De minimis curat praetor – Redress for dispersed trifle losses

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Abstract:

It seems that private law dislikes futilities, if the maxim *de minimis non curat praetor* is anything to go by: neither the courts nor the law should concern themselves with trifles. Indeed, the academic venture of drafting a Common Frame of Reference (CFR) upholds this principle by stating that "trivial damage is to be disregarded." If the CFR starts from the idea that trifle loss is not considered 'legally relevant damage', the question arises how the CFR would deal with losses referred to by the Germans as *Streuschäden*: trifle, but widely dispersed losses suffered by many individuals as a consequence of tort or breach of contract. Dispersed trifle losses are currently very much scrutinized by EU policymakers in the areas of competition law and consumer law. This makes sense from a policy point of view because what constitutes trifle loss at an individual level may well aggregate into considerable losses to society as a whole, or translate into extensive profits accrued to the wrongdoer.

So, the question is: *should the praetor not deal with trifles after all?* And if he does, how can he deal with it effectively and efficiently? In this paper, I will first survey the CFR for indications of how the drafters would probably approach this issue. Then, I will discuss the state of affairs in EU policymaking and analyse various recent national initiatives attempting to deal with mass damage and see if these provide viable pathways for dealing with trifles. Subsequently, I will identify issues that need addressing regardless what the preferable pathway may be. I will argue that the issue of dispersed trifles is currently too complex to be dealt with comprehensively at a European level in the near future. Instead, germinating initiatives at state level should be given the chance to blossom or wither. In any event, the CFR should take a less rigid stance on dispersed trifle losses than it seems to be taking now.

Keywords: Trifle loss; minor and dispersed damage; scattered and slight damage claims, Common Frame of Reference, private enforcement; disgorgement of profits
JEL Classifications: K12, K13, K41

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Contents

1 Reception of the maxim in the Common Frame of Reference

[171] The maxims 'de minimis non curat praetor' and 'de minimis non curat lex'[1] denote the dislike of courts and legislatures for trifles.[2] Although the maxims sound genuinely Roman, they were in fact only phrased as such in the Late Middle Ages.[3] Before, as much as ever since, the underlying principle has been invoked by civil courts to dismiss claims for trifles, but it has also been used by legislators e.g., to introduce financial thresholds for appeals.

At closer inspection, it is difficult to find one overarching rationale for the 'de minimis' maxim. Sometimes, the rationale seems to be that the injured party simply has to put up with the type of damage suffered. For instance, in some jurisdictions certain types of damage are considered 'a fact of life that one has to accept'.[4] But what seems trifle at first glance may at further reflection be considered substantially harmful. For instance, is incidental exposure to passive smoking in a restaurant a trifle with which the law should not

[1] The variant 'Minima non curat praetor' can sometimes be found as well. See, e,.g., Liebs, D (1991) *Lateinische Rechtsregeln und Rechtssprichwörter* Verlag C.H. Beck at 120.
[2] Even the Gods do not concern themselves with trifles, if we take Cicero's *De natura deorum* (3, § 86) word for it.
[3] Schmieder, P (2007) 'De minimis non curat praetor - Erheblichkeit als Zulässigkeitsschranke?' (120) *Zeitschrift für Zivilprozess* 199 at 200; Veech, ML and Moon, CL (1947) 'De Minimis Non Curat Lex' (45) *Mich. L. Rev.* 537 at 537 ff. This does not imply that the Romans never applied the substance of these maxims; see, e.g., D. 4.1.4 and D.4.III.9-11. See Spruit, JE (1998) 'De minimis non curat praetor' in Jacobs and Coppens (ed.) (1998) *Een Rijk Gerecht - Opstellen aangeboden aan prof. mr. P.L. Nève* Gerard Noodt Instituut 421-430 at 422 ff.
[4] Cf. the doctrine of *Sozialadäquanz*, as described by Koziol, H (1997) *Österreichisches Haftpflichtrecht - Band I: Allgemeiner Teil* Manz at no. 4/37; Buß, T (1998) 'De minimis non curat lex' (51) *Neue Juristische Wochenschrift* 337 at 342. Cf. also the concept of 'ordinary business risk', referred to in the 1979 California Supreme Court decision J'Aire Corp. v. Gregory (598 P. 2d 60 (Cal. 1979)), quoted by G.T. Schwartz, in: Banakas, EK (ed.) (1996) *Civil Liability for Pure Economic Loss* Kluwer Law International at 105.

be concerned? Moreover, what is trivial may well depend on context and comparison.[5] What is trivial to one person can be substantial to someone else.[6] Surely, 'trivial damage is to be disregarded' does not imply that debtors have a right to help themselves to a rebate by deliberately deducting a **[172]** small sum from all their debts.[7] So, is intentional harm-doing excluded from the ambit of the maxim?[8] In other cases, it is not so much the size of the claim itself but its proportion to the burden for the opposing party that renders the claim trivial. Likewise, the maxim is sometimes referred to as an expression of abuse of right against claims with mere nuisance value.[9] This implies that the maxim is the outcome of the process of weighing of interests involved.[10]

In short, the problem with legal maxims such as 'trivial damage is to be disregarded' is that they look good on decorative tiles (as do solemn sayings and proverbs) but do not provide firm foundation for readily applicable *rules*. Even the California Civil Code, which has literally incorporated the maxim 'the law disregards trifles', admits that the maxim is to be considered as an interpretative aid to be used in conjunction with other provisions rather than as a rule.[11]

Against this background, the recent initiative of drafting a European *Common Frame of Reference* deserves some consideration. Much has been said on the merits of this project as such, which I will not discuss here. However, if we submerge ourselves into the details of the CFR we find that it has moved up the maxim into the position of a rule by providing that "trivial damage is to be disregarded." (art. VI-6:102 (De minimis rule)).

