CHAPTER 10

Effective Enforcement of Consumer Law in Europe

Private, public, and collective mechanisms

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Abstract

In this chapter, we draw together the main issues discussed and arguments presented by the authors to this book. We provide insight into the questions why there is a need for the collective enforcement of consumer law and what legal instruments have been developed to this end in European law and domestic legal systems. Furthermore, we make some suggestions for finding the right balance between private and public enforcement efforts.

1 Introduction

Individual consumers are ill-equipped to enforce their legal rights. They stand isolated against companies and organizations which often have better legal support and resources. This may result in individual consumers abstaining from pursuing their legal entitlements. Moreover, whereas the individual consumer stands to gain from legal action in only one or few particular cases against a particular trader, that trader faces the cumulative risk that a detrimental outcome of a particular case may affect many other transactions. As a result, the trader can by simple economic calculation justify greater expenditures on litigation than the individual consumer can.[2]

Conversely, *organized* consumers, be they represented by private organizations or public authorities, may challenge traders on more equal footing. Centralization of individual consumers' interests and aggregation of individual consumers' claims may help create bargaining power that isolated individual consumers lack when complaining and claiming for themselves. Collective enforcement of consumer law may therefore be more effective.

In this book, the contributions are centred on the idea of private, public and collective mechanisms for enforcement of consumer law. In this chapter, we draw together the main issues discussed and arguments presented by the authors to this book. We provide an insight into the questions why there is a need for the collective enforcement of consumer law and what legal instruments to this effect have been developed in European law and domestic legal systems. Furthermore, we make an attempt at suggesting a framework for finding the right balance between private and public enforcement efforts.

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[2] Cf. William C. Whitford, 'Structuring Consumer Protection Legislation to Maximize Effectiveness', *Wisconsin Law Review* 1981, 1020, reprinted in: Iain Ramsay (ed.), *Consumer Law* (New York 1992), 459.

2 A short summary of the contributions

First, we give a short summary of the contributions to this book. In this book, authors representing a wide spectrum of expertise have presented the reader with information and insights regarding the challenges of collective enforcement of consumer law.

Gerrit Betlem gives a detailed account of the possibilities of transnational collective enforcement and the legal loopholes that both public and private collective enforcers may face. He notes that the present EU legislation roughly follows the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* as regards the provision of an institutional framework, the provision of mutual assistance concerning evidence gathering and information sharing and coordinating actions against 'rogue traders'[3] in multiple jurisdictions. However, in Betlems opinion the EU legal framework is somewhat incomplete. He argues that the EU legislation is not detailed enough as regards the legal action that can be taken by watchdogs against traders based in other countries, including in particular the possibility to allow for assets of rogue traders to be frozen on demand of foreign watchdogs. Moreover, as Betlem states, the legal framework in the EU fails to impose any duty on watchdogs to assist individual consumers who litigate against foreign traders, even though there may be collective consumer interests at stake.

Betlems paper shows that European policy is gradually shifting legislative attention to cross border cooperation in the enforcement of European consumer law, and that although the 1997 Injunctions Directive does not properly address any of the complicated cross-border enforcement issues, the Cooperation Regulation has increased the possibilities for both private and public enforcers to lodge cross-border complaints.[4] Indeed, as Betlem shows, the Unfair Commercial Practices Directive has potentially made competitors into private enforcers of the Directive, as they have a 'legitimate interest' in the cessation of unfair practices of their counterparts in competition. Moreover, they will also have a competitive interest in taking action, as unfair practices give rogue traders an advantage over competitors who do stick to fair market practices.

Howells paper shows that the role of a public enforcer such as the Office of Fair Trading (OFT) is not merely to enforce substantive law but also to collect and provide information, to grant licenses for consumer credit companies and

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3 The term is used in the 2002 Annual Report on handling of cross-border advertising complaints of the European Advertising Standards Alliance (EASA) and quoted by the European Commission in its proposal for the Unfair Commercial Practices Directive, COM (2003) 356 final, p. 4-5 and in its press release of 18 June 2003, IP/03/857. The term will be used throughout this paper.

4 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests; Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

to stimulate self-regulation. So, stimulating consumer awareness seems to be as much a part of public enforcement as wiping out rogue traders' practices. The OFT's strategy appears to have evolved from a fundamentally criminal law oriented approach into one of responsive and cooperative enforcement. The OFT has grown from a reactive into a proactive authority using market analysis rather than specific complaints as a guideline for policy. It works with businesses where possible and uses administrative fines where required. This evolution seems to reflect the 'benign big stick' approach presented in this book by Chris Hodges and bears resemblance to the 'tit for tat' strategy as appears in the regulatory policy theory and negotiation theory.[5]

In his paper, Hodges puts forward the case for responsive regulation in the field of enforcement of consumer law. He shows that there is little empirical evidence of the relative costs and effects of either 'privatising' enforcement by empowering private actors to collectively pursue 'regulation through litigation' or centralising enforcement effort into a public authority using the 'benign big stick' approach. Hodges argues that private litigation is a diffuse mechanism that raises questions of consistency, expertise, efficiency, accountability and transparency. His overall conclusion is that enforcement should be best placed in the hands of public authorities rather than in those of private enforcers and that stimulating self-regulation by industry and trade should be at the top of the priority list of such authorities.

In their paper, Jansen and Ammerlaan appraise the reasons for the recent introduction of a Consumer Authority by the Dutch government. These reasons first of all include that the government recognised that some traders did not only fail to comply with consumer legislation, but actually made use of unfair commercial practices precisely to undermine consumer legislation. Moreover, the expansion of the European legislation regarding the internal market required the government to set up an instrument to deal with cross-border breaches of consumer legislation. The government decided that it would be illogical if consumers would be better protected in cross-border infringements of consumer law than in case of purely domestic infringements. As a result, recently the *Wet handhaving consumentenbescherming* (Consumer Protection Enforcement Act)[6] was enacted. The Dutch Consumer Authority's primary tasks are to increase the knowledge of both consumers and suppliers of their rights and duties and of options for obtaining legal redress, and to enforce consumer legislation in case of collective infringements in order to protect the economic interests of the consumer. However – as is the case with the OFT-model – the Dutch Consumer Authority will not be the only public enforcer of consumer legislation in the Netherlands: it will operate as a mere secondary enforcer in areas where another public enforcement authority is active, such as the Competi-

5 E.g., Ian Ayres and John Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (Oxford 1992).

6 Act of 20 November 2006, *Staatsblad* 2006, 591, effective as of 29 December 2006.

tion Authority or the Food and Consumer Product Safety Authority. In determining its initial priorities, the Consumer Authority focuses on the impact of non-compliance with consumer law. In particular, the Authority will take action where the total economic loss (potentially) suffered by consumers is the highest, where consumer confidence is most at stake and where market behaviour jeopardizes competition and fairness on a particular market. On this basis the Consumer Authority announced it will focus the coming year on unilateral, unfair standard contract terms, the compliance with the obligations to inform and the right of withdrawal in the area of distance selling, on misleading lottery and price schemes, unclear pricing in the travel and tourism sector, and on information as to the rights and obligations of parties in case of non-conforming goods.[7]

Viitanen presents the reader with the Nordic 'acquis' concerning enforcement of consumer law and the settlement of individual and mass consumer claims. From his contribution follows that the Scandinavian approach reflects a regulatory culture of negotiated rulemaking, informal pressure on non-compliant business, and a proactive stance of public authorities. Court interference and criminal prosecution seem to play a secondary role in the enforcement process. Viitanen concludes that during the years the use of soft law methods has shown to be extremely effective. Possibly, the Nordic model meets most of the demands that Hodges sets for an effective 'benign big stick' approach.

