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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure

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1. INTRODUCTION

Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (hereafter "the Regulation") has been applied since January 2009 in all Member States except Denmark. Its main features are its written character, strict time limits for the conduct of the proceedings, the absence of a requirement of legal representation, the use of electronic communication, the use of standardized forms for procedural acts, and the abolition of the intermediary procedure for declaration of enforceability of the judgment ("exequatur").

Article 28 requires the Commission to present by the 1 January 2014 a report reviewing the operation of the Regulation. This report is based on an external study,[1] an on-line public consultation, replies to a questionnaire addressed to Member States, discussions in the European Judicial Network in Civil and Commercial Matters ("EJN") in 2011 and 2013, and input from consumers[2] and the general public[3].

2. THE APPLICATION OF THE REGULATION IN GENERAL

In general, the procedure is considered to have facilitated cross-border litigation for small claims in the EU. It has reduced the costs of litigating cross-border small claims up to 40% and the duration of litigation from up to 2 years and 5 months to an average duration of 5 months.

In comparison to national simplified procedures, the European Procedure has been found to be less costly as it is simpler than national procedures. Most national procedures only remove the need for legal representation in small value disputes before lower courts.

However, the use of the European Small Claims Procedure is still rather limited compared to the number of potential cases. In this respect, the number of applications differs greatly between the Member States, ranging between only 3 applications in Bulgaria and 1047

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1 Deloitte, Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation, July 2013 (hereafter: Deloitte-Study); available at: http://ec.europa.eu/justice/civil/document/index_en.htm.

2 Based on individual complaints and on the following reports: Centre européen de la Consommation/Europäischen Verbraucherschutz e.V, Procédure de règlement des petits litiges et injunction de payer européenne: des procedures simplifiées pas si simple dans la pratique, July 2011, available at: http://www.europe-consommateurs.eu/uploads/media/4.4.3_procedure_de_reglement_des_petits_litiges.pdf (hereafter: CEC, Procédure de règlement des petits litiges); ECC-Net, European Small Claims Procedure Report, September 2012, available at: http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf (hereafter: ECC-Net-Report). Moreover, the Study "Implementation of optional instruments within European civil law" made to the EP by Ms B. Fauvarque-Cosson and Ms M. Behar-Touchais in 2011 was taken into account. (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=72928).

3 Special Eurobarometer 395, European Small Claims Procedure, April 2013 (hereafter: Special EB 395), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf.

applications in Spain for 2012.[4] Apart from factors like shopping habits of the population and the availability or costs of alternative national procedures, this difference in the up-take of the European Procedure seems to be linked in particular with the awareness of its existence and operation.[5] This conclusion is supported by the fact that the number of applications under the Regulation has constantly increased since its entry into application in 2009.[6]

Eurobarometer 395 shows that two-thirds of those who used the procedure are overall satisfied with it. 13% of respondents was dissatisfied,17 % reported that the court was not knowledgeable of the procedure, 16 % had difficulties in filling in the forms and 10 % sought assistance in filling in the application form but did not receive it.

In addition, certain shortcomings are reported as set out below.

3. SCOPE OF THE REGULATION

3.1. Threshold of €2,000

The Regulation applies in cases where the value of the claim does not exceed €2,000.

The majority of the Member States have now national simplified procedures in place.[7] The thresholds of those procedures vary greatly, from €600 in Germany to €25,000 in the Netherlands. There has been a trend to increase the level of national thresholds for simplified court procedures since the introduction of the Regulation.[8] In some Member States such increase has been significant.[9]

Eurobarometer 347[10] shows that the threshold of €2,000 severely limits the availability of the procedure for SMEs in particular, whose cross-border legal disputes with another business amount on average to €39,700. For these claims businesses have to revert to national small claims procedures where they exist, or to ordinary civil proceedings. This may lead to disproportionate litigation costs and lengthy proceedings. Indeed, 45% of companies which experience a cross-border dispute do not go to court because the costs for procedure are disproportionate to the value of the claim, while 27% do not go to court because the court procedure would take too long.

3.2. The territorial scope

The Regulation currently applies to disputes where at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised. This limit results in depriving the parties who exercise their right to choose the jurisdiction of their common domicile under Regulation (EC) No 44/2001 (the Brussels I

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4 There is no data available in regard to the type and characteristics of the cases, but in regard to the threshold of €2.000, it can be assumed that the Regulation was predominantly used by consumers. Also Special EB 395 focused on its perception by EU-citizens.

5 According to the Spain answer of the questionnaire trainings have not only been addressed to courts and judges like in most of the other Member States – if at all – but also to bailiffs and enforcement agents. See also: Deloitte-Study, Part I, section 3.3.2.1, pp. 73-74.

6 See: Deloitte-Study, Part I, 3.3.2.1, pp. 66-67 (table 19) providing an overview over the responses of the Member States to the number of applications and judgments of the ESCP.

7 Only Austria, Bulgaria, Cyprus, Czech Republic and Finland do not have such a procedure. See: Deloitte-Study, Part I, section 3.3.1.1, p. 53.

8 For example, in Estonia, France, Hungary, Ireland, Italy, Lithuania, Slovenia, Spain, the Netherlands and UK.

9 In the UK, from £5,000 to £10,000, in the Netherland from €5,000 to €25,000; see: Deloitte-Study, Part I, section 3.3.1.1, pp. 52-53.

10 Flash Eurobarometer 347, Businesses-to-Businesses, Alternative Dispute resolution in the EU (hereafter: Flash EB 347), pp. 40-42, available at: http://ec.europa.eu/public_opinion/flash/fl_347_en.pdf.

Regulation)[11] over another competent jurisdiction of the use of the European Procedure. For example:

- where the contract is performed in another Member State, for example where it concerns the lease of a holiday house in another Member State;

- where the event giving rise to a tort claim took place in another Member State, for example a car accident which took place in a border region;

- where the judgment needs to be enforced in another Member State, for example where the defendant has a bank account in another Member State.

Furthermore, the limitation excludes applications under the Regulation lodged before courts of EU Member States by or against nationals of third countries, for example complaints of EU consumers against businesses located in a third country.

In addition, this limitation engenders legal uncertainty. Citizens may have the expectation that more of their cross-border cases would be covered by the Regulation and may also artificially create a cross-border scenario as provided for in the Regulation in order to benefit from its advantages, for example by assigning their claim to a foreign company.[12]

4. THE PROCEDURE SET UP BY THE REGULATION

4.1. Jurisdiction

The jurisdiction of the courts in the European Small Claims Procedure is governed by the Brussels I Regulation.

Some Member States have established one or a few specialised courts to deal with the European Small Claims Procedure (e.g. Finland, Malta and the Land Hessen in Germany). Such concentration has certain advantages such as concentrating specialised knowledge of courts, language skills and the availability of equipment with distance means of communication which allows to save costs. Potential disadvantages for claimants who would wish to lodge a cross-border small claim at their local court may be offset by the increased use of electronic processing of cases and distance means of communication.

4.2. Written procedure and the use of distance means of communication

The European Procedure is in principle a written procedure. This avoids the need to travel for the parties and saves costs and time. However, the court or tribunal may hold an oral hearing if it considers this to be necessary or if a party so requests. Courts are encouraged to hold oral hearings through video conference or other communication technology if the technical means are available.

The study shows that seven Member States/jurisdictions[13] offer limited (less than 10% of courts) or no possibilities for the use of ICT in court, while ten Member States/ jurisdictions[14] offer the possibility to communicate through ICT in all courts. Even in those Member States where the relevant equipment is available it cannot be guaranteed that the facilities are actually used for oral hearings in the European Small Claims Procedure due to the fact that

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11 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 12, 16.1.2001, p.1.

12 Such cases have been signalled during the discussions in the EJN.

13 Belgium, Bulgaria, Greece, Hungary, Latvia, Slovakia, UK – Northern Ireland.

14 Austria, Cyprus, Estonia, Finland, Luxembourg, Malta, the Netherlands, Portugal, Sweden and UK – Scotland.

their use is left to the discretion of the judge. Parties at present face unnecessarily high costs when they are requested to be physically present in court in another Member State for oral hearings.

In Special Eurobarometer 395 one third of the respondents indicated that they would be more inclined to file a claim if the procedures could be carried out only in writing, without need to physically go to court. Technology today permits the installation of distance means of communication at quite low costs (Skype-like equipment or teleconference).

4.3. Application, means of service and the use of electronic procedure

The claimant can lodge the claim with the court or tribunal directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State of the court seized.

10 Member States[15] and 5 Länder in Germany[16] may allow for the electronic submission of applications in cross-border cases (online or via e-mail). This development is likely to increase in the future[17] and is reflected in the context of the pilot project e-Codex on European e-justice[18] assessing the feasibility of a centralised European e-application system for the European Small Claims Procedure.

With respect to service, postal service with acknowledgment of receipt is the primary method of service. Service by electronic means can thus be applied only if service by post is not possible. At the time of the adoption of the Regulation, this provision was very progressive since it removed formalities relating to service. Meanwhile, some Member States have put in place electronic communication means for domestic procedures. Parties to the European Small Claims Procedure cannot benefit from those modernisations due to the rule establishing the priority of postal service over all other means of communication. Also, it can be expected that in the coming years the use of ICT in judicial systems will increase.

This insufficient use of ICT is a deterrent to the attractiveness of the Regulation: A fifth of the respondents to the Special Eurobarometer 395 on the European Procedure indicated that they would be more inclined to use the procedure if all the proceedings could be carried out online.

4.4. The duration of litigation

The Regulation prescribes time limits in order to speed up the litigation for small claims. Even though no sanctions are foreseen in case of non-respect of those time limits, data show that the duration for litigating cross-border small claims has drastically reduced litigation since the time of adoption of the Regulation. The duration of the European Procedure in a sample of Member States[19] show that litigation takes about 3 to 8 months with an average of approximately 5 months, compared to up to 2 years and 5 months before the adoption of the Regulation.

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15 See: Deloitte-Study, Part I, section 3.3.2.2, pp. 76-77: Austria, Estonia, Cyprus, Czech Republic (although when submitted by e-mail or fax, original must be submitted subsequently), Finland, France, the Netherlands (though not used in practice), Portugal, Slovenia, UK (England and Wales).

16 Berlin, Brandenburg, Bremen, Sachsen, Hessen.

17 In Germany, for example, the possibility of an electronic submission of a claim in all courts is envisaged for 2018.

18 http://www.e-codex.eu/index.php/legal-community-benefits; see also for the European Small Claims Procedure: http://www.e-codex.eu/pilots/small-claims.html.

19 10 Member States responded to this question; Bulgaria: 6 months; Estonia: 4 months; Finland: 3 months; France: 4,6 months; Malta: 6 months; Poland:6,3 months; Slovakia: 3 months; Slovenia: 4,3 months; Spain: 8,2 months; Germany: 3,4 - 5,3 months.

