

THE GREAT TRANSFORMATION. ADMINISTRATIVE AND JUDICIAL ENFORCEMENT IN CONSUMER PROTECTION: A REMEDIAL PERSPECTIVE

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INTRODUCTION

EUROPE AND US COMPARED: A CONCEPTUAL FRAMEWORK

Consumer protection and its enforcement have become an important part of both market design and regulation. Increasing levels of world trade call for integrated policies with the adoption of framework, bilateral and trilateral, agreements between the European Community, the U.S. and Asia, particularly India and China. But how different are still the regional institutional frameworks? How is the evolution of each region dependent upon the developments of other areas? Are we observing a co-evolutionary pattern of growth, or is regulatory competition the dominant feature of the relationship between different regional legal systems of consumer protection enforcement?

In order to answer these questions one needs to examine the important legislative changes occurring both in Europe and in the U.S.¹

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¹ Aggregate litigation constitutes an area of relevant transformations. A truly uniform regime of aggregate litigation does not currently exist in Europe. Academic attempts to design rules concerning global aggregate litigation have been put forward. While it is possible to have transborder litigation, Europe-wide collective actions are not yet a reality. The emerging legislation is national in substance and effects; far away from designing transborder aggregate litigation when commonality of questions of law and facts exist. In addition, the impact of aggregate litigation can only concern specific areas within consumer protection because the solutions vary so significantly within consumer law.

In the U.S., the legal regime for aggregate litigation is quite general, except for some areas, such as securities, where sector specific legislation has been enacted. Its development within consumer protection differs substantially in relation to economic losses and personal injuries. Nationwide class actions in the U.S. have to overcome many procedural obstacles. Moreover, the differences in substantive law among the fifty states, especially in the area of mass torts, prevent

Both ‘regions’ are reshaping their global policies, redefining the balance between private and public enforcement.² Changes are made looking not only inside their legal systems but also at the global level. Existing differences presumably require complex solutions, integrating regional and global regulatory frameworks for consumer protection in a new multilevel system.

The relationship between public and private enforcement has changed in different ways. Relevant transformations have taken place in the domain of public enforcement, rethinking the regulatory strategies concerning consumer enforcement. Private enforcement in aggregate forms has only recently entered the scene in Europe. Its evolution has not always been entirely consistent. While it is clear that aggregate litigation will complement administrative enforcement in consumer protection, the rationales for its use may differ across sectors.

Does the conceptual framework which distinguishes between public and private enforcement help to understand the contemporary evolution? The public/private distinction has probably become outdated. Often in European countries public agencies cannot enforce violations themselves, but need to bring the claims before a court. This constitutes judicial enforcement promoted by public agencies and would not fit with the traditional assimilation between public and administrative enforcement. A clearer and more useful distinction is that between administrative and judicial enforcement. However, even this distinction is often insufficient, given that similar remedies, with comparable effects, can be issued by both administrative authorities and judges. Thus, for example, the administrative versus judicial enforcement partition cannot be explained by looking at compensation and deterrence. In fact, the latter is often the main goal of both modes of enforcement.

For this reason this essay advocates a remedial perspective to consumer enforcement both for descriptive and normative purposes. A shift in view from enforcement to remedies reflects a loss of significance of the enforcer’s public or private nature. Further changes have occurred and the new frontiers of cooperative enforcement, operated by agencies and, to a limited extent, by the judiciary, reveal that the range of undertakings by the infringer can include commitments aimed at

nationwide class actions. Courts have developed relatively different standards in mass torts, antitrust, securities fraud and civil rights litigation. While nationwide class actions in the U.S. are difficult, a creative judiciary and lawyers’ networks across the nation have enabled the growth of widespread litigation with only minor distortions. The recent reform introduced with the Class Action Fairness Act in 2005 has contributed to the solution of some problems, but left many others to conflict of laws regimes.

² See Samuel Issacharoff & Geoffrey Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1 (2009) [hereinafter *American Exceptionalism*]; Michael Faure, Anthony Ogus, & Niels Philipsen, *Enforcement Practices For Breaches Of Consumer Legislation*, 20 LOY. CONSUMER L. REV. 361 (2008).

deterrence or compensation.³

The essay proceeds as follows: in Part I, the most recent legislative changes in Europe are described. A brief theoretical framework is provided in Part II in order to introduce the remedial perspective. Part III, then, develops the remedial perspective by focusing on coordination between injunctions and damages and the challenges for enforcement design policies. In Part IV, issues of conflicts of interest and accountability mechanisms are discussed to ensure not only alignment between claimants and representatives, but also policy consistency between compensation and deterrence, when different modes of enforcement are deployed. A conclusion in Part V provides some suggestions for the new European institutional framework.

PART I – THE EUROPEAN SCENARIO

I. Policing the European Market Through Judicial and Administrative Enforcement

The level of integration of the European consumer market has been growing steadily. The number of cross-border transactions has increased in the last ten years, partly due to the development of the ICT.⁴ Products and services, and their respective risks, have thus become more ‘common’ and the need for a coordinated strategy has clearly emerged. This evolution has led to the development of the European Consumer strategy for 2007-2013 on which a recent European Parliament (EP) Resolution has provided further suggestions.⁵ The awareness that Europe may become one of the largest retail markets, once full economic integration is achieved, pushes towards combining the ‘internal’ market strategy with a stronger role as a global player.⁶

³ See Fabrizio Cafaggi and Hans Micklitz, *The Way Forward*, in NEW FRONTIERS OF CONSUMER PROTECTION, pp. 383 ff. (Fabrizio Cafaggi & Hans. Mcklitz, eds., Kluwer, 2009).

⁴ ICT has increased the level of trade between enterprises and consumers and modified consumers’ choices. ICT has also contributed to modify enforcement policies both by adopting specific ones for e-commerce transactions and expanding the scope of ADR. Concerning the use of ICT in consumer transactions see Euro. Comm., *Consumer Protection In The Internal Market*, Special Eurobarometer (Oct. 2008), available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf. According to the research, 33% of consumers in the EU27 have purchased goods or services via the internet in the last 12 months, either in their home country or elsewhere (up from 27% in 2006, EU25). There is a significant variation in this figure at country level: 68% of individuals in the Netherlands have made an online purchase in the past 12 months, while this is true for just 4% of Bulgarians. 30% of EU consumers have made such a purchase from a retailer in their own country, while 7% have made an online purchase from a seller or provider in another EU country. For a broader analysis see NEW FRONTIERS OF CONSUMER PROTECTION 383 (Fabrizio Cafaggi & Hans Micklitz, eds., Kluwer, 2009) [hereinafter NEW FRONTIERS OF CONSUMER PROTECTION].

⁵ EU Consumer Policy Strategy 2007-2013, *Empowering consumers, enhancing their welfare, effectively protecting them*, EUR. PARL. DOC. (COM 2007) 99, SEC (2007) 321, (March 13, 2007), available at http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf.

⁶ European Parliament Resolution of 20 May 2008 on EU consumer policy strategy 2007-2013, at para. 12. The European Parliament “stresses that European norms in consumer policy and

Consumer law in Europe has developed through both primary and secondary legislation.⁷ While Member States' (MS) substantive law has been strongly influenced by European legislation and European Court of Justice case law, modes of enforcement have been left primarily to MS, in compliance with the principle of procedural autonomy.⁸ It should be clarified that this principle operates both as a gap filler and as a constraint.⁹

More recently, enforcement has become a central part of European intervention.¹⁰ The focus on consumer redress in antitrust and consumer law violations confirms that the multilevel structure has been subject to radical transformation, reducing the divide between substantive and remedial law.¹¹ In the last ten years a multi-polar

self-regulation initiatives should serve as a reference for global standards and best practices and welcomes the fact that Europe is a trendsetter, using soft power to improve consumer rights globally." See EC Reg. n. 2006/2004, 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (regulation on consumer protection cooperation), at para. 10:

The enforcement challenges that exist go beyond the frontiers of the European Union and the interests of Community consumers need to be protected from rogue traders based in third countries. Hence there is a need for an international agreements to be negotiated with third countries regarding mutual assistance in of enforcement of the laws that protect consumer interests. These international agreements should be negotiated at Community level in the areas covered by this Regulation in order to ensure the optimum protection of Community consumers and the smooth functioning of enforcement cooperation with third countries.

⁷ See STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* (Edward Elgar, 2005); UNDERSTANDING EU CONSUMER LAW (H.W. Micklitz, Norbert Reich, & Peter Rott eds., Intersentia, 2009) [hereinafter UNDERSTANDING EU CONSUMER LAW].

⁸ See Norbert Reich, *Legal Protection of Individual and Collective Consumer Interests*, in UNDERSTANDING EU CONSUMER LAW, *supra* note 7.

⁹ The gap filling function implies that absent Community legislation the Courts have to refer to national legislation. See *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 33-76, at para. 2:

In the absence of Community rules on the subject it is for the domestic legal system of each member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions can not be less favourable than those relating to similar actions of a domestic nature.

On the principle of procedural autonomy and the need to rethink about the relationship between rights remedies and procedure see Walter Van Gerven, *Of Rights, Remedies and Procedure*, 37 COMMON MKT L. REV. 501 (2000); TAKIS TRIDIMAS, *PRINCIPLES OF EUROPEAN LAW* (2nd ed., Oxford Univ. Press, 2006).

¹⁰ See European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final (Brussels, 2008), available at http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf, [hereinafter Green paper].

¹¹ For a more detailed analysis see *Way Forward*, *supra* note 3 at 383; Jules Stuyck, *Class Actions in Europe? To Opt-In Or To Opt-Out That Is the Question*, EUR. BUS. L. REV. (forthcoming, 2009); Fabrizio Cafaggi & Hans W. Micklitz, *Collective Enforcement of Consumer Law: A Framework for Comparative Assessment*, 16 EUR. REV. PRIVATE L. 391 (2008) [hereinafter *Comparative Assessment*]; CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* (Hart, 2008) [hereinafter *COLLECTIVE REDRESS IN EUROPE*]; WILLEM VAN BOOM & MARCO LOOS, *COLLECTIVE ENFORCEMENT OF CONSUMER LAW, SECURING COMPLIANCE IN EUROPE THROUGH PRIVATE GROUP ACTION AND PUBLIC AUTHORITY INTERVENTION* (Euro. Law, 2007) [hereinafter *COLLECTIVE ENFORCEMENT OF CONSUMER LAW*].

strategy has emerged; including not only judicial (Dir. n. 1998/27) and administrative enforcement (Reg. n. 2006/2004), but also promotion of alternative dispute resolution regimes (particularly mediation).¹² Specific attention has been paid to cross-border litigation concerning small claims, resulting in a newly-enacted regulation.¹³ A new proposal on consumer rights has been recently published;¹⁴ the proposal, lamentably, does not address the issue of collective enforcement.¹⁵

So far, consumer protection remains a sector-specific policy, characterized by internal fragmentation. It does not represent an horizontal clause, which would require impact assessment evaluation of other policies, i.e. there is no specific duty to evaluate the impact of general European legislation on consumer protection.¹⁶ The necessity to move the field of consumer protection from a sector-specific to an horizontal, general approach — similar to what has happened in the environmental field — has been firmly stated by the EU Commission and later by the European Parliament.¹⁷ Such evolution would have, among other things, deep impact on enforcement policies.

Regrettably the consumer *acquis*, as defined by the European Commission, does not encompass consumer protection in regulated markets.¹⁸ To the previously described horizontal legislation, specific

¹² See Commission Recommendation the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, n. 98/257/EC, European Council Res. on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (2000), Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (C (2001/310/EC).

¹³ Regulation No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 1973 O.J. (L 199) 40.

¹⁴ See Proposal For A Directive On Consumer Rights, Eur. Parl. Doc. (COM 2008) 614/13, (SEC 2008) 2544 (Aug. 10, 2008) on which see Hans W. Micklitz & Norbert Reich, *Cronica de una muerte anunciada: The Commission proposal for a "Directive on consumer rights,"* 46 COMMON MKT. L. REV. 471 (2009).

¹⁵ The general provision concerning enforcement (art. 41) leave to MS the task of defining specific remedies with regard to control unfair terms. It leaves open the alternative between judicial and administrative enforcement and defines the entities to be given standing, see on the proposal, Micklitz & Reich, *supra* note 14.

¹⁶ See Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [OJL 108 of 24 April 2002].

¹⁷ See Review of the Acquis COM (2006) 744 final and Commission Staff Working Document. Report on the outcome of the public consultation on the green document on the review of the consumer acquis, http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm; as analysed in MARCO B.M. LOOS, REVIEW OF THE EUROPEAN CONSUMER ACQUIS (Sellier, 2008).

¹⁸ The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice; the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities. Thus the Community *acquis* comprises not only Community law in the strict sense, but also all acts adopted under the second and third pillars of the European Union and the common objectives laid down in the Treaties. The Union has committed itself to maintaining the Community *acquis* in its entirety and developing it further. Applicant countries have to accept the Community *acquis* before they can join the Union. Derogations from the *acquis* are granted only in exceptional circumstances and

European consumer legislation in regulated markets should be added: from financial to banking, from telecom to energy.¹⁹ In the fields of public utilities or financial markets specific rules concerning consumer protection are drafted, like those related to universal services obligations.²⁰ It is unclear, however, whether specific regulation will be needed in relation to the specificity of market failures or whether, once the process of liberalization is completed, the level of rule uniformity in consumer protection should be much higher than the current one.²¹

The effectiveness of enforcement is an increasingly important issue in Europe.²² While improvements have been made, recent surveys suggest that the level of enforcement is still relatively low.²³ The application of the injunction EC Dir. 98/27 in transborder litigation is very limited.²⁴ The use of alternative dispute resolution is also quite scarce.²⁵ Currently collective redress is relegated to the limited fields of damages actions for breach of antitrust rules and in that of consumer protection.

are limited in scope. To integrate into the European Union, applicant countries will have to transpose the *acquis* into their national legislation and implement it from the moment of their accession (see at http://europa.eu/scadplus/glossary/community_acquis_en.htm). The consumer *acquis* encompasses all the European intervention including both legislation, soft law and ECJ case law, related to consumer protection, which recently has been part of a revision process. See *infra*.