The comments accompanying art. VI-6:102 Draft CFR (as stated in the *Principles of European Law* version of the article[12]) explain that trivial damage does not lead to a claim for reparation or injunction. The idea is that 'trivial damage must be accepted in a highly civilized society as a socially acceptable interference not warranting reparation' and that claiming should not constitute a nuisance for the defendant. Moreover, the draftsmen and –women declare that 'the rule of leaving trivial damage without a corresponding claim to compensation can also prevent class actions or other collective actions in which ultimately it is only the lawyers who profit or the organisations to which the relevant rights to reparation

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[5] Veech, ML and Moon, CL (1947) 'De Minimis Non Curat Lex' (45) *Mich. L. Rev.* 537 at 544.
[6] Schmieder, P (2007) 'De minimis non curat praetor - Erheblichkeit als Zulässigkeitsschranke?' (120) *Zeitschrift für Zivilprozess* 199 at 211.
[7] On this issue, e.g., Id at 203.
[8] Affirmative: Veech, ML and Moon, CL (1947) 'De Minimis Non Curat Lex' (45) *Mich. L. Rev.* 537 at 554 ff.; von Bar, C (2009) *Principles of European Law - Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)* Sellier at 928 ("Intentionally inflicted damage can hardly ever be categorised as trivial.")
[9] Schmieder, P (2007) 'De minimis non curat praetor - Erheblichkeit als Zulässigkeitsschranke?' (120) *Zeitschrift für Zivilprozess* 199 at 204 ff.
[10] Veech, ML and Moon, CL (1947) 'De Minimis Non Curat Lex' (45) *Mich. L. Rev.* 537 at 558 f.; Spruit, JE (1998) 'De minimis non curat praetor' in Jacobs and Coppens (ed.) (1998) *Een Rijk Gerecht - Opstellen aangeboden aan prof. mr. P.L. Nève* Gerard Noodt Instituut 421-430 at 425.
[11] Veech, ML and Moon, CL (1947) 'De Minimis Non Curat Lex' (45) *Mich. L. Rev.* 537 at 543.
[12] At the time of writing, the official comments to the DCFR ('Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference') were not yet available. I am confident, however, that the comments by von Bar, C (2009) *Principles of European Law - Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)* Sellier at 927 constitute a quite accurate precursor of these comments.

have been assigned. Trivial damage remains trivial even where it is suffered by many simultaneously.'[13] The comments continue to assert that the economic value of a claim is not decisive: damage to a favourite doll or pet is not considered trivial. The example that is given of what is considered trivial, concerns the lack of informed consent caused by a hasty nurse.

These comments are disappointing, to say the least. Firstly, from the comparative notes accompanying art. VI-6:102 it is clear that there is in fact no common core among European legal systems on the content and extent of the maxim. Indeed, the picture that arises from these notes is that there no such thing as a 'de minimis' *rule* in European domestic (tort) laws.[14] Secondly, it seems counterintuitive to file a case of informed consent **[173]** under trivial damage – especially in light of attempts in some countries to recalibrate the concept of damage in order to secure compensation for patients affected by breach of a duty to obtain informed consent.[15] Thirdly, there is no clear pan-European policy against (or in favour of) class actions. Justifying the conception or rule as laid down in art. VI-6:102, which apparently purports to frustrate any development of class actions, is an uncalled-for political statement on how European countries should go forward rather than a summary of the law as it stands. Fourthly, the CFR asserts that "trivial damage remains trivial even if it is suffered by many simultaneously." As I will argue in § 2, the phenomenon of dispersed trifle loss proves the draftsmen and –women wrong.

2 What are the issues with dispersed trifle loss?

Trifles are only trifles in context. Indeed, the context may indicate that what seems trivial at first sight may in fact be much graver. Consider the following examples. A newspaper is late every Monday; a telephone service invoice has been rounded with a few cents to the detriment of multiple consumers; energy suppliers inadvertently use rights of automatic debit even after clients have terminated the contract; a major company unilaterally postpones payment of its creditors with a few days;[16] a health insurance company overcharges its clients € 7,50 per annum, in violation of a statutory pricing scheme;[17] an enterprise tricks consumers into buying through misleading advertising; a horizontal price

[13] Id at 927-928.
[14] Note that art. VI-6:102 CFR is applicable to tort damages.
[15] On that issue, see, e.g., Chester v. Afshar [2004] 3 WLR 927. Cf. van Boom, WH (2006) *Efficacious Enforcement in Contract and Tort (inaugural lecture EUR)* BJU at 16.
[16] More examples are given by Schaefer, H-B (2000) 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations' (9) *European Journal of Law and Economics* at 185. Cf. Asser, WDH et al. (2003) *Een nieuwe balans - Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht* BJU at 175 and Tzankova, IN (2005) *Strooischade - Een verkennend onderzoek naar een nieuw rechtsfenomeen* SDU at 17 ff. See also Micklitz, H-W and Stadler, A (2003a) *Unrechtsgewinnabschöpfung - Möglichkeiten und Perspektiven eines kollektiven Schadenersatzanspruches im UWG* Nomos at 10 ff.
[17] The example is based on a Dutch case; see *Hoge Raad* (Supreme Court) 2 September 1994, Nederlandse Jurisprudentie 1995, 369.

cartel causes inflated consumer prices; a company uses unfair contract terms although it perfectly knows that these are not allowed.

Each of these cases concerns trifle losses suffered by many. The damage to society as a whole or to a specific group within society (clients, shareholders, et cetera) can be substantial. Moreover, the flip side of trifle losses may well be an aggregate profit of considerable size for the wrongdoer. Nevertheless, individuals may lack the incentives and tools to initiate private enforcement proceedings. Typically, individual loss is too insignificant to justify commencing civil proceedings. Moreover, not all those affected may be aware of having been wronged[18] or care to do something about it. If it would cost an individual consumer € 3,000 (£ 2,700) to obtain a declaratory judgment that a specific contract clause is unfair, would he bother if the damage that he suffers as a consequence thereof is limited to a fraction of those costs? [19] In such cases, it is rational for individuals to remain **[174]** apathetic although society as a whole could surely be expected to benefit from enforcement (provided it would lead to compliance).[20]

Obviously, the extent of the problem of rational apathy with dispersed trifle losses largely depends on national institutional settings. [21] In some countries access to civil justice is more expensive than in others, lawyers are less affordable than in others, and there are less alternative routes to justice (mediation, alternative dispute settlement committees) than in others.[22] Nevertheless, European research shows that merely 29% of individual consumers would be prepared to go to court of cases with a value under € 500.[23] Other sources indicate that in countries such as Germany, Austria and The Netherlands consumer claims under €