4.5. The removal of the obligation to be represented by a lawyer

Eurobarometer 395 found that one third of respondents who had used the European Small Claims Procedure used a legal representative through the procedure, while slightly more respondents used the procedure without legal assistance. In some instances, it appears that citizens made recourse to a lawyer because they did not benefit from free assistance or because court fees can only be paid through a lawyer (see below sections 6 and 8.2). Even if, therefore, the right to legal representation is a fundamental right of all citizens, citizens should not be compelled to have recourse to a lawyer because the rules of the Regulation are not complied with or because of purely practical obstacles.

4.6. The multilingual standard forms

The Regulation provides for four multilingual standard forms. These forms have been available on the European Judicial Atlas together with a translation tool into all official languages since 2008 and in the European e-Justice portal as dynamic forms with a wizard helping to fill them in since 2011.[20]

Citizens generally think that the application form is easy to fill in (62%), while some report difficulties (16%). Some consumers have found the standard forms to complex on some points such as jurisdiction, cross-border definition, calculation of interest and the documents which need to be attached.[21]

4.7. The minimum standards for review of the judgment

The exceptional remedy in Article 18 aims at redressing the situation where the defendant was not aware of the proceedings in the Member State of origin and was not able to properly defend himself. While the Regulation prescribes the conditions for opening the right for a review, the procedure itself is governed by national law.

Review procedures similar to the one of Article 18 of the Regulation also exist in other civil justice instruments, in particular the European Order for Payment[22], European Enforcement Order[23] and Maintenance Regulation[24]. Implementation of the review procedure under the European instruments has given rise to questions and uncertainties. In order to address such questions and uncertainties, it is appropriate to clarify the provision in Article 18 by taking inspiration from the more recent provision in the Maintenance Regulation.

5. RECOGNITION AND ENFORCEMENT IN ANOTHER MEMBER STATE

No problems have been reported concerning the abolition of exequatur in the Regulation. However, some problems on the actual enforcement have been reported to the European Consumer Centres, for example concerning the need for translation and the lack of information regarding enforcement procedures or contact details of enforcement agents in different countries.[25] Only a few Member States accept Form D of the Regulation in English

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20 See: https://e-justice.europa.eu/content_small_claims_forms-177-en.do.

21 See: CEC, Procédure de règlement des petits litiges; ECC-Net-Report.

22 Regulation 1896/2006/EC of the European Parliament and the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1 *et seq*.

23 Regulation 805/2004/EC of the European Parliament and the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15 *et seq*.

24 Council Regulation 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1 *et seq.*

25 ECC-Net, European Small Claims Procedure Report, September 2012, p. 28 available at: http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf.

and a few other languages.[26] This implies additional costs for the party seeking enforcement. Translation costs are usually charged per page, despite the fact that most information is already available in all official languages and only Section 4.3 containing the substance of the judgment needs to be translated.

6. ASSISTANCE FOR PARTIES

Few specific arrangements have been put in place in the Member States to ensure that the parties can receive practical assistance in filling in the forms. According to ECC-Net Report, 41 % of the Member States have reported that such assistance is not available to citizens and Eurobarometer 395 show that 10% of respondents sought assistance but did not receive it.

In conclusion, it appears that Member States do not consistently provide free of charge assistance. This may play a role in the limited use of the European Procedure.

7. INFORMATION OBLIGATIONS FOR THE MEMBER STATES

Under Articles 24 and 25, Member States must provide certain information necessary for the operation of the procedure. However, information on several issues which vary greatly among Member States is currently not available: information on court fees and the methods of payment of the latter, on national procedures for review under Article 18 as well as on the availability of free assistance to citizens.

Due to this lack of transparency, consumers and businesses lose time by searching for information on costs and cannot make a fully informed decision whether to use the procedure or not.

8. OTHER OBSTACLES TO THE APPLICATION OF THE REGULATION

8.1. Disproportionate court fees to the value of the claim

The evaluation shows that disproportionate court fees is an important obstacle to the use of the procedure in some Member States. Court fees may have to be paid up-front and may have a deterrent effect on claimants considering court action.[27]. Eurobarometer 347 shows that 45 % of businesses do not go to court because the cost of court proceedings would be disproportionate to the claim.[28] BEUC's position paper[29] confirms that disproportionate court fees are a factor which discourages consumers from using the Procedure.

Court fees vary among the Member States depending on the calculation methods in place (fixed or as a proportion of the value of the claim or a combination of these two). Court fees of more than 10 % of the value of the claim can be considered as disproportionate. This is particularly valid in cross-border cases where additional costs such as translation costs must

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[26] Estonia (English), Cyprus (English), Malta (English), Finland (Swedish and English), Sweden (English), France (English, German, Italian, Spanish) – Source: X.E. Kramer, Small claim, simple recovery? The European small claims procedure and its implementation in the member states, ERA Forum (2011) 12, p. 130.

[27] The fact that court fees fall under the “loser pays” principle does not reassure the claimant as the outcome of the case is uncertain and the claimant would first have to "freeze" his own money until effective enforcement.

[28] Flash EB 347, p. 31. Even though this survey is general for all types of B-2-B claims, it highlights that the proportionality of costs - and therefore also of court fees - is the main criteria for businesses in regard to the decision whether to litigate a case.

[29] Ref.-Nr. X/2013/040; available at: http://www.beuc.org/Content/Default.asp?PageID=606.

be expected. For claims above €2,000, court fees were found to be largely proportionate to the value of claims.

In many Member States, a minimum court fee is set in order to prevent abusive or frivolous litigation, i.e. lodging cases that are not adequately evidenced or justified, or which are of a derisory value, e.g. €10.

8.2. Practical obstacles to the payment of court fees

Some practical difficulties have been reported to the Commission regarding the payment of court fees in other Member States.

Payment methods differ greatly across Member States. Most Member States allow for the possibility of at least one form of electronic payment (debit/credit card on-line payment or bank transfer). Wire transfer is allowed in some Member States. In a few Member States however payment of court fees requires the actual physical payment at the court premises or payment through a lawyer or cheques which are not in general use in many Member States. In those countries parties need to incur travel costs or hire a lawyer in the Member State concerned in order to be able to pay the court fees.

9. LACK OF AWARENESS OF THE EXISTENCE AND OPERATION OF THE PROCEDURE

For a successful application of the European Small Claims Procedure, it is necessary that the relevant actors - the citizens, the courts and other organisations providing support and advice - are aware of its existence and of its operation. Evidence shows however that neither citizens, nor courts are yet well-informed:

Eurobarometer 395 shows that 86% of **citizens** have never heard about procedure. As a result, potential claimants, in particular consumers, either do not pursue their claims or pursue their claims using national procedures.

As for the **courts and judges**, a survey carried out by the ECC-Net in all Member States showed that almost half of the courts have never heard about the procedure, while the other half was not fully informed of its details. As a consequence, a high number of courts or tribunals are not in a position to ensure **efficient assistance** to citizens as requested in Article 11 of the Regulation.

The data indicate that, despite the Member States' attempts to increase the knowledge of courts, the dissemination of information has not been effective. Where training was offered not only to courts but also to bailiffs and enforcement agents, the use of the procedure increases. Also, a specialisation of jurisdiction may in certain Member States be a means to address the problem of low awareness among legal professionals. In conclusion, the success of the procedure would benefit from Member States dedicating more resources and means to improve their awareness raising measures.

The Commission on its part has tried to address the problem of lack of awareness by a range of actions like the publication of information together with interactive forms on several EU websites (EJN website, European Judicial Atlas, and e-Justice Portal); specialised training modules for judges and legal practitioners and workshops for trainers under the Civil Justice Programme; a Practice Guide for legal practitioners and a User Guide for citizens have been prepared together with the EJN in civil and commercial matters and will be published in 2013.

The Commission has also promoted the application of the procedure through financial means under the Civil Justice Programme. Also the European Consumers Centres (ECC) provide some assistance to consumers using the European Small Claims Procedure.

Relevant actors also seem to have difficulties in **distinguishing between the various instruments** to pursue their claims and enforce them abroad. In particular, they are uncertain when to use the Small Claims or the European Order for Payment Procedures and in which cases the use of the European Enforcement Order could be beneficial. A horizontal practice guide on how to distinguish and when to use the one or the other instrument may be helpful for citizens and practitioners.

10. CONCLUSION

This report shows that the application of the Regulation has generally improved, simplified and accelerated the handling of small claims in cross-border disputes. Nevertheless, there are some shortcomings.

The Regulation suffers from a lack of awareness. This issue is addressed by a number of measures undertaken by the Commission as described above.

In some instances the Regulation was not properly implemented. This may be remedied by clarifying some of its provisions which have given rise to difficulties. This is the case, for example, with the lack of transparency on certain information regarding court fees, methods of payment and the availability of assistance in filling in the forms.

The remaining problems are mainly due to deficiencies of the current Regulation, for example the limited scope in terms of the threshold and the limited definition of cross-border cases; the procedural shortcomings relating to the priority given to postal service; the low use of video-distance means of communication; the disproportionality of court fees in some instances; the lack of on-line methods of payment in some Member States, and; the unnecessary translation costs at the stage of enforcement.

This Report is therefore accompanied by a proposal for revision of the current Regulation and an impact assessment addressing the problems identified above.

members who were dissatisfied with an adverse judgment, would hardly be pressing claims already adjudicated against them, without the benefit of contingency fee arrangements, with the added risks of having to pay defendants'counsel fees and costs of litigation. Even if these practical considerations might weigh strongly in favour of allowing all foreign members to participate in plaintiff-s'proposed class, he elected to proceed with caution and limit the class to foreign members whose courts, in the unlikely event of successive litigations, are likely to give *res iudicata* effect to a U.S. judgment (78). The decision of the New York court in *Vivendi* has been well received by French commentators (79) and their approval deserves to be shared. The modern needs of international cooperation impose to restrict procedural public policy, in its "localistic" nature, to the flagrant and intolerable violations of the most fundamental principles. In a globalized world where global players do business across international borders and corporate wrongdoing has an international dimension, transnational regulatory litigation (80), needs to be combined with transnational judicial regulation based on an open attitude towards judgments from courts of countries that provide fundamentally fair mechanisms of efficient collective redress (81).

(78) Id at 104.

(79) See the important contribution by H. Muir Watt, *Régulation de l'economie globale et l'èmergence de compétences délèguées: sur le droit international privé des actions de groupe*, in *Rev.crit. droit int. priv.*, 2008, 251 and the concluding remarks in Pinna, *supra* note 74, 59 ss. The traditional negative position has been reasserted by J. Lemontey-N. Michon, *Les "class actions" américaines et leur éventuelle reconnaisance en France*, in *Journal dr. int.* 2009, 535.

(80) See H. Buxbaum, *Transnational Regulatory Litigation*, in 46 *Virg. J. Int'l L.*, 2006, 251.

(81) Pinna, *supra* note 74, writes "from a policy perspective, refusing to recognize a U.S. class action judgment is not a good solution for European countries" Even critics of certain aspects of the class action device acknowledge "that the rules on recognition and enforcement of judgments should be allowed to evolve to accommodate and support, not to frustrate such litigation". A. Briggs - P. Rees, *Civil Jurisdiction and Judgments*, 4th ed., London, 2005, 573.