¹⁹ See, however, the Green paper on the revision of the *Acquis* where the Commission has adopted a much narrower approach excluding even product liability and product safety. See also the Commission Staff Working paper, Report on the outcome of the public consultation on the Green Paper on the review of the consumer *acquis*, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/acquis_working_doc.pdf, and the Preparatory Work for the Impact Assessment on the Review of the Consumer *Acquis*, Analytical Report on the Green Paper on the Review of the Consumer *Acquis* submitted by the Consumer Policy Evaluation Consortium, 2007, available at http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf.

²⁰ See the Universal service directive: Dir. 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, [OJL 108 of 24 April 2002].

²¹ See Fabrizio Cafaggi, *Il diritto dei contratti nei mercati regolati: ripensare il rapporto tra parte generale e parte speciale*, 62 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 95 (2008).

²² See WILLEM VAN BOOM & MARCO LOOS, COLLECTIVE ENFORCEMENT OF CONSUMER LAW: SYNCHRONIZING PRIVATE, PUBLIC, AND COLLECTIVE MECHANISMS (Erasmus Univ., 2008) [hereinafter SYNCHRONIZING PRIVATE, PUBLIC, AND COLLECTIVE MECHANISMS]; *Comparative Assessment*, *supra* note 11 at 391; COLLECTIVE REDRESS IN EUROPE, *supra* note 11; *The Way Forward*, *supra* note 3 at 383; Norbert Reich, *Crisis Or Future of European Consumer Law*, in YEARBOOK OF CONSUMER LAW 3 (Deborah Parry et al. eds., Ashgate, 2009).

²³ See Jules Stuyck et al., An Analysis and Evaluation of Alternative Means of Consumer Redress Other Than Redress Through Ordinary Judicial Proceedings, Study Centre for Consumer Law, (Jan. 17, 2007) available at http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf [hereinafter Stuyck Report] (discussing Directive 98/27/EC effects on injunctions and its implementation and enforcement in 25 Member States).

²⁴ According to the Commission, only two cross-border cases have been brought since the Injunctions directive entered into force in 1998. See Report from the Commission concerning the application of the Injunctions Directive, available at <http://ec.europa.eu.consumers/enforcement/injunctions-en-htm>.

²⁵ See European Commission, Special Eurobarometer 195, "European Union Citizens And Access To Justice" (Oct. 2004), available at http://ec.europa.eu/consumers/redress/reports_studies/eurobarometer_11-04_en.pdf (the data show that European Citizens do not complain about products and services very often, as 47% never complain to a salesperson, retailer or service provider; and even when they complain they do it only rarely).

2. Administrative and Judicial Enforcement in European Consumer Protection

The combination between administrative and judicial enforcement in consumer protection still widely differ in the U.S. and Europe, despite some convergence.²⁶ Variations are also sector specific within consumer enforcement practices. Different national institutional strategies emerge for both quality and safety regulation and related risk-management issues. To some extent this is due to the fact that national consumer policy pre-existed European intervention; and many of those institutions have been revised, but not yet repealed.²⁷

The European Green Paper on collective redress and the White Paper on damages for antitrust violations are attempts to coordinate enforcement policies developed at the MS level with particular, but not exclusive focus on trans-border litigation.

Judicial enforcement presents a wide array of solutions. The main distinction concerns individual versus aggregate litigation. Aggregate litigation has been proposed in the field of antitrust violations and consumer protection. Public policy arguments for aggregate litigation are well known.²⁸ Of course, reservations concerning the potential abuses have also been widely articulated.²⁹ Less defined, however, are the different features of these arguments in domestic versus cross-border litigation.

Within aggregate litigation different types of proceedings are available.³⁰ To a large extent the choice of proceedings is dictated by the law but some room is left for contractual agreements concerning class action waivers, mandatory arbitration clauses.³¹ Aggregate

²⁶ See Ilya R. Segal & Michael D. Whinston, *Public Versus Private Enforcement of Antitrust Law: Survey*, 28 EUR. COMPETITION L. REV. 306 (2007); CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS 223 (Hart 2008) [hereinafter REFORM OF CLASS AND REPRESENTATIVE ACTIONS].

²⁷ For a detailed analysis see Fabrizio Cafaggi, *A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities*, in THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW 191, 191-244 (Fabrizio Cafaggi ed., Oxford, 2006).

²⁸ See Issacharoff & Miller, *supra* note 2, and Samuel Issacharoff & Ian J. Samuel, *The Institutional Dimension of Consumer Protection*, in NEW FRONTIERS OF CONSUMER PROTECTION, *supra* note 4, at 47. See Hans W. Micklitz, *Collective Private Enforcement Of Consumer Law: The Key Questions*, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW, *supra* note 11, at 13.

²⁹ See REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 26, at 243.

³⁰ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (American Law Institute, Apr. 2009) [hereinafter AGGREGATE LITIGATION] at § 1.02 (“(a) An aggregate lawsuit is a single lawsuit that encompasses claims or defences held by multiple parties or represented persons. (b) An administrative aggregation is a collection of related lawsuits, which may or may not be aggregate lawsuits, proceeding under a common judicial supervision or control.”).

³¹ In relation to the U.S. Geoffrey Miller contends that States diverge: California generally invalidates these class action waivers while New York enforces them. The Supreme Court has not yet ruled on the issue. Geoffrey Miller, *Compensation and Deterrence in Consumer Class Actions in United States and Europe*, in NEW FRONTIERS OF CONSUMER PROTECTION, *supra* note 4, at 234; Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class-Action*, 104 MICH. L. REV. 373 (2005).

litigation, both in the U.S. and Europe, constitutes the exception whilst individual litigation is the rule.³² Aggregation can be justified on both efficiency and distributional grounds but within the limits of due process.³³ But rationales for aggregation should also be defined according to the remedies. The effects of injunctive relief are often intrinsically collective; while individual injunctions are perfectly admissible, it is often more appropriate to use aggregate litigation in order to enjoin. Damages, on the contrary, are generally individualized and thus individual litigation is the rule rather than the exception.

In the EU, the White Paper on antitrust damages to consumers has functionally distinguished public from private enforcement.³⁴ The latter should have a predominantly compensatory function.³⁵ The White Paper proposes two measures: (i) an opt-in collective action and (ii) a representative action, brought by representative bodies, such as consumer organizations or administrative agencies.³⁶ Private enforcement will take place at the MS level where rules concerning damages can differ quite significantly. The European Commission has proposed that Decisions concerning infringement will be binding proof in civil proceedings for damages.³⁷ The European Commission is currently trying to define Guidance for national Courts. It will certainly be useful to harmonize highly differentiated regimes, but horizontal coordination will still be needed to ensure judicial cooperation at MS level.³⁸

The recent Green Paper on collective redress in the consumer field deals with violations of consumer legislation. Regrettably it has not clarified the relationship between public and private enforcement nor that between injunctions and damages.³⁹ Focusing on judicial enforcement related to aggregate litigation, the Green Paper defines four policy options: (1) no EC action; (2) cooperation between MS's; (3) mix of policy instruments; and (4) judicial collective redress procedure. Within option (4) the emphasis has been on financing litigation, preventing unmeritorious claims, defining standing options, and choosing between opt-in and opt-out actions. The European Commission has articulated the rationales as well as the risks and costs

³² See AGGREGATE LITIGATION, *supra* note 30.

³³ *Id.*

³⁴ See European Commission, White Paper on Damages actions for breach of EC antitrust rules, COM(2008) 165 final, (Brussels, 2008), available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf [hereinafter White Paper].

³⁵ See Wouter P.J. Wils, *The Relationship Between Public Antitrust Enforcement and Private Actions for Damages*, 32 WORLD COMPETITION 3, 12 (2009).

³⁶ See White Paper, *supra* note 34, at para. 2.1 (Commission suggesting a combination of two mechanisms for collective redress: (i) representative actions and (ii) opt-in collective actions).

³⁷ *Id.* at para. 2.3 (Commission proposes that national Courts are bound by the findings in Commission decisions and National Competition authority.).

³⁸ See Fabrizio Cafaggi, *Making European Private Law: Governance Design*, in MAKING EUROPEAN PRIVATE LAW 289 (F. Cafaggi & H. Muir Watt eds., Edward Elgar, 2008).

³⁹ See Green Paper, *supra* note 10.

of both opt-out and opt-in systems.⁴⁰

There are important constitutional and institutional issues to be considered when designing new European rules: in particular, the correct balance between private international law rules aimed at coordinating different MS legislation, mutual recognition systems, and harmonized legislation.⁴¹ From a constitutional perspective, legislation at the EU level has to be justified and grounded on approximation of laws concerning the internal market, fundamental rights to access justice, and judicial cooperation in civil and commercial matters.⁴² Even if these rationales were considered, still the principle of proportionality would require MS interests to be fully taken into account.

From an institutional perspective the actors playing in cross border litigation may need different governance structures and coordination devices. As the North American experience shows, various forms of networks are needed for lawyers and consumer organizations to be able to promote effective and efficient litigation at EU level. In the public domain coordination of judicial and administrative enforcement is needed. While EC Reg. n. 2004/2006 has provided a set of principles for administrative cooperation, foundational rules are still missing for coordination among State judiciaries involved in consumer aggregate litigation.⁴³ The complementarity between administrative and judicial enforcement needs to be implemented by a coordinated set

⁴⁰ *Id.* at para. 54-57.

⁴¹ See *Way Forward*, *supra* note 3, at 383.

⁴² See Michele Taruffo, *Harmonising Civil Litigation in Europe?*, in MAKING EUROPEAN PRIVATE LAW, *supra* note 38, at 46; for a broader view see EVA STORSKUBB, CIVIL PROCEDURE AND EU LAW, (Oxford, 2008).

⁴³ See European Commission, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (discussing general provisions concerning judicial cooperation in civil and commercial matters and those on mutual recognition of judgements). On the point see the recent judgement of the ECJ C-180/2006, 14 May 2009, not yet reported, where the court affirms that “Consequently, the answer to the questions referred is that, in a situation such as that at issue in the main proceedings, in which a consumer seeks, in accordance with the legislation of the Member State in which he is domiciled and before the court for the place in which he resides, an order requiring a mail-order company established in another Member State to pay a prize which that consumer has apparently won, and

– where that company, with the aim of encouraging that consumer to conclude a contract, sent a letter addressed to him personally of such a kind as to give him the impression that he would be awarded a prize if he requested payment by returning the ‘prize claim certificate’ attached to that letter,

– but without the award of that prize depending on an order for goods offered for sale by that company or on a trial order,

the rules on jurisdiction laid down by Regulation No 44/2001 must be interpreted as follows:

– such legal proceedings brought by the consumer are covered by Article 15(1)(c) of that regulation, on condition that the professional vendor has undertaken in law to pay that prize to the consumer;

– where that condition has not been fulfilled, such proceedings are covered by Article 15(1)(c) of Regulation No 44/2001 only if the consumer has in fact placed an order with that professional vendor.” More recently judicial cooperation in civil matters has been the focus of European institutions. See Council Decision 2008/976/JHA on the European Judicial Network, 2008 O.J. (L 348) 130 (Dec. 12, 2008).

of rules concerning institutional cooperation among MS institutions in the field of consumer enforcement.⁴⁴

The current European landscape is characterized by a relative uniform legislation related to injunctions and a quite diversified state legislation concerning collective redress for damages.⁴⁵

2. 1. Group Actions

Thirteen MS of the EU have introduced some form of collective redress.⁴⁶ No convincing attempts have so far been made at the MS level to integrate legislation concerning injunctions and collective redress into a unified or coordinated system of collective judicial enforcement. National legislation does not specifically address ways in which consumers of different European MS can join and bring claims before Courts, nor the extent to which national consumer organizations should ensure adequate representation of foreign consumers.⁴⁷ Transborder litigation has not been promoted with effective rules and institutions either through centralization, or through a well designed decentralized but coordinated enforcement system.

The Nordic systems, encompassing Finland, Sweden, Denmark, and Norway, have enacted new legislation on group actions.⁴⁸ They have created specialized institutions for both monitoring (Ombudsmen) and enforcing (Market Courts) consumer violations.⁴⁹ These countries rarely delegate actions to private bodies; and so the role of consumer associations remains relatively small.⁵⁰ In both monitoring and enforcement there is extensive use of soft law and the Consumer Complaint Boards act mainly by way of recommendations, which are usually complied with. In recent years, Ombudsmen have been given the power to provide compensation to victims of consumer law infringements.⁵¹

England is an intermediate case, where the role of the Office of Fair Trading, both in competition and consumer law, is very significant in defining enforcement policies.⁵² Empowerment of private bodies has

⁴⁴ On these questions see *Way Forward*, *supra* note 3; and Reich, *supra* note 22.

⁴⁵ See *Comparative Assessment*, *supra* note 11; REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 26, at 51.

⁴⁶ See Green Paper, *supra* note 10, at para. 8.

⁴⁷ For a detailed analysis see Stuyck Report, *supra* note 23; see also European Commission, Consumer Affairs, "Alternative Dispute Resolution: Helping Consumers Seek Redress" (Apr. 2007) available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

⁴⁸ See Per Henrik Lindblom, *National report Group litigation in Sweden*; Erik Werlauff, *Collective redress in Danish law and perspectives at EU level*; and Klaus Vittanen, *Collective Litigation in Finland*. All of these articles are available at Global Class Action Project, available at <http://globalclassactions.stanford.edu/>.

⁴⁹ See Klaus Vittanen, *Enforcement of Consumers Collective Interests by Regulatory Agencies in the Nordic Countries*, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW, *supra* note 11, at 100; see also REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 26, at 27.

⁵⁰ Vittanen, *supra* note 49.

⁵¹ *Id.*

⁵² See Geraint Howells, *Collective Consumer Redress Reform: Will It Be a Paper Tiger?*, in

been driven more by European legislation and the general regulatory reform than by the growing power of consumer associations.⁵³ In relation to procedural rules, the enactment of the Group Litigation Order (GLO) in 1999 has allowed some forms of consolidation mainly driven by consideration of judicial management rather than access to justice.⁵⁴ The debate over wider law reforms involving the introduction of class actions is still open.

Germany and Austria follow a model in which private organizations, consumer and trader organisations, play a major role in the enforcement of consumer law. These countries are quite reluctant to grant public authorities a prominent role, rebalancing the sharing of responsibilities between public and private enforcement.

