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COLLECTIVE REDRESS AS AN IDEAL MODEL OF CONSUMER REDRESS IN THE EUROPEAN UNION?

Abstract: *This paper aims at examining the problem of consumer redress and then be able to propose a comprehensive solution that could be applied in Europe. The importance of consumer redress is highlighted when considering its frequent connection to the issue of access to justice. In cases of small diffuse harms in particular, the need for redress become even more acute, as it is the only way for wrongdoing to not go unpunished. As indicated by empirical evidence, consumers when faced with a problem, most often take no action at all. If they do take action, their most likely reaction would be to take up their complaint with the trader and rarely take action even though they may be unsatisfied with the response. Consumers are not aware of the different third-party redress mechanisms and tend to believe getting redress is costly and time-consuming.*

Key words: consumers, EU Law, collective redress, ADR, class actions.

CONSUMER'S RIGHT OF REDRESS

The general concept of redress may be defined as 'receiving satisfaction for injury sustained'.[1] In relation to consumer law, the issue of redress means that consumers have effective and efficient instruments to protect their rights when these have been infringed. For consumer law in order not to be seen merely as a 'paper tiger', procedural law must enable recourse to court for the enforcement of such laws[2]. It is of key importance to remember that a right

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1 Ramsay, I. D. C., 1981, Consumer redress mechanisms for poor quality and defective products, *University of Toronto Law Journal*, 31, p. 117.

2 Miller, C. J., Harvey, B. W., Parry, D. L., 1998, *Consumer and Trading Law: Text, Cases and Materials*, Oxford University Press, p. 393.

is only as effective as its enforcement mechanism.[3] Enforcement of rights is primarily associated with recourse to courts and consumers' access to justice.[4]

Accordingly, consumer's right to redress has been recognised globally as one of the major principles of consumer law as one of the human rights.[5] The United Nations Guidelines on Consumer Protection of 1985 (as revised in 1999 and 2016), as the most important international legal document in the area of consumer protection, have also emphasised the importance of the adequate consumer redress.[6] This is why the United Nations Guidelines point out that the governments should secure that consumers can obtain redress of their rights through procedures which are expeditious, fair, inexpensive and accessible[7]. The required access to justice for consumers is a manifestation of the broader right to a fair trial as expressed also in the Article 6 of the European Convention for the Protection of Human Rights.[8] The EU Charter of Fundamental Rights also emphasises that all of the European Union policies shall ensure a high level of consumer protection which also mean that the effective redress of consumer rights needs to be secured.[9]

However, one of the main problems faced in the enforcement of consumer law is that the inequality between trader and consumer which also results in the fact that it is very difficult for the individual consumers to protect themselves against the economically stronger and more powerful traders.[10] This has been present as an eternal phenomenon. The rise of large corporations in the beginning of the twentieth century created a culture of corporations engaging in small violations of the law, since individual consumers were not likely to pursue the case in court.[11] Traditional methods of enforcement turned out to be unsuccessful when it comes to securing effective consumer redress. With the further globalisation of the market and development of the technology, the problem with the enforcement has become further complicated. In more recent times, the situation has turned into even a more complex one as the consumer transactions are being conducted on an international level, and increasingly via the internet, where the problem of consumer redress has become more prominent.[12] Accord-

3 Ontario Law Reform Commission, Report on Consumer warranties and guarantees in the sale of goods, Department of Justice 1972, (http://archive.org/details/reportonconsumer-00onta).

4 Ramsay, I., 2015, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd ed., Hart Publishing.

5 See: Benohr, I., 2013, *EU Consumer Law and Human Rights*, Oxford.

6 Durovic, M., 2020, International Consumer Law – The Way Forward, *Journal of Consumer Policy*, Vol. 43, No. 1, pp. 125–143.

7 United Nations Guidelines on Consumer Protection of 1985 at 33.

8 Durovic, M., Micklitz, H., 2017, *Internationalisation of Consumer Law*, Routledge, p. 20.

9 Article 38 EU Charter of Fundamental Rights.

10 Issacharoff, S., 1999, Group litigation of consumer claims: Lessons from the US experience, *Texas International Law Journal*, Vol. 34, Issue 1, p. 135.

11 Fisk, C., Chemerinsky, E., 2011–2012, The failing faith in class actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion, *Duke Journal of Constitutional Law &Public Policy*, 7, pp. 73, 74.