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Choosing Among the Three Regulations Creating a European Enforcement Order (EEO Regulation, EOP Regulation, ESCP Regulation): Practical Guidelines

Dr. Elena D'Alessandro, *Rome (*)*

Posto che la formazione di un titolo esecutivo europeo di natura giudiziale, il quale rende superfluo munirsi di exequatur ***nello Stato membro di esecuzione, è ottenibile vuoi mediante l'applicazione del Reg. n. 805/2004 (sui crediti non contestati: CNC), vuoi mediante l'applicazione del Reg. n. 1896/2006 (sul procedimento di ingiunzione uniforme: IU) ovvero del Reg. n. 861/2007 (sulla riscossione dei "crediti piccoli", di ammontare inferiore a 2.000 Euro: CP), l'Autrice - nella prima parte del saggio - delinea i costi-benefici ed i sottesi criteri che potrebbero guidare il creditore nella scelta del Reg. da utilizzare per precostituirsi tale titolo.***

Segnatamente, sono tre i criteri individuati. Il primo consiste nell'esame delle materie escluse dall'ambito di applicazione di ciascuno dei tre Reg. Poiché non vi è coincidenza tra quelle esorbitanti la sfera applicativa di ognuno dei richiamati atti normativi (ad es., l'arbitrato è materia finora esclusa dal Reg. n. 805/2004-CNC e dal Reg. n. 861/2007-CP ma non anche dal Reg. n. 1896/2006-IU), il creditore dovrà in primis ***verificare se la materia cui è riconducibile la propria posizione creditoria non fuoriesca dall'ambito di uno (o più) dei menzionati Reg.***

Il secondo criterio si sostanzia nella verifica del carattere transfrontaliero ovvero meramente interno della controversia che il creditore intende instaurare per precostituirsi il titolo esecutivo europeo. Soltanto il Reg. n. 805/2004-CNC è applicabile alle controversie aventi mera rilevanza interna. Gli altri due Reg. (n. 1896/2006-IU e n. 861/2007-CP) esigono, invece, che la controversia assuma carattere transfrontaliero, ossia che una delle parti (indifferentemente l'attore o il convenuto) abbia il domicilio o la residenza abituale in uno Stato membro diverso da quello adito.

Il terzo criterio consiste nella verifica della sussistenza dei presupposti applicativi richiesti da ciascuno dei tre Reg. Invero, poiché i rispettivi presupposti applicativi non coincidono, nella prassi dovrebbero essere frequenti i casi in cui, in concreto, il creditore vedrà integrati i requisiti applicativi di uno soltanto di essi. Infatti: i) il Reg. n. 805/2004-CNC esige, ad es., che il credito da soddisfare coattivamente non sia stato contestato. In tal caso, la formazione del titolo esecutivo giudiziale europeo avviene all'esito di un procedimento disciplinato dalla lex fori***, il quale deve tuttavia soddisfare determinati requisiti processuali finalizzati a far sì che la non contestazione sia effettivamente volontaria; ii) il Reg. n. 1896/2006-IU introduce un procedimento monitorio uniforme, la cui operatività è tuttavia limitata all'ipotesi in cui il convenuto non proponga opposizione. Se vi è opposizione il giudizio prosegue secondo le forme del procedimento monitorio previsto dallo Stato di origine (a meno che il ricorrente non abbia per questo caso richiesto l'estinzione del processo), dunque senza che vi sia formazione di un titolo esecutivo europeo. Conseguentemente, se il creditore ha ragione di ritenere che il debitore possa proporre opposizione, anche pretestuosa - ma ciò è sufficiente per ottenere il mutamento del rito -, sarà poco proficua la scelta del procedimento monitorio europeo; iii) il Reg. n. 861/2007-CP introduce anch'esso delle norme processuali uniformi finalizzate a disciplinare in modo omogeneo un processo a cog-***

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nizione piena ed esauriente. Affinché sia applicabile è tuttavia necessario,* in primis, *che l'entità del credito non sia superiore a € 2.000.
Nella seconda parte del saggio l'Autrice verifica la sussistenza di differenze tra i tre Reg. a proposito della esecuzione dei provvedimenti nello Stato membro richiesto. Difatti, se delle divergenze fossero ravvisabili, esse diverrebbero un ulteriore elemento da valutare nella scelta del Reg. per la formazione del titolo.
Mentre è pacifico che il Reg. 1896/2006-IU ed il Reg. n. 861/2007-CP disciplinano sia l'esecuzione che il riconoscimento nello spazio giudiziario comune della decisione che costituisce titolo esecutivo europeo, altrettanto non può dirsi in riferimento al Reg. n. 805/2004-CNC. Parte della dottrina tedesca, difatti, preferisce ritenere che il riconoscimento dell'efficacia di accertamento dell'esistenza del credito non contestato prodotta dalla decisione che costituisce titolo esecutivo europeo circoli esclusivamente ai sensi del Reg. n. 44/2001. La circostanza per cui i Reg. n. 1896/2006-IU ed 861/2007-CP disciplinano sia il riconoscimento che l'esecuzione induce l'Autrice a ritenere che i requisiti ostativi all'esecuzione di cui all'art. 22 del Reg. n. 1896/2006-IU e Reg. n. 861/2007-CP - i quali, a differenza del Reg. n. 44/2001, privilegiano la decisione emanata per prima a scapito di quella successiva nel tempo - siano anche altrettanti requisiti ostativi del riconoscimento. Una simile soluzione in riferimento al Reg. n. 805/2004-CNC, invece, in tanto è prospettabile, in quanto si ritenga che esso disciplini anche il riconoscimento. Si è poi cercato di stabilire se le norme processuali contemplate dallo Stato richiesto dell'esecuzione a proposito della possibilità di sospendere il processo esecutivo possano cumularsi con la sospensiva prevista dall'art. 23 di ciascuno dei tre Reg. Una soluzione di segno positivo è stata ritenuta prospettabile per il solo Reg. n. 805/2004-CNC, ove è ancora il legislatore nazionale (in specie, lo Stato di origine) a conferire l'efficacia esecutiva alla pronuncia valida come titolo europeo. Viceversa, poiché nel contesto dei Reg. n. 1896/2006-IU ed 861/2007-CP è il legislatore comunitario a conferire tale efficacia (arg. ex art. 26 Reg. n. 1896/2006-IU e 19 Reg. n. 861/2007-CP), si potrebbe ritenere che solo a quest'ultimo, e non anche alla* lex fori, *spetti individuare le situazioni in cui sia possibile una sospensiva. vi siano delle differenze tra i titoli esecutivi europei di natura giudiziale formatisi in base a ciascuno dei tre regolamenti allorquando si tratti di instaurare il processo esecutivo in uno Stato membro diverso da quello di origine. Se delle differenze vi fossero, esse diverrebbero ulteriori elementi che il creditore dovrebbe tenere in considerazione allorquando si tratti di individuare il regolamento in base al quale formare il titolo esecutivo europeo.

I. Introduction

Under Brussels I Regulation (1) a condemnatory judgment given in a Member State requires the *exequatur* procedure for the judgment to be declared enforceable in another Member State (so called "Member State of enforcement"). On the contrary, EEO Regulation (2), EOP Regulation (3) and ESCP Regulation

(1) In the context of this article:
– "EEO Regulation" means Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21.4.2004 creating a European enforcement order for uncontested claims applied since October 21th, 2005 in all Member States except Denmark;
– "EOP Regulation" means Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12.12.2006 creating a European order for payment procedure applied since December 12th, 2008 in all Member States except Denmark;
-" ESCP Regulation" means Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11.7. 2007 establishing a European small claims procedure applied since January 1st, 2009 in all Member States except Denmark;
– "Brussels I Regulation" means Regulation (EC) No 44/2001 of the European Parliament and of the Council of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applied in all Member States including Denmark.

(2) For an overview on the EEO Regulation see e.g.: Bittmann, *Vom Exequatur zum qualifizierten Klauselerteilungsverfahren*, Baden Baden 2008, 3 ff.; Burgstaller/Neumayr, *Der Europäische Vollstreckungstitel für unbestrittene Forderungen*, *Österreichische Juristen Zeitung* (ÖJZ) 2006, 179 ff.; Campeis/De Pauli, *Prime riflessioni sul titolo esecutivo europeo per i crediti non contestati*, GC 2004, II, 529 ff.; Consolo, *Spiegazioni di diritto processuale civile*, II, Padua 2008, 123 ff.; Crifò, *First step towards the Harmonization of Civil Procedure. The Regulation creating an European Enforcement Order for uncontested claims*, *CJQ* 2005, 200 ff.; D'Avout, *La circulation automatique des titres exécutoires imposée par le règlement 805/2004 du 21 avril 2004*, *RCDIP* 2004, 1 ff.; De Cesari, *Decisioni giudiziarie certificabili quali titolo esecutivo europeo nell'ordinamento italiano*, *FI* 2006, V, 103 ff.; De Cristofaro, *La crisi del monopolio statale dell'imperium all'esordio del TEE*, *Int'Lis* 2004, 141 ff., now in Consolo/De Cristofaro, *Il diritto processuale civile internazionale visto da Int'l Lis dal 2002 ad oggi*, Milan 2006, 1109 ff.; Fernández-Tresguerres Garcia, *Tìtulo ejecutivo europeo*, in: Borrás/Fernández-Tresguerres Garcia/Garcimartìn Alférez/Nievas, *La cooperación en Materia Civil en la Unión Europea: Textos y Comentarios*, Cizur Menor 2009, 221 ff.; Fasching, *Kommentar zu den Zivilprozeßgesetzen*, 2 Auflage, Wien 2008, EVTVO Vor Art. 1, Rn 1 ff.; Freitag, *Anerkennung und Rechtskraft europäischer Titel nach EuVTVO, EuMahnVO und EuBagatellVO*, in: *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen 2008, 759 ff.; Fumagalli, *Il titolo esecutivo europeo per i crediti non contestati nel Reg. n. 805/2004*, *RDIPP* 2006, 23 ff.; Gascón Inchausti, *El titulo ejecutivo europeo para créditos no impugnados*, Cizur Menor 2005, 27 ff.; Gerling, *Die Gleichstellung ausländischer mit inländischen Vollstreckunstiteln durch die Verordnung zur Einführung eines Europäischen Vollstreckungstitels für unbestrittene Forderungen*, Frankfurt am Main 2006, 1 ff.; Heringer, *Der europäische Vollstreckungstitel für unbestrittene Forderungen*, *Baden Baden 2007, 1 ff.*; *Geimer, Internationales Zivilprozessrech*t, 6 Auflage, Köln 2009, Rn. 3174 ff.; Kropholler, *Europäisches Zivilprozessrecht*, *8 Auflage*, Heidelberg 2005, Einleitung zur EuVTVO, Rn. 1 ff.; Laenens, *Le titre exécutoire européen en Belgique*, *in: Festschrift für Konstantinos Kerameus*, Athens 2009, 689 ff.; Lupoi, *Di crediti non contestati e procedimenti di ingiunzione: le ultime tappe dell'armonizzazione processuale in Europa*, *RTDPC* 2008, 171 ff.; Mayr/Czernich, *Europäisches Zivilprozessrecht*, Wien 2006, Rn. 383 ff.; Mankowsky, *Europäischer Vollstreckungstitel und prozessualer Verbraucherschutz*, *in: Festschrift für Konstantinos Kerameus*, cit., 785 ff.; Péroz, *Le règlement Ce numéro 805/2004 du 21 avril 2004 portant creàtion d'un titre exècutoire européen pour les créancers incontestée*, *Clunet* 2005, 637 ff.; Péroz, *Titre exécutoire européen*, *Juris Classeur*, Fasc. 2810, 2009, 1 ff.; Rauscher/Pabst, in: Rauscher, *Europäisches Zivilprozeßrecht*, 2 Auflage, München 2006, Bd. II, EG-VollstrTitelVO, Art. 1 ff.; Schlosser, *EU-Zivilprozessrecht*, 3 Auflage, München 2009, VTVO, art. 1 ff.; Van Drooghenbroeck/Brijs, *Un titre exécutoire européen*, Bruxelles 2006, 37 ff.