Micklitz provides the reader with an in-depth analysis of the legal position of interest group organisations in European and domestic consumer law. He pays special attention to the contours of a possible group action for compensation and disgorgement, confronting the advantages and disadvantages of recent national legislation such as the *Kapitalanleger-MusterverfahrenGesetz* (KapMuG; the Financial Investors' Model Proceeding Act), the Swedish *Lag om grupprättegång* (Group Proceedings Act 2003), and the recent Dutch *Wet Collectieve Afwikkeling Massaschade* (Mass Damage Collective Settlement Act). These statutes are notable legislative attempts at designing efficient procedures for collective consumer compensation. Micklitz goes on to discuss the tension between procedural economy and the fundamental right to be heard under the European Convention on Human Rights, and he also deals with problems of financial incentives for lawyers, and the possible shift from private litigation to public authorities claiming compensation on behalf of consumers.

The direct link between enforcement of consumer legislation and competition law, put forward by Betlem, is also emphasised by Cseres. She analyses the competition law implications of finding effective means for the enforcement of consumer interests. In her paper, she indicates the possibilities competition law offers to consumers in order to enforce their rights. She also shows the other side of the coin by focusing on the competition law perspectives of enforcing consumer interests by applying consumer protection rules, in particular with

7 Press release of 15 January 2007, available at www.consumentenautoriteit.nl.

respect to the existing system of remedies and sanctions. She shows that when individual consumers face costs and burdens that are disproportionate to the value of their complaint they will decline to seek redress and resolve disputes.[8] This is problematic in particular with regard to 'trifle losses' – cases in which overall damage is widespread but individual losses are nominal – because in such cases the injured individuals will not claim for economic reasons, even though the total economic loss may be high. As private actors are much more influenced by costs and benefits than public bodies enforcing the law, this is an indication that public agencies are better equipped to enforce consumer rights than private parties in case of 'trifle losses'. Moreover, Cseres finds that private interests do not always coincide with public interests. In her view, collective actions – where consumers may bundle their fragmented individual claims and divide litigation costs over a large group of consumers instead of over just one person – may provide solutions to both the individual incentive problem for trifle loss and to the public policy concern. This can also considerably enhance law enforcement, Cseres argues. It is necessary, however, to limit the potential adverse effects of collective actions, such as excessive litigation and excessive fees for attorneys. Ultimately, competition authorities, consumer organizations and courts need to cooperate in order to make enforcement of collective consumer interests a success, she concludes.

Finally, Van den Bergh relates consumer law enforcement to the principles of law and economics and he too gives the reader valuable insight into the analogies between the enforcement of competition law and the enforcement of consumer law rules. For instance, the problem of trifle losses – the concept will be dealt with more extensively *infra*, § 3 – and how policymakers deal with these issues, show that consumer law can learn from competition law. Van den Bergh argues that both private and public enforcement of consumer law should aim at redressing market failures and should heed excessive enforcement which may stifle innovation. Van den Bergh also shows that as consumer law values are likely to be underenforced by individual consumers, the intervention of public authorities is vital. So, finding the right mix and quantity of enforcement instruments seems to be the challenge ahead. In § 9 we will address this matter in some detail.

3 Why collective action is needed

Consumer law gives individuals substantive rights with ancillary remedies – varying from claiming performance and damages, to rescission of the contract, suspending payment or invoking a cooling-off period and thus

8 In a similar vein, William C. Whitford, 'Structuring Consumer Protection Legislation to Maximize Effectiveness', *Wisconsin Law Review* 1981, 1026 f., reprinted in: Iain Ramsay (ed.), *Consumer Law* (New York 1992), 465 f.

withdrawing from the individual contract concluded by the consumer. Such remedies start from the idea that individuals autonomously enforce their legal rights and that they seek individual access to justice.[9] But do they? It seems that they do not, or to quote Hadfield c.s., "consumer protection laws which give a private right of action to harmed consumers are notoriously underutilized".[10] If individuals do not invoke the available remedies, the underlying substantive rights may suffer from a state of underenforcement. This underutilisation boils down to too few complaints reaching the pinnacle of the complaints pyramid described by Cseres in her contribution, causing but a few consumers to take their case to court.

Naturally, claiming that consumers invoke their legal rights 'too little' or 'too much' needs a yardstick, which is difficult to offer.[11] Especially yardsticks such as 'the social optimal', 'economically efficient' and 'welfare optimising' level of enforcement may be appropriate in theory but difficult to use in practice. The evidence, however, does point towards a lack of enforcement of consumer law.[12] The obstacles for consumers to access justice are manifold: lack of information on legal rights, the costs of acquiring such information, the legal cost, time and effort, et cetera, all impede access to dispute resolution and stand in the way of enforcing consumer rights.[13]

Moreover, consumer losses could be large but tend to be small. The smaller the detriment to the individual consumer, the more likely he will be to abandon his complaint at the lower level of the complaints pyramid in the face of the cost of climbing up. The smallest of these complaints are what we called earlier 'trifle losses'. Trifle loss may be incidental but may also be of a more structural nature. Whenever an infringement of consumer law gives rise to such a dispersal of detriment to a great number of consumers endowed with individual but uneconomically viable claims, these consumers may show what is sometimes called 'rational apathy'.[14] The possible benefits of claiming for trifle loss are

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9 The complaints pyramid presented by Cseres in her contribution to this book is not necessarily in conflict with this idea. It seems natural that consumers try to settle their dissatisfaction with their counterpart in an amiable way.

10 G.K. Hadfield et al., 'Information-Based Principles for Rethinking Consumer Protection Policy', 21 *Journal of Consumer Policy* 1998, 161. Cf. Iain Ramsay, 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation', 28 *Sydney L.Rev.* 2005, 33.

11 See especially Van den Bergh in his contribution drawing attention to this most relevant point.

12 See e.g., Anthony Ogus et al., *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes* OECD (2006).

13 Cf. Stephen Weatherill, *EU Consumer Law and Policy* (Cheltenham 2005) 227.

14 William M. Landes and Richard A. Posner, 'The private enforcement of law', 4 *J. Legal Stud.* 1975, 33; Hans-Bernd Schaefer, '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* 2000, 195. Cf. Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 604 f.; Yves Picod and Hélène Davo, *Droit de la consommation* (Paris 2005) 321. For empirical underpinning of this

outweighed by the transactional cost of pursuing a complaint.[15] Not complaining then seems the rational thing to do. The result may be that trifle loss is in fact amplified by a structural consumer 'apathy', which in turn may well lead to structural non-enforcement of substantive rules of consumer law.[16] This turns enforcement into what economists would consider a 'public good'.[17]

Apart from the issue of trifle loss, there is a more fundamental question: what is, if any, the effect of individual consumers pursuing their legal rights on corporate behaviour? Are consumer claims mere isolated events that are dealt with as such by businesses, or does claiming by individual consumers actually lead to change in corporate behaviour and quality improvement of their products and services? The former seems to be the case, Cseres argues in her contribution to this book, whenever businesses operate on the basis of a cost-benefit analysis, violation of consumer rights is considered to be the price of doing business and a degree of wrongdoing is considered to be incidental to marketing and promotional activities. In any case, in changing corporate behaviour the law and its enforcement are but one factor. The net effect of individual enforcement efforts on corporate behaviour may be substantial, but may also turn out to be insignificant. Imagine for instance a retail chain of consumer electronics sellers using unfair terms in its general conditions. If a specific consumer is faced with such clauses he may successfully contest the invocability of such clauses. However, he will typically not request an injunction forbidding the seller to use similar clauses in future transactions with other consumers. As a result, the unfair clauses remain in circulation, thus sustaining illicit practices with regard to other, less informed or persistent consumers.[18] This is characteristic for indi-

'apathy', see, e.g., Hazel Genn, *Paths to Justice – What people do and think about going to law* (Oxford 1999) 67 ff. Note that the extent of the 'apathy' in part depends on financial arrangements concerning legal aid, litigation fees and civil procedure cost allocation. Cf. WRR, *De toekomst van de nationale rechtsstaat*, Wetenschappelijke Raad voor het Regeringsbeleid (2002) 63 205 ff.