The Dutch system has recently been reformed. The traditional reliance on self-regulation has been only partially revised with the introduction of a new Agency in 2006.⁵⁵ However, the newly established Consumer Agency has rather limited regulatory powers and does not undermine the prominent role of Dutch consumer organizations. The reform that has introduced group litigation has promoted forms of cooperative enforcement translating into agreements between the infringer and the victims often supported by private associations to be later approved by Courts.⁵⁶

The southern European countries have given a stronger role to private associations.

In Portugal, for example, both the injunction directive and the 'group action' introduced via popular action in 1995 have been implemented by referring to associations. Litigation has been very limited, evident sign that DECO has used its power to negotiate *ex ante*

NEW FRONTIERS, *supra* note 4, at 329; and Christopher Hodges, *Developing Approaches to Public and Private Enforcement in England and Wales*, in NEW FRONTIERS, *supra* note 4, at 151. For a broader overview see GERAINT S. HOWELLS & STEPHEN WEATHERILL, *CONSUMER PROTECTION LAW (MARKETS AND THE LAW)* (2d ed., Ashgate, 2005). See Enterprise Act, 2002, c. 40, at §§ 11 & 205 (describing the super-complaint procedure under which organisations may address the OFT, which is then obliged to investigate the complaint within 90 days).

⁵³ See Philip Hampton, "Reducing Administrative Burdens: Effective Inspection and Enforcement," HM Treasury (Mar. 2005), available at <http://www.hm-treasury.gov.uk/d/budo5hamptonv1.pdf>; Richard B. Macrory, "Regulatory Justice: Making Sanctions Effective," Better Regulation Executive (Nov. 2006), available at <http://www.berr.gov.uk/files/file44593.pdf>; see also Legislation and Regulation Reform Act, 2006, c. 51 and Regulatory Enforcement and Sanctions Act, 2008, c.13. But see the Enterprise Act, 2002, c.40, at § 8 (defining the tasks and instruments of consumer enforcement). The coordination between this general reform and that of the Enterprise Act of 2002 especially section 8 generates a fairly complex landscape where it is unclear if consumer regulation constitutes a 'special case' or can be nicely integrated in the more general strategy.

⁵⁴ See REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 26, at 53; RACHEL MULHERON, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (Hart, 2004); Rachel Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, 70 MOD. L. REV. 550 (2007).

⁵⁵ Sjoerd Ammerlaan & Dirk Janseen, *The Dutch Consumer Authority: An Introduction*, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW, *supra* note 11, at 107.

⁵⁶ See Ewoud Hondius, *Public and Private Enforcement in Consumer Protection: A Dutch Perspective*, in NEW FRONTIERS, *supra* note 4, at 235.

with enterprises.⁵⁷

France probably stands above the others; but certainly in recent times the weight and power of consumer organizations has grown both in Italy and Spain. Public funds, like in Germany and Austria, are given to consumer organizations to contribute to their activities, including financing litigation.⁵⁸

In Italy, while the main monitoring and enforcing power is still in the hands of the Ministry for economic development, there is a growing role of the Competition authority as a consumer protection agency, especially after the implementation of an unfair trade practices directive.⁵⁹ New legislation concerning group action has been introduced with an opt-in system but has not come into force yet.⁶⁰

Eastern European countries have taken different paths characterized by a stronger role of administrative enforcement.⁶¹

2. 2. Injunctions

In Europe legislation confers injunctive power to both judiciary and administrative entities. Administrative and judicial injunctions can concur.⁶² The Injunction Dir. n. 98/27 has left MS to choose between judicial and administrative enforcement or both. While most of the old MS have chosen judicial enforcement, the new MS have selected both.⁶³ There is a potential overlap between the injunctive power conferred to administrative authorities by the implementing Act of the Directive and those conferred directly by Regulation 2006/2004.⁶⁴ In addition to the general Directive 98/27, there are sector specific directives as that on unfair contract terms and on unfair commercial practices which differ as to the content and the effects of injunctions.⁶⁵

Injunctions against violations of consumer legislation can be prohibitory and consist of orders to cease and desist from an unlawful

⁵⁷ Art 52 (3) of the Portuguese Constitution as amended in 1989 states that “[e]veryone shall be granted the right of popular action either personally or via associations that purport to defend the interests in question, including the right of the aggrieved party or parties to apply for compensation.”

⁵⁸ For an examination of the different sources to finance litigation in a comparative perspective see Raffaele Torino, *Il finanziamento delle azioni seriali. Esperienze straniere ed azione collettiva risarcitoria*, in *Analisi Giuridica dell'Economia*, Class, Action!(?), 257 (2008).

⁵⁹ See Italian Consumer Code art. 140.

⁶⁰ See Italian Consumer Code, art. 140 bis. See Sergio Chiarloni, *Il nuovo articolo 140 bis del codice di consumo: azione di classe o azione collettiva?*, *Analisi Giuridica dell'Economia*, Class, Action!(?), 107 (2008); For a comparative analysis see Geoffrey P. Miller, *Punti cardine in tema di class action negli Stati Uniti ed in Italia*, in *Analisi Giuridica dell'Economia*, Class, Action!(?), 211 (2008).

⁶¹ See Antonina Bakardjeva, *Public and Private Enforcement of Consumer Law in the Member States from CEE Countries: Institutional Choice in the Shadow of Enlargement*, in *NEW FRONTIERS*, *supra* note 4, at 70.

⁶² See, e.g., In Italy Tribunale di Roma 30.01.04.

⁶³ See Bakardjeva, *supra* note 61.

⁶⁴ See *Way Forward*, *supra* note 3, at 430.

⁶⁵ *Id.* at 409.

behavior. Often however the most important regulatory functions to perform are affirmative injunctions that order a firm to change or rectify a business practice and/or a contractual term. While Directive 98/27 seems to limit the use of affirmative injunctions focusing primarily on prohibition and cessation, the sector specific regimes, in both unfair contract terms and unfair commercial practices permit wider use of affirmative injunctions.⁶⁶ It should, however, be underlined that MS have implemented Directive 98/27 in different ways and some have broadened the content of injunctions, including affirmative orders concerning restitution.⁶⁷

The most relevant distinction concerns the effects of injunctions. The binding effects of injunctions are regulated in different ways in each MS. Often they also vary according to the sectors. In general the majority of MS does not give general, *erga omnes* effects to the injunction, limiting them, rather, to the parties involved in litigation.⁶⁸

At State level these differences are reduced if the regime of injunctive relief has been regulated in a consumer code or a consumer protection act. However, in many States differences remain significant.⁶⁹ Many of them depend on the adoption of an *in abstracto* or *in concreto* review.⁷⁰ If judicial or administrative review is *in abstracto*, the subject matter is the clause or the practice.⁷¹ If it is considered unfair the judgment will bind all parties beyond those

⁶⁶ See Directive 98/27/EC of the European Parliament and of the Council of May 19 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 51 at art. 2 ("Actions for an Injunction"). Some MS have implemented this directive permitting both prohibitory and affirmative injunctions. See, e.g., Italy art. 140 Codice del Consumo where cease and desist orders and affirmative injunctions correcting practices or clauses can be issued. See, in the Italian case law, Trib. Rome, 23.05.2008, in Giur. It., 2008, 12; Tribunale Roma, 30.04.2008, Foro it. 2008, I, 2679. See also Trib. Palermo 20.02.2008, Foro it. 2008, I, 2475.

⁶⁷ See, e.g., in Italy Consumer Code, art. 140. See for the case law Tribunale Roma 23.05.2008.

⁶⁸ See European Commission, "Report from the Commission concerning the application of Directive 98/27 of the European parliament and of the Council on injunctions for the protection of consumers," [hereinafter Report on Directive 98/27] at para. 25:

In most Member States, a ruling on an application for an injunction has a mitigated impact. It is mandatory only with respect to the case and the parties in question, i.e the qualified entity which brought the action and the company which is subject of the injunction. In practice this means that if a company commits and infringement identical to that for which another company has already been convicted a new injunction must be sought to stop the new infringement. In the same way, the annulment of an unfair term in a contract proposed by a company does not prevent the same company from continuing to use this unfair term in a similar contract.

⁶⁹ In relation to Central Eastern European Countries, see Bakardjeva, *supra* note 61, at 63 (stating that "[t]he CPAs in Latvia and Bulgaria are empowered to directly intervene and require change in contract conditions or termination of unfair contracts (Latvia s. 25/4)(6) CPA or of misleading advertising (Bulgaria s. 34 CPA)").

⁷⁰ See in Italy C.A. Roma, 24.09.2002 (holding that in abstracto, collective review aims at the cancellation of a clause insofar it is a standard contract term, but does not prevent the insertion of that clause as a result of a negotiation between the parties). See also Cass. 21.05.2008, n. 13051 (upholding C.A. Roma 24.2.2002), Resp. civ. e prev. 2008, 12, 247 and Cass., 28.02.2006, n. 4467.

⁷¹ See Marek Safjan, Lukasz Gorywoda, & Agnieszka Janczuck, *Taking the Collective Interest of Consumers Seriously: A View From Poland*, in NEW FRONTIERS, *supra* note 4, at 171.

which are part of the specific trial. On the contrary, if the review is *in concreto* the findings will be limited to the specific litigation and similar cases will have to be tried *ex novo*.⁷²

The Directive on Unfair Contract Terms 93/13 allows a court to enjoin different enterprises or trade associations, while also recommending or imposing contractual terms.⁷³ In these cases the injunction can be imposed on an entire industry in order to delete an unfair term from a contract.⁷⁴ MS have deployed different rules in the implementation and only some of them have given injunctions general effects.⁷⁵ However, the individual members of the trade association are bound by the judgment only if they took part in the litigation.

In the domain of unfair commercial practices (EC Dir. n. 2005/29) (“UCPD”) if an unfair practice is recommended by a trade association or practiced by more than one enterprise the injunction can be addressed to all the enterprises, members of the specific industry, that have adopted the practice or have subscribed to a code that permits the unfair practice.⁷⁶ In relation to judicial enforcement, the individual enterprise is bound by the judgment only if it took part in the litigation. In many MS enforcement has been attributed to administrative agencies which issue injunctions whose effects are often binding beyond the litigants.

Clearly the possibility that (i) a judicial injunction declares a certain clause or practice unfair, and thus unlawful, and (ii) that this applies to future litigants reinforces the regulatory functions of judicial enforcement. If the same applies in the context of a claim for damages the market policing power of judges would become extremely relevant. The differences, mainly based on procedural rules untouched by the directives, do not currently allow the deployment of consumer judicial enforcement as an effective regulatory strategy to police market practices.

⁷² This distinction is often applied to individual and collective litigation. *In abstracto* review refers to litigation on unfair terms or practices challenged by consumer or trade organisations, while *in concreto* review is generally applied to individual litigation. See in the Italian case law Trib. Roma, 2nd May 2007, in Resp. civ., 2008, 426.

⁷³ See European Council of the Communities, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, at art. 7, para. 2 [hereinafter Directive 93/13].

⁷⁴ *Id.* at art. 7.3; see also *Way Forward*, *supra* note 3.

⁷⁵ This has happened in relation to unfair contract terms. See Report on Directive 98/27, *supra* note 68, at para. 26 (describing what happens in various MS jurisdictions when court rules that a contract term is unfair).

⁷⁶ See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005 O.J. (L 149) 22] [hereinafter Unfair Commercial Practices Directive]. See in the Italian case law, Trib. Roma, 30.01.2004, in *Danno e Resp.*, 2004, 873, with comment of R. Conti, *Inibitoria collettiva, pubblicitaria ingannevole e ritardi del vettore aereo*; see also *Way Forward*, *supra* note 3.

PART II – CHOICE OF ENFORCERS AND CHOICE OF REMEDIES:
FRAMING THE REMEDIAL PERSPECTIVE

3. *Enforcers and remedies*

Presently, enforcement policies in consumer law provide a wide variety of alternative strategies concerning both the enforcers and the available remedies.

The choice of enforcers concern primarily the alternative/complementarity between judicial and administrative enforcement.⁷⁷ It should be noted here that ex ante regulation is not being contrasted with ex post private enforcement; but rather administrative with judicial enforcement. While the two modes of enforcement may have different requisites they both operate as reaction to the infringement which does not exclude a deterrence function.

The approaches might differ: they can be seen as substitutes or complements. While I have advocated elsewhere the approach of institutional complementarity as the best theoretical approach, in current European consumer protection law often the two modes of enforcement are overlapping, while in some areas neither operates.⁷⁸

In order to investigate the complementarity it is important to look at both substantive and procedural rules which give claimants the choice between the two modes of enforcement or the possibility of using them both, simultaneously or sequentially. Conventionally, Europe has been depicted as administrative enforcement oriented, while the U.S. has been described as private enforcement based. The divergence, however, is decreasing. At first sight convergence between the U.S. and Europe is occurring: the former has increased the role of administrative agencies while the latter has introduced aggregate litigation. Is the rise of judicial enforcement in Europe a sign of weakness of public enforcement? I do not believe that the growing legislation on aggregate litigation in Europe should be interpreted as a response to the failure of administrative enforcement. Rather the rise in aggregate litigation should be viewed as evidence that ex post accountability can improve the effectiveness of consumer legislation if sequential enforcement between public and private is well engineered.

⁷⁷ This alternative is often described as that between public and private enforcement looking more at standing than at the nature of the enforcers. Judicial enforcement, however cannot be entirely identified with private since often claimants seeking remedies are public actors, agencies or ombudsmen. For this reason it is preferable to speak of judicial and administrative rather than public and private.

⁷⁸ Consumer protection is traditionally broken down into protection of consumer economic interests by means of contract and tort law (private law), and protection of consumer health and safety by means of public law. For a more detailed analysis see *Way Forward*, *supra* note 3, at 383; and *Comparative Assessment*, *supra* note 11, at 391.

4. *Divisible and Indivisible Remedies*

The choice of enforcers and eventually the form of enforcement may be affected by differences between divisible and indivisible remedies (damages and injunctions for example).⁷⁹ Various remedies require particular due process requirements in the U.S., and to a more limited extent, in Europe.⁸⁰

1) When the remedy is damages and compensation the primary goal, judicial enforcement is often the dominant available strategy. Only recently have public enforcers been given standing to seek compensation on behalf of injured parties. But they still need to seek damages before a Court on behalf of injured consumers. In Europe the most illustrative example is provided by Scandinavian countries where Ombudsmen have been given the power to seek compensation both in addition to injunction or as a single separate remedy before a Court. In England the OFT has direct power to enforce both competition and consumer protection laws and power to seek remedies before a Court.⁸¹ As we shall see within unfair commercial practices administrative agencies have been given the power to ask infringers for commitments including both injunctive relief and damages. Cooperative enforcement often includes hybrids. Still in the majority of cases damages can be sought before a Court by a private entity, being an association or an individual acting as a representative of a group.