(3) For an overview on the EOP Regulation see e.g.: Einhaus, *Die Qual der Wahl: Europäisches oder internationales deutsches Mahnver-*

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(4) provide for the suppression of the *exequatur* procedure, so as to create a European enforcement order that facilitates cross-border debt recovery. Consequently, if the creditor wants to enforce the judgments in one or more Member States he does not need to introduce one or more *exequatur* procedures. This is the principally common feature of the three Regulations. Another shared feature deriving from this simplified enforcement system is that the final judgment must be rendered in proceedings where the Court has jurisdiction, in accordance with the rules of Brussels I Regulation (5).

As regards other aspects, considerable differences exist between the EEO, EOP and ESCP Regulations. For instance, the rationale for the abolition of the *exequatur* procedure in the EEO Regulation is mutual trust and the respect of detailed minimum standards (the minimum standards established by the EEO Regulation) relating to service and the information requirements of the debtor (6), whereas in the EOP and ESCP Regulations the rationale is "procedural harmonization". In fact, the EOP and ESCP Regulations, for the first time, do not confine themselves to rules establishing minimum standards in the areas of service of process and information owed to the debtor, but introduce a uniform procedure disciplined by community law, the so-called "European procedure". As the procedure is the same in all Member States, the fact that proceedings take place in France or in Germany rather than in Italy, is irrelevant. Thanks to this uniformity, the final judgment can be automatically recognized and *enforced* (my emphasis) in all Member States.

Owing to the differences existing between the EEO/EOP/ESCP Regulations, Part I of this paper seeks to identify the criteria that can be used by the creditor in identifying the Regulation best-suited for him to obtain a European enforcement order for a condemnatory judgment.

Part II will focus on evaluating the characteristics of enforcement of the European order of payment in the Member State of execution, with the overall aim of highlighting the difference in comparison to the procedure of enforcement under the Brussels I Regulation. A description will not be provided, however, of the process leading to the formation of a European enforcement order under the three Regulations (7) and of the related enforcement proceedings.

II. Part I

1. Scope. Differences in excluded matters

All three Regulations are applicable in civil and commercial matters. The meaning of "civil and commercial matter" is that established by Article 1, Brussels I Regulation. Some excluded matters from the scope of each regulation, however, differ. Particularly, under Article 2(2) EEO Regulation the following civil and commercial matters are excluded: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration. This list of exclusions is identical to that stated by Article 1, Brussels I Regulation (8).

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fahren, IPRax 2008, 323 ff.; Fiorini, *Facilitating Cross-Border Debt Recovery. The European Payment Order and Small Claims Regulations, ICLQ* 2008, 449 ff.; Freitag, *Rechtsschutz des Schuldner gegen den Europäischen Zahlungsbefehl nach der EuMahnVO, IPRax* 2007, 509 ff.; Guinchard, *L'Europe, la procédure civile et le créancier: l'injonction de payer européenne et la procédure européenne des petits litiges, Revue trimestrielle de droit commercial* 2008, 465 ff.; Hess/Bittmann, *Die Verordnungen zur Einführung eines Europäischen Mahnverfahrens und eines Europäischen Verfahrens für geringfügige Forderungen, IPRax* 2008, 305 ff.; Geimer (above, note 2), Rn. 3198 ff.; Kormann, *Das neue europäische Mahnverfahren im Vergleich zu den Mahnverfahren in Deutschland und Österreich,* Jena 2007, 1 ff.; Lupoi (above, note 2), 171 ff.; Romano, *Il procedimento europeo di ingiunzione di pagamento*, Milan 2009, 1 ff.; Schlosser (above, note 2), MahnVO, Art. 1 ff.; Sujecki, *Das Europäische Mahnverfahren, NJW* 2007, 1622 ff.

(4) For an overview on the ESCP Regulation see e.g.: Bertoli, *Verso un diritto processuale civile comunitario uniforme: l'ingiunzione europea di pagamento e le controversie di modesta entità, RDIPP* 2008, 395 ff.; Bina, *Il procedimento europeo per le controversie di modesta entità (Reg. CE n. 861/2007), RDP* 2008, 1629 ff.; Brokamp, *Das Europäische Verfahren für geringfügige Forderungen,* Tübingen 2008, 1 ff.; Campeis/De Pauli, *Le regole europee ed internazionali del processo civile italiano,* Milan 2009, 500 ff.; D'Alessandro, *Il procedimento uniforme per le controversie di modesta entità,* Turin 2008, 3 ff.; Fiorini (above, note 3), 449 ff.; Freitag (above, note 2), 759 ff.; Guinchard (above, note 3), 465 ff.; Leandro, *Il procedimento europeo per le controversie di modesta entità, RDI* 2009, 65 ff.; Pozzi, *Il rito bagatellare europeo, RTDPC* 2008, 395 ff.; Schlosser (above, note 2), BagatellVO.

(5) See Article 6 EOP Regulation ('For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction'). In contrast, neither EEO Regulation nor ESCP Regulation expressly provide that the jurisdiction must be based on Brussels I Regulation. However, the need of this prerequisite shall be deduced by the literal interpretation of Article 6(b) EEO Regulation concerning the requirements for a certification as European Enforcement order ('1. A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if:..(b) the judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001') as well as by the text of Annex I (4) ESCP Regulation. It is also to be stressed that the EEO Regulation, like the EOP Regulation (but unlike the ESCP Regulation) has an exclusive jurisdiction rule for consumers. In fact, Article 6(1) d EEO Regulation and Article 6(2) EOP Regulation contain a rule broader in scope than Article 15 Brussels I. See on these provisions Kramer, *A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure,* in: Jongbloed (ed.), *The XIII World Congress of Procedural Law: The Belgium and Dutch Reports*, Antwerpen 2008, 267.

(6) See Articles 6, 13, 15, 17 of the EEO Regulation. For this reason, not only judgments, but also Court settlements and authentic instruments can be certified as European enforcement orders. This result does not occur under EOP and ESCP Regulations.

(7) The lead-up process to each Regulation is obviously different.

(8) This means, for example, that the exclusion of arbitration must be interpreted according to ECJ case law, especially: ECJ, judgment 2.10.2009, C-185/07, *Allianz Spa v West Tankers*, para-

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Under Article 2(2) EOP the following matters are excluded: (a) rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) claims arising from non-contractual obligations, unless: (i) they have been the subject of an agreement between the parties or there has been an admission of debt, or (ii) they relate to liquidated debts arising from joint ownership of property.

The EOP Regulation is also applicable to arbitration (9), but otherwise it cannot be generally applied to claims arising from non contractual obligations (10). Focusing on arbitration, EOP Regulation shall certainly be applied by the arbitrators in order to obtain the reimbursement of costs and the payment of remuneration. It shall also be used to enforce credits stated as existing in a special kind of Italian arbitration award called "irrituale" (11).

Finally, in accordance with Article 2 (2) ESCP Regulation, the following matters are excluded from the Scope of the Regulation: (a) the status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession; (c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (d) social security; (e) arbitration; (f) employment law; (g) tenancies of immovable property, with the exception of actions on monetary claims; or (h) violations of privacy and of rights relating to personality, including defamation (12). In the ESCP Regulation, matters under letters *f* to *h* constitute an amplification of the excluded matters. In this case, a *narrower meaning* of "civil and commercial matter" is used, in comparison to the Brussels I and the EEO Regulations, but, as we have seen, this narrower meaning does not coincide with that adopted by the EOP Regulation.

In light of these differences, therefore, the first criterion to be taken into account by a creditor in choosing the most appropriate Regulation will be the areas covered and excluded by each Regulation.

2. Only the EEO Regulation is Applicable to National Cases

As the EOP and the ESCP Regulations are intended to promote the compatibility of civil procedure rules applicable in the Member States, in accordance with Article 65 (c) EC Treaty, these Regulations can apply solely to cross-border and not national cases.

A cross-border case is one in which at least one of the parties, *i.e.* the claimant as well as the defendant, is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized.

Domicile shall be determined in accordance with Articles 59 and 60 of Brussels I. Neither the EOP Regulation nor the ESCP (nor the Brussels I) Regulations define the concept of habitual residence. It is interesting to see whether national law has a part to play in defining this concept, especially considering that Article 26 EOP Regulation and Article 19 ESCP Regulation both provide that, "subject to the provisions of Regulations", proceedings shall be governed by the procedural law of the Member State in which the procedure is conducted. If we consider that these rules must be applied in a uniform way, it could be argued that there is no role for national law in defining this meaning, because the use of *lex fori* challenges this uniformity.

In particular, it is reasonable to believe that the national courts will refer to the ECJ case law on the meaning of "habitual residence" adopted in other European rules, such as *e.g* the European arrest warrant rules, which provides that a person is resident in the Member State of enforcement either when he has established his actual place of residence there or when he is staying there and if, following a period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence (13).

The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction (ESCP Regulation) or the time when the application for a European order for payment is submitted (EOP Regulation). Since the EEO Regulation does not provide for a uniform procedure, there is no need that the claims for which the enforcement order is sought have cross border implications. For this reason, the EEO Regulation can also apply in national cases, when all the parties are domiciled or habitually resident in the Member State of the court or tribunal seized.

Because of these differences, the second criterion that can drive the creditor in choosing the Regulation to obtain a European Enforcement Order is the cross-border character of the controversy. In fact, only if the claim has cross border

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graph 22; ECJ, judgment 17.11.1998, C-391/95, *Van Uden*, paragraph 33; ECJ, judgment 25.7.1991, C-190/89, *Marc Rich*, paragraph 26. In other words, in order to establish whether the matter is excluded reference must be made solely to the subject-matter of the proceedings. More specifically, exclusion is determined by the nature of the rights which the proceedings in question serve to protect. For this reason, the EEO Regulation seems able to be used by the arbiters to enforce the judgment concerning reimbursement of costs and payment of remuneration. The same Regulation shall also be used to enforce credits stated as existing in a special kind of Italian arbitration award called "irrituale".

