112 Rule 23 (c) (Certification Order). Cf. on the regulatory policy behind the federal class action rules: Redish/Berlow, "The Class Action as Political Theory", 85 *Wash. U. L. Rev*. 753 et seq. (2007).

113 Rule 23 (a) (1).

114 Rule 23 (a) (2).

115 Rule 23 (a) (3).

116 Rule 23 (a) (4).

have to fulfil predominance and superiority requirements: The questions of law and fact common to the members of the class have to dominate individual issues, and compared to other procedural devices, are superior[117]. Due process concerns and the right to a fair hearing, class actions for damages are predicated upon a notice requirement and a right to opt-out[118]. Proposed settlements for class action proceedings[119] have to be submitted for judicial review to scrutinise claims and defences and the value distributed to the class.

In mass tort cases separate actions would create the risk of inconsistent or varying adjudications[120]. Thus, the Federal Rules of Civil Procedure authorise mandatory class actions: There is no statutory duty to observe a notice requirement and the members of the class are deprived of their right to opt-out[121]. In fact, it is procedural efficiency which dictates the curtailment of individual rights[122]. Mandatory class actions have also been discussed as a device to initiate collective proceedings by by-passing restructuring plans under US bankruptcy law[123].

The complexity of mass tort cases has highlighted the inherent limits of class actions. Conversely, mass tort class actions have ushered in the advent of class actions as a resolution device[124]. A global offer will be negotiated between the counsels of the parties and approved by the court[125]. The settlement will take effect if a requisite percentage has opted in by acceptance[126].

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117 Rule 23 (b) (3) and Eley v. Morris, 390 FS 913 (918) (N.D. Ga., 1975)

118 For an economic analysis of optimal class size and and opt-out rights: Betson/Tidmarsh, "Optimal Class Size, Opt-out rights and "Indivisible" Remedies", 79 *Geo. Wash. L. Rev.* 542 (568 et seq.) (2011).

119 Cf. Tidmarsh, "Mass Tort Settlement Class Actions" (Federal Judicial Center 1998), available at *http://www.fjc.gov/public/pdf.nsf/lookup/tidmarsh.pdf/$file/tidmarsh.pdf*.

120 See on the 'limited-fund' argument in the context of mandatory class actions: Nagareda, "The Preexistence Principle and the Structure of the Class Action", 103 *Col. L. Rev.* 149 (228 et seq.) (2003).

121 See Rule 23 (1) and (2) and 2002 *Ann. Surv. Bankr. L.* 8 (II. The Mandatory (Non-opt out Class Action).

122 See Redish/Larsen, "Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process", 95 *Cal. L. Rev.* 1573 (1586, 1603 et seq.) (2007), and: Rubernstein/Conte/Newberg, in: 5 Newberg on Class Actions 17:57 (4th ed., updated November 2012) (on the need to coordinate between independent suits and mandatory class action).

123 Edwards/Herbst/Hewitt, Mandatory Class Actions as a Restructuring Technique, 875 (881 et seq.) (1992).

124 McKenzie, "Toward a Bankruptcy Model for Nonclass Aggregate Litigation", 87 *N.Y.U. L. Rev.* 960 (968 et seq.) (2012).

125 A similar pattern has been observed in aggregate, non-class settlements: Lewis, "Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions", 31 *Rev. Litig.* 209 (231) (2012); Erichson, 80 *Notre Dame L. Rev*. 1769 (1784 et seq.) (2005).

126 Cf. Johnson, "Securities Class Actions in State Courts", 80 *U. Cin. L. Rev*. 349 (383) (2011).

III The Commission's Activities on Collective Redress

1. The Green Paper on Consumer Collective Redress[127]

The Commission has opted for a bifurcated strategy which combines traditional arguments of consumer protection with potentially contentious aspects of private law enforcement. The Commission's Green Paper on Consumer Collective Redress calls for effective mechanisms as mass consumer markets have increasingly become cross-border events. The Green Paper diagnoses a market distortion as infringements of consumers' rights are not adequately matched by efficient collective redress mechanisms. The policy options which the Commission offers do not challenge the distribution of power between Member State authorities and the individual citizen[128]. In fact, the dichotomy between paternalism and private autonomy in collective redress[129] is studiously ignored.