2) The case for injunctions is different. Injunctions can be sought before a Court or before an administrative entity, either a government office or an independent agency. Here the choice about enforcers is open and it might depend on several factors.

3) A third hypothesis, the one I focus in this contribution, is where claimants seek both divisible and indivisible remedies and face choices concerning enforcers and remedies.

In general when both remedies are sought different strategies are available: a) to look for a single enforcer, generally the Court,

b) to separate enforcement strategies while maintaining coordination. That is, the claimants can seek damages before Courts and injunction before administrative agencies and decide to bring the claims simultaneously or sequentially.

Claimants can thus act either:

b1) sequentially (in general seeking an injunction before an

⁷⁹ See AGGREGATE LITIGATION, *supra* note 30, at § 2.04 (“(a) Divisible remedies...entail the distribution of relief to one or more claimants individually, without predetermining in practical effect the application or availability of the same remedy to any other claimant. (b) Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”).

⁸⁰ AGGREGATE LITIGATION, *supra* note 30, at § 2.04; and in relation to Rule 23(b) (2) and (3) text and footnotes below.

⁸¹ See REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 26, at 51.

administrative entity and then, if granted, asking for damages before the Court, or seeking injunction before a Court and damages before another Court); or

b2) simultaneously (seeking an injunction and damages before the same Court, different Courts or an administrative agency and a Court).

5. Litigation, Negotiation and the Choice of Enforcement

To what extent is the selection of enforcement mode and that of remedy driven by the choice between adjudication and negotiation? Choice of enforcement may depend on whether the main aim of claimants is judgment or settlement; and whether the remedy sought is injunction or compensation.

Claimants may use enforcement strategies to increase their negotiating powers. Enforcement rights in Europe have often been used to negotiate rules in order to ensure better compliance by enterprises. This mechanism has in part been institutionalized by the injunction directive 98/27 which requires prior consultation aimed at negotiating the remedy.⁸² Unintentionally, European consumer enforcement law has increased bargaining in the shadow of (threatened) litigation. In Europe litigation has been a driver for negotiations more than a direct form of regulation.⁸³ Unlike the U.S. model of regulation through litigation, the European model can be described as bargaining through or ‘in the shadow’ of litigation. To what extent these negotiations translate into ex post regulation has to be further explored. It is beyond the scope of this paper to investigate on how the different available remedies can affect negotiation and its outcome, namely whether a property or a liability rule granted to claimants may affect defendants’ negotiation strategy.⁸⁴

6. On Which Factors Does the Choice of Remedies Depend?

6. 1. Size of Claims and Modes of Enforcement

Choice of enforcement may depend on substantive law issues concerning both liability and remedies.⁸⁵ The size of damages, in

⁸² See Directive 98/27, *supra* note 68, at art. 5 (“Prior Consultation”). In Italy, for example the consultation is mandatory and lack of prior consultation prevents the consumer organisation from bringing the action before Court. See Tribunale Roma 23.05. 2008, in Foro it. 2008, I, 2674.

⁸³ See Geoffrey Miller, *Compensation and Deterrence in Consumer Class Actions in the United States and Europe*, in NEW FRONTIERS, *supra* note 4, at 263.

⁸⁴ See generally, J. Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006).

⁸⁵ See AGGREGATE LITIGATION, *supra* note 30, at § 2.03 (“... the Court (a) may authorize aggregate treatment of a common issue concerning liability by a way of class action when substantive law separates that issue from the choice and distribution of appropriate remedies and

particular its variance among classes of consumers, may affect the incentives to bring claims and the choice of enforcement.⁸⁶ Within aggregate litigation the size of damages per individual consumer may differ. This explains in the U.S. both the degree and the features of aggregate litigation in consumer class action, antitrust, and mass torts. The typical consumer class actions are generally associated with small claims related to economic losses, antitrust class actions are related to higher economic losses, and mass torts with personal injuries claims, generally of higher value than economic losses. However, in the field of mass torts the specificity associated to personal injuries has suggested a much more cautious approach on the use of class actions in the U.S.⁸⁷

The size of the various claims affects the agency relationship between representatives and plaintiffs which in turn may influence choices of enforcement and the type of remedies. The smaller the size of individual claims the lower the claimants' incentives are to monitor, and the higher the risk of opportunism. Clearly the size of the claims is relevant for damages; but not for injunctions where incentives to monitor are defined differently.

The agency relationship should be thought as both the premise and the consequence of the institutional framework of enforcement mechanisms. It is the premise because the size of the claim is an independent variable, but is also the consequence because, given an agency relationship where monitoring costs are very high, the enforcement mechanism can favor accountability of the representatives when 'spontaneous incentives to align lack.' This in turn may favor or disfavor aggregation and contribute to the increase or decrease in the number of claimants.

6.2. Incentives of Representatives in Aggregate Litigation

One relevant set of variables concerning the choice of remedies and that of enforcement depends on the incentives of the representative(s), partly associated with the systems of funding litigation.⁸⁸ In Europe there are three main potential representatives in consumer enforcement: public entities (ombudsmen in the Scandinavian countries, OFT in England),⁸⁹ consumer associations, and

from other issues concerning liability; and (b) may authorize aggregate treatment of both common issues of liability and individual issues of remedy by way of a class action when a determination of the liability issues, in practical effect, will determine both the choice of remedy and the method for its distribution on an individual basis.”)

⁸⁶ See Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT' L.J. 135, 149 (1999) (claiming that variance between individual claims suggest that aggregate litigation is strongly recommended in low value/low variance claims, recommended in low variance/high value claims while is problematic when variance is high).

⁸⁷ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 594 (1997) (holding that mass tort cases are usually not appropriate for class treatment).

⁸⁸ For a detailed analysis see Issacharoff & Miller, *supra* note 2.

⁸⁹ See Gerrit Betlem, *Public and Private Enforcement of EU Consumer Law*, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW, *supra* note 11, at 37; and Roger Van Bergh,

a lead plaintiff, generally represented by a law firm or a network of law firms. European legislation has given the lead to consumer organizations and public bodies in litigation concerning injunctions, while a more balanced approach has been adopted in relation to group actions.⁹⁰ In the U.S. the private attorney general model has given a dominant role to plaintiffs law firms and relegated public interest law firms and consumer organizations to a secondary role.⁹¹ In this context the role of the plaintiffs' bar to provide effective rules has also been a crucial feature.⁹² But this balance changes in other fields of aggregate litigation like fundamental rights or, to a limited extent, employment discrimination.

The choice of remedies is affected by the incentives of the representative which may or may not be (perfectly) aligned with those represented or at least with all of them.⁹³

Aggregate litigation presents specific features of conflicts of interests related to the lawyer-client relationship which require a more active supervision by Courts.⁹⁴ In relation to consumer organizations the potential conflict may concern members versus non members if the former, given membership rights, have stronger voice than the latter.

Both the decision on whether and how aggregation should occur is influenced by conflicts of interest between principals and agents, which partly depend on the level of heterogeneity of claims and

Should Consumer Protection Law be Publicly Enforced? An Economic Perspective on EC Regulation 2006/2004 and its Implementation in the Consumer Protection Laws of the Member States, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW, *supra* note 11, at 179 (arguing in favor of strong public enforcement).

⁹⁰ See Directive 98/27, *supra* note 68, at art. 3 ("Entities qualified to bring an action").

⁹¹ For a historical perspective mainly focused on the U.S. see JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS AND THE REMAKING OF AMERICAN LAW (Harvard Press, 2004); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (Univ. of California Press, 2002); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW, (Harvard Press, 2001). For a comparative perspective see *Way Forward*, *supra* note 3; and *Comparative Assessment*, *supra* note 11.

⁹² However the high level of discretion while exercising its regulatory functions has often translated into an accountability deficit. On these questions see John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

⁹³ Miller, *supra* note 83, at 230.

⁹⁴ This principle is well recognized in the U.S. and Canada.
See AGGREGATE LITIGATION, *supra* note 30:

...(a) As necessary conditions to the aggregate treatment of related claims by way of a class action the Court shall determine that there are no structural conflicts of interest between the named parties or other claimants and the lawyers who would represent the claimants on an aggregate basis among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favour some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-a-vis the lawyers themselves.

For Canada see Court of Appeal for Ontario, *Fantl and Transamerica*, 2009 ONCA 377, par. 39 "The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the states of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of individual issues."

classes of consumer claimants.⁹⁵ The selection of representatives occurs in different ways in the U.S. and Europe.⁹⁶ In neither system is the choice of the agent primarily made by the principals, thereby posing severe misalignment problems.

Profit driven law firms, public interest law firms, and consumer organizations have different incentives, leading to divergent and potentially conflicting litigation and settlement strategies. For this reason legislation allowing different representatives in aggregate litigation is more desirable than one granting, de jure or de facto, quasi monopoly standing to one category.⁹⁷

Conflicts of interests may concern different classes of claimants. They differ for factual reasons, some of them have already been harmed, while others will likely be harmed in the future. Conflicts may also arise because claimants have different preferences over remedies. Some of them may prefer injunctions and enforce the prohibition seeking product withdrawal or stopping the unfair commercial practice; others may want to monetize their entitlement and transform a property rule into a liability rule through settlement. *Amchem*, decided by U.S. Supreme Court, constitutes a good illustration of conflicting classes of claimants who should not be represented by the same lawyer.⁹⁸ The ALI Principles have proposed judicial review of compliance with the duty of loyalty, distinguishing the criteria to be deployed from those related to conflicts of interests in settlements.⁹⁹

In relation to consumer organizations the potential conflict may concern members versus non members. How are consumer organizations bound to take into account the general interest of consumers and in particular those who are non members? When consumer organizations are asked to represent the consumer collective interest, in proceedings seeking injunctions, they certainly owe a duty of loyalty to members. It is unclear, however, which duties are owed to non members who are seeking injunctive relief. In particular, it is unclear how non members can affect the choices of enforcement and remedies outside of membership rights. Both the legal framework and the practices reveal an accountability deficit which may affect the selection of claims and the choice of enforcement modes.¹⁰⁰

The disparity on accountability between the U.S. and Europe is wide probably because the U.S. experience has generated more refined rules, while most of the recent European legislation does not address

⁹⁵ See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007).

⁹⁶ See Fed. R. Civ. P. 23(g) (“Appointing Class Counsel”). In Europe the injunction directive does not define a selection process and only constrains the choices within the organizations in the list made public every year by the European Commission. For group actions the selection varies from MS to MS. In the International civil Litigation Draft conflict of interest plays a major role. For example, it is a precondition for the choice of representative.

⁹⁷ See *Comparative Assessment*, *supra* note 11.

⁹⁸ See *Amchem*, 521 U.S. at 625-27.

⁹⁹ See AGGREGATE LITIGATION, *supra* note 30, at § 2.08; see *id.* at § 2.08 (comment f).

¹⁰⁰ See *Way Forward*, *supra* note 3; Issacharoff & Miller, *supra* note 2, at 193-96.

but for few exceptions, the issues of conflicts of interests in relation either to consumer organisations or to law firms.¹⁰¹ The U.S. model has developed rules concerning the classical private general attorney model combining loyalty, voice and exit, while less has been done when NGOs or other consumer organizations bring the claims.¹⁰²

The specificity of these conflicts of interests is also related to the fact that in aggregate litigation, at least in the US, the issue is regulated not by contract, as it happens in individual and consolidated litigation, but by the aggregation itself.¹⁰³ The decision concerning certification and the modes of aggregation are relevant to address and prevent conflicts of interests among different classes of claimants. Judicial review of loyalty is thus strategic and the judge has often been defined as the fiduciary of the class. Opt-in systems may reduce these problems to the extent that parties should be able to define representatives before opting-in. However, since most of the times, even in opt-in regimes, the litigation strategy is not subject to negotiation preceding access to the class, conflicts of interests are likely to arise there as well.

To sum up: incentives and conflicts of interests affect the choice of remedy both in litigation and at time of settlement when they diverge. A distinction is made between structural conflicts of interests that pre-exist the litigation and those that arise during the litigation and may concern the settlements. Different rules take care of these conflicts in the U.S. system while in Europe the issue is still unsettled.¹⁰⁴

7. Choice of Enforcement Mechanisms and Structure of the Market for Legal Services

The selection of modes of enforcement is affected by the competitiveness and maturity of the market for legal services. The main differences between the U.S. and EU are related to the dominance of different representatives: in the U.S. the strong presence of plaintiff's lawyers, in Europe consumer associations and public bodies.¹⁰⁵ These institutional differences represent broader distinctions concerning models of regulatory capitalisms.¹⁰⁶

¹⁰¹ See Judge Posner's opinion in *In re Rhone Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Castano v. Tobacco Co.* 84 F.3d 734 (5th Cir. 1996).

¹⁰² See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: an Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (claiming "the American preference for adversarial legalism over public hierarchical bureaucracy often results in private systems of informally aggregated settlement that bear a closer resemblance to public compensation systems that Kagan allows"). See John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

¹⁰³ See AGGREGATE LITIGATION, *supra* note 30, at § 2.07 comment (d) ("Loyalty as protection against structural conflicts of interest").

¹⁰⁴ *Id.*

¹⁰⁵ See Issacharoff & Miller, *supra* note 2.