15 Cf. Ianika N. Tzankova, *Strooischade – Een verkennend onderzoek naar een nieuw rechtsfenomeen* (Den Haag 2005), 19 f.

16 Cf. Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in: Charles E.F. Rickett and Thomas G.W. Telfer (ed.), *International Perspectives on Consumers' Access to Justice* (Cambridge 2003) 48 ff; N. Frenk, *Kollektieve akties in het privaatrecht (diss. Utrecht)* (Deventer 1994) 286; Hans-Bernd Schaefer, '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* 2000, 185; Peter Cartwright, *Consumer Protection and the Criminal Law – Law, Theory and Policy in the UK* (Cambridge 2001) 16.

17 On public goods, e.g., R. Cooter and T. Ulen, *Law & Economics* (Reading 2004) 42 f. A similar obstacle is identified by Cseres with regard to consumer action against competition law infringements, where individual consumers lack both the tools and the incentives to lodge complaints. Moreover, it has been argued that consumers suffering from anti-competitive cartels should not be allowed to claim compensation for indirect purchase detriment (see the discussion by Cseres in her contribution to this book).

18 Hugh Collins, *Regulating Contracts* (Oxford 1999) 233. Cf. Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', in: Jack Beatson and Daniel Friedman (ed.),

vidual action in consumer law: the individual consumer may have been helped, but society as a whole may be left untouched. Who will ensure that unfair terms will be deleted from contracts with other consumers?

Furthermore, whereas consumers typically invoke their legal rights after the event, there may be room for some form of additional *ex ante* enforcement. Later in this paper, we will tag a number of such ex ante instruments. Suffice to say at this point that the effectiveness of consumer claims as such may be insignificant if it is an isolated claim and does not raise any threat to business reputation. Media attention therefore seems an important ingredient for effectiveness, although it is also clear that fly-by-night operators and rogue traders in general tend to be relatively immune to such negative exposure.

4 Private law instruments filling the enforcement gap

Currently, there is no common European core regarding enforcement in private litigation.[19] There is no across-the-board right to injunctive relief for individual claimants reinforced with recurring penalty payments such as *astreinte*, *Zwangsgeld* or *dwangsom*. The effects of non-compliance with injunction orders, stop and desist orders and the like may therefore vary from country to country. As a result, the impact of such orders may vary. Moreover, there is neither a European class action nor a common group action for disgorgement or compensation of the interested backing of organisations. On the contrary, most member states are just beginning to discover the need for efficient and effective mass damage settlement.

As the contributions to this book make clear, the most significant pieces of European legislation in this respect are the Injunctions Directive[20] and the Cooperation Regulation.[21] Moreover, some other directives contain relevant but scattered provisions for both domestic and cross-border enforcement. So, the

Good Faith and Fault in Contract Law (Oxford 1995) 254. See also, with regard to respective roles of legislation and case law, Paul Burrows, 'Contract Discipline: In Search of Principles in the Control of Contracting Power', 2 *European Journal of Law and Economics* 1995, 141.

[19] See, e.g., Hans Schulte-Nölke et al., *EC Consumer Law Compendium – Comparative Analysis* (Bielefeld 2006) 583 ff., for a telling overview of the state of domestic laws in Europe prior to implementation of Directive 98/27/EC.

[20] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests. On this Directive, see, e.g., Peter Rott, 'The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive Into German and English Law', 24 *Journal of Consumer Policy* 2001, 401 ff.; Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 592 ff.

[21] Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

existing European legislative framework is far from comprehensive. Moreover, as Betlem rightly observes, none of the pieces of European enforcement legislation addresses purely internal cases (although admittedly the Injunctions Directive is not clear in this respect). So, cross-border enforcement seems more at the forefront of European policymaking than the unification of procedural law of collective enforcement in general.[22]

Moreover, none of the European legal instruments deal with (let alone change, reduce or harmonize) *the cost* of cross-border private litigation,[23] which may explain the apparent lack of increase in collective private enforcement across the borders of EC member states.[24]

5 Compensation of mass consumer damage

One of the issues not regulated at a European level is the compensation of mass consumer damage. Few European jurisdictions allow compensation claims instigated by interest group organisations on behalf of consumers (other than by means of assignment of individual claims). As Micklitz reports, there are some important issues that would have to be dealt with if such collective compensation actions were to be allowed. The first psychological barrier to overcome, however, seems to be the fear of American scenes in European courts. There is serious scepticism concerning the phenomenon of *class actions*. The US example indeed seems to show that with class actions lawyers win and consumers and businesses lose out.[25] This unfair distribution of proceeds may well be caused by traits of the legal system (*e.g.*, contingency fees, punitive damages, settlement practice and jury bias) rather than by the phenomenon 'class action' as such.[26] Be that as it may, the concept of class action in itself

[22] Note the policy considerations for the Dutch government to extend the scope of the Consumer Authority's activities to purely domestic situations as to prevent that consumers would be better off in cross-border contracts then in domestic contracts.

[23] See Hans Schulte-Nölke et al., *EC Consumer Law Compendium – Comparative Analysis* (Bielefeld 2006) 582.

[24] Cf. Hans-W. Micklitz, 'Legal Redress', in: Geraint G. Howells et al. (ed.), *European Fair Trading Law* (Aldershot 2006) 220.

[25] Cf. Deborah R. Hensler et al., *Class Action Dilemmas – Pursuing Public Goals for Private Gain (Study)*, RAND Institute for Civil Justice (1999) 1 ff.; for a recent overview of advantages and drawbacks, see, e.g., James M. Underwood, 'Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action', 46 *S. Tex. L. Rev.* 2004, 397 ff.

[26] Cf. J. Basedow et al. (ed.), *Die Bündelung gleichgerichteter Interessen im Prozeß* (1999) 49; Per Henrik Lindblom, 'Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure', 45 *Am. J. Comp. L.* 1997, 822 ff.; Rachael Mulheron, *The Class Action in Common Law Legal Systems* (Oxford 2004) 72 ff.; on fundamental differences between the U.S.A. and Europe in this respect, see, e.g., Christopher Hodges, 'Multi-Party Actions: A European Approach', 11 *Duke J. Comp. & International Law* 2001a, 339 ff.

does not enjoy popularity in Europe. The gap left by failing private enforcement is usually filled by some form of public enforcement rather than by the after the event class action for damages.[27] This alternative intervention may take the form of state-driven intervention, self-regulation, or something in between. For instance, by subsidizing private claims or setting up alternate dispute resolution boards or small claims courts with low financial thresholds, governments sometimes successfully activate private enforcement.[28]

However, as Micklitz shows, all these efforts still start from the idea that individual claims for compensation are to be dealt with on an individual basis. Compensating individuals thus in essence remains a tailor-made procedure rather than mass justice. As already mentioned, the issue of designing *mass* compensation procedures is slowly becoming the centre of legislative attention in Europe.[29] Although a common approach is not yet found, this evolution should be applauded. *Group* actions instigated by authorized interest groups – rather than class actions instigated by lawyers – may indeed overcome the lack of enforcement in cases of trifle loss and may empower large groups of people otherwise suffering from rational apathy.[30] Having said that, the actual design of a European group action should be carefully contemplated and adverse experience in other jurisdictions should be heeded.

With regard to the introduction of a European group action for consumer compensation, several relevant questions would need answering.[31] First, who

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[27] Harald Koch, 'Non-Class Group Litigation under EU and German Law', 11 *Duke J. Comp. & International Law* 2001, 358.

[28] Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in: Charles E.F. Rickett and Thomas G.W. Telfer (ed.), *International Perspectives on Consumers' Access to Justice* (Cambridge 2003) 50 ff.