[18] Cf. Van den Bergh, R (2007) 'Should Consumer Protection Law be Publicly Enforced?' in van Boom and Loos (ed.) (2007) *Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention* Europa Law Publishing 179-203 at 201.
[19] See Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 384 footnote 475.
[20] On rational apathy and free riding, see Landes, WM and Posner, RA (1975) 'The private enforcement of law' (4) *J. Legal Stud.* at 33; Schäfer, H-B (2000) 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations' (9) *European Journal of Law and Economics* at 195; Howells, GG and Weatherill, S (2005) *Consumer Protection Law* Ashgate at 604; Garoupa, N (2001) 'Optimal law enforcement when victims are rational players' (2) *Economics of Governance* at 231 ff.; Van den Bergh, R (2007) 'Should Consumer Protection Law be Publicly Enforced?' in van Boom and Loos (ed.) (2007) *Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention* Europa Law Publishing 179-203 at 184. Cf Meller-Hannich, C (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos at 14.
[21] When making inventory of pros and cons of remedying rational apathy, one should also take into account the additional costs of adjudicating trifle loss cases. On these aspects, e.g., Shavell, S (1982) 'The Social Versus the Private Incentive to Bring Suit in A Costly Legal System' (11) *Journal of Legal Studies* at 333 ff.; Shavell, S (1985) 'Criminal Law and the Optimal use of Nonmonetary Sanctions as a Deterrent' *Columbia Law Review* at 1231 ff; Shavell, S (1993) 'The optimal structure of law enforcement' (36) *J. of Law and Economics* at 255 ff.
[22] van Boom, WH (2006) *Efficacious Enforcement in Contract and Tort (inaugural lecture EUR)* BJU at 23.
[23] Stuyck, J et al. (2007) *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report* Katholieke Universiteit Leuven at 204. For more detailed figures on 'tipping points' between viable claims and trifle losses, see European Commission (2009) *Consumer redress in the European Union; consumer experiences, perceptions and choices (aggregated report August 2009 prepared by TNSqual+)* European Commission at 8.

10,000-17,000 are economically unviable to take to court.[24] Moreover, even in those countries where consumer claims do not reach civil courts but are dealt with through easily accessible alternative redress schemes –varying from dispute settlement committees to consumer ombudsmen – usually a fee is due. Even though the fee itself may be low – ranging from € 25 to € 100 – it would still be too high for making some individual claims viable.[25]

An additional obstacle upon which I touched earlier may be caused by the concept of 'damage' in private law itself. It may well be that the law of damages does not consider certain trifle losses to be damage worth compensating at all. Consider for instance the time one has to wait in a telephone queue to be helped, the discomfort of having to complain repeatedly over defective services, or being withheld seemingly trivial information required by law. If the law of damages considers all this to be 'facts of life that one has to accept', then private law obviously is ineffective in providing redress for dispersed trifle losses.

3 Triviality from a EU perspective

There is a general and a specific EU perspective to triviality. Concerning the general perspective, if an EU member state chooses to enforce an EU Directive through domestic private law, it must ensure that the remedies provided by its domestic legal system are **[175]** effective, proportionate and dissuasive.[26] As a result, a national concept of 'de minimis' may contradict this obligation. Moreover, European law may sometimes even model the concept of damage itself, inflating it rather than disregarding it.[27]

As regards the specific EU perspective, the European Commission has recently devoted itself to developing a European policy on effective redress for mass damage in consumer law and on private enforcement of competition law.[28] As concerns mass damage, the European Commission holds that the lack of an effective legal framework enabling consumers to ensure adequate compensation in mass claim cases is detrimental to the market and creates a justice gap.[29] The Commission is currently holding consultation rounds in which five policy alternatives for remedying this gap are considered: 1) doing nothing, 2) developing self-

[24] Civic Consulting and Oxford Economics (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* at 91.
[25] Vgl. Id at 96. Note that sometimes these thresholds are sometimes built in deliberately to dissuade claims for trifle loss. For Denmark, see Peter Møgelvang-Hansen (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Denmark' in Consulting and Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 23-24.
[26] *Sabine von Colson & Elisabeth Kamann v Land Nordrhein-Westfalen* (ECJ 10 April 1984, 14/83, [1984] ECR 1891); *Courage Ltd. v Bernhard Crehan* (ECJ 20 Sept 2001, C-453/99, [2001] ECR I-6297).
[27] *Simone Leitner v. TUI Deutschland (*ECJ 12 March 2002, C-168/00 [2002] ECR I-2631.
[28] On private enforcement of competition law, see EU Commission (2005) *Green Paper "Damages actions for breach of the EC antitrust rules"* COM (2005) 672 final at 1 ff; EU Commission (2008) *White Paper "Damages actions for breach of the EC antitrust rules"* COM (2008) 165 final at 1 ff. On the EC consumer strategy in general, see EU Commission (2007) *EU Consumer Policy strategy 2007-2013* COM (2007) 99 final at 10 f.
[29] EU Commission (2009) *Consultation Paper "Consumer Collective Redress"* at 3.

regulation, 3) encouraging voluntary collective ADR schemes and judicial collective redress, 4) introducing binding collective schemes and redress, 5) introducing a EU-wide judicial collective redress mechanism.[30] The Commission formulated the following benchmarks for further EU policymaking in the area of collective redress.[31] It does not take much reflection to acknowledge that some of these benchmarks are not easily reconciled:

- Any new mechanism for collective redress should enable consumers to obtain satisfactory redress in cases in which they could not have otherwise adequately pursued on an individual basis.
- It should be possible to finance actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.
- The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.
- The compensation to be provided by traders/service providers against whom actions have been successfully brought, should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.
- One outcome should mean the reduction of future harm to all consumers. Therefore a preventive effect on potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct. **[176]**
- The introduction of unmeritorious claims should be discouraged.
- Sufficient opportunity for adequate out-of-court settlement should be foreseen.
- The information network preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions (?).
- The length of proceedings leading to the solution of the problem in question should be reasonable for all parties.
- Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

Whether the EU will indeed develop further policies on collective redress in general and dispersed trifle losses in particular, is still uncertain.[32] Therefore, a closer look at developments at member state level seems to be in order.

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[30] EU Commission (2008) *Green Paper "Consumer Collective Redress"* COM (2008) 794 final at 15 ff.
[31] See <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.
[32] Cf. Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 403 f.

4 Triviality from a comparative legal perspective

4.1 Preliminary observations

How do European legal systems approach dispersed trifle losses? Do the usual rules of substantive private law and civil procedure apply? Or can individuals voluntarily consolidate their claims in some sort of 'opt in' procedure? Can they appoint a representative association as their attorney? Is there is special civil procedure for trifle losses of which individuals have to opt-out? Have specific powers been conferred upon public authorities to recoup trifle losses?

In this section I briefly analyse various legislative initiatives that have emerged across Europe and that have relevance to attempts of dealing with minor and widely dispersed damage. Before doing so, two general preliminary observations are in order.