¹⁰⁶ See PETER A. HALL AND DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (Oxford, 2001). In relation mainly to European neo-corporatist model see COLIN CROUCH & WOLFGANG STREECK, *THE*

This picture, however, needs further qualification. On the U.S. side, while certainly the private attorney general model, being mainly profit driven, developed in the most profitable areas of litigation, the others have been covered by public interest law-firms and NGO's. The market for legal services is certainly mature but at least in certain areas not highly competitive.¹⁰⁷

In Europe consumer organizations have been key players. European legislation on injunctions has provided them with legal tools to engage into transborder litigation.¹⁰⁸ The effectiveness of the framework is unclear.¹⁰⁹ The level of litigation is low and remarkable differences exist across MS, especially between western and eastern European countries.¹¹⁰ The market for legal services in collective consumer litigation is just now emerging. The recent law reforms have attracted the interest of U.S. law firms and have brought about governance changes in European law-firms to establish coordinated strategies for trans-border class actions. Many of these changes are also driven by the re-location of global litigation from the U.S. to Europe.¹¹¹

8. The Conflicts Between Deterrence and Compensation: The Remedial Perspective

The choice of enforcement modes has conventionally been correlated to different goals: administrative with deterrence and judicial with compensation. But the debate over class actions has highlighted that, especially in relation to small individual claims, the main function of aggregate litigation is deterrence and the legal framework should be defined accordingly.¹¹²

Thus, judicial enforcement fosters deterrence when injunctive relief is sought or when pecuniary remedies are the main drivers but individual claims are small.¹¹³ Judicial enforcement primarily promotes compensation when pecuniary remedies are sought for larger individual sizes. Since both administrative and judicial enforcement, in negative value suits, are primarily aimed at deterrence, the choice between them

DIVERSITY OF DEMOCRACY: CORPORATISM, SOCIAL ORDER AND POLITICAL CONFLICT (Edward Elgar, 2006).

¹⁰⁷ See John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice"*, 30 CARDOZO L. REV. 407 (2008) (arguing that opt-out mechanisms should be devised in order to improve competition among plaintiff lawyers).

¹⁰⁸ See generally Report on Directive 98/27, *supra* note 68.

¹⁰⁹ *Id.*

¹¹⁰ See Bakardjeva, *supra* note 61, at 70; and Safjan, et al., *supra* note 71, at 171.

¹¹¹ See Nagareda, *American Exceptionalism*, *supra* note 2.

¹¹² See Coffee, *Accountability and Competition in Securities Class Actions*, *supra* note 107; and John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534 (2006).

¹¹³ See *Castano*, 84 F.3d at 748 ("[The] most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit"); see also Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157 (2006) ("negative value claims" are claims in which the costs of enforcement in an individual action would exceed the expected individual recovery.")

should be based on a comparative institutional analysis and their ability to coordinate with secondary goals such as compensation.¹¹⁴

This perspective can only partially explain the complementarity between the two modes, given on the one hand the role of injunction in judicial enforcement, clearly aimed at deterring unlawful conduct, and, on the other hand, the development of compensation schemes, governed by administrative bodies on the basis of administrative law. Thus, especially in relation to deterrence, it is the combination between different types of remedies, primarily injunctions and damages, that should be considered in choosing between judicial and administrative enforcement.

The identification of different goals concerning administrative and judicial enforcement is only the first step in defining the quality of complementarity. Within each mode and especially within judicial enforcement tensions and even conflicts may exist between compensation and deterrence.¹¹⁵ These tensions require that policy priorities are well defined but also call for rules of conflicts of interests, enabling classes' subdivision according to their preferences while giving injured parties adequate representation.¹¹⁶

PART III – COORDINATING INJUNCTIONS AND PECUNIARY REMEDIES: DIFFERENT STRATEGIES IN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT

10. Coordination Between Injunctions And Pecuniary Remedies

The remedial perspective calls for an examination of the various remedies and their scope in aggregate litigation. I will first analyze the degree and modes of coordination between the two classes of remedies and then consider the conflicts of interest associated with classes of claimants seeking different remedies for the same infringement. The main challenges for an effective system of aggregate litigation in Europe are not related to the existing lack of coordination among enforcers; but, rather, to the absence of a regulation concerning conflicts of interests among different classes of consumers and between consumers and competitors.¹¹⁷

When there are negative value law suits, clearly the main goal is deterrence, but when the level of individual compensation grows then the two functions, deterrence and compensation, are combined.¹¹⁸ In Europe the main rationale for the introduction of aggregate litigation at

¹¹⁴ See Issacharoff, *supra* note 95.

¹¹⁵ See Miller, *supra* note 83, at 263.

¹¹⁶ See below text and footnotes.

¹¹⁷ See *supra* note 89.

¹¹⁸ See Judith Resnik, *Money Matters: Judicial Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); and Coffee, *supra* note 107; Issacharoff & Miller, *supra* note 2, at 186.

the MS level has been indicated as compensation, while deterrence is mainly pursued through the use of injunctions—both judicial and administrative.¹¹⁹ The remedial distinction more than the juxtaposition between administrative and judicial enforcement can explain when deterrence prevails over compensation.

In Europe the possibility of integrating into a single lawsuit different remedies is still very limited in aggregate litigation yet commonly admitted in individual litigation.¹²⁰ The general rule is that evidence of violations gathered in the proceeding concerning injunctive relief cannot be used to ask for damages by individual claimants in different proceedings. This implies high costs of replicating litigation to seek different remedies for the same infringement. In addition, the limited reach of *res judicata* concerning an injunction may require additional evidence even where, exceptionally, claimants seeking damages can rely on the conclusions reached in the proceeding on injunctive relief. Similar issues arise in the context of aggregate litigation taking place before courts in different MS except for the application of Regulation 44/2001 on mutual recognition.

In the U.S. aggregate litigation may include both injunctive relief and damages.¹²¹ In the language of class actions these are functionally distinguished in divisible and indivisible remedies.¹²² They may be sought simultaneously or sequentially.¹²³ Aggregation for indivisible remedies is held to be desirable and, at times, mandatory.¹²⁴ Aggregation for divisible remedies requires a more complex analysis concerning the value and variance of claims involved.

Aggregation through class actions has to follow the

¹¹⁹ See White Paper, *supra* note 34; and Green Paper, *supra* note 10.

¹²⁰ Significant differences exist between aggregate litigation seeking injunctive reliefs and that seeking pecuniary rewards. Individual rights are not considered insuperable obstacles to collective redress. In the area of injunctions opt-out rights are often reduced or eliminated, in that of damages individual rights are given greater importance but limitations to opt-out are still held admissible. See, e.g., *Ortiz v. Fireboard Corp.* 27 U.S. 815 (1999); *Molski v. Gleich* 318 F.3d 937, 948-49 (9th Cir. 2003).

¹²¹ The former are regulated under Fed R. Civ. P. 23(b)(2) while the latter are regulated by 23(b)(3). See AGGREGATE LITIGATION, *supra* note 30, at § 2.04: The Court may authorize aggregate treatment of common issues concerning an indivisible remedy by way of a class action, with no requirement under § 2.08 that claimants must be afforded an opportunity to exclude themselves from such treatment. Aggregate treatment as to an indivisible remedy may be appropriate, even though additional divisible remedies are also available that warrant individual treatment or aggregate treatment with the opportunity of claimants to exclude themselves, as specified in § 2.07.

¹²² The distinction between divisible and indivisible referred to in note 121, *supra*, is articulated by the Courts in relation to several variables. See, e.g., *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-58 (5th Cir. 1974). See AGGREGATE LITIGATION, *supra* note 30, at § 2.04.

¹²³ See, e.g., *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 209 F.R.D. 323, (S.D.N.Y. 2003) ("courts generally allow plaintiffs in class actions to sue for injunctive relief on behalf of the class and then bring damages claims in subsequent individual actions") (citing *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir.1996); *Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir.1993); *Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C.Cir.1983)).

¹²⁴ See AGGREGATE LITIGATION, *supra* note 30, at § 2.07 comment h. ("Mandatory aggregation to manage indivisible remedies"); see also *Allen*, 358 F.3d at 471.

requirements of Federal Rule of Civil Procedure 23(b)(2) in relation to declaratory judgments and injunctive relief and those of Rule 23(b)(3) in relation to damages.¹²⁵ Different due process requirements arise in the two contexts. Rule 23(b)(3) states requirements to be added to those defined in Rule 23(a), i.e. numerosity, commonality, typicality and adequacy of representation.¹²⁶ It permits individualized monetary damages, allows opt-out, and imposes notice requirements.¹²⁷ Rule 23(b)(2), on the other hand, does not allow opt-out, nor is personal notice necessary.¹²⁸ Unlike Rule 23(b)(3) which requires predominance and superiority, Rule 23(b)(2) requires only that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”¹²⁹ In class actions aimed at injunctive relief all wrongdoers who need to be restrained have to be involved.¹³⁰

These requirements differ especially in relation to predominance and superiority which have to be added to those under Rule 23(a).¹³¹ Class certification under 23(b)(3) is considered unsuitable if proof of essential elements of the cause of actions requires individual treatment.¹³² In general the use of Rule 23(b)(3) is more frequently used for breach of contract claims and for economic losses and property harm than mass torts.¹³³ When personal injuries are involved—often this is the case in mass torts—courts are more reluctant to grant class

¹²⁵ See Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. OF LITIG. 691, 706-09 (2006). The nature of equitable relieves concerning 23(b)(2) allows different types of remedies other than injunctions. Class actions under 23(b)(2) can include restitution, disgorgement, constructive trust, equitable estoppel and rescission.

¹²⁶ For a detailed examination see *In re Prudential Ins. Co. America Sales Practices Litigation* 148 F.3d 283, 309 (3d Cir. 1998).

¹²⁷ These have been articulated by the Supreme Court of the United States in *Phillips Petroleum v. Shutts* 472 U.S. 797 (1985).

¹²⁸ See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); see RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 193 (Foundation Press, 2009).

¹²⁹ See *supra* note 121.

¹³⁰ See, e.g., *U.S. v. Paccione*, 964 F.2d 1260, 1274-75 (2d Cir. 1992).

¹³¹ See *Amchem*, 521 U.S. 591, 613-15 (“In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”); see also, *Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3rd Cir. 2008) (“Under predominance requirement for class certification issues common to class must predominate over individual issues.”).

¹³² See *Hydrogen Peroxide*, 552 F.3d at 312 (“In antitrust cases, impact is often critically important for the purpose of evaluating Rule 23 (b) (3)’s predominance requirement because it is an element of the claim that my call for an individual, as opposed to common proof.”); see *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 20 (1st Cir. 2008) (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact can not be established through common proof.”); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (“[W]here the fact of damage cannot be established for every class member through the proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.”).

¹³³ See, e.g., *Vioxx litigation* where class actions have not been held viable. MDL-1657 *Vioxx Products Liability Litigation*, available at <http://vioxx.laed.uscourts.gov>.

certification, and bifurcation may be required or two separate actions might be necessary.¹³⁴ Specifically, in many mass torts proximate cause may differ among different plaintiffs, and so aggregate treatment is more difficult.¹³⁵ The same requirements, though, do not apply to Rule 23(b)(2).

The regime of Rule 23(b)(2) changes when, in addition to injunctive relief, damages are sought. Due process requires that some of the requirements associated with Rule 23(b)(3) are applied in hybrid class actions as well.¹³⁶

Hybrid class actions may encompass multiple claims, including injunctive relief and compensatory and/or punitive damages. Federal Courts in the U.S. are split in relation to certification of hybrid class actions, in particular on whether the less restrictive requirements for injunctive relief can apply to pecuniary remedies, regulated by 23(b)(3).¹³⁷ Some courts require damages to be merely incidental.¹³⁸

¹³⁴ See *Cooper v. Southern Co.*, 390 F.3d 695, 721 (11th Cir. 2004) (holding that class certification was not warranted because injunctive relief was appropriate).

¹³⁵ See, e.g., *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006); *Discover Bank v. Superior Court*, 36 Cal.4th 96, 153, 30 Cal.Rptr.3d 76, 113 P.3d 1100, where the court affirmed that waiver of class arbitration in a consumer contract of adhesion is unconscionable under California law and should not be enforced, when it occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. West's Ann.Cal.Civ.Code § 1668; see *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, where the court affirmed that Consumers Legal Remedies Act's (CLRA) anti-waiver provision would be violated by enforcement of forum selection clause in service agreement to require former subscribers in California to bring suit in Virginia due to internet service provider's (ISP) alleged conduct in continuing to debit their credit cards for monthly service fees after they terminated their subscriptions, where Virginia law would not allow subscribers to bring class actions, and there would also be limitations regarding injunctive relief, no punitive damages or enhanced remedies for disabled and elderly, reduced recovery for unintentional acts, shorter period of limitations, and use of lodestar formula to calculate attorney fees. West's Ann.Cal.Civ.Code § 1750 et seq.

¹³⁶ See *Allison v. Citgo Petroleum Group*, 151 F.3d 402 (5th Cir. 1998).

¹³⁷ The debate has arisen in relation to the interpretation of the statement made by the rules advisory committee where it was stated: "The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." The most important divide is between the Fifth and Seventh Circuit on the one hand and the Second Circuit on the other. The former deny certification while the latter allows certification of hybrid class actions. *Allison*, 151 F.3d 402; *Jefferson v. Ingersoll Intern. Inc.*, 195 F.3d 894 (7th Cir. 1999); *Robinson v. Metro North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). While the Fifth and the Seventh Circuit require damages to be incidental, the Second Circuit, in *Robinson*, permits class certification if "the positive weight or value ... of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy." *Robinson*, 267 F.3d at 164 (citing *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)). See *Sherman*, *supra* note 133, at 709 (the split between the circuits goes not only to impediments to hybrid class actions and bifurcation, but also to fundamental disagreement as to predominance and cohesiveness in class actions, and would seem to require Supreme Court review at some point).

¹³⁸ This is the position of the Fifth, Seventh and Eleventh Circuit. See *Allison*, 151 F.3d 402 followed by *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); see *Allison*, 151 F.3d, at 402 (defining incidental damages); *Bolin*, 231 F.3d at 976.

Other Courts allow wider discretion and grant certification for compensatory damages.¹³⁹ Some Courts allow not only compensatory but also punitive damages. Damages in hybrid class actions should not require an individualized analysis.