12 Issacharoff, S., 1999, p. 135.

ingly, the question on how to design an adequate system of enforcement which will secure an efficient and effective consumer's access to justice is in the focus of consumer policy, notably of the EU consumer policy.[13]

DIFFERENT MODELS OF CONSUMER REDRESS

In order to secure consumer right to redress, a broad spectrum of options have been put forward, which range from formal processes such as small claims courts, to informal ones such as alternative dispute resolution (ADR) mechanisms.[14] Some of these redress mechanisms aim at protecting the individual, and treat consumer problems on a case-to case basis.[15] The issue of consumer redress underlines the problems faced in both the function of the market, as well as private litigation, where harm may be small individually, but large on aggregate.[16] The little injustices taking place against consumers should be reconceptualised as collective harms in order to achieve the optimum level of redress.[17] Therefore a collective redress mechanism which is able to protect these diffuse collective interests is required.[18]

The relationship between consumer and trader is a complex one, and takes place largely outside the courtroom.[19] In the drafting of a policy, focus is often on ensuring access to court for the consumers, as it is assumed that is what consumers need.[20] Defining what consumers require is an issue worth analysing. It needs to be taken into account that the choices made by consumers are defined by the options presented to them, options that have been put forward by the state.[21] Therefore the dichotomy between 'giving people what they want or the state prescribing what they want', is in fact a false dilemma.[22] Bearing this in mind, it is of use to take into account how consumers view the existing redress mechanisms, and what criteria they would use to evaluate them. In the seventies, when consumer protection law was still a new and developing field of law generating a great deal of discussion, Best and Andreassen published one of the most comprehensive studies of the time, which was conducted in the USA and researched consumer problems and responses to unsatisfactory purchases.[23]

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13 Wrbka, S., 2015, *European Consumer Access to Justice Revisited*, Cambridge University Press.

14 Ramsay, I. D. C., 1981, p. 118.

15 Ramsay, I. D. C., 2015, p. 216.

16 *Ibid*.

17 Ramsay, I. D. C., 1981, p. 118.

18 Ramsay, I. D. C., 2015, p. 216.

19 Ramsay, I. D. C., 1981, p. 118.

20 *Ibid.*, 119.

21 *Ibid*.

22 *Ibid*.

23 See Best, A., Andreasen, A. R., 1976–1977, Consumer Response to unsatisfactory purchases: a survey of perceiving defects, voicing complaints, and obtaining redress, *Law & Society Revue*, 11, p. 701.

THREE MODELS OF COLLECTIVE CONSUMER REDRESS

Three main systems for collective consumer redress have been identified. These are[24]: a) the private initiative model, in which the case is brought to court by the consumers themselves. This is the model followed in the USA. b) The consumer organisation model, where consumer organisations are given standing in court to represent consumers. That model is more common in European civil law countries such as Greece, Germany and Italy. c) The public agency model, where public bodies protect consumer interests. The key example of a private initiative model is the USA class action.[25] In fact, the USA class action is regarded as the primary model for collective redress.[26] The USA class action system, as it was formulated in mid-20th century presents the primary historic model for collective redress.[27] As such it is worth examining its key features.

The USA private enforcement system focuses on facilitating actions in court and tends to take precedence over public enforcement.[28] The reasoning behind this is that regulation in the USA is treated with suspicion, as it conflicts with the liberal ideal of autonomy and the sub-sequent concept of the capitalist free market.[29] In the US system, one single claimant can represent the entire class; bar the members who actively choose to opt-out.[30] The opt-out class action is representative of the US procedural exceptionalism, as Americans often employ procedural characteristics that seem to set them apart from the rest of the world.[31]

Punitive damages seem to play an important role for American courts, which tend to award high damages.[32] Furthermore, the US class actions are funded via contingency fees which in their own turn have led to the creation of a highly specialised plaintiffs' bar.[33] Fee rules in the US differ from the loser-pays-all rule commonly found in European countries; conversely each party bears its own costs regardless of the outcome.[34] This combination of the possibility of high damages with no financial risk on behalf of the claimant, thanks to the fees rules, creates an incentive to bring forward claims. The downside of this mass

24 See Th. Bourgoignie's preface to his edited work *Group Actions and Consumer Protection,* 1992, Story Scienta.

25 Hodges, C., 2010, *Collective Redress in Europe: The New Model*, C.J.L. pp. 370, 372.

26 *Ibid.*

27 *Ibid.*, p. 393.

28 *Ibid.*, p. 390.

29 Hodges, C., 2009, Backmatter: What are people trying to do in resolving mass issues, how is it going and where are we headed?, *Annals of theAmerican Academy of Political and Social Science*, Vol. 622, p. 330.

30 Hodges, C., 2009, From class actions to collective redress: a revolution in approach to compensation, *Civil Justice Quarterly*, pp. 41, 42.

31 Marcus, R. L., 2005, Putting American Procedural Exceptionalism into a Globalised Context, *The American Journal of Comparative Law*, 53, p. 709.

32 Hodges, C., 2009, p. 42

33 Gidi, A., 2003, Class Actions in Brazil-A Model for Civil Law Countries, *American Journal of Comparative Law*, 51, pp. 311, 368.