First, we should acknowledge that there are significant differences in regulatory culture between European countries. These differences are also pertinent to legislative policies on consolidating claims for dispersed trifles. Generally speaking, a contrast exists between those countries on the one end of the spectrum that adhere to some sort of principle of 'free market of collective representation' and countries on the other end that follow a course of restraint in allowing collective action in civil courts. Even a relatively straightforwardly simple legal technique such as voluntary assignment of individual claims to consumer organizations can be difficult if a legal system is structurally biased against consolidation of individual claims.[33] Under German law, for instance, consumer organizations are curtailed in their ambitions to give legal advice, to act as collective representatives for individuals in claims **[177]** for injunctive relief, [34] and to act as assignee of consumers' money claims.[35] By contrast, in other countries consumer associations may be virtually unrestrained in this respect.[36]

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[33] For an example of such legal obstacles see, e.g., the now repealed article 1 § 3 (8) *Rechtsberatungsgesetz* (RBerG; Legal Advice Act). Cf. Micklitz, H-W and Stadler, A (2006) 'The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure' *European Business Law Review* at 14; Stuyck, J et al. (2007) *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report* Katholieke Universiteit Leuven at 276-277; Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 397-398; Schilken, E (2008) 'Der Zweck des Zivilprozesses und der kollektive Rechtsschutz' in Meller-Hannich (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos 21-52 at 35 ff; Micklitz, H-W and Stadler, A (ed.) (2005) *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* Landwirtschaftsverlag at 13.25.

[34] The German State designates associations deemed fit to represent consumers in claims for injunction in the interest of consumers at large. For an overview of the statutory provisions designating authorized organizations, see, e.g., Baetge, D (2009) 'Germany' (622) *Annals of The American Academy of Political and Social Science* at 127 ff.; Halfmeier, A (2006) *Popularklagen Im Privatrecht : zugleich ein Beitrag zur Theorie der Verbandsklage* Mohr Siebeck at 51 ff.

[35] See § 7-8 *Rechtsdienstleistungsgesetz* 2008 (Legal Services Act 2008) and § 79 *Zivilprozessordnung* (German Code of Civil Procedure). Cf. Meller-Hannich, C (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos at 14; Micklitz, H-W (2007) 'Collective private enforcement of consumer Law: the key questions' in Van Boom and Loos

Secondly, even if a legal system generously allows the voluntary consolidation of trifle claims, there is the issue of financing. Obviously, private associations do not have limitless resources to entertain collective consumer claims in court. This in itself constitutes a considerable barrier to consolidation of trifle claims. Various 'solutions' have been tried or considered across Europe to tackle the formidable funding problem. In Austria, for some years state subsidies were used to help the *Verein für Konsumenteninformation* (Association for Consumer Information) to consolidate and bring to court dispersed claims for (trifle) loss.[37] Alternatively, legislators may consider allowing instruments of risk diversification such as contingency fees and after the event insurance for collective claimants to spread the risk of loser-pays rules. These procedural instruments will not be dealt with here.

4.2 Consolidation through an opt-in civil procedure

Courts can drastically economize by joining multiple claimants that have similar claims with a similar legal basis. So, theoretically speaking, if the law could design a swift and efficient procedure for amalgamating claims that could effectively deal with claims for dispersed trifles in a balanced manner, much would be gained. In practice, however, it evidently is very difficult to design a procedure that fully realizes all the benefits that theory predicts. One of the manifold causes is the traditional focus of civil procedure with individuals rather than groups. For instance, under German law, the constitutionally warranted right for individual claims – however small – to be heard in court is strictly interpreted.[38] Attempts to consider a procedural system in which trifle claims are automatically considered part of a collective procedure without explicit consent of the individuals involved, have met with hostile rejection rather than careful deliberation. Hence, the German *Kapitalanleger-MusterVerfahrensgesetz* (KapMug; Capital Investors Model Case Procedure Act) is to be considered as a German-style compromise between the fundamental right of individuals and the needs of efficient adjudication.

[178] The KapMug does not specifically address dispersed trifles. It is rather an experimental statute introduced in 2005 as a response to a multitude of identical and similar claims for compensation of disappointed investors claiming they were given wrong and misleading information in a Deutsche Telekom securities prospectus. The KapMug procedure does not constitute a separate opt-in procedure but rather a 'trial within a trial' (or rather an

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(ed.) (2007) *Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention* Europa Law Publishing 13-36 at 13 ff.

[36] The Netherlands can be considered rather liberal in this respect. See the overview presented by van Boom, WH (2009) 'Collective Settlement of Mass Claims in The Netherlands' in Casper, Janssen, Pohlmann and Schulze (ed.) (2009) *Auf dem Weg zu einer europäischen Sammelklage?* Sellier 171-192 at 171 ff.

[37] See § 227 *österreichische Zivilprozessordnung* (Austrian Code of Civil Procedure). Cf. Micklitz, H-W (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Austria' in Civic Consulting and Oxford Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at nr. 1.1.3.

[38] Similar objections were raised in the Swedish debate on the opt-out procedure. See Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 400.

interlocutory procedure) on the request of an individual party in a pending civil procedure on securities. [39] Once the request to open a Model Case Procedure (MCP) has been filed, other interested parties can opt-in by registering in the central MCP register. The court of first instance allows the MCP to carry forward if the case raises common issues of fact or law that are of relevance in a substantial number of other (pending) cases. The appropriate Appeals Court (*Oberlandesgericht*) conducts the MCP, the outcome of which is a declaratory judgment on points of fact or law. The outcome of the MCP can then be appealed before the Federal Supreme Court (*Bundesgerichtshof*). Only once the MCP outcome is final, will the original procedures be resumed. The MCP can only be considered an ancillary procedure to a main procedure for compensation; issues of damage assessment and causation are not part of the MCP. [40] The outcome of the MCP is binding upon the registered parties and the summoned parties (their main procedures will be stayed during the MCP). [41] Consequently, much is done to ensure that the summoned party is heard in the MCP as to prevent any reproach of unconstitutionality of the procedure.

The KapMug can hardly be called a success:[42] it does not speed up proceedings, nor does it offer an easy way to a court-mediated settlement. Moreover, the registered participants face the risks of losing the case (and hence paying the expensive court-appointed experts)[43] and lawyers have little incentive to instigate a MCP. [44] To date, the Telekom-case that prompted the enactment of KapMug is still pending before the German courts.