The distinction concerns damages that can be calculated on a standardized basis and damages that require individual computation. The former allow integration between the two remedies and coordination between deterrence and compensation within same proceedings; the latter, however, impose a separate inquiry and thus may bring about divergent results. Consensus exists, though, on the necessity that, even in the absence of monetary recovery, plaintiffs would have had reasons to seek injunctive relief and that these remedies would be appropriate if plaintiffs were successful on the merits.¹⁴⁰

When both rules, 23(b)(2) and 23(b)(3) can apply courts should treat the suit as having been brought under 23(b)(2) thus forcing all the class members to be bound. The purpose of mandatory class treatment is to avoid inconsistency.¹⁴¹

Courts, however, may define subclasses in relation to the remedies sought and subject them to the different rules. In hybrids, questions of commonality may appear different in relation to indivisible and divisible remedies.¹⁴² Also, the adequacy of representation may vary in relation to different remedies sought in the same class actions. The issue arises especially when class actions seeking both injunctive and monetary relief are bifurcated.¹⁴³

In Europe the question of hybrid collective litigation is just now emerging since group actions have only recently been introduced but no proposals for coordination have been so far made. Coordination between injunctions and other remedies exists more for specific areas than as a general policy. Neither the injunction directive nor the new legislation on class actions specifically address the interplay between

¹³⁹ This is the position of the Second and Ninth Circuits. See *Robinson*, 267 F.3d 147; and *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

¹⁴⁰ See *Robinson*, 267 F.3d at 164 (“[b]efore allowing [23](b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiff would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits”).

¹⁴¹ According to the rules advisory committee: “One person may have rights against or be under duties toward numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct.” See CHARLES ALLAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, *FEDERAL PRACTICE AND PROCEDURE* (2008), at § 1784.1 (“Certification of Hybrid Class Actions”).

¹⁴² See *Allison*, 151 F.3d 402 (“...proposed (b)(2) classes need not withstand a court’s independent probe into the superiority of the class action over other available methods of adjudication or the degree to which common issues predominate over those affecting only individual class members, as (b)(3) classes must.”).

¹⁴³ See *in Re Methyl Tertiary Ether*, 209 F.R.D. 323.

the two remedies in the context of aggregate litigation.¹⁴⁴

In Europe judicial enforcement results from the combination of injunctions and different types of pecuniary remedies. While the former have been primarily introduced through European legislation and the latter by MS legislation, the two sets of remedies should often be integrated in practice.¹⁴⁵ However only few MS while enacting the new legislation on group representative actions have taken an integrated approach. Few exceptions exist allowing the use of the findings in collective procedure to ask for individualized damages.

II. Complex Hybrids: Injunctions, Invalidity, and Damages in Unfair Contract Terms, Unfair Commercial Practices and Product Safety

Let us now examine the European legislation concerning remedies in unfair contract terms and unfair commercial practices and product safety to verify the existent level of coordination between different remedies and the open issues for an integrated remedial perspective of aggregate litigation.

In the area of unfair commercial practices a wide array of remedies is now available.¹⁴⁶ While the implementation of the Unfair commercial practice directive (UCPD) reveals a clear preference for administrative over judicial enforcement, with the use of criminal law by some MS, the use of judicial injunctions is still possible. Similar paths seem to be followed in the US.¹⁴⁷

¹⁴⁴ An unfair commercial practice may be stopped by injunction without giving rise to compensatory damages unless negligence is proved. This might be the case if intention is required for restitution or skimming off, while it is not for injunctive relief.

¹⁴⁵ See, e.g., Bakardjeva, *supra* note 61, at 73 (in Bulgaria where the new CPA of 2006 has granted the rights of consumer associations to lodge complaints seeking injunctive relief, damages on behalf of a group of consumers and damages based on collective consumer interests.)

¹⁴⁶ See Unfair Commercial Practices Directive, *supra* note 76.

¹⁴⁷ See The Federal Trade Commission Act 15 U.S.C. 45 and at State level for instance the Michigan Consumer Protection Act (M.C.L.A.) at 445.910, where the attorney general may bring a class action on behalf of persons residing in or injured in this state for the actual damages caused by any of the following:

(a) A method, act, or practice in trade or commerce defined as unlawful under section 3.

(b) A method, act, or practice in trade or commerce declared to be unlawful under section 3(1) by a final judgment of the circuit court or an appellate court of this state which is either reported officially or made available for public dissemination pursuant to section 9 by the attorney general not less than 30 days before the method, act, or practice on which the action is based occurs.

(c) A method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the federal trade commission act, 15 U.S.C. 45(a)(1), in a decision which affirms or directs the affirmance of a cease and desist order issued by the federal trade commission if the order is final within the meaning of section 5(g) of the federal trade commission act, 15 U.S.C. 45(g), and which is officially reported not less than 30 days before the method, act, or practice on which the action is based occurs. For purposes of this subdivision, a method, act, or practice shall not be deemed to be unfair or deceptive within the meaning of section 5(a)(1) of the federal trade commission act solely because the method, act, or practice is made unlawful by another federal statute that refers to or incorporates section 5(a)(1) of the

Within administrative enforcement the option has been for ex post control. No preventive authorization for trade practices, including advertisements, is required but for few exceptions mainly related to health and safety. It is not infrequent, however, that individual enterprises or trade associations might informally negotiate general rules with the Agency. For example, industry-wide codes of conduct concerning trade practices are often used, their content being negotiated ex ante with the competent regulators, be it the general or the sector specific regulator.

A third mode of enforcement is provided by self-regulatory bodies. They have a very deep rooted tradition in the field of advertisement and have broadened into the general field of unfair commercial practices. Remedies differ from those deployed in administrative and judicial enforcement and reputational and organizational sanctions are in place. Self-regulatory bodies operate within systems of complementarities with administrative and judicial enforcement. Unlike the two other systems subject to the scrutiny of European law concerning equivalence and effectiveness, self-regulatory regimes at national level do not have to comply with enforcement principles at EU level.¹⁴⁸

What is the relationship between public enforcement, including administrative and judicial, and enforcement in self-regulatory regimes? It is important to notice that in some legislation sequential enforcement has been introduced. Parties can agree to bring the claim firstly before the self-regulatory body; only afterwards, before the administrative or judicial enforcer. If simultaneous enforcement takes place the administrative enforcer can, upon its discretion, suspend the proceeding and wait for the final decision of the private enforcer.¹⁴⁹

Not only prohibitory but also affirmative injunctions are allowed.¹⁵⁰ The former are used to stop an unfair practice, the latter impose modifications to eliminate the unfairness from the practice. In practice, the most prominent example is corrective advertisement,

federal trade commission act.

(2) On motion of the attorney general and without bond in an action under this section the court may make an appropriate order: to reimburse persons who have suffered damages; to carry out a transaction in accordance with the aggrieved persons' reasonable expectations; to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court after a hearing may appoint a receiver or order sequestration of the defendant's assets if it appears to the satisfaction of the court that the defendant threatens or is about to remove, conceal, or dispose of his assets to the detriment of members of the class.

¹⁴⁸ See Fabrizio Cafaggi, *Enforcement in European Private Regulation: Assessing Effectiveness and Efficacy*, unpublished manuscript on file with the author.

¹⁴⁹ See, e.g., the Italian Consumer Code art. 27.3.

¹⁵⁰ See, e.g., Unfair Commercial Practices Directive, *supra* note 76, at art. 11. The Authority in Italy held the misleading character of an advertisement campaign concerning slimming pills, thereby ordering its suspension. AGCM, *Provvedimento n. 16515*, P15485-EPH 200 Capsule. In the Italian case law see Trib. Palermo, 20.02.2008; Trib. Torino, 17.05.2002 and 1.07.2002, in Giur. It., 2002, 2334; Trib. Roma, sez. IX, 23.05.2008, in Giur. It., 2008, 12.

where the injunction obliges the advertiser to modify the defective advertisement. The role of both judges and administrative authorities is regulatory in nature when they administer these types of injunctions. By issuing affirmative injunctions the enforcers contribute to the definition of unfair practices and police markets accordingly.

In addition to prohibitory and affirmative injunctions, penalties, in the form of *astreintes*, have been introduced in cases of non-compliance.¹⁵¹

The injunction to stop misleading or aggressive practices is more and more associated to claims for damages, whether they be purely compensatory or aimed at disgorging unlawful profits.¹⁵² In order to seek pecuniary remedies it is not necessary to plead an injunction successfully, i.e. an injunction is not a prerequisite to ask for damages. It might happen however that a claimant, a consumer association, first seeks to stop the unfair trade practices, thereby seeking injunctive relief; and then individual consumers try recovering damages, thus giving rise to sequential enforcement.¹⁵³ The DCFR (Draft Common Frame of Reference) has introduced two types of damages that can be associated to injunction in the context of unfair commercial practices: loss upon reliance on incorrect advice or information, and loss upon fraudulent misrepresentation.¹⁵⁴ In the

¹⁵¹ See Unfair Commercial Practices Directive, *supra* note 76, at art. 13. These penalties can either be administered by administrative authorities or by Courts, depending on the choice made by MS while implementing the Directive. These rules clearly open the space for introducing punitive damages. The broad formula adopted in art. 13 does not limit the use of penalty only to failure to comply with injunctions or other orders because it refers generically to infringements of national provisions adopted in application of the directive.

¹⁵² See for example the Belgian legislation implementing the Directive. Art. 94/14:

§ 1er. Les contrats et les conditions de fourniture de produits et de services aux consommateurs peuvent être interprétés notamment en fonction des messages publicitaires et des pratiques commerciales en relation directe avec ceux-ci.

§ 2. Lorsqu'un contrat a été conclu à la suite d'une pratique commerciale déloyale [...] le consommateur peut, dans un délai raisonnable à partir du moment où il a eu connaissance ou aurait dû avoir connaissance de son existence, exiger le remboursement des sommes payées, sans restitution du produit livré ou du service fourni.

Lorsqu'un contrat a été conclu à la suite d'une pratique commerciale déloyale [...] le juge peut, sans préjudice des sanctions de droit commun, ordonner le remboursement au consommateur des sommes qu'il a payées sans restitution par celui-ci du produit livré ou du service fourni.

See also the Irish Consumer Protection Act, 2007 (Act No. 19/2007) (Ir.), at art. 74. 2 ("A consumer who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages.").

¹⁵³ Whilst the German law on unfair commercial practices, does not separate the procedure for injunction and the skimming-off procedure, the German consumer organisations tend to first request an action. The reason is twofold. Under German law, the claimant is asked to settle the conflict before filing an action in the court. If the claimant does not try he bears the risk to pay the costs in case the defendant submits himself to the request. The second has to do with the different requirements on proof. In Italian jurisprudence, the previous approach denied any standing for the association of consumers in claims for damages in favour of consumers. See Trib. Torino, 20.11.2006, in Foro It., 2007, I, 1298; Trib. Genova, 2.08.2005, in Danno e Resp., 2005, 1225; Trib. Milano, 15.09.2004, in Giur. It., 2005, 998, with a comment by De Santis.

¹⁵⁴ See VI.-2.207 and VI.- 2.210 PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE (DCFR) OUTLINE EDITION,

current European regime sequential enforcement is problematic because individual consumers asking for damages for contracts concluded on the basis of misleading advertisements cannot rely on the findings of the proceeding concerning injunctive relief unless they have joined it. The binding effects of injunctions are limited to the litigants and only joinders allow economies on evidence-gathering. This is true also for injunctions issued by Agencies when the implementation of art. 11 UCPD is made through administrative enforcement.

Substantive rules vary for the two classes of remedies. The elements to be proven for an injunction may differ from those necessary to recover damages.¹⁵⁵ A strict liability regime operates for the former, while proof of fault is often required for the latter. No harm is necessary for the former, proof of harm is often a prerequisite for the latter. The burden of proof differs in the proceeding concerning an injunction before the Agency and that related to damages before the Court.¹⁵⁶ Causation is stricter for action seeking damages.¹⁵⁷

Some MS, while implementing the Directive 2005/29, have added new forms of enforcement, focusing on cooperation between enforcers and infringers.¹⁵⁸ Cooperative enforcement has been promoted in the UK as a general enforcement strategy.¹⁵⁹ Well known in the fields of competition and environmental law it has been transposed in different forms in the area of consumer protection. Italy and Ireland, for example, have given the competent Administrative Authority the power to 'define' with the trader the undertakings to modify the unfair practice so as to eliminate the elements of unfairness.¹⁶⁰ In this context the trader can commit to cease the unfair practices while also compensating injured parties for any harm suffered.¹⁶¹

Cooperative enforcement can take a number of different forms.

(Sellier, 2009).

¹⁵⁵ See Irish Consumer Protection Act, *supra* note 152, at art. 71.6 ("If the Court considers it necessary or appropriate in the circumstances taking into account all interests involved and, in particular, the public interest, the court may make an order under this section without proof of any actual loss or damage or of any intention or negligence on the part of the trader."). See Italian Cass., Sez. Un., 15.01.2009, n. 794 (holding that under the law against misleading advertisement the plaintiff asking for damages has to prove the misleading character of the message, the damage and its causal relation to the misleading advertisement, that the defendant is in fault). See generally Cass., 28.03.06, n. 7036, Cass., 6.04.2006, n. 7985, Cass., Sez. 3°, 13.02.2007, n. 3086, Cass., 4.07.2007, 15131, Cass., 29.08.2008, n. 21934.

¹⁵⁶ See, e.g., in Italy Cass., Sez. Un., 15.01.2009, n. 794 (stating that unlike in the proceeding concerning injunctions before the Competition Agency where it is for the trader to prove the absence of unfairness in those concerning damages it is for the consumer to prove that the practice was unfair and caused damages.).

¹⁵⁷ See Jane Stapleton, *Regulating Torts*, in REGULATING LAW (Christine Parker, Colin Scott, Nicola Lacey, & John Braithwaite, eds., Oxford, 2004).

¹⁵⁸ See Comparative Assessment, *supra* note 11. See the Irish Consumer protection Act, *supra* note 156, at art. 74.2.

¹⁵⁹ See generally *supra* note 53.

¹⁶⁰ See, e.g., art. 27 Italian Consumer Code as it has been modified by legislative decree, Aug. 2, 2007, n. 146.

¹⁶¹ See, e.g., Irish Consumer Protection Act, *supra* note 152, at art. 73.4.

It can be framed within self-enforcing agreements which in case of violation by the trader can be directly sanctioned by the administrative authority. It may take the form of a regulatory contract enforceable only before a Court. Within the framework of cooperative enforcements a coordination between injunctive relief and damages can take place under the control of the Agency.¹⁶²

Coordination will be needed to implement an integrated strategy able to pursue deterrence and compensation appropriately by pleading injunctive relief and damages. However, the developments of administrative enforcement in some MS, the UK for example, suggest some further qualifications. The use of co-regulation in the area of unfair commercial practices is more frequent than other areas of consumer law; and this is reflected in the forms of enforcement administered by private organizations, formally or informally delegated by the public authority.¹⁶³ This regulatory form often brings new forms of enforcement concurring with judicial and conventional administrative enforcement.