34 Ramsay I, 2015, p. 256.

litigation is that it may invite unmeritorious claims.[35] Defendants may be pressured into settlement by claimants whose case is of questionable merit, in fear of the risk of paying an excessive amount in damages if the case goes to court.[36] This type of 'blackmail settlement' has become a common phenomenon in USA class litigation.[37]

Therefore class actions are often considered to negatively influence the economy by financially burdening the firms and possibly causing insolvency.[38] Unfortunately, the large sums of money awarded in damages tend to benefit the lawyers who receive large fees, rather than the aggrieved consumers, who may end up receiving very small amounts of money out of the settlement.[39] This situation underlines the possibility of conflicts of interest between claimants and lawyers as their intermediaries, as it may result in settlements that may be unjust for the consumer, yet lucrative for the lawyer.[40] However, this appears to be a 'necessary evil' for the USA system as the class actions are admittedly fuelled by the lawyers, whose motivation, of course, lies in their expected high fees.[41] Other characteristics distinctive of the USA system are: facilitating the plaintiff's access to evidence, as a claimant would have the right to extensive discovery of documentary evidence[42] and the use of juries, which may have a role to play in the high damages awarded.[43]

Many of the features of the USA system have been heavily criticised as allowing for abuse and leading to excessive litigation.[44] That is also the position in Europe, which is notoriously negative to the USA class action and the excesses it invites.[45] However many of these characteristics unique to the USA system are better understood when taking into account the fact that this is a system aiming at motivating consumers to bring claims.[46] According to this model, "consumer associations are given the right to institute or take-over proceedings on behalf of individual consumers or perhaps a group of consumers."[47] This model presents an alternative approach to the 'classic' USA class action model where individuals bring the action to court.[48] This model of representative action is hardly as crystallised as its US counterpart, since each country that employs it, does so in a divergent manner.

35 Westby, S., 2011–2012, Associations to the Rescue: Reviving the Consumer Class Action in the United States and Italy, *Transnational Law & Contemporary Problems*, 20, pp. 157, 176.
36 *Ibid*., p. 176.
37 Hodges, C., 2009b, p. 43.
38 Westby, S., 2011–2012, p. 176.
39 Hodges, C., 2009b, p. 43.
40 Westby, S., 2011–2012, p. 176.
41 Issacharoff, S., 1999, p. 148.
42 Hodges, C., 2009b, p. 42.
43 Ramsay, I., 2015, p. 256.
44 Hodges, C., 2009, p. 372.
45 Westby, S., 2011–2012, p. 175.
46 Hodges, C., 2009, pp. 41, 42.
47 Miller, C. J., Harvey, B. W., Parry, D. L., 1998, p. 481.
48 *Ibid*.

THE ROLE OF CONSUMER ORGANISATIONS

Consumer organisations may be authorised to bring an action on behalf of consumers requesting injunctive or compensatory relief.[49] It is argued that the consumer organisation model deals with some of the common problems of leaving right to action exclusively to consumers, such as motivation to act[50] or collecting evidence, without inviting the abuses associated with the USA model. The question is whether the consumer associations are qualified to represent consumers? Not per se, however in all likelihood they will possess the necessary level of legal expertise and knowledge on consumer matters to be able to bring forward a claim.[51] Consumer organisations have the advantage of being viewed by the consumers as having their best interests in mind.[52] On the other hand, it is important to keep in mind that consumer associations as well have their own ideological considerations and priorities which may not necessarily coincide with those of the whole of the consumers.[53] For instance, a consumer association may wish to promote environmental concerns, while consumers may be more concerned with purely financial aspects.[54] Opposite to that, lawyers do not have an ideological agenda and are rather interested in securing their fee, regardless of the policy at stake.[55] Which option of the two is preferable, is debatable.

Consumer associations are likely to receive contributions from their members, or even public funding, which gives them an advantage as far as funding the action goes,[56] especially in a European context where contingency fees are rarely allowed. This provides minimum risk for the consumer, which instead is shifted to the association which will have to pay the entire fee in case of an unsuccessful action.[57] It is also easier for a consumer organisation to define, motivate and notify the members of a class as it already has the list of its members.[58] The effectiveness of consumer organisations depends on certain factors within the applicable system which may vary significantly. Is it an opt-out or an opt-in system? For an opt-in system, which is more likely in a European context, a consumer organisation would indeed find it easier to motivate its members to participate as they are already on board with the organisation's agenda. However, if organisations are allowed to bring actions representing also non-members, the situation complicates.

49 Howells, p. 649

50 *Ibid.*

51 Samuel Issacharoff, Geoffrey P. Miller, 2008, Will Aggregate Litigation Come to Europe?, (November) NYU Center for Law, Economics and Organisation, Law & Economics Research Paper Series Working Paper No. 08–46, *Vanderbilt Law Review*, 62, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296843, pp. 179, 193).

52 Westby, S., 2011–2012, p. 187.

53 Issacharoff, S., 1999, p. 194.

54 *Ibid.*

55 *Ibid.*

56 McCowan Heilman, K., 2008–2009, The Rights of Others: Protection and Advocacy Organisations' Associational Standing to Sue, *University of Pennsylvania Law Review*, 157, pp. 237, 253.

57 Issacharoff, S., 1999, p. 199.

58 Westby, S., 2011–2012, p. 186.

Consumer welfare definitely lies within the spectrum of 'public interest' issues; many countries have powerful public agencies responsible for consumer matters. Examples of such authorities are the Consumer Ombudsman in Scandinavia, while notably even the USA has a powerful Federal Trade Commission.[59] Usually public agencies have a policing role.[60] Question is if a public agency would be well-suited to bring claims to court on behalf of the consumers. This question may be answered when taking into account certain parameters: a) Does a public authority have the competence required to defend consumers?[61] Public authorities that specialise in consumer issues have extensive experience, are well-informed and have a high level of expertise, thus making them ideal to represent consumers.