In some respects, the operation of the KapMug is similar to the Group Litigation Order (GLO) as instituted in England and Wales by the Civil Procedure Rules (CPR 1999).[45] Both procedures share the fundamental feature of opt-in: individuals cannot become part of either procedure without their knowledge and consent.[46] By issuing the GLO and opening **[179]** the GLO register, individual claimants are given the possibility to opt-in into a centrally

[39] For a description of the KapMuG, see, e.g., Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 391 ff.
[40] Id at 393.
[41] Vorwerk, V and Wolf, C (2007) *Kapitalanleger-Musterverfahrensgesetz (KapMug) Kommentar* Beck at 124-125.
[42] Criticism was already expressed by Mickitz, H-W and Stadler, A (2006) 'The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure' *European Business Law Review* at 1487 ff.
[43] § 8 KapMuG.
[44] § 15 (5) jo. § 16 (15) *Rechtsanwaltsvergütungsgesetz* (Lawyer Remuneration Act). Vgl. Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 392-393.
[45] Obviously, there are other procedural instruments of managing multi-party actions under English law (see , e.g., Andrews, N (2001) 'Multi-party proceedings in England: representative and group actions' (11) *Duke J. of Comp. & Int. Law* at 251 ff.; Civil Justice Council (2008) *Improving Access to Justice through Collective Actions - Developing a More Efficient and Effective Procedure for Collective Actions* at 18 ff.). None of these are really relevant for dispersed trifles.
[46] Note, however, that under the KapMuG, there is a subtle difference in effect for a summoned party ('Beigeladene'; § 8 (3) KapMuG) that opts out after the petition for initiating a Model Case has been granted: he is bound by the outcome of the MCP (§ 16 KapMuG) but can escape costs by opting out within two weeks after the MCP petition has been granted (§ 17 (4) KapMuG). Possibly, a summoned party can escape *res iudicata* effect by ending his individual procedure before the MCP is granted by the court of first instance. See Bergmeister, F (2009) *Kapitalanleger-Musterverfahrensgesetz - Bestandsaufnahme und Reformempfehlung aus der Perspektive von Recht und Praxis der US-amerikanischen Securities Class Action* Mohr Siebeck at 226 ff.

directed procedure.[47] Opting-in basically facilitates a voluntary joinder of cases insofar as common or related issues of fact or law are involved. [48] Unlike the German MCP, the English GLO procedure is both flexible and unpredictable because much of the discretionary power is left to the appointed managing judge to direct the case into the right direction. The German MCP and the English GLO have in common that they are not specifically designed to address dispersed trifles. Hence, neither procedure seems to provide a sustainable solution for the issues involved in trifles.

4.3 Consolidation through an opt-out civil procedure

An opt-out civil procedure, in which multiple claimants can be involved without their explicit consent (as is the case with the U.S.A. class action), does not sit well with fundamental values of civil procedure: individuals cannot be bound by litigation in which they did not take part, res judicata can only take effect vis-à-vis those persons that were properly issued a writ, and courts should hear their arguments before rendering a decision.

Strictly construing these fundamental values would smother any discussion on tackling dispersed trifles. Rational apathy is not easily addressed if these values remain non-negotiable. This does not, however, imply that it is impossible to address the issue. Indeed, it seems that Portugal and Denmark, and to some extent The Netherlands, may have found a way to balance the need for dealing with dispersed trifles with these fundamental values by designing systems that are basically *opt-out* systems.[49]

The Portuguese Constitution warrants a so-called *acção popular*, and the 1995 Statute implementing this 'public action' basically allows designated consumer associations to instigate public actions in the interest of their backing.[50] The procedure is less formal than common court cases, court fees for the consolidated claimants are attenuated[51] and the standard for evidence of both identity of injured individuals and their damage is relaxed.[52] The managing judge has special powers concerning the collection of information[53] and striking out unmeritorious cases at an early stage. [54] The managing judge is monitored by

[47] Hodges, C (2008) *The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe* Hart Publishing at 53 ff.
[48] Cf. CPR Part 19.10 en 19.11.
[49] See also Norwegian and Finnish law, as referred to by Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 385 f.
[50] Statute 83/95 of August 31, 1995. See Antunes, HS (2007) *Class action, group litigation and other forms of collective litigation (Portuguese report presented at 'The Globalization of Class Actions' conference December 2007, Centre for Socio-Legal Studies, University of Oxford, England)* at 6.
[51] Tortell, L (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Portugal' in Civic Consulting and Oxford Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 6; 21. Note that the defendant is not privileged in this respect; he will have to pay the normal fees.
[52] Id at 5.
[53] Art. 17 of Statute 83/95 of August 31, 1995.
[54] Art. 13 of Statute 83/95 of August 31, 1995; see Tortell, L (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Portugal' in Civic Consulting and Oxford

[180] the attorney general's office. [55] Individuals have the right to opt-out from the collective proceedings. [56]

Although the Portuguese opt-out procedure looks good on paper, there is still little practical experience to report.[57] Some argue that the lack of adequate lawyer remuneration is to blame, whereas others point to the absence of a Portuguese compensation culture,[58] the lack of resources in consumer associations and the availability of low-threshold alternative dispute settlement mechanisms.[59] Therefore, how the 1995 Statute will perform in complicated cases of dispersed trifle losses remains to be seen. [60]

In Denmark, a 2008 Act introduced the *Gruppesøgsmål* ('group action').[61] The *Gruppesøgsmål* can be used if individual claimants have similar claims on identical factual and legal grounds. The appropriate court is exclusively authorized to start the *Gruppesøgsmål* and it will do so if the involved claimants can be individualized, identified and reached and if it considers a collective procedure the superior method of adjudication in the given case.[62]

Two types *Gruppesøgsmål* are available, the opt-in and the opt-out version. The opt-out *Gruppesøgsmål* can be initiated at request, which may be especially convenient in cases of

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Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 21 ; Antunes, HS (2007) *Class action, group litigation and other forms of collective litigation (Portuguese report presented at 'The Globalization of Class Actions' conference December 2007, Centre for Socio-Legal Studies, University of Oxford, England)* at 11.

[55] See further Antunes, HS (2007) *Class action, group litigation and other forms of collective litigation (Portuguese report presented at 'The Globalization of Class Actions' conference December 2007, Centre for Socio-Legal Studies, University of Oxford, England)* at 11.