II. I. Unfair Contract Terms

Control over unfair terms in MS precedes European legislation. In legislation enacted in Germany (1976), England (1977), and France (1978) different models of control were adopted, reflecting varieties of capitalisms and different combination between judicial and administrative control.¹⁶⁴ European intervention has mainly addressed the definition of unfairness, introduced new remedies while leaving open relevant choices concerning modes of enforcement.¹⁶⁵ Unlike UCPD where the combination was injunction and damages, here it is injunction and invalidity or lack of binding effects.

In the area of unfair contract terms (UCT) according to EC Directive 93/13 enforcement could have been either judicial or administrative. Most MS have chosen ex post judicial enforcement. However, the role of monitoring by administrative Agencies is very relevant, though often informal, unlike the case of UCPD. The directive allows prohibitory and affirmative injunctions in addition to declaratory judgements.¹⁶⁶ Different national models are in place, some mainly

¹⁶² On cooperative enforcement see *Comparative Assessment*, *supra* note 11.

¹⁶³ In the area of deceptive advertisement the Advertising Standards Authority in the UK can deploy different remedies. See the agreement between OFT and ASA concerning handling complaints. See Fabrizio Cafaggi, *Private Regulation and European Private Law*, in TOWARDS A EUROPEAN CIVIL CODE (4th ed., 2010) (forthcoming).

¹⁶⁴ For an illustration see Hans W. Micklitz, *Some Reflections on Cassis De Dijon and the Control of Unfair Contract Terms in Consumer Contracts*, in HUGH COLLINS, STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW 19, 24 (Kluwer, 2008).

¹⁶⁵ See *Contract I*, PRINCIPLES OF EXISTING EC CONTRACT LAW (Acquis Principles), (European law Publishers, 2009)

¹⁶⁶ See Dir. 93/13, *supra* note 73, at art. 7.

relying upon administrative agencies, others on consumer organisations. In the UK, for example, the role of OFT is predominant.¹⁶⁷ It has been given both the power to monitor and that of promoting judicial control. The latter has been used very parsimoniously.¹⁶⁸ In France, *la Commission des clauses abusives* has significant monitoring power but no standing.¹⁶⁹ It is for consumer organizations to use the information collected in the reports by the Commission.¹⁷⁰ In Germany monitoring is often made by associations which also have the power to bring claims before Courts. In Italy, as well, monitoring is mainly performed by consumer organizations. The enforcement system is thus a combination of public-private monitoring and judicial control.

The differences among these systems are reflected in various combinations between market and social control, which may affect choice of remedies, negotiating strategies between parties and with administrative enforcers, and preferences over settlements.

Unlike unfair commercial practices no forms of cooperative enforcement have specifically been designed by European or national legislation in the field of unfair contract terms. However, undertakings by enterprises could be sought by enforcers. This has certainly been the case in relation to competition law, where public enforcers have asked trade associations to make explicit commitments about practices

¹⁶⁷ See Geraint Howells, *Enforcing Consumer Interests by Regulatory Agencies-The British Experience a Case Study of the Office of Fair Trading*, in COLLECTIVE ENFORCEMENT F CONSUMER LAW, *supra* note 11, at 65.

¹⁶⁸ See *Director General of Fair Trading v. First National Bank plc*, [2001] UKHL 52, [2002] 1 AC 481. In the *First National Bank* case the courts were concerned with a term in a common form loan agreement which provided for the continuance of contractual interest payments after judgment had been given in favor of the bank in the county court, where, unlike the position on a High Court judgment, statute does not provide for interest to be payable on a money judgment. The Director General of Fair Trading considered the term to be unfair for the purpose of regulation 4 of the 1994 Regulations and sought an injunction to restrain use of the term by the bank. The bank argued that an assessment of the fairness of the term was prohibited by art. 3(2) of the Unfair Terms in Consumer Contracts Regulations 1994. According to Lord Bingham:

The object of the regulations and the directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank's entitlement to interest does not come to an end on the entry of judgment. *First National Bank*, [2001] UKHL 52, at para. 12.

See also *Office of Fair Trading vs Abbey National PLC, et al.*, [2009] EWCA Civ 116 (Court upheld a judgment concerning whether or not the OFT is entitled to assess the fairness of certain charges made by the Banks under art. 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999. The action was about the charges made by the Banks to their customers who have personal current accounts with them when they are requested or instructed to make a payment for which they do not hold the necessary funds in the account and which is not covered by a facility arranged with the customer.

¹⁶⁹ See Jean Calais Aulois & Frank Steinmetz, *Droit de la consommation*, Précis Dalloz, 640 (Mar. 2003).

¹⁷⁰ *Id.*

concerning bank charges and other elements like termination clauses in standard contract forms.¹⁷¹

The unfair term is not binding on the consumer but the contract shall continue to be binding upon the remaining terms. MS had to introduce injunctive relief in the implementation of the directive.¹⁷² Injunctions can be pleaded by consumer organizations against single enterprises, groups of enterprise or trade associations that recommend standard contract terms.¹⁷³ When injunctions are pleaded against trade associations recommending terms current procedural rules exclude binding effects on individual enterprises, members of the recommending association, unless they are joined in the proceeding. Thus, in theory, even if an injunction against a term recommended by the trade association has been issued, the individual enterprise could insert it in the contract. Only a new proceeding will scrutinize the unfairness of the term and eventually oblige the enterprise to set it aside. Symmetrically the effects of the injunction pleaded by the consumer association will not bind the enterprises in the individual relationship with the consumers. When operating within a sequential enforcement scheme, individual consumers seeking damages will only be able to use the findings in the proceeding for injunction if they had joined but the enterprise can prove that in the specific circumstances the terms were fair. Otherwise the injunctions will not have effect on subsequent litigation between the enjoined enterprise and individual consumers.¹⁷⁴

The insertion of the directive 93/13 in the Annex of directive 98/27 also makes those injunctions applicable to the subject matter.¹⁷⁵ Injunctions can impose exclusion of unfair terms from the standard contract forms. They generally operate for future relationships while are held to be non-binding for contracts already concluded to have unfair terms.¹⁷⁶ In some MS injunctions produce effects not only on

¹⁷¹ See the commitments made by the ABI (Associazione bancaria italiana) and the consortium of banks known as Patti Chiari under art. 14-ter L. n. 287/90, in the context of an antitrust procedure opened by the AGCM (n. 18866/08). The final decision is expected by September 2009.

¹⁷² See *Commission v. Italy*, 2002, Case C-119/04.

¹⁷³ See Directive 93/13, *supra* note 77, at art. 7.3.

¹⁷⁴ See in England *Oft v. Foxtons Limited* Court of Appeal [2009] EWCA Civ. 288, and *Feetum v. Levy* [2006] 3 WLR 427 (CA), *FSA v. Rourke* [2002]

¹⁷⁵ See Directive 98/27/EC, *supra* note 69.

¹⁷⁶ See in England *OFT v. Foxtons Limited* Court of Appeal [2009] EWCA Civ. 288 par

71:

There is no question of the findings in a collective challenge being binding on a subsequent individual challenge in proceedings between the supplier and an individual consumer : the parties to those proceedings are different. The issue decided as between the parties to a collective challenge can thus be revisited in an individual challenge. But if there is an injunction which extends to existing contracts, the ability of the supplier to initiate or participate in such proceedings will be governed by the terms of that injunctions. Indeed, it is the fact that the findings on a collective challenge are not binding in an individual dispute which makes it necessary in order to protect consumers in a meaningful way for the court to be able to grant an injunction in the case of an existing contract.

future but also on existing contracts.¹⁷⁷ A judge can order, by means of injunction, the deletion of an unfair contract term.¹⁷⁸ In some MS judicial discretion allows ‘carving out’ contracts.¹⁷⁹ But the boundaries between effects of injunctions and that of invalidity of the individual contract are not always clear cut. These invalidity rules might be coupled with damages for precontractual liability.¹⁸⁰ When injunctions are sought by consumer organizations, individual consumers may join to seeking compensatory remedies.

There are two sets of pecuniary remedies that may interplay with injunctive relief in the area of unfair contract terms: compensatory and restitutionary. Compensatory damages can be sought if the use of an unfair term can give rise to precontractual or extracontractual liability following the use of unfair terms. It should be clear at the outset that a successful plea for injunctive relief is not necessarily combined with precontractual liability and the invalidity of the unfair term.¹⁸¹

But there are hypotheses in which the prohibition of the use of an unfair term can be associated to damages. In that case the contract can still be valid and precontractual liability refers to the specific unfair term.¹⁸²

In the area of unfair contract terms damages are often restitutionary. Restitution, in this case, is often the consequence of avoidance of the unfair term. Claims for restitution can successfully be pleaded if the term of the contract is not binding. This is often a matter for an individual claimant while a consumer organization usually cannot have a term be declared not binding through collective proceedings. In some MS, however, restitution can be ordered with an injunction giving rise to hybrid collective action.¹⁸³

The limits of the regulation are also related to the difficulty of policing Europe wide practices. National Courts in MS do not have the power to enjoin a contract term used Europe-wide but have only State jurisdiction.

¹⁷⁷ See on the relation to the deterrence function of injunctions provided by Dir. 93/13 in Italy Cass. 13051, 21.05.2008 (holding that limiting the scope of injunction to future relationships would contradict the rationale of that remedy).

¹⁷⁸ See, e.g., art. L. 421-6 French Code de la Consommation (“The judge may order... the deletion of an illegal or abusive clause from any contract or standard contract offered to or intended for the consumer.”).

¹⁷⁹ See in England *OFT v. Foxtons Limited* Court of Appeal [2009] EWCA Civ. 288 where Lady Justice Arden stated that “Regulation 12(3) gives the Court a very wide discretion as to the form of any injunction. In an appropriate case, the court could, for example, ‘carve out’ contracts fulfilling a particular description.”

¹⁸⁰ See Directive 93/13, *supra* note 73.

¹⁸¹ See Tribunale di Roma, 30.04.2008, at n. 58 (holding that in the context of a collective action restitution can be successfully pleaded in order to eliminate the effects of unfair commercial practices and contract terms).

¹⁸² In Italy see Cass. 29.09.2005, n. 19024; and Cass. 8.10.2008, n. 24795.

¹⁸³ See in Italy Tribunale di Roma 23.05.08.

11. 2. Product Safety

In the area of product safety and liability the injunction directive 98/27 does not apply. Injunctive type remedies, however, are available, such as product recall and product withdrawal both under Directive 2001/95; but also as judicially administered remedies according to many legal systems.¹⁸⁴

The most common case is the combination between voluntary or administrative recall and damages. However, if voluntary recall has not taken place consumers may ask for it before the Court. Claimants may thus ask for damages caused by the defective product and seek product recall or withdrawal before the Court.¹⁸⁵ A complementary path is that of directive 2001/95 on product safety where recall or withdrawal can be ordered by the competent administrative authority and damages be sought before a Court.

The foregoing examples show that judicial enforcement, being exercised upon the lead of private and/or public claimants, is often the result of a combination of injunctive relief and pecuniary remedies. In different terms this happens also when injunctive remedies are defined by administrative authorities and pecuniary remedies by Courts. In both cases different combinations between *ex ante* and *ex post* can occur. Especially in relation to collective judicial enforcement the two can be combined: the choice between injunction and damages is not constrained by lack of legislation and it becomes primarily a matter of choice by the claimants. However, in this area as well findings concerning the infringement related to injunctive relief cannot be used by individual claimants seeking damages. Thus, but for few exceptions, if a product is held defective and recalled from the market these findings could not be used in individual litigation concerning damages in the same MS state and a *fortiori* in a different one.¹⁸⁶

¹⁸⁴ It should be noted that the Product liability directive is limited to damages and does not regulate injunctive relief as it is the case for the RESTATEMENT (THIRD) OF TORTS § 402(a). In Europe, there are two famous examples from the area of product safety, that concern the public warning against health risks: OLG Stuttgart NJW 1990, 2690 – Birkel, and ECJ, 17 April 2007, Case C-470/03, COS.MET, [2007] ECR I-2749.

¹⁸⁵ It presupposes that individuals are entitled to seek product recall or withdrawal. This, however, is the case only in a few Member States., *see e.g.* Italy and Portugal, Art. 1 (2) of Law 83/95; *see generally* Global Class Actions Exchange, www.globalclassactions.stanford.edu.

¹⁸⁶ Difficulties also exist in the U.S. *See, e.g.,* the objections posed by Judge Posner in *In Re* matter of Rhone-Poulenc Rorer Incorporated at al, 51 F.3d 1293, 1300 (7th Cir. 1995). Considering the innovative yet, in his evaluation impermissible solution proposed by the District Court, Judge Posner stated:

The district court proposes to substitute a single trial before a single jury instructed in accordance with no actual law of any jurisdiction – a jury that will receive a kind of *esperanto* instruction merging the negligence standards of the 50 States and the district of Columbia.... That kind of thing can in our system of civil justice (it is not likely to happen because the industry is likely to settle – whether or not it really is liable): without violating anyone’s legal right. But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision makers. That would not be a feasible option if the stakes to each class members were too slight to repay the costs of a consolidated

PART IV – CONFLICT OF INTERESTS AND ACCOUNTABILITY
MECHANISMS IN CONSUMER ENFORCEMENT

*12. Conflicts of Interests Among Consumers and Between Consumers
and Traders Concerning the Choice Of Remedies: Refining the
Remedial Perspective*

Simple coordination among different remedies and enforcers can certainly improve enforcement policies in European consumer law, contributing to prioritize between regulatory functions, deterrence and compensation. It is a necessary yet not a sufficient condition. Even if a better coordinated strategy were in place, defining simultaneous and sequential enforcement rules concerning follow-on, additional questions would remain. In particular, conflicts of interests between different classes of consumers related to the combination between injunctions and damages and even within damages for different sub-classes, have to be addressed. Two potentially conflicting goals emerge: the desire to reach a final conclusion of litigation excluding so called collateral attacks and the necessity to protect actual claimants and future potential claimants from inadequate remedies precluding them from accessing courts. Stability is certainly an important goal of aggregate litigation but it has to be balanced with individual and collective due process rights. Different solutions may be necessary for different classes of claimants over time and this might reduce the stability of the final outcome and the defendants' incentives to settle with waivers concerning future litigation.¹⁸⁷ Conflicts of interest, especially among classes of claimants, may emerge under different doctrines such as: commonality, typicality, predominance.¹⁸⁸ Not only do they constitute a limit to aggregation but they also act as a constraint on coordination among different types of remedies and modes of enforcement. As we shall see when various classes of claimants have different preferences about remedies, separation between modes of enforcement may be preferable over integration both within judicial enforcement—by distinguishing proceedings concerning injunctions and damages—and between administrative and judicial enforcement.