One of the concerns for allowing public authorities to represent consumers in court would be bringing the vices of public enforcement into private enforcement, since public authorities may be influenced by political or other public interests.[62] Traders are usually influential companies with the ability to join forces and exert pressure on the government or lobby to protect the interests of their industry.[63] Unfortunately, their counterparts, the consumers, even though large in numbers do not have the same strong group identity that would allow them to influence the government on policy issues.[64] In order to avoid this unwanted political influence jeopardising the impartiality of the public agency, certain steps can be taken. This type of independent authorities already exist in Europe as, for example the Hellenic Consumers' Ombudsman[65]. By operating in a civil law system, where no contingency fees are allowed and a loser-pays-all fees rule applies, the problem of financial resources becomes even more acute. They could be partially funded by the damages awarded, at least for certain administrative costs. Since a large part of the consumers turn to the internet as a source of information on consumer matters,[66] a well-designed, user-friendly website could become a focal point for the consumers.

Furthermore, the evidence shows that the variety of available redress mechanisms is a source of confusion for the consumers and may prevent them from taking action. If informal mechanisms, such as ADR are available, should it be mandatory for the consumer to turn to them first before, proceeding to formal court action? Arguably, such an option might on the one hand ensure a more efficient resolution of problems, while on the other hand ensure that only the most important of cases go to court; thus avoiding excessive litigation. As far as representing consumers in court is concerned, could serve as the first barrier

59 *Ibid.*

60 *Ibid.*

61 Issacharoff, S., 1999, p. 193.

62 Ramsay, I., 2015, p. 264.

63 Issacharoff, S., 1999, p. 140.

64 *Ibid.*

65 The Hellenic Consumers' Ombudsman is the Greek ADR authority, whose function is regulated by a statute. For further reference see http://www.synigoroskatanaloti.gr/stk_establish.html.

66 Report 9.

to prevent unmeritorious claims, which are a concern for European policy, by screening them out.[67] A settlement would help save resources but should be an option only if it ensures adequate compensation for consumers. Once more the negative example of the USA unfair settlements is to be avoided.

OPT IN V. OPT OUT MODEL

One of the fundamental and most controversial issues around collective redress is whether an opt-in or opt-out action should be adopted. In an opt-in system, the interested individual must take action in order to participate to the class action and be bound by the judgement.[68] On the contrary the opt-out model does not require any action on behalf of the individual in order to participate.[69] All interested parties will be bound by the judgement resulting from the class action unless they take action to opt-out.[70] European legal tradition has been notoriously negative towards the US tradition of opt-out class action.[71] This attitude is based on the notion that the USA example may invite a number of undesirable results and excesses.[72]

Many Member States have opted for the opt-in model as better serving their needs and assuring that due process and res judicata are safeguarded.[73] In civil law countries the possibility of a few litigating for the many, possibly without them knowing is perceived as a threat to individual autonomy and access to court.[74] The opt-in action ensures that one is knowingly bound by a judgement instead of being forced to accept a potentially unfair or no settlement as would be the case with an opt-out action.[75] It has been argued that opt-out actions conflict with the res judicata principle since the individual's claims are extinguished by the judgement rendered, unless they choose to opt-out.[76] Opt-in action is favoured in the European Union, where protection of the individual's right to litigation is regarded as highly important.[77]

On the other hand, the opt-in system has been criticised as favouring the defendant rather than the consumer.[78] The burden of notifying and recruiting plaintiffs requires time and money and is a discouraging factor for taking on negative

67 Commission of the European Communities, *Green Paper on Consumer Collective Redress,* Brussels 27. 11. 2008, COM(2008) 794 final, 12.

68 Westby, S., 2011–2012, p. 174.

69 *Ibid.*

70 *Ibid.*

71 Hodges, C., 2009, p. 59.

72 *Ibid.*

73 Hensler, D., 2009, The Globalisation of Class Actions: An Overview, 622 ANNALS, AAPSS, p. 9.

74 *Ibid.*, p. 17.

75 *Ibid.*, p. 15.

76 Westby, S., 2011–2012, p. 177.

77 *Ibid.*

78 Gidi, A., 2003, p. 365.

claims.[79] Opt-in may also have a detrimental effect on the deterring effect of a class action.[80] The less plaintiffs are involved, the smaller their compensation will be.[81] If the defendants do not face a high enough liability exposure then the 'watchdog effect' is diminished, especially as far as large businesses are concerned.[82]

Conversely, opt-out may be better suited to defend the interests of consumers.[83] If collective redress is to place emphasis on deterrence of future violations, then an opt-out system may offer an advantage as it ensures maximum participation.[84] And this means a greater deterring effect.[85] Where individual litigation is not a financially viable option; an opt-out action may present a chance for a trial, thus improving access to justice rather than hindering it.[86] Moreover, a claim with mass participation is more likely to succeed since it is possible to put pressure on the defendants and claim larger amounts of damages.[87] Furthermore if the consumers who have not been notified retain their individual rights, as is usually the case, the problem of being bound by a decision without knowing is reduced.