[29] Cf. N. Frenk, *Kollektieve akties in het privaatrecht (diss. Utrecht)* (Deventer 1994) 289 ff.; W.D.H. Asser et al., *Een nieuwe balans – Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht* (Den Haag 2003) 173 ff.; Astrid Stadler, 'Gruppen- und Verbandsklagen auf dem Vormarsch?' in: Birgit Bachman et al. (ed.), *Grenzüberschreitungen – Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit (Festschrift für Peter Schlosser zum 70. Geburtstag)* (Tübingen 2005) 939 ff. See also European Commission, *Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products (COM (2000)893final)*, European Commission (2000) COM (2000)893final p. 34: "Other areas where the Commission intends to launch initiatives concern measures to make it easier for consumers to take legal action collectively and the definition of the applicable law to non-contractual obligations." See also the historical notes by Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven 1987) 10 f.

[30] In a similar vein (with regard to trifle loss), I. N. Tzankova, *Strooischade – Een verkennend onderzoek naar een nieuw rechtsfenomeen* (Den Haag 2005) 128 ff.. Cf. Gerhard Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadenersatz, Kollektivschaden (Gutachten zum 66. Deutschen Juristentag Stuttgart 2006)* (München 2006) A107 ff.

[31] Generally, see Neil Andrews, 'Multi-actions proceedings in England: representative and group actions', 11 *Duke J. Comp. & International Law* 2001, 263 ff.

should be representing the individual consumers?[32] A class action would empower private individuals and/or their lawyers, whereas a group action would authorize acknowledged[33] interest groups with a certain degree of representation to instigate claims. A pressing argument against the possibility of individuals starting group compensation claims would be that scheduled fees would give lawyers rather than stakeholders the incentive to start proceedings.[34] A possible modified model, identified by Micklitz, is the current Swedish law, where a consumer who has a claim which is typical for the whole group as regards the financial and other interest in the case, is chosen to represent the group. In such a case, the group members' interests would be represented in a manner as similar as possible to the situation where they would individually claim themselves.

There are several reasons why group actions may have to be preferred over class actions instigated by lawyers working on the basis of a (usually rather high) contingency fee. In the case of class actions, the risk of frivolous claims – fed by too much media attention and the fear of businesses for bad publicity and the accompanying fear of detriment to the business reputation[35] – seems higher than in the situation where the lawyer does not have a personal (financial) interest in the outcome of the claim. Furthermore, the problem of 'sweetheart settlements' or 'sell-out settlements' may rise: if the lawyer's fee is not based on the amount of time he invested in the procedure, but merely on the amount of damages that is obtained on behalf of the individual consumers, the lawyer might be inclined to settle prematurely and at a 'bargain' rather than to invest much time and effort in lengthy legal proceedings – once the claim is settled and the lawyer has obtained his fee, he may try to start yet another claim and thus obtain a more substantial income than would have been the case if the original claim would have been followed up in court.[36]

Yet another issue is whether individual consumers should be required to *opt in* or *opt out* regarding a collective action scheme. Should all consumers in a similar case automatically be represented in the group action, even without their consent and possibly without them knowing of the group action? Or should they rather be required to actively join the group action? In the latter case the free rider problem emerges: individual consumers may be inclined *not* to join the

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32 Cf. Emmanuel Putman, 'Scénario pour une class action à la francaise', 58 *La revue des idées* 2005, 322.

33 It should be noted, however, that where *ad hoc*-interest groups created upon the initiative of lawyers are allowed to act as claimant in a group action, there does not seem to be much difference between class actions and group actions as regards the matter of representation.

34 There is some evidence that multi-party actions are essentially 'lawyer led'; see, e.g., Christopher Hodges, *Multi-Party Actions* (Oxford 2001) 83.

35 Cf. Ianika.N. Tzankova, *Toegang tot het recht bij massaschade (thesis Tilburg)* (Deventer 2007) 113 f.

36 Cf. Hans-Bernd Schaefer, '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* 2000, 204; J. Basedow et al. (ed.), *Die Bündelung gleichgerichteter Interessen im Prozeß* (1999) 27 f. Cf. also the contribution by Cseres in this book.

group action but nevertheless benefit in the pursuit of their individual claim from the research conducted on behalf of the group action. On the other hand, in the former case, individual consumers would have to opt out in order to not be bound by the judgement in the group action. Clearly, such a scheme would require stringent norms as to the question whether the leaders of the group action are actually representative of the group. It would also require safeguards to prevent 'fake group actions' instigated with insufficient funding or incompetent and inadequate legal representation with the hidden purpose of failing the claim, thus freeing the tortfeasor from otherwise successful individual claims.[37] Apart from that, it should be recognised that opting out in cases of trifle loss may be illusory: rational apathy will probably also lead to acceptance of the default position (i.e. opt-in).[38]

Moreover, how would damages have to be calculated? Would a group action include heads of damage that are usually not considered to be individual damage, such as damage to 'consumer surplus'?[39] Perhaps the best way to proceed here is to experiment with group actions for specific types of trifle loss and to evaluate after a period of some years what the added value of group actions is in that particular field.[40] In any event, the criteria set by Micklitz are essential in making any system of mass claim settlement work: are the claimants numerous, are their claims common or similar, are the claims typical for all claimants, is the group adequately represented, is a mass claim superior to individual settlement?

6 Self-regulation and public supervision: two ends of the spectrum?

How can collective consumer interests be served best? A number of instruments of enforcement are relevant here. In this section, we will make some remarks on self-regulation on the one hand, and supervision

37 Cf Ianika.N. Tzankova, *Toegang tot het recht bij massaschade (thesis Tilburg)* (Deventer 2007) 148 f.

38 Cf. Hans-Bernd Schaefer, '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* 2000, 195. Moreover, Theodore Eisenberg and Geoffrey P. Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', *NYU, Law and Economics Research Paper No. 04-004; Cornell Law School Research Paper No. 04-019* 2004, 1 ff. point out that in the U.S.A. legal practice a considerable number of people may actually fail to opt out, even in cases where the loss sustained is more than trivial.

39 On this point, see, e.g., Clifford A. Jones, *Private Enforcement of Antitrust Law* (Oxford 1999) 153 ff. With regard to similiar issues in compensation of environmental damage, see Edward H. P. Brans, *Liability for damage to public natural resources standing, damage and damage assessment* (The Hague 2001). Note that the 2003 Swedish Group Proceedings Act – considered by some to be the most inclusive of European statutes on class action – is very cautious in allowing claims for damages.

by public authorities on the other. They seem to be on two opposite ends of the spectrum, but in practice they may well converge.

At a European level, self-regulation through so-called codes of conduct seems very popular: in EU private law, policy trade associations and professional associations are encouraged to develop such codes.[41] This instrument may not only help to empower interest groups, but can also facilitate concrete rulemaking on the basis of vague private law standards such as 'good faith' and 'unfair' terms or 'unfair' commercial practices. As Viitanen, Hodges, and Van den Bergh rightly emphasize, the use of self-regulation may add to private and public enforcement.[42] Under specific conditions self-regulation, either on a fully voluntary basis or stimulated by state intervention or committal, can be a very effective instrument of both standard-setting and reaching compliance by business. For this reason, voluntary arrangements such as codes of conduct are stimulated in, e.g., the Unfair Commercial Practices Directive.[43] State supported negotiations concerning standard contract terms are a good example of such self-regulation.

Contrastingly, public authorities may step in where self-regulation fails. Remember the case of unfair contract terms: consumers may enforce their rights *ex post*, namely by avoiding the unfair term from the contract as soon as the professional counterpart using the term invokes it. This does not seem to be the most effective way of stamping out unfair contract terms.[44] In such cases

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40 In this respect, the recent changes to the German UWG present a possibility of experimenting with group actions for profit disgorgement. For references, see, e.g., Rolf Sack, 'Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle', *Wettbewerb in Recht und Praxis* 2003, 549 ff.; Markus Burckhardt, *Auf dem Weg zu einer class action in Deutschland? Eine Untersuchung des Art. 1 § 3 Nr. 8 RBerG im System zwischen Verbandsklage und Gruppenklage* (Baden-Baden 2005) 36 ff.; Hans-W. Micklitz and Astrid Stadler, 'Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung', *Wettbewerb in Recht und Praxis* 2003, 559 ff.