(9) *Wider meaning* of "civil and commercial matter" in comparison with the Brussels I and the EEO Regulations.

(10) *Narrower meaning* of "civil and commercial matter" in comparison with the Brussels I and the EEO Regulations.

(11) Romano (above, note 3), 32, but, as we have seen, doubts can be raised as to whether these kinds of orders, especially in the light of *West Tankers*, shall be considered arbitration-related matters (above, note 7). See on this inclusion generally Schlosser (above, note 2), Art. 3 MahnVO, Rn. 6; Rauscher (above, note 2), Einf EG MahnVO, Rn. 9.

(12) Pursuant to Article 2, ESPC Regulation shall also not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*). Kramer (above, note 3), 264, notes "this formulation is derived from Article 1 of the Brussels I Regulation and the case law of the European Court of Justice in relation to this provision".

(13) ECJ, Judgment 17.7.2008, C-66/08, *Szymon Kozlowski*.

implications, can the creditor decide to employ one of the three Regulations. If the claim has no cross border implications, only the EEO Regulation can apply, but, as established by article 3 of the EEO Regulation, it must be also an uncontested claim (see subsequent paragraph).

3. Different Purposes achieved

The EEO, EOP and ESCP Regulations achieve different purposes and consequently imply different (special) requirements for their respective applications. Such purposes shall be analysed below.

A) *Purpose of the EEO Regulation*: the purpose of the EEO Regulation is to create a European Enforcement Order for uncontested pecuniary claims in order to allow, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings to be brought in the Member State of enforcement prior to recognition and enforcement.

To reach this aim, the subsequent special requirements for application must be satisfied:

a) Pecuniary claim shall be regarded as uncontested in the sense of Article 3 EEO Regulation.

National case-law examples of uncontested pecuniary claims in the sense of Article 3 (b) EEO are: *i*) in Italy, an injunction for payment (*decreto ingiuntivo non opposto* (14)), uncontested by the debtor (15); *ii*) the order bearing a French injunction to pay (*injonction de payer* (16)), uncontested by the debtor (17). Attention must be paid to the fact that, in order to obtain an Italian or a French injunction for payment, the creditor has to support the claim with documents. On the contrary, in the EOP procedure the claimant does not need to apply with documents, but needs only to describe the available evidence (the claim, though, must have cross border implications).

b) Minimum procedural standards prescribed in Articles 16-18 EEO must be observed in order to ensure that the debtor was informed about the proceedings, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation, in sufficient time and in such a way as to enable him to arrange for his defense.

These minimum procedural standards may create difficulties in some Member States, for example in Italy, in relationship with judgments rendered before the Labour Court. In fact, under Italian labour litigation rules the claimant may lodge his claim by the Court and then the judge, with a subsequent decree, shall determine the day for the oral hearing (18) without giving the debtor all the information prescribed by Article 17 (b) EEO Regulation. For these reasons, if the creditor does not expressly require and obtain the insertion of such information in the decree, this kind of judgment should not be certified as a European enforcement order. In fact, in this case the cure of non compliance with minimum standard, provided for in Article 18 EEO Regulation cannot operate, because the judgment rendered by the Italian Labour Court does not contain any information (19) concerning the procedural requirements for contesting the judgment and the time limit for doing so;

c) Minimum standards for the service of documents which must be observed as required in Articles 13-14 EEO Regulations.

These requirements are finalized to ensure full certainty (Article 13) or a very high degree of likelihood (Article 14) that the document served has reached its addressee, so that the claim shall be regarded as voluntarily uncontested.

B) *Purpose of the EOP Regulation:* the purpose of the EOP Regulation is to simplify and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

Evidently, the EEO and the EOP Regulations are both created to obtain a European enforceable order for uncontested pecuniary claims (20), but only the EOP Regulation establishes in addition a uniform payment procedure throughout all Member States, which is certainly able to produce a European Enforcement order.

This means that the creditor can be sure that the debtor may not lodge a statement of opposition against the enforcement of the European order for payment in the Member State of enforcement affirming that the order does not really concern an uncontested pecuniary claim. For this reason, the debtor is not in a position even to ask for the withdrawal of the order in the Court of origin. Conversely, in the same circumstances under the EEO Regulation the debtor will ask for the withdrawal of the order. It must be stressed also that the EOP Regulation does not abrogate national procedural laws such as, for instance, the Italian *decreto ingiuntivo*, the French *injonction de payer* and the German *Mahnverfahren*, which will be certified as European enforcement orders under the EEO Regulation. In fact, the EOP procedure is not

(14) See Articles 633 ff. Italian Code of Civil Procedure. Article 641 CCP states that the debtor may lodge a statement of opposition (*opposizione*) against the injunction within 40 days of service of the order for payment. During this time, the judge can declare the injunction for payment provisionally enforceable (*provvisoria esecutività*) only when the enforcing State is Italy.

(15) Examples of such cases include: Tribunale Milano, 23.4.2008, *FI* 2009, I, 926, with comment by Caponi. The claim cannot be declared uncontested until the time for lodging a statement of opposition has elapsed. Shall the certification nonetheless be issued, therefore, the debtor can propose an application of withdrawal of the European Enforcement Order certificate. In the same sense OGH Austria, 22.2.2007, *IPRax* 2008, 440, with comment by Bittmann, 445, noting that if, from the beginning, the claim was contested, it is possible for the debtor to propose an application of withdrawal of the European Enforcement order.

(16) See Articles 1405 ff. French Code of Civil Procedure.

(17) Cour d'appel d'Aix en Provence 20.8.2008 (N 07-14921), downloadable under *www.legifrance.gouv.fr*

(18) See Article 415 Italian Code of Civil Procedure.

(19) Since the debtor is not informed in or together with the judgment in accordance with Article 18 (b) EEO Regulation.

(20) See Article 4 EOP Regulation.

mandatory, but only serves as an optional choice for the creditor.

Generally speaking, three differences exist between the European order of payment and the national (especially the Italian and the French) orders of payment. Firstly, to obtain a European order of payment there is no need to attach any document. The application shall simply provide a description of evidence (*i.e.*, the documents) supporting the claim. Vice versa, in order to obtain an Italian or a French order for payment, the creditor needs to support his claim with documents (21).

Secondly, in some Member States, for example in Germany, there is only one court with jurisdiction (for the whole State) to issue a European order for payment: the *Amtsgericht*, *i.e.* district court of Berlin-Wedding (22). On the contrary, in order to obtain a national *Mahnverfahren*, it is sufficient to apply to any of the district courts of the Federal Republic of Germany (23).

Thirdly, if a statement of opposition is entered by the debtor within the time limit laid down in Article 16(2) EOP (*i.e.* if the claim becomes contested), the EOP Regulation shall no longer apply and the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure, unless the claimant, in his application, has explicitly requested that the proceedings be terminated in that event. If the proceedings continue in accordance with the rules of the local civil procedure as a result of a contested claim, the final judgment is a national judgment which will be recognized and enforced in the other Member States by virtue of the Brussels I Regulation (24) and not by virtue of the EOP Regulation. Consequently, in the event of a condemnatory judgment/order, an *exequatur* procedure will be required.

C) *Purpose of the ESCP Regulation:* The European Small Claims Procedure is intended to simplify and speed up litigation concerning small claims in cross-border cases, whilst at the same time reducing costs. The Regulation also eliminates the intermediate proceedings necessary to allow recognition and enforcement, in other Member States, of judgments given in the uniform procedure. It should be pointed out that the ESCP Regulation does not concern uncontested pecuniary claim, areas covered by the EEO and the EOP Regulations. It concerns small claims, *i.e.* pecuniary and non pecuniary claims where the value of a claim does not exceed EUR 2000 (25) at the time when the claim form is received by the court with jurisdiction, excluding all interest, expenses and disbursements.

This means that in the case of non pecuniary claims, such as delivery of goods, etc., the creditor can apply solely for the European Small Claims Procedure (provided that the value of the claim does not exceed the ceiling of EUR 2.000). In doing so, he should also indicate the estimated value of the claim as well as any intention of applying for a secondary claim for compensation in the event it is not possible to satisfy the original one (26). Consequently, the cases of concurrences, and resulting possibility of choice, between the EEO/EOP and the ESCP Regulations are only those concerning pecuniary claims (27).

As in the case of the European Order of Payment, the European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States. Unlike the EOP Regulation, the ESCP Regulation cannot be generally transformed into a national proceeding. In fact, the ESCP Regulation does not concern exclusively uncontested claims. Consequently, there is no need to transform an ESCP into a national proceeding if and when the claim becomes contested.

Under the ESCP Regulation there are only two cases in which the uniform proceeding continues as a national proceeding:

1) When - pursuant to Article 5(5) ESCP - the Court finds that the value of a non-monetary claim exceeds the limit set out in Article 2 (1);

2) When the defendant submits a counterclaim which exceeds the limit set out in Article 2 (1): in this case, the claim and the counterclaim shall not be subject to the European Small Claims Procedure, but shall be dealt with in accordance with the relevant procedural law applicable in the Member State of the *forum*.

In our view, provision no. 2 is unfortunate: in fact, it is sufficient for the defendant to affirm that the value of the counterclaim exceeds EUR 2000 to obtain the transformation of the European Small Claim Procedure into a national proceeding (28). After the transformation, the proceeding becomes national and the final judgment shall be recognized and enforced in the other Member States by virtue of Brussels I rules and therefore by virtue of an *exequatur* proceeding. There can be no doubt that, in this way, the claimant loses the benefits of the ESC Procedure.

(21) In Italy, the claimant also needs legal assistance: representation by a lawyer is mandatory.

(22) See § 1087 German Code of Civil Procedure.

(23) *Rectius*, in Germany it is sufficient to apply to the *Amtsgericht* before which the claimant has his domicile. Only if the claimant is not subject to the German general jurisdiction, does the *Amtsgericht* Wedding Berlin have exclusive competence. See § 689 German Code of Civil Procedure.

(24) In so far as the subject matter of the judgment is not excluded from the scope of Brussels I Regulation.

(25) According to German scholars, when the value of the pecuniary claim exceeds EUR 2000 the claimant shall apply for a partial claim, as in German national civil procedure. See *e.g.* Schlosser (above, note 2), Art. 2 BagatellVO, Rn. 2; *Mayer/Lindemann/Haibach, Small Claims Verordnung*, München 2009, Rn. 515-522. Nevertheless there are Member States where the possibility of a partial claim is denied because it is considered as a case of abuse of process. See, in Italian case law, Corte di cassazione, Sezioni Unite, 15.11.2007, No. 23726, *RDC* 2008, I, 235, with comment by De Cristofaro.