One of the Commission's policy proposals focuses on cooperation between the Member States so that citizens from one Member State could join test case proceedings in another. Both, Government entities and private organisations would have to make an effort to accommodate the concerns of unidentified non-domestic constituencies. Although couched in the language of representative action a corporatist element remains whereby an entity administers the rights of private citizens based on regulatory policy considerations. The real policy question to be addressed in this context is whether law enforcement should be exclusively entrusted to the public authorities or corporatist private organisations which may have more clout, but also arrogate to themselves the right to decide on what consumers think and do not think[130]. The Commission appears to offer a way out of this dilemma: For the benefit of consumer representative or group actions and test cases should be expanded. As an aside, judges or public authorities should be reduced to the role of gatekeepers certifying collective proceedings or decide on funding respectively. The 2008 Green Paper side-steps, however, the issue whether, as under the Dutch collective redress scheme for mass torts, a group of individual consumers may be founded *ad hoc* to bring a representative action or initiate settlement negotiations.

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127 Green Paper On Consumer Collective Redress, Brussels, 27 November 2008 (COM(2008).

128 See on this aspect of collective redress: Issacharoff, "Class Action and State Authority", 44 *Loy. U. Chi. L. J.* 369 (373 et seq.) (2012).

129 Redish/Larsen, 95 *Cal. L. Rev.* 1573 (1579) (2007).

130 For a US perspective: Lemos, "Aggregate Litigation Goes Public: Representative Suits by State Attorneys-General", 126 *Harv. L. Rev*. 486 (499) (2012), debating whether attorneys-general are 'representative.

2. The Commission on 'a Coherent European Approach to Collective Redress'

The Commission's working document on 'a Coherent European Approach to Collective Redress'[131] reveals a remarkable shift in strategy. The Commission de-emphasises the cross-border aspect of protecting consumers, highlighting instead the necessity of strengthening the enforcement of EU law. The Commission explains that public law enforcement is motivated both by concerns for individual interests and those of the Union. On the other hand, with the enlargement of the Union law enforcement has become more decentralised. In the rhetoric of the Commission private law enforcement is to supplement public activities. Ultimately, the working document seems to borrow from the US concept of employing citizens as 'private attorney-generals': The Commission expressly acknowledges that private law enforcement may be secured by both individual redress procedures, but also through collective redress mechanisms[132].

In a US context, mandatory class actions and settlement negotiations call for a recalibration of the right of the individual in the face of collectivist pressures[133]. The interface between bankruptcy law and settlement class actions as restructuring device[134] has sharpened the awareness for the rights of individual creditors or members of the class. In Europe, representative or group actions which produce a judgment with an *erga omnes* effect are as problematic for individual autonomy as mandatory class actions under Rule 23 of the Federal Rules of Procedure.

The Green Paper discusses whether collective redress procedures should be introduced on an opt-in or opt-out basis. In the eyes of the Commission, this is an issue which has to be decided in the light of the importance which politicians attach to collective proceedings as desirable enforcement mechanisms for private rights. UK experience suggests that opt-in mechanisms might operate as a deterrent to collective redress schemes[135]. It would also seem that the European fee structure frustrates the establishment of a US-

131 European Commission Staff Working Document, Public Consultation, Towards a Coherent European Approach to Collective Redress, Brussels 4 February 2011 (SEC(2011)173 final.

132 *Ibid*.

133 Cf. Coffee, "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action", 54 *U. Chi. L. Rev*. 877 (896 et seq.) (1987).

134 Sabino, "Going to the Head of the "Class" in Bankruptcy Cases: The Continuing Evolution of Class Actions, The Class Proof, and Plaintiff and Defendant Classes in Bankruptcy Cases", 2005 *Ann. Surv. of Bankr. Law* 12 (13 et seq.) (2005).

135 See Mulheron, "The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis", 13 *Colum. J. Eur. L.* 409 (434 et seq.) (2009).

style class action industry. Thus the principled rejection of opt-out schemes seems to be unfounded[136]. Dutch law on collective settlements combines a *de facto* opt-in approach with opt-out mechanisms: *Ad-hoc* coalitions for settlement negotiations on mass torts may be established, but non-consenting individuals are entitled to opt out once the court has approved the settlement[137]. Although the Commission alludes to European sensitivities about abusive collective redress proceedings, it is unclear whether the rejection of opt-out mechanisms is informed by empirical data or economic analysis[138].