41 See, e.g., article 17 *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*. Cf. OFT, *Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act*, Office of Fair Trading (2003) 5 ff.

42 For an overview of self-regulation amidst possible alternative instruments of regulation, see, e.g., Anthony Ogus, 'Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries', in: Paul Cook et al. (ed.), *Leading Issues in Competition, Regulation and Development* (Cheltenham 2004) 146 ff., (p. 157 ff.); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford 1994) 107 ff. Cf. Peter Cartwright, *Consumer Protection and the Criminal Law – Law, Theory and Policy in the UK* (Cambridge 2001) 40 ff.; Peter Cartwright, *Banks, Consumers and Regulation* (Oxford 2004) 121 ff.

43 Cf. 'whereas' no. 20 and article 17 of the Unfair Commercial Practices Directive.

44 It is doubtful whether the sanction of avoidability is sufficient to meet the requirements of the Directive. It may be doubted, in particular, whether a Member State that requires the consumer to *invoke* the unfairness of a clause, has properly implemented the Directive, as in such a case the clause is binding until the consumer has avoided it, even though article 6 (1) of the Directive provides that unfair

a more direct instrument of enforcement of the underlying private law values – although not necessarily a perfect one – would be an ex ante evaluation of standard terms of trade either by a government agency or private interest group or a procedure facilitating forced erasure of the clauses altogether.[45] Indeed, article 7 of the Unfair Contract Terms Directive provides that the Member States ensure that 'adequate and effective means exist to prevent the continued use' of unfair general clauses.[46] Moreover, in *Commission/Italy,* the ECJ emphasised that under this article, the Member States are required to facilitate the possibility of a procedure against unfair terms even before they are used in practice.[47] This leads public authorities such as the OFT and the recently instated Dutch Consumer Authority to actively pursue enforcement against businesses that continue to use unfair contract terms.[48]

A slightly different approach is the setting up of a negotiation process between representatives of consumer groups and business and trade organisations leading to balanced contract terms in consumer contracts. This reflects the Nordic as well as the Dutch approach, but to some extent it also bears resemblance to the French monitoring process. In France, the governmental *commission des clauses abusives* can recommend erasing or adjusting unfair clauses. Although the commission does not have regulatory powers, it can publish its findings and it has some informal influence over courts and legislature.[49]

terms used in a contract concluded with a consumer by a seller or supplier 'shall ... not be binding on the consumer'. In any case it is clear that the national court may not wait for the consumer to invoke the unfairness of the clause. In a recent case (ECJ 26 October 2006, case C-168/05, not yet reported (Mostaza Claro/Centro Móvil Milenium), nos. 36-38, the ECJ stated that this provision is a mandatory rule of consumer protection which aims to re-establish equality between the parties. Such measure, the ECJ explains, is essential to accomplish the tasks entrusted to the Community under article 3 (1) under (t) of the EC Treaty. The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, according to the ECJ, the national court being *required* to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier. This seems to imply that where a case is heard before a national court, the court *must* apply any means it has in order to set the unfair clause aside.

45 Cf. Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', in: Jack Beatson and Daniel Friedman (ed.), *Good Faith and Fault in Contract Law* (Oxford 1995) 251 ff.; Robert Bradgate, 'Experience in the United Kingdom', in: (ed.), *The integration of Directive 93/13 into the national legal systems (Proceedings of the Conference 'The Unfair Terms Directive: 5 years on – 1-3 July 1999')* (Brussels 1999) 29. On this problem, see also EC, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts,* Commission of the European Communities (2000) COM(2000)248 final 20 ff.

46 See Stephen Weatherill, *EU Consumer Law and Policy* (Cheltenham 2005) 126.

47 ECJ 24 January 2002, case C-372/99, ECR 2002, p. I-819 (Commission/Italy).

48 E.g., Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 597.

49 Jean Calais-Auloy and Frank Steinmetz, *Droit de la consommation* (Paris 2003) 208 f., no. 185 ; no. 548. Moreover, authorized consumer interest groups can instigate an 'action civile'; Jean Calais-Auloy and

Authorized consumer interest groups are allowed to request for injunctive relief.[50]

Another example of such *ex ante* supervision that may lead to adjustment of corporate behaviour at an early stage is the Nordic 'advance opinion'. Viitanen describes the practice of 'advance opinions' under the Danish Marketing Act, which makes it possible for businesses to submit at an early stage the legal question to the Consumer Ombudsman whether the planned marketing arrangement is in conformity with consumer law. Such advance opinions have the obvious advantage of creating clarity and legal certainty for businesses at an early stage, thus avoiding possible overcautious marketing strategies. In most legal systems, however, the problem with such a system would be that civil courts judging ex post are not bound by such advance opinions.

7 Injunctive relief by collective private action

It has been said that individual and private claims differ in many respects from public enforcement. A relevant difference is that the latter does not concern itself with redressing the wrongs committed vis-à-vis individual persons, but with protecting the general interest. This does not imply, however, that it is impossible for private law to focus on collective well being.[51] In fact, in recent years a number of jurisdictions have given interest groups standing in court to file specific claims, notably claims for declaratory and injunctive relief. Nevertheless, the European picture with regard to interest group actions is one of diversity.[52] For instance, in the Netherlands there was already a very generous position on interest group standing with regard to both mandatory and prohibitory injunctions and declaratory relief.[53] In Germany, *Verbandsklagen* are

Frank Steinmetz, *Droit de la consommation* (Paris 2003) 597 ff, no. 556 ff. For an overview of the European 'styles' of reagulatory policy in consumer affairs, see, e.g., DTI, *Comparative Report on Consumer Policy Regimes,* Department of Trade and Industry (2003).

50 Jean Calais-Auloy and Frank Steinmetz, *Droit de la consommation* (Paris 2003) 211 ff., no. 188.

51 Hugh Collins, *Regulating Contracts* (Oxford 1999) 8, even goes as far as to argue that 'welfarist regulation' is transforming contract law regulation.

52 For an in-depth comparative review of these jurisdictions, see Hans-W. Micklitz and Astrid Stadler (ed.), *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* (2005) 57 ff.; cf. Hans Schulte-Nölke et al., *EC Consumer Law Compendium – Comparative Analysis* (Bielefeld 2006) 583 ff.; Ulrike Docekal et al., *Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in 25 EG-Mitgliedstaaten,* Bundesministerium für Soziale Sicherheit, Generationen and Konsumentenschutz (2006) 1 ff.