(26) See Annex I (7).

(27) Probably, when the creditor applies to the ESCP Regulation for a non pecuniary claim, he could file an action for a declaratory judgment and not necessarily an action for a condemnatory judgment (arg. *ex* Annex I 7.2.1), notwithstanding the fact that the real benefit of opting for the ESC Procedure arises only in the event of an application for a condemnatory judgment to obtain a European Enforcement Order.

(28) The consequences are even more unwelcome for the claimant in Member States which have not introduced specifically simplified procedures for small claims, for instance in Italy.

The ESC Procedure is in principle conducted in writing and is not a summary procedure concerning uncontested claims. This means that the creditor must prove the existence of his claim, *i.e.* he has to support his application with documents or with the request of evidence.

Concluding, since the EEO, EOP and ESCP Regulations achieve different purposes, *a final, third criterion of selection can be an evaluation carried out by the creditor of his own specific situation, in order to ascertain whether it fits with the purposes of the different Regulations*. Having done so, he can choose which Regulation he should use in order to obtain a European Enforceable Order.

4. Conclusions of Part I

In this Part we have identified three criteria which the creditor should use in selecting the appropriate Regulation for a European Enforcement Order. Briefly, to make this selection the creditor has to compare his specific situation with the scope and the purpose of each Regulation, considering also that only the EEO Regulation shall be used in the case the claim has no transnational implications.

III. Part II

1. No considerable Differences in Recognition under the EEO and the ESCP Regulations

The three abovementioned Regulations enhance the enforceability in other Member States of an European order/judgment. Nevertheless, as regards the EEO Regulation, scholars cast doubts on whether the recognition of declarative effects (*effects of res judicata*) of the European enforcement order (29) in other Member States takes place in accordance either with Brussels I Regulation or with the EEO Regulation (30). Only under the former assumption, the grounds for non recognition laid down in Article 34 Brussels I Regulation would be applicable (31).

The same question does not arise in the case of the EOP and the ESCP Regulations. Because these Regulations concern a uniform proceeding, they address the recognition of declaratory effects, if any (32), as well as the enforcement of a European order (33), as stated by Article 19 of the EOP Regulation (34) and by Article 20 of the ESCP Regulation (35). In our view, this is the reason why, unlike the EEO Regulation, both EOP Regulation and ESCP Regulation do not specifically address the issue of the relationships between the two Regulations and Brussels I. If this were not the case *i.e.*, if the EOP and the ESCP Regulations had not concerned recognition, indications in both Regulations clarifying the topic would have been necessary. In fact, the Brussels I Regulation would have had to rule about the recognition of these categories of judgments/orders.

However, the EOP/ESCP Regulation and also the EEO Regulation - if we accept that the latter address enforcement as well as recognition - do not expressly define the objective, subjective and time limits of the authority of *res judicata* recognizable in all the Member States. Under Brussels I Regulation, it is generally accepted that the objective, subjective and time limits of the *res judicata* effects enjoyed by a judgment in another Member State are determined by the law of the State of origin (principle of the extension of the judgment's effects) (36). It has to be ascertained whether this principle can also apply to the EOP and ESCP Regulations (37).

It is quite evident that there is only one reason by virtue of which the above-mentioned principle should be held as not applicable: the fact that a uniform proceeding must lead to an order or a judgment having the same effects in all Member States. The achievement of such a result would be not assured by applying the national laws of the State of origin, which do not necessarily coincide.

It could be argued that this idea can be accepted if the proceedings governed by the EOP and ESCP Regulations were entirely uniform, *i. e.* where European law should govern the entire procedure. Nevertheless, this entire

(29) If the order has such effect according to the law of the State of origin.

(30) Some commentators believe that the EEO Regulation, despite Article 5, addresses only the enforcement of European orders for uncontested claims on the grounds that Article 11 EEO Regulation states that the European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment. For this reason, the recognition of judgments certified as EEO would still depend upon Brussels I (Articles 11 and 27 EEO Regulation). In this sense see, e.g. Kropholler (above, note 2), Art. 5 EuVTVO, Rn. 3; Heringer (above, note 2) 118 ff.; D'Alessandro, *Exequatur secondo la Conv. Bruxelles ed applicazione delle forme dell'art. 67 l. 218/1995*, *Int'l Lis* 2008, 1, 21 ff. Vice versa, other commentators believe that the EEO Regulation concerns enforcement as well as recognition, invoking a literal interpretation of Article 5 EEO Regulation, which rules that a judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognized and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. See e.g. Lupoi (above, note 2), 188; D'Avout (above, note 2), 13 ff.; Gascón Inchausti (above, note 2), 37-38; Péroz, *Titre exécutoire* (above, note 2), IV. 2. The practical differences between the two positions are not so striking: in fact, it is unlikely that a decision certified as an EEO (in the light of its satisfying the requirements established in Articles 6 ff. EEO Regulation) shall be affected by one or more grounds for denial of recognition under Article 34 Brussels I Regulation.

(31) But see § 2.

(32) The problem concerns, in particular, the EOP Regulation. In fact, it is not clear whether the order has also *res judicata* effects. On this problem see among others Romano (above, note 3), 162 ff.; Schlosser (above, note 2), Art. 18 MahnVO, Rn. 3.

(33) And further the recognition of the judgment not upholding the claim under the ESCP Regulation.

(34) "A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition".

(35) "A judgment given in a Member State in the European Small Claims Procedure shall be recognized and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition".

(36) See e.g. Kropholler (above, note 2), vor Art. 33, Rn. 9.

(37) Under the EOP Regulation, for the positive, see Schlosser (above, note 2), Art. 26, Rn. 1. Under the ESCP Regulation for the positive see e.g. D'Alessandro (above, note 4), 97 ff.

uniformity may exist under the EOP Regulation (38) only if no opposition is proposed. It is, however, certainly inexistent under the ESCP Regulation where the claim form is governed by the ESCP Regulation but, for instance and pursuant to Article 19, the availability of third-party intervention, the availability of appeal as well as the appeal procedure (39) will take place in accordance with the *lex fori* .

Since there is no entire uniformity among all the Member States in proceedings under the ESCP Regulation, in our view the above-mentioned issue cannot be invoked in order not to apply the principle valid under Brussels I, by virtue of which *objective, subjective and time limits* of the *res judicata* effects enjoyed by the judgment are determined by the law of the State of origin (40).

So, under the point of view of *res judicata* effects there are no differences between the EOP and the ESCP Regulations. Differences should be recognized only in comparison with the EOP Regulation if we share the argument that a uniform proceeding must lead to an order having the same effects in all Member States (this means: same *objective, subjective and time limits* of *res judicata* effects).

2. Differences in Enforceability

Under the EEO Regulation, a judgment that has been certified as a European enforcement order by the court of origin, for enforcement purposes, is treated as if it had been delivered in the Member State in which enforcement is sought. In others words, under the EEO Regulation and unlike the Brussels I Regulation:

1) he intermediate procedure of *exequatur* for enforcement is abolished;

2) since an *exequatur* procedure is not required, enforceability is conferred to the (European) order by the Member State of origin rather than by the Member State of enforcement.

The *lex fori* of the Member State of origin determines whether and when enforceability is to be conferred to the order/judgment. For instance, if under *lex fori* the condemnatory judgment is enforceable only when it becomes final, the certification as a European enforcement order can be obtained only for a final judgment.

In contrast, the EOP and the ESCP Regulations:

I) both abolish the intermediate procedure of *exequatur*;

II) both directly confer enforceability to the order/judgment rendered in the European Proceeding (41). In other words, it is the two Regulations and not the national law of the Member States that decide if and when enforceability can be granted.

For example, a condemnatory judgment given under the ESC Procedure shall be enforceable notwithstanding the possibility of an appeal, even though *lex fori* of the Member State of origin states that the condemnatory judgment is enforceable only when final, *i.e.* when any appeal would be time-barred.

We will now focus the subjective limits of such enforceability, as it is not clear whether the rule governing these limits shall be:

a) either the law of the State of origin (considering that the enforceability of the European Enforcement Order, under EEO Regulation, is conferred by the State of origin); or

b) the law of the State of enforcement; or

c) directly, the Regulations (considering that under the EOP and ESCP Regulations enforceability is conferred by European law).

The prevailing opinion prefers the second choice (42) on the grounds that Article 20 (2) EEO Regulation, as well as Article 21 (1) ESCP Regulation and Article 21(1) EOP Regulation expressly affirm that any judgment certified as EEO or any order/judgment given in an EOP/ESC procedure shall be enforced under the same conditions as a judgment given in the Member State of enforcement. In the case of enforcement in Italy, this means that the European enforcement order (obtained either under the EEO/EOP or ESCP Regulation) can be used as an enforcement order in the same way as a national enforcement order by the creditor and his lawful successors and against the debtor and his lawful successors (Articles 475.2 and 477 code of civil procedure).

3 No differences in enforcement procedure

In accordance with Article 20(1) EEO Regulation and Article 21(1) EOP/ESCP Regulation the enforcement procedures shall be governed by the law of the Member State of enforcement. From this point of view, there are no differences between the three Regulations.

For this reason, some Member States, such as France, Germany, Great Britain, Spain and Bulgaria have adopted national rules to solve some problems concerning the relationships between the national law of enforcement and the Regulations. Furthermore, it must be stressed that, for instance, in France, Germany and also in Italy a national condemnatory order/judgment shall be enforced only upon the production of a certified copy of it along

(38) For this reason Romano (above, note 3), 162 believes that the *objective limits* of the *res judicata* effect enjoyed by an EOP enforcement order are to be determined in a European way, in the sense of intangibility of the substantive advantage for the winning party. On this point, it should be noted that: 1) the uniformity of subject matter of the dispute (determined in accordance with Article 7 EOP Regulation) does not necessarily imply the equality of *res judicata* authority. In fact, it is also important to ascertain whether the authority of *res judicata* is limited to the judgement itself or whether it extends to the grounds on which the judgment was based; 2) nevertheless, it is not clear which rule governs the subjective limits of the *res judicata* of such an order.

(39) See also Article 26 EOP Regulation concerning the relationship with national procedural law: "All procedural issues not specifically dealt with in this Regulation shall be governed by national law".

(40) *Contra* Freitag (above, note 2), 773 ff. noting that the concept of objective limits of the ESCP judgment is to be determined in a European way because of the uniformity of the dispute subject matter. This argument can be criticised: see above, note 39.

(41) See Article 18 EOP Regulation as well as Article 15 ESCP Regulation.

(42) Subjective limits of the enforceability of European orders/judgments are to be drawn according with the law of the State of enforcement: see e.g., Schlosser (above, note 2), Art. 20 VTVO, Rn. 1 ff.; D'Alessandro (above, note 4), 91-92.

with a writ of execution (43). The need for a writ of execution seeks to ensure that: *a*) the enforceable copy is a copy of an *authentic* (my emphasis) enforcement order; *b*) only one copy of the judgment or order shall be issued and enforced. Consequently, the need for a writ of execution appears unnecessary in view of the enforcement procedure for a European enforceable order. In fact, the ascertainment necessary in order to obtain the writ of execution under the rules of the mentioned Member State, shall enforcement take place there, is already accomplished in the Member State of origin where:

a) the European enforcement order certificate under the EEO Regulation; or

b) the standard form G under theEOP Regulation; or

c) the certificate concerning a judgment (standard Form D) under the European Small Claims Procedure,

are issued.