[56] Article 15 of Statute 83/95 of August 31, 1995; see Vilaça, JLdC et al. (2004) *Study on the conditions of claims for damages in case of infringement of EC competition rules - National Report Portugal* Ashurst at 4.

[57] Cf. Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 387. Mulheron, R (2008) *Competition law case under the opt-out regimes of Australia, Canada and Portugal (A research paper for submission to the Department for Business, Enterprise and Regulatory Reform (BERR))* Department of Law, Queen Mary University of London at 77 reports the competition case (abus of dominant position) DECO v Portugal Telecom. This case ended with a settlement involving a cy-près price-rollback (i.e., free phonecalls for existing costumers under certain conditions).

[58] Antunes, HS (2007) *Class action, group litigation and other forms of collective litigation (Portuguese report presented at 'The Globalization of Class Actions' conference December 2007, Centre for Socio-Legal Studies, University of Oxford, England)* at 20. On the relevance of compensation culture for the upsurge in mass damages claims, see, e.g., Hodges, C (2001) 'Multi-party actions: A European Approach' (11) *Duke J. Comp. & International Law* 321 at 330. See also more generally on consumer complaints culture: European Commission (2009) *Consumer redress in the European Union; consumer experiences, perceptions and choices (aggregated report August 2009 prepared by TNSqual+)* European Commission at 20.

[59] Tortell, L (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Portugal' in Civic Consulting and Oxford Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 3.

[60] Civic Consulting and Oxford Economics (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* at 97.

[61] *Retsplejelovens* (Code of Civil Procedure), §§ 254 a-254 k. See Peter Møgelvang-Hansen (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Denmark' in Consulting and Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 3.

[62] Id at 4; Werlauff, E (2009) 'Class Actions in Denmark' (622) *Annals of The American Academy of Political and Social Science* at 203.

dispersed trifles. If the individual claims involved are too small to be economically viable and the number of claims is such that the aggregate costs of opting-in would be excessive, the court may choose for the opt-out *Gruppesøgsmål*.[63] In the parliamentary proceedings, an amount of DKK 2,000 (€ 265; £ 240) was mentioned as the lower limit of individually viable claims.[64] In principle, a class attorney (either an individual or association) is appointed by the court to proceed on behalf of the group. In opt-out proceedings, however, the court can only appoint the Danish Consumer Ombudsman, *Forbrugerombudsmanden*,[65] as the exclusive attorney for the group.[66]

[181] As with the Portuguese public action, there is little experience with the Danish opt-out system. It seems that the Danish system is hesitant to adjudicate on an aggregate level if individual circumstances are relevant for assessing damage and calculating damages. Possibly, the *Gruppesøgsmål* will then be restricted to a declaratory judgment holding that there is in principle a right of all individuals involved to be compensated. The exact amount is then to be assessed afterwards and may depend on specific individual circumstances.[67]

The Dutch 2005 Collective Settlement of Mass Damage Act (*Wet Collectieve Afwikkeling Massaschade*, WCAM) is rather eccentric, as it builds on voluntary out-of-court settlement rather than works towards settlement. In short, the Act works as follows.[68] First, the allegedly liable party on the one hand and a foundation or association acting in the common interest of the injured individuals involved on the other, should reach an amicable settlement agreement on compensation of those individuals. Then, these parties jointly petition a specific court to declare the settlement binding on all persons to whom damage was caused.[69] The court will consider several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g., amount of compensation, adequate representation of interested parties). Then, if the Court rules in favour of the settlement, it will declare the settlement binding upon all persons involved. Individual interested parties are given the choice to opt-out and pursue their claims privately. Essentially, the WCAM 2005 declares a contract with a self-appointed attorney binding upon third parties. The contract can be concluded at any stage of the conflict. Hence, the issue of liability and exact calculation of damage can be left undecided by agreeing to a settlement. In that respect the WCAM seems to emphasize expedient conciliation rather than protracted

[63] Retsplejelovens § 254 e (9).
[64] Peter Møgelvang-Hansen (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Denmark' in Consulting and Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 5.
[65] See < http://www.forbrug.dk/forbrugerombudsmanden/ >
[66] Werlauff, E (2009) 'Class Actions in Denmark' (622) *Annals of The American Academy of Political and Social Science* at 204.
[67] Peter Møgelvang-Hansen (2008) 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report Denmark' in Consulting and Economics (ed.) (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* 1 ff. at 7.
[68] See generally van Boom, WH (2009) 'Collective Settlement of Mass Claims in The Netherlands' in Casper, Janssen, Pohlmann and Schulze (ed.) (2009) *Auf dem Weg zu einer europäischen Sammelklage?* Sellier 171-192 at 177 ff.
[69] See art. 1013 (3) *Burgerlijke Rechtsvordering* (Dutch Code of Civil Procedure) for the exclusive competence of the Amsterdam Court in WCAM cases.

litigation, and therefore the monitoring role of the court is crucial. Furthermore, the fact that the WCAM procedure starts out with a voluntary settlement by a foundation or association with the alleged tortfeasor obviously implies that the tortfeasor first has to *agree* to a settlement. This requires parties to negotiate "in the shadow of the alternative": namely, the alternative of not settling, given the fact that there are no legal levers for forcing any of the parties into settling.[70] Rational choice theory would predict that a tortfeasor would not lightly enter into a WCAM settlement if the individual claims are too small to be economically viable. Why would he, if the affected persons would not individually litigate anyway? Possibly, other incentives to settle may play a role such as indirect reputation effects, media pressure and political pressure. Although the experience with the 2005 Act is fairly positive, it is too early to say whether the WCAM has anything to offer in case of dispersed trifle losses.