Another criticism on opt-out action is that the Representative would have the burden to identify the victims and distribute compensation in an opt-out action.[88] That is not accurate because according to the system followed in the USA and in Norway it is the consumers themselves who need to opt-in and produce evidence in the later stage of distribution of damages. It seems like opt-out action can alleviate some of the problems faced in opt-in such as higher costs and low participation.[89] However in Europe opt-out actions bear negative associations with excessive litigation as a result of the USA legal tradition.[90]

FINANCING OF COLLECTIVE REDRESS

Financing the action is a key issue for collective action whose importance has been underlined also by the European Commission.[91] Obtaining funding for an action has long been identified as one of the barriers to collective redress, especially when the action regards a negative claim.[92] When deciding on the best option, there is a delicate balance to be struck between giving incentives for action yet avoiding unmeritorious claims.[93] One option for financing actions

79 Westby, S., 2011–2012, p. 177.
80 Hensler, D., 2009, p. 16.
81 *Ibid.*
82 *Ibid.*
83 Hodges, C., 2009, p. 336.
84 Westby, S., 2011–2012, (note 128), p. 178.
85 *Ibid*.
86 Hodges, C., 2009, (note 122) pp. 335–336.
87 Westby, S., 2011–2012, (note 128), p. 178.
88 Green Paper p. 13.
89 Green Paper, p. 13.
90 Green Paper, p. 13.
91 Green Paper, p. 12.
92 *Ibid.*, p. 4.
93 Consultation Paper, p. 11.

would be contingency fees, as is the case in the States. However, contingency fees have been connected with the abuses of the USA class action system leading to a surge of unmeritorious claims.[94] This negative association has led to the prohibition of contingency fees in most of Europe, with certain limited exceptions, e.g. in the UK or in Germany.[95] The loser-pays-all fees rule common in Europe, conversely discourages litigation.[96] Though negative to contingency fees, the European Commission in its Green Paper would consider the alternative of distributing part of the compensation to the representative entity.[97] Nevertheless, isn't granting the representative entity part of the damages, in order to cover part of its expenses, nothing but a contingency fee by another name?[98] The use of elements of the USA class actions should not be demonised; if combined with adequate safeguards they can be of use, while avoiding abuse.

Cy-pres or fluid recovery is a mechanism that allows for grants or distribution of unclaimed class action settlement funds to provide a source of funding for public interest and legal services organisations whose work can be said to further the interests of the class.[99] Cy-pres mechanisms are often used in the area of consumer protection[100] and Europe is no stranger to them. Another financing option worth considering, though it addresses the problem only partially, is that of cutting down legal costs; for example by exempting class actions from court fees.[101] It need not be an abolition of the loser-pays-all rule so highly valued in Europe, but more like a 'one-way fee shifting system'; this way the defendant would have to pay the counsel fees if the claim succeeds, but the claimant doesn't have to pay the defendant's fees if the claim is rejected.[102] Finally, there is also the possibility of pre-financing via third parties.[103] This is considered an innovative solution to the funding problem and in jurisdictions such as Canada and Australia litigation funding companies are in operation.[104] However, Europe doesn't seem so interested in the prospect[105].

PUNITIVE DAMAGES

It can be argued that in most European civil law countries, such as Germany, the principle of compensation takes precedence.[106] As a consequence the general rule is that, in absence of special circumstances justifying the award of

94 Green Paper, p. 12.
95 Issacharoff S., 1999, p. 198.
96 Westby, S., 2011–2012, p. 177.
97 Green Paper, p. 12.
98 Issacharoff, S., 1999, p. 200.
99 Seligman, B., Larkin, J., 2008, *Fluid recovery and Cypres: a funding source for legal services*, *Impact fund*, (www.impactfund.org), p. 1.
100 Seligman, p. 1.
101 Green Paper, p. 12.
102 Issacharoff, S., 1999, p. 201.
103 Green Paper, p. 13.
104 Issacharoff, S., 1999, p. 199.
105 *Ibid.*
106 Wagner, p. 59.

nominal or exemplary damages, the compensation awarded must not exceed the loss.[107] The victim must make whole but not more.[108] Even in English law, where nominal damages are allowed, it is clear they pose an exception to the rule of full compensation.[109] In the USA punitive damages have been distorted into a means for individuals seeking revenge.[110] The purpose of punitive damages has beyond deterrence to be turned into a vendetta of sorts, where seeing the defendant punished is viewed as a 'right' of the plaintiff.[111] However that does not mean there are not other important functions served by punitive damages, or that the abuses noted in the USA paradigm cannot be avoided.