Due to the identical nature of the two types of controls and on the basis of the scope of each Regulation, the first in time control, i.e. the control in the Member State of origin, will be enough. Not surprisingly, therefore, Articles 1082, 1083, 1102 of the German civil procedure code expressly provide that the enforcement procedure shall be carried out on the basis of a European enforcement order, a European order for payment or a condemnatory judgment pursuant to the European Small Claims Procedure, without the need of a writ of execution. The French and the Italian civil procedure rules make no provisions for this case, but prevailing opinion of commentators and case law considers the writ of certiorari as superfluous (44).

For enforcement in another Member State, the claimant shall produce:

1) Under the EEO Regulation:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) a copy of the European enforcement order certificate which satisfies the conditions necessary to establish its authenticity; and

(c) where necessary, a transcription of the European Enforcement Order certificate or a translation thereof into the official language of the Member State of enforcement;

2) Under the EOP Regulation:

(a) a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity; and

(b) where necessary, a translation of the European orders for payment into the official language of the Member State of enforcement;

3) Under the ESCP Regulation:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) a copy of the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement.

All three Regulations provide that no security, bond or deposit, however described, shall be required to the party who in one Member State applies for enforcement of a judgment certified as a European Enforcement Order as well as for enforcement of a European Order of payment or condemnatory judgment under the ESC Procedure, on the grounds that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

When the above-mentioned requirements are fulfilled, enforcement proceedings take place according to the law of the Member State of enforcement without any substantial differences between the EEO, EOP and ESCP Regulations. One difference between the three Regulations does still however exist: the ESC Procedure provides that the party seeking enforcement in another Member State of a judgment given under the European Small Claims Procedure shall not be required to have an authorized representative or a postal address in the Member State of enforcement, other than with agents having competence for the enforcement procedure. In other words, this rule is valid only for the enforcement procedure by a condemnatory judgment rendered under an ESC Procedure. For instance, when the State of enforcement is Italy, the creditor, in accordance with Article 480 Italian Code of Civil Procedure, should not be domiciled in the Member State of execution, but, in this case, documents destined to the creditor shall be served in the office of the clerk of the Court.

4 Possible Differences in Grounds for Refusal of Enforcement

The procedure for refusal of enforcement is governed by the national law of the Member State of enforcement (45), but the Regulations establish the grounds for such a refusal. Article 21 EEO Regulation and Article 22 EOP/ESCP Regulation establish that enforcement shall be refused by the court with jurisdiction in the Member State of enforcement if the judgment/order given in the uniform proceeding is irreconcilable (46) with an earlier judgment given either in any Member State or in a third country, provided that:

(a) the earlier decision/order involved the same cause of action and was between the same parties;

(b) the earlier decision/order was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have

(43) See: 1) Article 502 French Code of Civil Procedure; 2) Article 475 Italian Code of Civil Procedure; 3) Articles 724-725 German Code of Civil Procedure.

(44) Tribunale Milano, 30.11.2007, *FI* 2009, I, 926, with comment by Caponi, 926. Among the Italian scholars, see *e.g.*: De Cesari, *Diritto internazionale privato e comunitario*, 2 edizione, Milano 2005, 116; Campeis/De Pauli (above, note 2), 540; De Cristofaro (above, note 2) 145-146; Fumagalli (above, note 2), 41 note 39; Lupoi (above, note 3), 203; Romano (above, note 3), 197 note 197. Among French scholars see *e.g.* Péroz (above, note 3), 20, according to whom the need for a writ of execution would constitute precisely an intermediate proceeding necessary to enable enforcement, which the above-mentioned Regulations sought to eliminate.

(45) **More information is available at http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_ec_en. htm**

(46) The term "irreconcilability" seems to be interpreted according to the meaning of Article 34 (3) and (4) Brussels I, even though the wording of Article 21 EEO, Articles 22 EOP, ESCP Regulation and Article 34 (3) and (4) Brussels I Regulation does not strictly coincide. This point was made by Schlosser (above, note 2), Art. 22 BagatellVO, Rn. 1.

been raised as an objection in the court proceedings in the Member State of origin.

Under no circumstances may an order/judgment given in the EE/EOP/ESC Procedure be reviewed as to its substance in the Member State of enforcement (*révision au fond*). The grounds which may prompt the refusal of enforcement are generally the same in the three Regulations. Only the EOP Regulation provides for an additional provision under which, upon application, enforcement shall also be refused if and to the extent that the defendant has paid the amount awarded in the European order for payment and so has fulfilled his obligations.

Two questions arise from the wording of Article 21 EEO Regulation and Article 22 EOP, ESCP Regulation. The *first question* is related to the nature of the grounds for refusal and whether they are exclusive/mandatory or not. If the answer were positive, the result would be the existence of a further motive for refusal only under the EOP Regulation. It should be emphasized, however, that the grounds foreseen under Article 22 (2) EOP Regulation are related to a fact (the payment) occuring *after* the rendition of the order, regardless of whether this fact took place in the Member State of origin or in the Member State of enforcement, or in any case they are related to an event the duration of which nevertheless exceeds the *res judicata* preclusion attached to the order under the national civil procedure rules of the Member States.

In contrast, grounds under Article 21 EEO Regulation and Article 22(1) EOP/ESCP Regulation are related to facts which occurred *before* the rendition of the order/judgment *only* in the Member State of enforcement or to an event the duration of which nevertheless does not exceed the time limits of the order/judgment under the national civil procedure rules of the Member States.

For this reason, it is reasonable to hold that only these latter grounds of refusal are exclusive/mandatory, because they cast an exceptional rule in comparison with national procedural law. Consequently, the debtor cannot invoke, as grounds for refusal of enforcement, a complaint that could be invoked in the Member State of origin before the judgment/order was emitted and it was there not invoked.

For instance, it is impossible to claim:

a) the original non-existence of the credit; or

b) the wrongful granting of the European Enforcement Order certificate

to obtain the refusal of enforcement of the European order of payment in the Member State of enforcement (47). Briefly, it could be said that in so far as the debtor could invoke the objection in the State of origin, there will be no possibility to invoke it subsequently in the Member State of enforcement.

In this context, Article 22 (2) EOP Regulation represents nothing more than a specific application of the general rule of time limits of *res judicata* effects traditionally attached to orders/judgments according to the national rules of civil procedure of most Member States. As is well known, to apply the general rule there is no need for a specific legislative provision. Therefore, limitations arising out of the general rules of time limits of judgment can constitute grounds for the refusal of enforcement, upon facts (not necessarily payment) which occurred after the order/judgment, even without a specific provision of the Regulation. This means that there is no real difference between the grounds for refusal of enforcement in the three Regulations.

The *second question* relates to the grounds stated in Articles 21 EEO Regulation and 22 EOP/ESCP Regulation, i.e. whether these are grounds solely for denial of enforcement or also grounds for denial of recognition (48). This problem certainly involves the EOP/ESCP Regulations because both address not only the enforcement but also the recognition of the European order of injunction/judgment. Instead, the question refers to the EEO Regulation only if one accepts the position that the Regulation governs the recognition as well as the enforcement of the European Order.

If one accepts the opposing view that the EEO Regulation governs only the enforcement of the European Order, with recognition being governed by Brussels I Regulation, it is obvious that Article 21 EEO could refer solely to the refusal of enforcement. In such a case, however, a problem arises from the concurrence of Brussels I and EEO Regulation, which actually is a general one since the concurrence is expressly provided for by Article 27 EEO Regulation even as far as the enforcement is concerned. In fact the Regulations (Brussels I and EEO) do not share the "First in Time" rule, since Brussels I Regulation gives always priority to the national judgment irrespective of the fact that it has been released earlier than the foreign one. So, in the event of irreconcilable decisions the coexistence of two judgments/decisions in the same Member State is prevented by giving priority either to the judgment rendered in the Member State of recognition/execution, or the the earlier judgment recognised in the Member State of recognition/execution and, at the same time in the latter case, by refusing the recognition and the enforcement of the second judgment in time.

On the other hand, it has to be established whether recognition of the declaratory effects of the judgment (49) or order rendered under EOP and ESCP is automatic and prevents the possibility to oppose grounds for non recognition or whether the grounds for refusal of enforcement are also grounds for non recognition (50). The question is controversial and its drawbacks are clear: Only if the grounds for refusal or enforcement are also considered grounds for non recognition would the "First in Time" rule determine which of the two contrasting orders/judgments should prevail. Instead, should the grounds for refusal of enforcement be considered solely for this specific purpose

(47) See e.g. Campeis/DePauli (above, note 2) 533 ff.; De Cristofaro (above, note 2) 145; Fumagalli (above, note 2), 31 ff.; Lupoi (above, note 3), 188 ff.; Rauscher/Pabst (above, note 2), Einl. EuVTVO, Rn. 46-48 and, in case law, Tribunale La Spezia, 7.2.2008, *FI* 2009, I, 926, with comment by *Caponi*, 926. In the case *sub b*) the debtor should have applied for a withdrawal of the Certificate in the Member State of origin pursuant to Article 10 EEO Regulation.

(48) On this point see Freitag (above, note 1), 768 ff.

(49) And it would be not only a condemnatory judgment but also a declaratory judgment which rejects the claim.

(50) In spite of the fact that the judgment rendered under the ESCP Regulation can be a declaratory judgment which therefore cannot be used as a European Enforcement order.

(*i.e.*, if recognition under the EOP/ESCP Regulation should not allow any ground for refusal) the *res judicata* "second in time" would prevail - almost in Italy and in the other member States who adopt the "Second in time Rule". Nevertheless, such a result is unsatisfactory, especially if the judgment rendered under the ESCP Regulation or the order rendered under EOP Regulation have both, declaratory and executive, effects. Indeed, in the present case, recognition and enforcement would be governed differently in the member States who share this "Second in time Rule": the "Second in time Rule" referring to recognition, whilst the "First in Time Rule" would refer to enforcement, and the same order/judgment could be on the one hand enforced but would on the other hand do not have any *res judicata* effect.

As a result, the declaratory effects of the second judgment or order conflicting with the previous order or judgment rendered or first recognized in the State of execution would be recognized, while the same judgment or order could be opposed as an European enforceable order due to the provisions of Article 22 EOP/ESCP Regulation. Conversely, the first judgment or order could be enforced as an European enforceable order, but not as a *res judicata* so as to avoid the credit, *i.e.* the subject matter of the enforced, being contested.