4.4 Skimming off profits in (quasi-)civil procedure

Few European legal systems have taken actual steps towards introducing civil disgorgement of profits to counter the problematic private enforcement in cases of dispersed trifle losses. German law is prototypical of a legal system that has recently **[182]** taken this route. Under § 34 GWB (*Gesetz gegen Wettbewerbsbeschränkungen*; Act against Restraints on Competition), the German competition authorities have powers to order disgorgement of profits obtained in contravention of competition rules. The public skimming off procedure, as laid down in § 34, is subsidiary to fining but also to the private collective skimming off procedure as laid down in § 34a GWB.[71] This latter article allows designated consumer organisations to apply for skimming off profits.[72] The organization bears the costs of initiating a skimming off procedure, while in case of success the proceeds end up in the State's purse. Unsurprisingly, consumer organizations are hardly willing to invest in this procedure.[73] As a result, the legislature's intention to give an additional incentive to comply with the GWB by putting illegal profits in jeopardy has little chance of materializing.[74]

§ 10 UWG (Gesetz gegen *unlauteren Wettbewerb*; Act against Unfair Competition) suffers from a similar design flaw.[75] The article is specifically designed to discourage unfair commercial practices causing dispersed and trifle losses by allowing skimming off of

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[70] Cf. Parliamentary Proceedings II 2008/09, 31 762, no. 1, 4 ff (evaluation of the WCAM 2005).
[71] Leicht, M (2009) *Gewinnabschöpfung bei* Verstoß *gegen die lauterkeitsrechtliche Generalklausel* Nomos at 203-204.
[72] Id at 209-210.
[73] Schaumburg, E (2006) *Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht* Nomos at 123; Neuberger, J (2006) *Der wettbewerbsrechtliche Gewinnabschöpfungsanspruch im europäischen Rechtsvergleich* Mohr Siebeck at 119.
[74] Schilken, E (2008) 'Der Zweck des Zivilprozesses und der kollektive Rechtsschutz' in Meller-Hannich (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos 21-52 at 44-45. Cf. Hefermehl et al. (2009) *Gesetz gegen den unlauteren Wettbewerb (UWG)* Beck at 1141, § 10 UWG no. 3.
[75] Cf.see Micklitz, H-W and Stadler, A (2006) 'The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure' *European Business Law Review* at 1484.

profits.[76] In essence, it authorizes designated consumer associations to initiate skimming off proceedings in case of intentional unfair commercial practices. Again, the proceeds are to be handed over to the State. [77] Compensation of individuals is not foreseen[78] and therefore evidence of individual damage it is not required. [79] As the burden of proving intent is on the claimant, [80] § 10 UWG can hardly be considered an easy road to clawing back unlawfully acquired profits.

4.5 Mixed administrative and civil procedures

Finally, mixed administrative and civil redress procedures are increasingly coming to the fore. English competition law offers a good example of mixed administrative and civil procedure aimed at redressing collective detriment.[81] An individual who has suffered damage as a result of a competition law infringement, could bring proceedings in a separate civil case. **[183]** However, section 47a Competition Act 1998 opens an alternative route by allowing the individual to file a follow-on suit before the Competition Appeal Tribunal (CAT). Moreover, since 2003 designated consumer associations are authorized under section 47b to bring follow-on proceedings before the CAT comprising of "consumer claims" made on behalf of at least two consumers. Consumer claims are defined as claims which "an individual has in respect of an infringement affecting (directly or indirectly) goods or services". [82]

In theory, this specific procedure could cater for an aggregation of individual claims for dispersed trifle losses. In practice, however, 'representative claims' can only be consolidated on an opt-in basis.[83] If the CAT sustains the claims, the detrimented consumers are compensated directly or through the designated organization acting as intermediary. As a

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[76] Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 411; Schilken, E (2008) 'Der Zweck des Zivilprozesses und der kollektive Rechtsschutz' in Meller-Hannich (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos 21-52 at 44-45; Hefermehl et al. (2009) *Gesetz gegen den unlauteren Wettbewerb (UWG)* Beck at 1140, § 10 UWG no. 1. Micklitz, H-W and Stadler, A (2003) *Unrechtsgewinnabschöpfung - Möglichkeiten und Perspektiven eines kollektiven Schadenersatzanspruches im UWG* Nomos at 92 suggested a ´trifles ceiling' of € 25-75 per person.
[77] Cf. Schaumburg, E (2006) *Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht* Nomos at 122-123.
[78] Hefermehl et al. (2009) *Gesetz gegen den unlauteren Wettbewerb (UWG)* Beck at 1141, § 10 UWG no. 3.
[79] OLG Stuttgart 2-11-2006, 2 U 58/06, VuR 2007/2, p. 72, sub II-2d.
[80] Seeliger, D (2008) 'Kollektiver Rechtsschutz im Kartell- und Wettbewerbsrecht' in Meller-Hannich (ed.) (2008) *Kollektiver Rechtsschutz im Zivilprozess* Nomos 73-92 at 91-92.
[81] Another example of the mixture of administrative concilliation and civil redress is the concept of Ombudsmen. See, e.g., Viitanen, K (2007) 'Enforcement of consumers' collective interests by regulatory agencies in the Nordic countries' in Boom and Loos (ed.) (2007) *Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention* Europa Law Publishing 83-106 at 85.
[82] S. 47b Competition Act 1998 was enacted in 2003 with the coming into force of S. 18 Enterprise Act 2002. On this procedure, see 23. To date, the Consumers' Association is the only designated organisation; see the Specified Body (Consumer Claims) Order 2005.
[83] Dayagi-Epstein (2006) 'Representation of Consumer Interests by Consumer Associations - Salvation for the Masses?' (3) *Competition Law Review* at 218-219.

result, the procedure can be considered neither innovative nor seriously addressing the issue of dispersed trifle losses.[84]

5 Towards redress for dispersed trifles?

From the previous, two main conclusions can be drawn. First, contrary to suggestions in the Common Frame of Reference, the maxim 'de minimis non curat praetor' is not a *rule* but rather a *conclusion,* haphazardly drawn after weighing the interests involved. Secondly, there is no common core in the private law systems in Europe on whether (and if so, how) to provide redress for dispersed trifle losses. This absence of a European common core is easily explained. What constitutes a trifle loss depends on a number of variables, such as the costs of bringing individual claims to court in terms of court fees, lawyer costs and duration of proceedings. These variables vary, so to speak: some countries have extensive small claims courts, others have a rich culture of alternative dispute resolution in cases of trifles, and again others have no alternative routes.[85] Such institutional settings define and demarcate triviality. Therefore, at this moment in time it seems too early to fully unify procedures for mass claim actions at a European level. At a more general level, however, there are common issues that need consideration if national legislators and courts choose from multiple routes towards redress for dispersed trifles. I mention five of these issues.