One of the most important functions of punitive damages is called 'the multiplier'.[112] If someone sues then there may be others that are unlikely to sue or if they do they might not win.[113] In this case, if only compensatory damages are awarded, the defendant does not in fact bear the social cost of his wrongdoing.[114] From this perspective, the particular plaintiff may be awarded an amount that goes beyond compensation, but the purpose would be to assign costs rather than punish the defendant.[115] If this type of socially compensatory punitive damages, who are punitive only by name, were to be introduced on a European level, they should be accompanied by rules on distribution of these damages that would ensure they would be assigned to serve functions that would benefit the consumers that do not sue.[116] As mentioned above a cy-pres distribution mechanism could be beneficial.

CROSS BORDER DISPUTES

In today's globalised economy, cross-border consumer disputes are ever more so likely to arise, especially when taking the growth of the internet into account.[117] In the context of the European Union that is even more so true. One of the main concerns for the Union is to increase consumer's confidence in the internal market and one of the ways of doing so is to make sure they can get redress even in cases where cross-border issues are present.[118] Cross-border disputes are bound to create a variety of problems relating to conflict of laws. Assuming an EU-wide collective redress mechanisms were to be introduced, the question to ask is whether the existing legislative instruments are sufficient to

107 *Ibid*., p. 60.
108 *Ibid.*, p. 59.
109 *Ibid.*, p. 60.
110 Calabresi, G., Schwartz, K. S., 2011, p. 179.
111 *Ibid.*
112 *Ibid*., p. 180.
113 *Ibid.*
114 *Ibid*.
115 *Ibid*.
116 Sharkey, C. M., 2003, Punitive damages as societal damages, *Yale Law Journal*, 113, p. 347.
117 Ramsay, I., 2015, p. 264.
118 Green Paper, p. 2.

handle the arising cross-border issues or whether the introduction of specialised mechanisms for cross border redress are required.[119] The main issues to be dealt with are the ones concerning jurisdiction, choice of law and enforcement of judgements.[120]

EU MODELS OF COLLECTIVE REDRESS

Currently only a few of 27 Member States have a collective redress mechanism in place.[121] Even amongst these relatively few however, there is great divergence and the mechanisms in force deliver diverse results.[122] Their differences can be attributed to the particular historical circumstances that dictated the need for them.[123] On the European level, the Commission has in the past years adopted a variety of measures of substantive law on consumer protection and is currently shifting its focus to enforcement. The Commission recognises the need to facilitate access to justice and has long debated the subject of collective redress; however the measures taken so far on a European level have focused on individual redress.[124] It seems though, that in view of recent developments collective redress seems to be gaining momentum.[125]

In the field of consumer protection, the European Commission has been concerned with the issue of collective redress and has taken initiatives aiming at establishing common standards within the Union.[126] In 1998 the Injunction Directive[127] introduced a right of action for consumer associations, thus giving consumer associations standing in court in a type of representative action.[128] However the scope of this measure is limited as it concerns only injunctive relief and does not cover damages.[129] In 2008 the Commission issued a Green Paper on collective redress, which did not lead to the adoption of any legislative measures. The subject of collective redress has once more resurfaced in the agenda of the European Commission, with the launch of a horizontal public consultation in 2011 aiming at identifying common principles within the union as well as examine how these principles could be incorporated in a European system.[130] The discussion initiated by the European Commission on the issue and the thought of introducing a form of collective redress has been met with resistance by mem-

119 Consultation Paper, p. 11.

120 Ramsay, I., p. 264.

121 Report, p. 17.

122 Green Paper, p. 5.

123 Hodges, C., 2009, p. 43.

124 *Ibid*.

125 *Ibid*, p. 381.

126 Consultation Paper, p. 5.

127 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions on the protection of the consumer's interests, O.J. L 166, 11/06/1998, P.0051-0055.

128 Injunctions Directive, art. 3.

129 Wagner, G., 2011, Collective Redress – categories of loss and legislative options, *Law Quarterly Review*, 55, p. 57.

130 Consultation Paper, p. 5.

ber states such as Germany.[131] The reason behind the scepticism towards collective redress, is the fear that the problems associated with the US legal tradition of class actions will migrate to Europe.[132]

In the Green Paper of 2008, four different options ranging from minimum to maximum harmonisation were put forward by the Commission. The options to be considered are: 1) No action,[133] which means retaining the status quo, where consumers within the Union may turn only to their national redress mechanisms and the EU initiatives are exhausted in non-collective procedures such as the Small Claims Regulation[134] and the Mediation Directive,[135] 2) Cooperation between Member States[136], entailing the use of cooperation to facilitate the use of a national collective redress mechanism by the nationals of another Member State, and the possibility of a cooperation network, 3) Mix of policy instruments,[137] employing methods such as small claims procedure and ADR and elements such as an increased role for public authorities and 'awareness-raising' actions, 4) Judicial Collective Redress Procedure,[138] for the introduction of an EU-wide collective redress mechanism suggesting options from representative actions to test cases. There are further issues to be clarified such as whether such a collective action should be opt-in or opt-out and how the distribution of the damages should be conducted.[139] The Commission seems to be negative towards an opt-out regime. Another important issue to be addressed is how the action should be funded with options ranging from private litigation funding corporations to considerations for abolishing the loser-pays-all fee rule applicable in most civil law member states[140]. This is the only option able to provide a complete solution for Europe.