53 Walter van Gerven et al., *Cases, Materials and Texts on National, Supranational and International Tort Law* (Oxford 2000) 273-275. An example of this generous position is a case in which the Dutch Consumer Association successfully filed for a declaratory judgement for the benefit of victims of a mass tort (legionnaires disease outbreak at a flower exposition); see Rechtbank Alkmaar 12 december 2002, *Nederlandse Jurisprudentie* 2003, 68.

only allowed to file for injunctive relief on the basis of specific statutory provisions.[54] Recently, however, suggestions for a more general statutory framework have been voiced.[55] A similar picture emerges from England and Wales.[56] In France, specific statutory provisions (mostly concerning consumer law) present interest group organisations with the right to file an 'action civile' or a request for injunctive relief.[57] In theory, this 'action civile' can be the basis of a group claim for compensation, but in practice the 'action' is confined to cases of criminal offences and the damage may not consist of the total of individual damage.[58] It seems that with regard to multi-party *compensation* proceedings, up to now England and Wales seem to be the most receptive.[59]

As noted earlier, collective private action has become a deliberate choice of instrument in European consumer law enforcement. We refer to the access to private enforcement by organizations with a 'legitimate interest' as dealt with in article 4 (1) Directive 84/450/EEC (as amended by Directive 97/55/EC on misleading and comparative advertising), Directive 98/27/EC on injunctions for the protection of consumers' interests, articles 4 (2) and 8 (3) of Regulation 2006/2004 on consumer protection cooperation, and article 11 of the Unfair Commercial Practices Directive. However, standing in court of private groups and organizations is not boundless. It may be subject to acknowledgement of the consumer interest group by the national executive, as the list of qualified entities according to the Injunctions Directive shows. Such lists may come a long way in redressing the lack of guarantees for accountability of such private organisations. If private collective group actions were to become a more important instrument of enforcement, we feel that issues of accountability and transparency would have to be dealt with more intensely. Already, in jurisdictions that allow the consolidation of claims for compensation in mass tort cases, the question may be raised how the intermediary interest groups and their lawyers

54 Walter van Gerven et al., *Cases, Materials and Texts on National, Supranational and International Tort Law* (Oxford 2000) 272-273. See currently the *Unterlassungsklagengesetz (UKlaG)*, outlining the specific cases in which injunctive relief can be pursued. Cf. Ellen Schaumburg, *Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht* (Baden-Baden 2006) 143 ff.

55 See, e.g., Hans-W. Micklitz and Astrid Stadler (ed.), *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* (2005) Cf. several authors in *Österreichisches Anwaltsblatt* 2006/2 discussing the "*Sammelklage*".

56 OFT, *Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act*, Office of Fair Trading (2003) 1 ff.

57 Yves Picod and Hélène Davo, *Droit de la consommation* (Paris 2005) 330 ff.

58 See, e.g, Emmanuel Putman, 'Scénario pour une class action à la francaise', 58 *La revue des idées* 2005, 322; Jean Calais-Auloy and Frank Steinmetz, *Droit de la consommation* (Paris 2003) 597 ff., no. 556; Yves Picod and Hélène Davo, *Droit de la consommation* (Paris 2005) 332, no. 529. Cf. Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 593.

59 Christopher Hodges, 'Multi-Party Actions: A European Approach', 11 *Duke J. Comp. & International Law* 2001a, 328; Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 647 f.

are funded and what percentage of the proceeds actually end up in the hands of the injured parties. Similar concerns would have to be addressed in cases where collective actions for disgorgement were acknowledged. Having a procedure for listing and blacklisting may then prove helpful, but we should not forget that issues of accountability and transparency are even more pressing when it comes to public authorities. The level of democratic control of such authorities largely depends on national constitutional arrangements, which in itself is not a complete guarantee of effective, proportionate, and dissuasive enforcement effort.

Granting private group organisations standing in court is one thing, making them use their right to actually start civil proceedings is quite another. In practice, interest groups have little resources to spend on costly litigation.[60] The Netherlands, for instance, seems to be one of the most permissive jurisdictions when it comes to interest group standing in court. Any incorporated interest group, even if it has been founded on an *ad hoc*-basis, has standing to sue in the interest of their backing and may file for injunction and stop and desist orders.[61] Hence, the legal position of such organisations seems excellent. In reality, however, they hardly ever appear in civil court.[62] This is caused at least in part by the fact that the consumer organisation is obliged to try to reach an out of court settlement ('prior consultation') before the organisation can be heard by the court,[63] which fits perfectly with the consensus-model that dominates the Dutch (legal) culture but in practice may function as a hindrance to effective enforcement of consumer law.[64] To sum up Viitanen's conclusion: competitors are more likely to enter the courtroom than consumer organisations.[65] However, the most plausible reason for this absence of consumer organisations in civil procedure is

[60] Klaus Viitanen, 'The Crisis of the Welfare State, Privatisation and Consumers' Access to Justice', in: Thomas Wilhelmsson and Samuli Hurri (ed.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot 1999) 552. Contra: I. N. Tzankova, *Strooischade – Een verkennend onderzoek naar een nieuw rechtsfenomeen* (Den Haag 2005) 92 f.

[61] See article 3:305a Dutch Civil Code; note that the fact that The Netherlands has only put one private organisation on the list of the Injunction Directive is relevant for access to courts abroad but not for access to courts in domestic proceedings.

[62] See, critically, G.J. Rijken, 'De Wet algemene voorwaarden na één jaar: een trieste tussenbalans', *NJB* 1994, 643 ff.

[63] Cf. article 6:240 (4) Dutch Civil Code for proceedings combatting unfair contract terms and article 3: 305a (2) Dutch Civil Code for other proceedings. Legal persons governed by public law, including the Consumer Authority, have to comply with the same rule of obligatory prior consultation (article 3:305b (2) Dutch Civil Code). These provisions apply also to foreign consumer organisations on the list of the Injunction Directive. They apply as well in the case of an alleged infringement of Community law, cf. art. 3:305d (3) Dutch Civil Code.

[64] Cf. Ianika.N. Tzankova, *Toegang tot het recht bij massaschade (thesis Tilburg)* (Deventer 2007) 137.

[65] This is the more remarkable given the no-cost rule, as explained in the contribution by Viitanen to this book.

the lack of funds to pursue civil litigation. In a sense this is fortunate because limitless resources of consumer organisations will certainly not help finding enforcement equilibrium. Nevertheless, from a political perspective there might be good reasons for supporting 'collective relief' in areas where private enforcement lags behind and political pressure to intensify public enforcement is mounting.

So, rational policy may demand that governments identify in which areas private enforcement could add to or substitute public enforcement, and then provide incentives – be it financial or otherwise – for collective private enforcement. The Finnish proposal for a *State Group Action Board* as reported by Viitanen goes a long way in this direction, but this proposal was abandoned for reasons of budgetary constraints. Somehow, the politics of public finance do not always reflect rational policy.[66] The fact that public policy seems reserved when it comes to spending money on group actions seems even more curious when we consider that most European jurisdictions do have some sort of national scheme helping *individuals* in need of legal aid, but obviously forget the economies of scale when they refuse interest groups to benefit from similar arrangements.[67] Moreover, it has been argued that it would be unfair to abandon the 'loser pays'-rule in consumer cases. On the other hand, it could be argued that it may seem equally unfair to deny respectable private organisations a subsidy that each and every individual claimant whose interests are at stake does receives. And in any case, would this not be cheaper for the government than subsidizing many individual claimants? In other words, governments may be acting penny-wise but pound-foolish, in this respect.[68]

There is also the matter of monitoring. Injunctive relief obtained by a consumer organisation does by no means guarantee voluntary compliance with the court decision. So who will monitor the implementation of the court decision? Clearly, full monitoring could be too expensive and inefficient.[69] Therefore, incentives have to be built into civil procedure for voluntary full compliance by the respondent and some monitoring by the claimant at the same time. There are several instruments in the various jurisdictions that can help in this respect. The European legislature could introduce a *recurring penalty payment – i.e.*, the provisional obligation to pay a designated sum of money in the event of non-

[66] Cf. Klaus Viitanen, 'The Crisis of the Welfare State, Privatisation and Consumers' Access to Justice', in: Thomas Wilhelmsson and Samuli Hurri (ed.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot 1999) 561 ff.

[67] Cf. Hugh Collins, *Regulating Contracts* (Oxford 1999) 89.

[68] Cf. Matthias Arkenstette, 'Reorientation in Consumer Policy – Challenges and Prospects From the Perspective of Practical Consumer Advice Work', 28 *Journal of Consumer Policy* 2005, 361 ff. See also the education efforts by the EU (cf. European Commission, *Consumer Policy Strategy 2002-2006*, EU Commission (2002) 25).