First, it seems foreseeable that any model allowing consolidation in some civil procedure will only work (if it will work at all) on an opt-out basis. It seems plausible that opt-in models will have little impact on redressing dispersed trifles.[86]

Secondly, if a legislator were to choose for some form of skimming-off of profits, arrangements should be made for coordination between punitive sanctions from criminal **[184]** and administrative law on the one hand and remedies aiming at disgorgement, (cy-près) compensation and conciliation on the other. [87]

Thirdly, there is the matter of accountability. Giving interest groups (consumer associations etc.) special powers in civil procedures comes with advantages and disadvantages. If such associations are given special powers but not the appropriate ancillary financial incentives – as is the case in Germany – little is to be expected from these powers. An obvious

[84] Moreover, the *Consumers' Association vs. JJB Sports plc*. case (Case no. 1078/7/9/07) shows that the English have not found an efficient method of cy-près redress either. On this case, Hodges, C (2008) *The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe* Hart Publishing at 24 ff.
[85] Cf. Civic Consulting and Oxford Economics (2008) *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* at 93.
[86] Cf. European Commission (2009) *Consumer redress in the European Union; consumer experiences, perceptions and choices (aggregated report August 2009 prepared by TNSqual+)* European Commission at 80.
[87] Cf. Schäfer, H-B (2000) 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations' (9) *European Journal of Law and Economics* at 183 ff.

disadvantage of giving special powers is the issue of accountability and transparency. [88] To enhance accountability, one can consider designating public authorities as 'lead counsel' in such procedures.[89] Again, this depends on domestic institutional settings and the intensity of regulation of (designated) private associations.

A fourth point, which is related to the previous, is the matter of the efficiency of private law remedies as a whole. In a recent critique of private enforcement in the area of European mass damage events, Chris Hodges has advocated a mixture of public enforcement and voluntary ADR as superior to the purely private litigation model. In essence, Hodges argues that a sensible approach would be to authorize public authorities to issue compensation orders or some alternative redress order aiming at restoration. In Hodges' view this model would be more flexible and cost effective than private law alternatives.[90] Although his arguments do not specifically pertain to dispersed trifles, Hodges' arguments unmistakably have persuasive power. I am unconvinced, however, that at this moment in time one size fits all for Europe as far as dispersed trifles are concerned. A central role for public authorities may not be the superior solution for all countries.[91] There is little relevant experience with this model. More important though is that public authorities need funding as much as private enforcers and what works in countries with a culture of large government may not necessarily work in countries with a tradition of small government, big private joint action and powerful bar lobby. Having said that, a newly designed redress system that would primarily benefit lawyers without offering significantly improved redress to consumers would hardly be applauded.[92] So, in this perspective, encouraging a mixture of public oversight and private consolidation mechanisms may indeed work in those areas where European policy has been aiming at converging enforcement cultures for some time already, as has been the case in competition law and consumer law.

A fifth point concerns the concept of damage, which might be in need of a redesign. In simple individual cases of trifle loss, the private law of damages is used to assess and calculate damages. This may be more complicated in case of dispersed trifles and **[185]** adjudicators may find they have to order an alternative distribution (cy-près) of proceeds. In cases of trifle loss, it is one thing to organize restitution but quite another to organize distribution of the proceeds. The easy way out seems to be the German skimming-off model,

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[88] See Edwards, J (2006) 'Accountability in the consumer movement' (16) *Consumer Policy Review* at 20 ff.; Kocher, E (2007) *Funktionen der Rechtsprechung - Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* Mohr Siebeck at 65.

[89] Briefly on the different models of consolidation Howells, GG and Weatherill, S (2005) *Consumer Protection Law* Ashgate at 639-640.

[90] Hodges, C (2008) *The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe* Hart Publishing at 207 ff, 223 ff. Cf. Hodges, C (2001) 'Multi-party actions: A European Approach' (11) *Duke J. Comp. & International Law* 321 at 341.

[91] Obviously, one cannot but agree with Hodges that the English experience with cy-près distribution in the JJB case (see fn. 84) leaves much to be desired. Again, local institutional settings (such as lawyer remuneration culture and cost rules) need to be considered before concluding that the JJB case would be dealt with equally poorly in other European countries with similar follow-on compensation procedures.

[92] Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 383.

in which the illegal profits end up in the State's purse.[93] This may seem fairly easy, although the matter of coordination with claims for compensation of private loss is bound to rear its head sooner or later. Rather more complicated is the issue of distribution in those legal systems that would want to combine the classical *restitutio in integrum* principle of private law with an innovative opt-out procedure. How would these systems go about distributing the proceeds among the affected individuals, especially if the costs of distribution are excessive? And what if the redeem rate of trifle claims itself is trivial? Indeed, American evidence shows that rational apathy works both ways: if a legal system were to put an opt-out system into operation to remedy dispersed trifle losses, injured persons could well turn out to be too apathetic to opt-out *and* to exercise their rights to trifle compensation.[94]

6 Conclusion

Should the law concern itself with trifles? To me, it is clear that dispersed trifle losses can be detrimental to society and as such deserve careful legislative and judicial consideration. That does not imply, however, that wrongfully inflicted dispersed trifle losses should be compensated at all costs. Perhaps some cases are more deserving than others.[95] In any event, the issue of minor and widely dispersed damage is too complex to be dealt with comprehensively at a European level in the near future. At this moment it seems advisable for the EU to take a rather neutral position on redress for trifle losses and leave the policy issues involved to domestic legislatures and courts.[96] By doing so, currently germinating initiatives at state and sectoral level may be given the chance to blossom or wither. What is clear, though, is that the CFR should take a less rigid stance on minor and widely dispersed damage than it seems to do now. An academic venture such as the CFR cannot be expected to incorporate all relevant political and procedural aspects and for that reason alone the draftsmen and –women would be wise either to do away with art. VI-6:102 altogether or radically rewrite the accompanying comments and stress that there is no such thing as a *rule* that prescribes that legislatures and courts do not concern themselves with trifles.

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[93] Note that the relevant German statutes do not provide any guidance on what should happen with the skimmed-off profits once these are in the State's purse.

[94] Empirical evidence of opting-out from USA class actions is to be found with Eisenberg, T and Miller, GP (2004) 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (57) *Vanderbilt L.Rev.* at 1529 ff.; Gilles, M and Friedman, GB (2006) 'Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepeneurial Lawyers' (155) *U.Penn.L.Rev.* at 133 ff.

[95] Cf. Ministry of Justice (2009) *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* Ministry of Justice, at 3.

[96] Cf. Fairgrieve, D and Howells, G (2009) 'Collective redress procedures - European debates' (58) *International and Comparative Law Quarterly* 379 at 409. See also the disparate responses by stakeholders to the Commission's Green Paper on consumer collective redress at GHK et al. (2009) *Assessment of the economic and social impact of the policy options to empower consumers to obtain adequate redress (Final analytical report on the Green Paper on consumer collective redress submitted by the consumer policy evaluation consortium - DG Health and consumer protection)* at 8.