In modern times, cross-border trade is only gaining in importance, and that is even truer within the European market.[141] Due to that fact, large numbers of consumers may be harmed by the same or similar malpractice of a single trader.[142] This type of aggregated harm leads to a distortion of the market.[143] Here lies the core of the European agenda on collective redress. The main objective for the European Union is to enhance the consumers' trust in the internal market and thus facilitate cross-border trade within that market.[144] The Commission

131 Wagner, G., 2011, (note 214), p. 55.

132 Hodges, C. J. S., 2008, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford and Portland OR Hart, p. 131.

133 Green Paper, p. 7.

134 Regulation (EC)No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, *OJ* L 199, 31. 7. 2007, p. 1.

135 Directive 2008/52/EC of the European Parliament and of the Council of 21May 2008 on certain aspects of mediation in civil and commercial matters, *OJ* L 136, 24. 5. 2008, p. 3.

136 Green Paper, p. 8.

137 *Ibid*., p. 9.

138 *Ibid*., p. 12.

139 Green Paper, p. 13.

140 Green Paper, p. 12.

141 *Ibid.*, p. 3.

142 *Ibid.*

143 *Ibid.*

144 Green Paper, p. 2.

has identified the fact that consumers tend to mistrust the legal systems of other Member States and are thus discouraged from shopping in them, as a problem[145]. If ensuring the optimal function of the internal market is the main aim for collective redress, it can be argued that it is the objective of deterrence of wrongdoing that is a priority for the European Union.[146] However, the Commission is going to lengths to avoid the impression that it is attempting to import the US litigation culture which has been heavily criticised in Europe and is considered undesirable.[147] Achieving deterrence has been associated with the US legal culture and the excesses it invites.[148] With regard to that the Commission is hesitant to focus on deterrence and prioritises achieving compensation instead.[149]

THE POLICY CHOICES

The choices concerning group actions, and accordingly representative actions, reflect the objectives and core value of each legal system.[150] It is of course essential to keep a balance between the different objectives, yet in the context of the EU, if the goal is optimal functioning of the internal market, then it seems that goal will be best achieved by prioritising deterrence.

The criteria that would define who may be given standing in court would be part of substantial law; however they would be enforced by the judge.[151] The Commission seems to find merit in having a certification procedure, most likely at a preliminary stage of the trial, which would ensure that the claim is not unfounded and the claimant is in fact fit to represent the class.[152] The certification stage enhances the role of the judge in this system and has the potential of acting as a barrier to unmeritorious claims.[153] Having in place adequate safeguards against unmeritorious claims poses a major concern for the Commission, which fears the USA phenomenon of abusive claims.[154]

Following to this, in the last years, the European Commission invested substantial efforts to improve EU consumer law, including the rules on collective redress, through its massive Regulatory Fitness and Performance Programme (REFIT), aimed to assess the existing EU consumer legislation. That project was first mentioned in 2012.[155] Eventually, the REFIT turned out to be

145 *Ibid.*

146 Wagner, G., 2011, p. 60.

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 Calabresi, G., Schwartz, K. S., 2011, The costs of class actions: allocations and collective redress in the US experience, *European Journal of Law and Economics*, 32, pp. 169, 171.

151 Note that in a European court system it is unlikely to have jury trial consumer damage claims, opposite to the USA system.

152 Green Paper, p. 13.

153 Green Paper, p. 13.

154 *Ibid.*

155 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Regulatory

a detailed fitness check of the existing consumer and marketing law directives carried in all of the twenty eight EU Member States during 2016 and 2017. The REFIT concluded that there is a need for improving of effectiveness of the Union's consumer legislation, eventually resulting in the development of the New Deal for Consumers in 2018.[156] The development of new common European rules on collective redress is also a part of the New Deal for Consumers aims to ensure stronger consumer protection and better enforcement of consumer law in the EU.

After many months of discussion and deliberation, in June 2020, the text of the draft "*Directive on representative actions for the protection of the collective interests of consumers*"[157] was agreed and adopted by the Council and the European Parliament. When it finally comes into force, the draft directive will effectively introduce a common right of collective redress across the EU. It will require member states to put in place procedures by which "qualified entities" will be able to bring representative actions to seek injunctions, damages and other redress on behalf of a group of consumers who have been harmed by a trader who has allegedly infringed EU law. However, the draft directive is likely to remain controversial, the process being alien to the jurisprudence of some member states, who may be concerned that the procedure could encourage a more litigious culture. The draft directive will, most likely, be adopted by the end of this year or at the beginning of 2021. EU Member States will then have two years in which to implement it into national legislation, with a further six months for the new processes to come into effect, meaning that widespread collective redress procedures are unlikely to be available before 2023 at the earliest.