The Commission's 'coherent approach to collective redress' rehearses the traditional rhetoric of harmonisation. A coherent European framework is intended to offer common principles while paying homage to different national legal traditions. Nonetheless, it is difficult to see how common principles can be developed for regulatory concepts so radically different[139]. With a purely horizontal approach it will be difficult to ensure a common stance on the role of individual rights in collective proceedings. Moreover, it is by no means a foregone conclusion that representative organisations or state attorneys-general claiming to act in the best interest of consumers will always make the right policy decisions on collective redress. With a dose of realism, it might be more promising to concentrate on legal principles for cross-border cases[140].

Nonetheless, the Commission's proposal may well produce unexpected side-effects in the legal orders of the Member States. Hopefully, the Commission's policy papers will unleash a debate about the role of public and private attorneys-general claiming to represent the interests of a class of potential plaintiffs. In this context, a regulatory policy analysis is apposite on how to balance collective interests against individual rights. This is a debate about the material rights of members of the class and about the scope of relief. The focus on opt-in or opt-out regimes for collective redress overshadows the need for a policy debate on settlement negotiations in mass proceedings which, at the intersection of class and bankruptcy rules, raise the question about the rights of a dissenting minority[141].

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136 See Mulheron, 15 *Colum. J. Eur. L.* 409 (451) (209), who had made her criticism before the European Parliament passed its resolution of 2 February 2012, favouring opt-in mechanisms for collective redress schemes.

137 Consider in this context, Coffee's proposal, 54 *U. Chi. L. Rev.* 877 (926 et seq.) (1987), to control opt-outs.

138 See the plea by Hess, in: Fairgrieve/Lein, 107 (118), for an opt-out model of collective redress in a cross-border setting.

139 This brings Hess, in: Fairgrieve/Lein, 107 (117), to the conclusion that EU rules on collective redress should only be developed for cross-border cases.

140 Id.

141 See on problems of consent and autonomy in a non-class aggregate litigation: Burch, "Group Consensus, Individual Consent", 79 *Geo. Wash. L. Rev*. 506 (513 et seq.) (2011).

When the Commission initiated the debate on collective redress in Europe, it was motivated by potential mass claims in a cross-border context and forum-shopping. It would seem that the enforcement of a judgment or a transnational settlement pose a much greater problem for comparative collective redress analysis[142] than the fall-out from forum-shopping. Settlements resolving a transnational collective redress proceeding are bound to disclose conflicting concepts on public policy and procedural fairness and, hence, challenge the practitioner's imagination[143].

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КОЛЕКТИВНА ПРАВНА ЗАШТИТА У ЕВРОПИ – АРГУМЕНТИ У ПРИЛОГ ХАРМОНИЗАЦИЈИ?

Резиме

Европски парламент и Комисија су усвојили кохерентан приступ у односу на колективну правну заштиту. Колективни поступци имају утицаја и на индивидуалне тужиоце и на шире регулаторне интересе. Националне стратегије за јавно или приватно извршење од стране ad-hoc интересних група се морају преиспитати. Овај чланак се фокусира на колективну правну заштиту у неким државама чланицама ЕУ и САД, пре преиспитивања стратегије Комисије. Хоризонтални приступ према хармонизацији националних шема представља велики изазов. Законодавци треба да размисле о њиховом становишту у односу на opt-in механизме и да више пажње посвете приватним споразумима са прекограничним реперкусијама.

Кључне речи: *колективна правна заштита, потрошачи, ЕУ, Европски суд правде, колективна тужба.*

142 Muir Watt, in: Fairgrieve/Lein, 119 et seq.; cf. Wasserman, "Transnational Class Actions and Interjurisdictional Preclusion", 86 *Notre Dame L. Rev.* 313 (335 et seq.) (2011

143 Cf. on the prospects of governance of aggregate litigation by contract: Nagareda, "Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism", 62 *Vand. L. Rev.* 1 (49 et seq.) (2009).