The differences concerning hybrids between the U.S. and Europe are relevant.¹⁸⁹ In the U.S. Rule 23(b)(2) does not allow opt-out,

proceeding. But this is not the case with regard to the HIV-hemophilia litigation. Posner himself recognizes that this solution has been accepted by federal courts in asbestos litigation but criticises its outcome. In *Amchem* the Supreme Court on the one hand recognized the legitimacy of aggregation decided by the MDL Panel and on the other hand rejected the solution proposed by the district Court of Pennsylvania. *Amchem*, 521 U.S. 591.

¹⁸⁷ See Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1650 (2008).

¹⁸⁸ See NAGAREDA, *supra* note 128, at 94.

¹⁸⁹ See Issacharoff & Miller, *supra* note 2; and *American Exceptionalism*, *supra* note 2.

while Rule 23(b)(3) permits opt-out and imposes notice requirements. In Europe injunctions often do not have general effects beyond the parties involved in litigation. Different results may arise in individual MS litigation and the emerging MS legislation on group actions is predominantly opt-in based.¹⁹⁰ While at first sight Europe seems to be more respectful of individual due process rights and preclusion effects, the real lack of effectiveness of collective litigation and remedies reveals still lower levels of consumer enforcement making that protection much less relevant. The alternative opt-in/opt-out, though certainly relevant, does not constitute the most significant variable to address and to solve conflicts of interests. These differ in relation to type of remedies and require accountability mechanisms that ensure protection of absentees but also adequate representation of those who have chosen to actively participate in the litigation process with conflicting interests. Certification procedures and settlements' review are certainly important; but exit, voice and loyalty need to complement them.¹⁹¹

Consumers, affected by a violations across Europe, may have different preferences as to which litigation strategy should be pursued. But perhaps as importantly their representatives may have divergent interests and prefer different remedies, thereby selecting different modes of enforcement. Different procedural strategies may be required by substantive legal requirements. The same violation, contaminated blood with the HIV virus or exposure to asbestos, can be based on different theories of liability depending on when the injury has occurred and what the available knowledge was at the time it materialized. These different theories may prevent the use of aggregate litigation for lack of commonality or require sub-classing; potentially generating conflicts among classes of injured consumers.¹⁹²

Different remedies can be associated to different injurers' liability theories and plaintiffs' conduct to avoid or to mitigate harm. Plaintiffs conduct is generally not considered when deciding about injunctions whilst they become relevant to define the existence of liability in the context of damages. Causation has different features when injunctions or damages are sought. These differences are here considered as potential determinants of conflicts of interest unlike before, when they were examined to design appropriate forms of coordination within aggregate litigation and between aggregate and

¹⁹⁰ See Deborah R. Hensler, *The Globalization Of Class Actions: An Overview*, 622 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 7 (2009).

¹⁹¹ See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 385 (1999); Coffee, *supra* note 102; Geoffrey Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003); Jonathan Macey & Geoffrey Miller, *Judicial Review of Class Action Settlements*, 1 J. OF LEGAL ANALYSIS 167 (2009).

¹⁹² For a comparative analysis in Europe, focusing on UK and France, see SIMON WHITTAKER, *LIABILITY FOR PRODUCTS: ENGLISH LAW, FRENCH LAW, AND EUROPEAN HARMONISATION* (Oxford, 2005).

individual litigation.¹⁹³

Conflicts of interest and accountability questions may be addressed in relation to several issues:

a) *The desirability of aggregating claims*: Different interests may translate into lack of commonality and cause the exclusion of aggregation depending on the remedy sought;

b) *The composition of the group or class*: Conflicts of interest may affect the criteria deployed to create the class or to proceed to subclassing. Claims are aggregated into sub-classes according to different types of remedies but also different modes of enforcement and even different national legal systems;¹⁹⁴

c) *The multiplicity of enforcement strategies within the group*: Within the same class or group preferences over remedies may be different and an agreement can be reached among different members of the class/group to pursue different litigation strategies.

A few potential conflicts can be exemplified:

1) The producers' decision concerning safety features produces a risk of harm. Some consumers know they will be exposed to the risk others do not know which risks they will be exposed to.

2) The violation has occurred but when litigation starts harm has materialized only for one class of consumers. The others know that the harm will materialize but do not know when and which type will occur and how it will affect individual members of the class.

3) Consumers may have different preferences over the level of safety of a product or a certain commercial practice that may be considered unfair. Those who are more risk averse may prefer the product to be removed from the market, the others may prefer the product staying and giving consumers the option whether to buy or not, once they have accurately been informed.

In case 2 the different interests imply that those who have already suffered harm, if they are not repeat players, may not be interested in injunctions but only seeking damages. The others, on the contrary, may not be interested in damages either because they cannot recover at all or can only recover a small amount (e.g. fluid recovery cases). In this framework there are several possibilities depending on whether litigation about the same violation needs to combine the remedies within the same proceeding or different classes can seek different remedies in different proceedings and only coordination is needed.

¹⁹³ See *Amchem*, 521 U.S. 591, 625-26 (Requirement for certification of class action under Fed. R. Civ. P. 23(a)(4) that named parties will fairly and adequately protect interest of class was not met where parties sought to achieve global settlement of current and future asbestos related to the claims).

¹⁹⁴ In the U.S, subclassing may follow state jurisdiction when the differences among states are compatible with commonality requirement but too high to create a single class. In Europe the issue of commonality when claimants coming from different jurisdictions bring a single aggregate claim has not been addressed.

These divergent interests pose regulatory issues concerning the agency relationship between consumers and their representatives, which affect the choice of modes of enforcement and that of remedies. But this is not the only open question. Since consumer enforcement, both at European and MS level, provides standing to different bodies, i.e. consumer associations, public bodies and private law firms, is it possible, or even desirable, that different strategies will develop across Europe for the same infringement? Today competing legal actions across Europe may be based on different remedial strategies and brought by uncoordinated if not competing actors. Can competition among claims and claimants increase the conflicts of interest and eventually decrease the level of consumer protection or at least increase distributional conflicts among different classes of consumers located in different MS? Does competition decrease coordination or affect the modes of coordination? Should aggregation always be voluntary or should there be cases of mandatory aggregation despite conflicts of interests?

Furthermore, these conflicts of interest may arise not only among different classes of consumers but also between consumers and traders when standing is granted to both as it is the case in Europe for unfair contract terms, unfair commercial practices, and in antitrust private enforcement. It should be recalled that recent MS legislations on group and representative actions have ignored these issues leaving the task of regulating the agency relationship to the conventional law of lawyering and the law of associations.¹⁹⁵

An important distinction must be made at the outset between prohibitory and affirmative injunctions. I first examine the choice between prohibitory and affirmative injunctions and then the relationship between injunctive relieves and damages.

12.1.1. The Choice Between Prohibitory and Affirmative Injunctions

EC Directive 98/27 and EC Regulation 2006/2004 mainly relate to prohibitory but may also include affirmative injunctions. Consumers may diverge on the type of injunctions they seek: whether prohibitory or affirmative. Those who prefer prohibitory injunctions will presumably value the risks associated to the unfair practice or the defective product higher than the benefits even if the unfairness or the defect can, to a certain extent, be cured. The opposite is true for those favoring affirmative injunctions, presumably seeking to cure the problem and still being able to use the product or to deploy the clause in the contract.

12.1.2. Prohibitory Injunctions and Damages

¹⁹⁵ See on these questions Fabrizio Cafaggi, *Conflict of Interests and Loyalty in Aggregate Litigation*, unpublished manuscript on file with the author.

Prohibitory injunctions have effects that reach beyond those who seek the remedies. If a product is placed out of the market or a practice declared unfair and prohibited then little can be done for the class of consumers interested in keeping the product in the market or the commercial practice in place.

12.1.3. Affirmative Injunctions and Damages

Affirmative injunctions can be more selective and reach a qualified number of consumers. The use of affirmative injunctions implies that the problem can be fixed. In the case of an unsafe product, safety can be improved by curing the defect; in the case of unfair contract terms or practices the term or practice can be corrected by changing some of its features. But most importantly it may imply that the specific risk or source of unfairness, perhaps associated with a specific class of consumer, can be cured without depriving the other consumers of the benefits stemming from the clause, the practice, or the product.

In the context of individual remedies the problem is solved by giving the buyer or the consumer the choice between curing or terminating the contract and damages. In aggregate litigation to provide choices is harder. When remedies are incompatible and subclassing is not the solution, choices have to be made according to the principle of proportionality, which applies to enforcement.

The principle of proportionality suggests that affirmative injunctions should be preferred over prohibitory injunctions. Similarly affirmative injunctions should be preferred over damages.

Let us contrast an affirmative injunction to curing the product defect or to modifying the unfair term or contractual clause and damages. This injunction is incompatible with damages, at least with economic losses. As the examples concerning individual remedies demonstrate if claimants choose the right to cure they cannot ask for damages until cure has shown to be ineffective.¹⁹⁶ Affirmative injunctions can be seen as a collective right to cure and should be held incompatible with damages.

Thus, when affirmative injunctions for cure are sought they would exclude damages. If different classes of consumers have

¹⁹⁶ See in the European context DCFR III.- 3:202 Cure by debtor: general rules:

(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance;

(2) If the debtor can not make a new and conforming tender within the time allowed for performance but promptly after being notified of the lack of conformity offers to cure within a reasonable time and at the debtor's own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the non-conformity.

conflicting preferences over the two remedies the judge will have to decide which remedies should be granted. Principles concerning these choices by class representatives should be designed in order to reduce conflicts of interest.

CONCLUSION

A FUNCTIONAL APPROACH TO REMEDIES CONCERNING AGGREGATE LITIGATION IN EUROPE: TOWARDS A MORE INTEGRATED INSTITUTIONAL DESIGN

In this essay I have suggested that European consumer policies need to tackle fundamental issues concerning coordination among modes of enforcement and among sectors from a remedial perspective. Higher coordination in administering different remedies increases policy consistency, allows economizing in information costs, avoids multiplication of litigation over the same issues, thereby ensuring stability and uniformity. Coordination does not require integration in a single enforcement strategy. On the contrary conflicting interests may call for a combination of different yet coordinated enforcement strategies.

The scope of enforcement coordination is quite broad and encompasses different functions ranging from deterrence, to compensation, and risk management. The focus on the alternative between public and private enforcement does not capture the real issues related to the nature and function of remedies and the actors that can adequately represent consumers in litigation and negotiations for settlements. A remedial perspective highlights the real alternatives and provides a clearer framework to address and to solve conflicts of interests among different classes of claimants and between them and their representatives.

A meaningful comparative institutional analysis following the European Green Paper on collective redress has to consider the following: standing, or entry regulation, selection of representatives and certification, content of the remedies, settlement, binding effects of the judgment or the settlement, preclusion. Coordination between administrative and judicial enforcement should be explicitly addressed and solved; in particular when both injunctions and damages are simultaneously sought. When appropriate to economize in litigation costs, sequential enforcement should be preferred over simultaneous enforcement. This will reduce information costs, making available evidence gathered under the first type of enforcement to be used in follow-on suits. So, for example, if administrative enforcement comes first, findings concerning the existence of infringement and liability could be used, where substantive law permits, in the proceedings concerning damages which will follow. Coordination between

administrative and judicial enforcement is necessary but not sufficient. Conflicts of interests between different classes of consumers may arise and require different strategies of integration or separation between proceedings. The existence of conflicts of interest should influence the institutional design of coordination in aggregate litigation. When conflicts cannot be solved separation of litigation and sub-classing are needed to ensure that due process rights can be fully exercised.

I have made four normative claims related to potential legal reforms to be introduced in Europe:

a) The use of consumer enforcement for regulatory purposes requires important procedural changes.

b) An effective deterring strategy imposes higher integration of remedial responses both between judicial and administrative enforcement and within judicial enforcement between injunction and damages. This coordination should take place between aggregate litigation seeking different remedies, i.e. injunctions and damages but also between administrative fines and damages, and between aggregate and individual litigation.

c) Rules concerning conflicts of interests and representatives' accountability in aggregate litigation are needed, differentiating lawyer-client relationships from organization-non-member claimants.

d) Enforcement of consumer law imposes the introduction of new incentives on collective actors and a higher degree of competition between law firms and consumer organizations, with the reduction of rents enjoyed primarily by the latter.

In particular, drawing from the U.S. experience, some lessons can be learned about the impact of conflicts of interest on aggregation. A distinction between conflicts among active claimants and conflicts between active and future claimants should be made. In opt-in system the protection of absentees is less relevant than in opt-out systems.

The existence of conflicts of interest among classes of claimants may: (a) limit the desirable level of aggregation, (b) suggest to prefer sequential instead of simultaneous enforcement, (c) impose sub-classing and different representatives for each sub-class. The homogeneous or heterogeneous nature of claims should become a strategic factor. Heterogeneity refines the category of commonality.

Heterogeneity of claims generally gives rise to the potential conflict of interest and may require ad hoc solutions.

1) When claims are heterogeneous limited aggregation is necessary and the distinction between injunctive relief and damages may be appropriate.

2) When claims are heterogeneous it may be desirable to opt for sequential enforcement with administrative or judicial injunctions coming first and damages, on collective or individual basis, following.

3) When claims are heterogeneous selecting different representatives may increase accountability and decrease the risks of

collusion with defendants.

Legal reforms on collective redress will provide Europe with a unique opportunity to increase consumer confidence by developing enforcement policies that can contribute to market integration and consumer protection. They will offer Europe the chance to compete for leadership in global litigation on consumer matters within a cooperative framework with North and South America and Asian 'emerged' markets. But Europe cannot act in a vacuum and should provide national judiciaries with new instruments to manage aggregate litigation in a fair and effective way.