CONCLUSIONS

This paper aimed at examining the problem of consumer redress and then be able to propose a comprehensive solution that could be applied in Europe. The importance of consumer redress is highlighted when considering its frequent connection to the issue of access to justice. In cases of small diffuse harms in particular, the need for redress become even more acute, as it is the only way for wrongdoing to not go unpunished. As indicated by empirical evidence, consumers when faced with a problem, most often take no action at all. If they do take action, their most likely reaction would be to take up their complaint with the trader and rarely take action even though they may be unsatisfied with the response. Consumers are not aware of the different third-party redress mechanisms and tend to believe getting redress is costly and time-consuming.

Fitness, COM(2012) 746 final, (https://ec.europa.eu/info/sites/info/files/eu-regulatory-fitness_dec2012_en_0.pdf, 16 August 2020).

156 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumer COM/2018/0183 final, (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573718927782&uri=CELEX-%3A52018DC0183, 16 August 2020).

157 2018/0089 (OCD).

Although there is merit in utilising them in a redress system, provided there are certain safeguards, a gap of protection remains. That gap is to be filled by a collective redress mechanism; otherwise the social dimension of consumer rights would be ignored. The two main models for collective consumer redress, mainly the USA class action and the consumer association representative action were briefly examined. After prioritising the aims of such a system by placing the weight on deterrence, the main elements of such a system were examined. Europe has been notoriously negative towards the USA class action system; however as argued in this paper some of its elements, such as opt-out and a form of punitive damages could be put into place provided there are safeguards in place to avoid the excesses of the USA legal tradition. The new European legislation is still to be passed and only at the end of this year or in 2021 we will have a clearer picture on what will be the common European approach towards collective redress.

BIBLIOGRAPHY

1. Benohr, I., 2013, *EU Consumer Law and Human Rights*, Oxford.
2. Best, A., Andreasen, A. R., 1976–1977, Consumer Response to unsatisfactory purchases: a survey of perceiving defects, voicing complaints, and obtaining redress, *Law & Society Review*, 11.
3. Calabresi, G., Schwartz, K. S., 2011, The costs of class actions: allocations and collective redress in the US experience, *European Journal of Law and Economics*, 32.
4. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumer COM/2018/0183 final, (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573718927782&uri=CELEX%3A52018DC0183\).
5. Durovic, M., 2020, International Consumer Law – The Way Forward, 43 *Journal of Consumer Policy* 1.
6. Durovic, M., Micklitz, H., 2017, *Internationalisation of Consumer Law*, Routledge.
7. Hensler, D., 2009, The Globalisation of Class Actions: An Overview', 622 ANNALS, AAPSS, 9.
8. Hodges, C. J. S., 2008, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford and Portland OR Hart.
9. Issacharoff, S., Miller, G. P., 2008, Will Aggregate Litigation Come to Europe?, (November) NYU Center for Law, Economics and Organisation, Law & Economics Research Paper Series Working Paper No. 08–46, *Vanderbilt Law Review*, 62, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296843).
10. McCowan Heilman, K., 2008–2009, The Rights of Others: Protection and Advocacy Organisations' Associational Standing to Sue, *University of Pennsylvania Law Review*, 157.
11. Miller, C. J., Harvey, B. W., Parry, D. L., 1998, *Consumer and Trading Law: Text, Cases and Materials*, Oxford University Press.
12. Ramsay, I. D. C., 1981, Consumer redress mechanisms for poor quality and defective products, *University of Toronto Law Journal*, 31.

13. Ramsay, I. D. C., 2005, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 3rd Edition.
14. Sharkey, C. M., 2003, Punitive damages as societal damages, *Yale Law Journal*, 113.
15. Wagner, G., 2011, Collective Redress – categories of loss and legislative options, *Law Quarterly Review*, 127.
16. Westby, S., 2011–2012, Associations to the Rescue: Reviving the Consumer Class Action in the United States and Italy, *Transnational Law & Contemporary Problems*, 20.

KOLEKTIVNA ZAŠTITA KAO IDEALAN MODEL ZAŠTITE POTROŠAČA U EVROPSKOJ UNIJI?

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REZIME

Cilj ovog rada je da ispita problem kolektivne zaštite prava potrošača, a zatim da predloži sveobuhvatno rešenje koje bi se moglo primeniti u Evropskoj uniji. Bitnost kolektivne zaštite potrošača ističe se kada se razmatra njena bliska povezanost s pitanjem pristupa pravdi. U slučajevima štete nanete potrošačima koja je male vrednosti, potreba za pravnim sredstvima postaje još značajnija, jer je to jedini način da nepravda ne ostane nekažnjena. Kao što pokazuju empirijski dokazi, kada se potrošači suoče s problemom, najčešće uopšte ne preduzimaju ništa. Ako nešto preduzmu, njihova najverovatnija reakcija biće podnošenje žalbe trgovcu i retko preduzimanje radnji, iako mogu biti nezadovoljni odgovorom. Potrošači nisu svesni različitih mehanizama pravne zaštite trećih strana i skloni su verovanju da je upotreba pravnih lekova skupo i dugotrajno rešenje. Upravo zbog toga, bitno je razviti efikasan sistem kolektivne zaštite potrošača.

Ključne reči: potrošači, Zakon EU, kolektivna zaštita potrošača, alternativno rešavanje sporova, kolektivna tužba.