[69] S. Shavell, 'The optimal structure of law enforcement', 36 *J. of Law and Economics* 1993, 271-272; G.S. Becker, 'Crime and punishment: an economic approach', 78 *J. Political Economy* 1968, 193.

compliance with the original court decision – ancillary to injunctive relief under the Injunctions Directive.[70] Thus, the respondent would forfeit a considerable sum of money clearly exceeding the value of his obligation if he does not comply with the court order.[71]

In some legal systems injunctive relief is already combined with this *penalty payment*.[72] This has proved to be a useful incentive for compliance, even more so in conjunction with media attention.[73] On the other hand, incentives for the respondent to comply may not be enough. Then, the consumer organisation may be given financial or reputational incentives to develop monitoring activities, for instance by allowing the consumer organisation to benefit directly from the penalty payment instead of requiring the respondent to make such payment to the State, as is the case in some Member States. Finding the appropriate incentive for private groups to develop the right level of monitoring activity is one of the more challenging assignments for European legal doctrine.

8 Bundling actions for trifle loss?

The Roman legal expression that people should not complain to the judicial authorities about small nuisances – *de minimis non curat praetor* – seems outdated. In modern Europe the insight has grown that trifle loss and minor detriment to individuals as such may equal large detriment to consumers as a whole on the one hand and substantial benefits accruing to the wrongdoer on the other hand. Hence, from a deterrence point of view such detrimental infringements of consumer law should be remedied. But is it possible to secure compliance through individual damages actions? The 'rational apathy' we mentioned earlier leads to less than maximal individual enforcement efforts. However, forced bundling of trifle claims – as experienced in the typical Ameri-

70 Cf. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

71 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe – A Comparative Study* (München 2004) 114.

72 A recent Dutch case serves as an example. In the Dutch case of HCC (a small consumer organisation of computer hobbyists) against Dell Computers, the Court of Appeal of The Hague found several provisions in the standard contract terms of Dell to be unfair (Court of Appeal The Hague 22 March 2005, *Landelijk Jurisprudentienummer* AT1762 (HCC/Dell Computer B.V.)). The court awarded conditional penalty payments in case Dell would not implement the required changes within three months time. HCC was of the opinion that Dell had not sufficiently performed its obligations under the court ruling and indicated it would start proceedings to execute the penalty payments. Dell tried to prevent HCC from this by ordering a prohibition of such proceedings. The Court denied the order (Court of Appeal The Hague 24 October 2006, *Landelijk Jurisprudentienummer* AZ0734 (Dell Computer B.V./HCC)).

73 Perhaps media attention (e.g., publication of the court decision) should also be a more prominent part of the private law enforcement toolbox.

can class action leading to 'sell-out' and 'coupon settlement' – does not seem an attractive alternative either. As Cseres argues, such settlements do not seem to bring meaningful compensation to consumers and mainly appear to be in the interest of the lawyers involved.

So, perhaps the proceeds of claims for compensation of trifle loss should not be distributed? For instance, it has been suggested that interest groups should be allowed to claim exemplary damages or some other form of damage in excess of individual damage (e.g., damage to 'consumer interests') and put these into a fund. With this fund these interest groups could then finance future litigation in the common interest.[74] To some extent this is already allowed by § 10 of the German *Gesetz gegen den unlauteren Wettbewerb (UWG)* , according to which consumer interest groups can claim profit disgorgement in some cases of unfair trade practice. The disgorged profits accrue, however, not to the consumer organisation that commenced the enforcement action but to the State after deducting the cost of claiming.[75] Under the influence of debated changes to the current EU legislation of competition law this may, however, change.[76]

9 Mixed instruments: private and public enforcement

It has been argued that public enforcement is superior to private enforcement and that having a public authority retaining control ensures a balanced and responsive enforcement process whereas private collective enforcement raises not only issues of accountability, legitimacy, and transparency, but may also bring about frivolous and disproportionate enforcement activity and cause overdeterrence.[77] In short: public watchdogs are to be preferred over private watchdogs. In this respect Hodges suggests a working mode in which private entities do the 'barking' (e.g., by lodging complaints in an administrative procedure before a public authority) while the 'biting' (fining, claiming, injunction) remains the public authority's prerogative.

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74 Cf. D. Collins, 'Public Funding of Class Actions and the Experience with English Group Proceedings', 31 *Manitoba L.J.* 2005, 236-238. See also Edward H. P. Brans, *Liability for damage to public natural resources standing, damage and damage assessment* (The Hague 2001).

75 On this topic, see, e.g., Rolf Sack, 'Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle', *Wettbewerb in Recht und Praxis* 2003, 549 ff.; Markus Burckhardt, *Auf dem Weg zu einer class action in Deutschland? Eine Untersuchung des Art. 1 § 3 Nr. 8 RBerG im System zwischen Verbandsklage und Gruppenklage* (Baden-Baden 2005) 36 ff.; Hans-W. Micklitz and Astrid Stadler, 'Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung', *Wettbewerb in Recht und Praxis* 2003, 559 ff.

76 Cf. *European Commission, Green Paper "Damages actions for breach of the EC antitrust rules", EU Commission (2005) COM (2005) 672 final* 1 ff., in particular p. 8 f. Cf. J. Kessler, 'Cui bono? Schadensersatzansprüche der Verbraucher im Kartellrecht', *Verbraucher und Recht* 2007, 41 ff.

77 See also the contribution of Cseres to this book.

Admittedly, however, public authorities have their limitations as well. Public authorities may lack information that private enforcers do have. Moreover, much like private consumer organisations, they too have limited resources, need to prioritise and therefore cannot enforce all rules with equal vigour.[78] Furthermore, public authorities may or may not maximize enforcement efforts (we cannot really know as a result of the principal/agent phenomenon).[79] Additionally, public authorities are in danger of suffering from 'agency capture' when taking a 'responsive enforcement' stance.[80]

Undeniably, if we consider consumer law to be part of the free market design in Europe, then the state's role in setting up and enforcing the market structure is essential.[81] Naturally, the state can rely on criminal law and the common framework for the enforcement of criminal law. Administrative law sanctions and procedure is also used as a tool for implementing and enforcing some parts of consumer law. More recently, there have been experiments with in-between solutions for the benefit of generating compliance with consumer law. A notable form of such a solution is the empowerment of public agencies to enforce private law rights for the benefit of the public. For instance, the Office of Fair Trading (OFT) can file for injunctive relief with regard to unfair terms in consumer contracts for the benefit of consumers at large.[82] Not surprisingly, the same applies for its Dutch counterpart.[83]

So, public enforcement is important, but we would not go as far as to suggest that it is superior to private law. We feel that public and private enforcement should instead coexist or continue to do so. In both public policy theory and law

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78 Cf. Ian Ayres and John Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (Oxford 1992) 103.

79 On that topic, e.g., Joseph E. Stiglitz, *Economics of the Public Sector* (New York 2000) 202 ff. Cf. Keith Hawkins, *Law as a Last Resort* (Oxford 2002) 16 ff., p. 415 ff.

80 See, e.g., Michael Faure and Roger van den Bergh, *Objectieve Aansprakelijkheid, Verplichte Verzekering en Veiligheidsregulering* (Antwerpen 1989) 148; Sally S. Simpson, *Corporate Crime, Law, and Social Control* (Cambridge 2002) 86 ff.; see also Catherine Albiston, 'The Rule of Law and the Litigation Process – The Paradox of Losing by Winning', in: Herbert M. Kritzer and Susan S. Silbey (ed.), *In Litigation – Do the "Haves" Still Come Out Ahead?* (Stanford 2003) 174.

81 Cf. Peter Cartwright, *Consumer Protection and the Criminal Law – Law, Theory and Policy in the UK* (Cambridge 2001) 7.

82 Regulation 8 Unfair Terms in Consumer Contracts Regulations 1994; Regultion 12 of the Unfair Terms in Consumer Contracts Regulations 1999; Part 8 of the Enterprise Act 2002. Cf. J. Basedow et al. (ed.), *Die Bündelung gleichgerichteter Interessen im Prozeß* (1999) 15, p. 126; OFT, *Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act*, Office of Fair Trading (2003) 18 ff., p. 76 f. Usually, the threat of OFT seeking an order is sufficient to prompt businesses to change their general clauses.

83 Cf. article 3:305d Dutch Civil Code. The Dutch Consumer Authority is required to give the infringing party a reasonable period to stop the infringement and to obtain a copy of the data on which the Consumer Authority bases its intention to act against the infringing party.

and economics the arguments in favour of *combined* public and private enforcement efforts are well articulated.[84] We feel that consumer law may profit from a similar combined approach and that there is no need for strict adherence to either public law or private law enforcement.[85] Having said that, it must be admitted that overzealous enforcement on both sides – or rather: the setting and maximal enforcement of unnecessary high standards of care – may stifle innovation and cause counterproductive corporate behaviour. Hence, the real challenge is finding the *optimal* quantity of private litigation and responsive public enforcement against the background of the goals of substantive consumer law.[86] In this regard we second Hodges' call for a balanced approach. Using the 'fine-tuning' process proposed by Van den Bergh in a trial-and-error setting may indeed give a valuable starting point for such an approach. Admittedly, however, what is lacking are data on costs, benefits, effects, and side effects of consumer empowerment. Obtaining a clearer picture of these data is crucial in finding the optimal level of enforcement.

Having said that, we think we can already see from the contributions to this book a picture emerging of the road ahead. This road is one of a balanced and multifaceted approach. This is an approach in which individual consumers are encouraged to make use of the available civil law remedies and consumer organisations serve the consumer interests at large by filing for injunctive relief and claiming compensation for trifle loss, and in which one or several public authorities are entrusted with the supervision over the proper functioning of consumer markets. Hence, in this approach the use of criminal law is reserved for combating rogue traders, who usually have little reputation to lose but may be sensitive to imprisonment. In such cases, directors and executives of such companies should be exposed to imprisonment to repair the judgement proof-problem. The balance is found in the extent to which these powers are used and the net effect on consumer markets.

So, the challenge for EU member states is to find the right balance in the light of the unfolding European legislative approach. As Van den Bergh rightly observes, the member states have different starting points in this respect. Traditionally, the national approaches to enforcement diverge: some jurisdictions trust on enforcement by private consumer organisations (e.g., Germany), others emphasize the role of public authorities (e.g., United Kingdom, Scandinavian countries) or the criminal justice system (e.g., France), and some prefer

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[84] Seminal S. Shavell, 'A model of the optimal use of liability and safety regulation', 15 *Rand J. of Economics* 1984, 271 ff. Cf. Susan Rose-Ackerman, 'Tort Law in the Regulatory State', in: Peter H. Schuck (ed.), *Tort Law and the Public Interest – Competition, Innovation, and Consumer Welfare* (New York 1991) 80 ff.

[85] Cf. Harald Koch, 'Non-Class Group Litigation under EU and German Law', 11 *Duke J. Comp. & International Law* 2001, 360.

[86] In a similar vein, see Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in: Charles E.F. Rickett and Thomas G.W. Telfer (ed.), *International Perspectives on Consumers' Access to Justice* (Cambridge 2003) 64 ff.

soft instruments of negotiated and self-regulatory market balance (Scandinavia, the Netherlands). However, from whatever enforcement culture the EU member states may come, administrative or criminal law now seem to be indispensable. This follows from the more recent European legislation such as the Cooperation Regulation and the Unfair Commercial Practices Directive that designates 'competent administrative authorities' and 'public bodies' with the task of enforcing and cooperating in the collective interest of consumers.[87] So, the mix of enforcement instruments is here to stay, challenging national policymakers to find the right balance between the different instruments against a background of the need for effective, proportionate, and dissuasive sanctions.

10 Concluding remarks: On the way to creating (slightly less im)perfect markets

Making consumer law work is not all about sticks and carrots. We conclude from the contributions by Hodges and Viitanen that 'soft approaches' may have an important impact as well and should be used where possible. Moreover, as Van den Bergh rightly points out, any regulator should consider it to be its priority to address the causes of market failure, e.g., by making sure that consumers have adequate information on quality and essence of the offered products. A certain level of information symmetry is an important prerequisite for any market to function properly.[88] This is especially true for infrequently bought experience and credence goods. With regard to these goods, consumers are not fully able to learn from their mistakes and 'vote with their feet'.[89] As a result there may be a lack of incentives for producing above average quality and consequently good quality may not be signalled to consumers. This may result in consumers being forced to choose on the basis of price alone rather than on a mix of relevant properties of the product.[90] Such imperfections

[87] Cf. Hans-W. Micklitz, in: Geraint G. Howells et al. (ed.), *European Fair Trading Law; The Unfair Commercial Practices Directive* (2006) 227.

[88] Seminal George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', 84 *The Quarterly Journal of Economics* 1970, 488 ff. Information on legal rights and dispute resolution options seems crucial as well; cf. Peter Cartwright, *Consumer Protection and the Criminal Law – Law, Theory and Policy in the UK* (Cambridge 2001) 17 ff.

[89] Cf. G.K. Hadfield et al., 'Information-Based Principles for Rethinking Consumer Protection Policy', 21 *Journal of Consumer Policy* 1998, 140 ff.

[90] Note that the assumption underlying this theory is one of rational consumer choice; this assumption has been criticised from the viewpoint of behavioural science; see, e.g., Christine Jolls et al., in: Cass. R. Sunstein (ed.), *Behavioral Law & Economics* (2000) 14 ff.; David A. Statt, *Understanding the Consumer – A Psychological Approach* (London 1997) 227 ff.; Incardona Rossella and Poncibò Cristina, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', 30 *Journal of Consumer Policy* 2007, 21 ff.

– Van den Bergh mentions relevant examples – are conceivable in financial and insurance markets especially, where quality is not easy to measure or evaluate by individual consumers and reputation is based on trust and brand reputation rather than on intrinsic value. The complex task of public authorities serving consumer interests here is to try to create informational transparency (without overloading consumers with information), comparability and other conditions for markets to function as perfectly as possible. No private consumer organisation can fulfil that task alone. It can, however, fulfil the role of 'side-kick' to the regulator by bringing collective actions to civil courts on the basis of general private law. This may lead the regulator to step in and regulate the litigated issue by means of legislation.[91] The recent EU legislation thus paves the way for a productive coexistence of the needed mixed approach of public/private enforcement. As is shown above, it appears to be essential that two more steps are taken. On the one hand, more elaborate study should be made of the possible benefits and drawbacks of granting consumer organizations the right to obtain damages on behalf of consumers and to put these into a fund to finance future litigation in the common interest. On the other hand, as Betlem suggests, public watchdogs should be obliged to assist individual consumers who litigate against foreign traders in a situation where a collective interest is at stake.

One final remark is in order. However detailed or elaborate a public or private scheme for the enforcement of consumer law is, in practice it all comes down to the determination and stamina of the parties enforcing the law. As Whitford concluded as early as 1981, the commitment of public authorities to the enforcement of the legislation is far more important in determining the level of compliance than the statutory powers they may have.[92] If collective enforcement of consumer legislation is to truly work in Europe, any piece of legislation empowering consumer organizations or public authorities needs to provide sufficient (and in any case not adverse) incentives for enforcing such legislation.

In sum, there is still a lot the European legislator may do to improve enforcement of European consumer law. We hope that this book has provided fuel for such future action.

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[91] G.K. Hadfield et al., 'Information-Based Principles for Rethinking Consumer Protection Policy', 21 *Journal of Consumer Policy* 1998, 154, rightly observe that legislative intervention may come too late when media attention has already made consumers very cautious.

[92] William C. Whitford, 'Structuring Consumer Protection Legislation to Maximize Effectiveness', *Wisconsin Law Review* 1981, 1041 f., reprinted in: Iain Ramsay (ed.), *Consumer Law* (New York 1992), 480 f.