Thus, if one assumes that EOP/ESCP Regulations are different from the Brussels I Regulation (51), in the above mentioned member States enforcement under the EOP/ESCP Regulations would be more difficult than recognition, but such a result seems to contradict the aims of the two Regulations, namely the simplification of the enforcement procedure in comparison to Brussels I Regulation. In our view, then, one should favour the opposite solution according to which the scope of Article 22 EOP/ESCP Regulation embraces not only enforcement but also recognition (*broad interpretation*). In this way the "First in Time Rule" become the uniform Rule in all the member States, but for in the realm of the enforcement/recognition proceedings of Brussels I Regulation, which would nonetheless give priority to the national judgment. Lastly, it is interesting to note that the abovementioned question was an issue of interpretation of the nineteenth-century German and Italian codes of civil procedure: Article 661 German code of civil procedure and Article 941 Italian code of civil procedure governed solely the grounds for non enforcement of foreign judgments. Notwithstanding this, commentators agreed upon the fact that the two Articles shall have a broad interpretation, in the sense that those grounds must be held as grounds for non recognition (52). Subsequently, the same grounds become *expressis verbis* also grounds for denying recognition in the new features of the German and Italian Codes of civil procedure (53).

5. Differences in Stay or Limitation of Enforcement Procedure

Article 23 EEO/EOP/ESCP Regulation states, that where a party has challenged a judgment given in the ESC Procedure or a judgment certified as a European enforcement order or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18 ESC Procedure as well as an application for review in accordance with Article 20 EO Procedure, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement (54) may, upon application by the party against whom enforcement is sought,

(a) limit the enforcement proceedings to protective measures; or

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.

Article 23 EEO Regulation provides an additional Rule under which limitation and stay can also be obtained if the debtor has applied for the rectification or withdrawal of a European enforcement order certificate in accordance with Article 10 EEO Regulation.

The wording of Article 23 EEO/EOP/ESCP Regulation gives rise to different interpretative problems.

1. Firstly, it is unclear whether this Article concurs with the rules concerning stay or limitation of enforcement proceedings provided for by the law of the State of enforcement of the judgment or order, as far as, for instance, these rules allow the possibility, for the judge entrusted of the control over the enforcement proceedure, to stay (not the enforcement proceeding, but) the enforceability of the judgment/order. In light of Article 23 EEO Regulation, the solution seems to be a positive one because, as we have seen, the issue of enforceability is not directly governed by the Regulations but by national law. This can probably mean that the national civil procedure can play a role in regulating stay and limitation of the enforcement procedure. Particularly, as the national law of the Member State of origin governs the grant of enforceability, the national law of the Member State of enforcement governs the possibility to stay enforceability or the enforcement proceeding.

Within this context, Article 23 EEO Regulation would govern only the limitation/stay of the enforcement proceeding resulting from the challenge or review proposed in the Member State of origin, whereas the lex fori would govern the limitation/stay arising from complaints applied in the Member State of enforcement.

For instance, according to Italian law (55) the stay of enforceability as well as the stay of enforcement procedure can be granted to the debtor in the case of a motion for refusal of enforcement on the grounds that the defendant has paid the claimant the amount awarded in the

(51) Where the grounds for non recognition are also grounds for refusal of enforcement.

(52) See e.g. Roth, in: Stein/Jonas/Roth, *Kommentar zur Zivilprozessordnung*, Band 5, 22. Auflage, Tübingen 2006, Rn. 4-6 and, in Italy, Chiovenda, *Principii di diritto processuale civile*, Reprint, Naples 1980, 935.

(53) See Article 328 German Code of Civil Procedure and Article 796 Italian Code of Civil Procedure repealed by Law 31.5.1995 No. 218 and replaced by the Article 64 Law 31.5.1995 No. 218.

(54) For further details see the Information communicated by Member States in accordance with Article 21 EEO Regulation and Article 29 EOP Regulation and Article 25 ESCP Regulation available at **http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_forms_es_en. htm?countrySession=3&**

(55) See Article 624 Italian Code of civil Procedure.

order/judgment (56). On the contrary, as we have seen, under the EOP and ESCP Regulations enforceability is directly conferred by the Regulation (57). Consequently, it is not clear whether such a circumstance implies that only the Regulation can also indicate the criterion of stay/limitation to the European enforceability. Currently, as there is no legal certainty about the issue, we have to await the case-law of the European Court of Justice.

II. The *second question* concerns, again, all three Regulations. The last paragraph of Article 23 EEO/EOP/ESCP Regulation provides only that the option *sub c)* is a residual choice. The criteria that should direct the court in the choice between remedies *sub a*) and *sub b*) are not provided. Consequently, such an evaluation is left at the discretion of the judge.

A further problem is the meaning of the sentence under *a)*: "Limit the enforcement proceedings to protective measures". A number of authors have expressed the view that such terms should be interpreted in the light of *lex fori* (58), invoking as a support the wording of Articles 26 EOP Regulation as well as the wording of Article 19 ESCP Regulation. However, in this way, some doubts can be raised for cases in which the national procedural law does not provide for any kind of limitation of the enforcement proceeding to protective measures, such as in Italy.

For this reason, as far as the enforcement is to take place in Italy, some commentators (59) have explained that the above-mentioned rule confers on the judge of the Member State of enforcement the power to stay the enforcement proceeding after attachment (*pignoramento*). Against this interpretation, though, it may be argued that in this way the provision under letter *a*) duplicates the provision under letter *c*) as in both cases there would be a stay of the enforcement proceeding soon after attachment. The question is still debated and it is probably too early to find a unanimous solution. Again, we wait with interest for the judgments of the European Court of Justice on this topic.

III. Conclusions

In Part I we have seen that the creditor should apply three criteria in choosing the appropriate Regulation to obtain a European enforcement order, because the excluded matters and the scope of each Regulation do not correspond. The analysis carried out in Part II also demonstrated that the effects of the three types of European enforcement orders do not coincide. In fact, only the effects of the EOP order and the ESCP Judgment as an enforcement title correspond.

Instead, there are differences between the EEO/EOP orders and the ESCP condemnatory judgment in so far as the possibility to refuse enforcement by invoking the rules of national procedural law governing the stay of enforceability is concerned. Such an opportunity certainly exists only under the EEO Regulation.

(56) This would an additional provision in respect of Article 23 EEO Regulation.

(57) The so called European enforceability.

(58) See e.g.: Kropholler (above, note 2), Art. 23 EuVTVO, Rn. 8; Rauscher/Pabst (above, note 3), Art. 23 EuVTVO, Rn. 7.

(59) Romano (above, note 2), 189 note 116.

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Sabino Cassese, I Tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale, Donzelli ed., Roma, 2009, pp. 105.

Con questo snello e cattivante libricino, l'Autore - autorevole amministrativista e giudice costituzionale - offre un punto di vista sinottico sul tema di fondo di cui questa nostra rivista *Int'l Lis* da otto anni scandaglia, invece, i dettagli: il *judicial dialogue* internazionale, l'emergere di un ordine costituito dai giudici - al di sopra degli Stati -, ossia dalla "*least dangerous branch*" quale riflesso reattivo e così, ad un tempo, quale argine embrionale alla imperiosa supremazia - al di sopra, essa pure, degli Stati - del potere economico autoregolantesi: potere costituito dalla produzione per il consumo convulsivo e bulimico di beni (e dallo stimolo pubblicitario globalizzato) ad opera di multinazionali che si intendono fra loro e vorrebbero comporre i conflitti, se possibile, soprattutto con gli arbitrati e, prima ancora, con il lobbismo. Onde tutelare meglio, e nonostante l'enfasi pubblicitaria con ben poca *openness*, il moltiplicarsi ovunque dei beni spazzatura.

Non è solo quello dei diritti umani fondamentali il campo di elezione di questa riflessione, che analizza casi ricadenti in otto diversi ambiti: la produzione di energia, la tutela dell'ambiente, lo sport, i diritti umani appunto, agricoltura ed alimentazione, ordine pubblico e giustizia, libertà di espressione del pensiero (e rete cibernetica), disastri e protezione civile (e così diritto all'abitazione serena). Questi "campi" si incrociano con almeno sette ordini giuridici globali, in cui la suggestiva (a tratti quasi visionaria, ma certo non inopportunamente!) rassegna dell'A. delinea il ruolo delle Corti, sviluppando intuizioni multidisciplinari: una, per molte, è quella - già, vorremmo ricordarlo, del *report* ferrarese di Mauro Cappelletti - certo anche di Habermas, che spiega l'ambizione (e l'idoneità) delle Corti a svolgere ruoli sempre più vasti con il fatto che esse parlano ed ascoltano come eguali, interagiscono fra loro con l'antico metodo discorsivo-dialettico, secondo la concezione proceduralista e con il contraddittorio, dando luogo - nei casi più felici, occorre forse soggiungere - a decisioni *soft*, *evolutive*, partecipate e collettive, palesi ma "leggere". Tutto all'opposto delle decisioni dei poteri economici "conformanti".

(Claudio Consolo)

EUROPEAN
COMMISSION

Strasbourg, XXX
C(2013) 3539/3

COMMISSION RECOMMENDATION

of XXX

on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

COMMISSION RECOMMENDATION

of XXX

on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, *inter alia by* facilitating access to justice, as well as the objective of ensuring a high level of consumer protection.

(2) The modern economy sometimes creates situations in which a large number of persons can be harmed by the same illegal practices relating to the violation of rights granted under Union law by one or more traders or other persons ('mass harm situation'). They may therefore have cause to seek the cessation of such practices or to claim damages.

(3) The Commission adopted a Green Paper on antitrust damages actions in 2005[1] and a White Paper in 2008, which included policy suggestions on antitrust-specific collective redress.[2] In 2008 the Commission published a Green Paper on consumer collective redress.[3] In 2011 the Commission carried out a public consultation 'Towards a more coherent European approach to collective redress.'[4]

(4) On 2 February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress.', in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights. The Parliament also stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States.[5]

(5) On [ADD DATE 2013] the Commission issued a Communication 'Towards a European Horizontal Framework for Collective Redress, [ADD reference] which took stock of the actions to date and the opinions of stakeholders and of the European Parliament, and presented the Commission's position on some central issues regarding collective redress.

(6) It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights supplements public enforcement. Where this

1 COM(2005)672, 19.12.2005.
2 COM(2008)165, 2.4.2008.
3 COM(2008)794, 27.11.2008.
4 COM(2010)135 final, 31.03.2010.
5 2011/2089(INI))

Recommendation refers to the violation of rights granted under Union Law, it covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons.

(7) Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in this Recommendation should be applied horizontally and equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.

(8) Individual actions, such as the small claims procedure for consumer cases, are the usual tools to address disputes to prevent harm and also to claim for compensation.

(9) In addition to individual redress, different types of collective redress mechanisms have been introduced by all Member States. These measures are intended to prevent and stop unlawful practices as well as to ensure that compensation can be obtained for the detriment caused in mass harm situations. The possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.

(10) The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.

(11) In the area of injunctive relief, the European Parliament and the Council have already adopted Directive 2009/22/EC on injunctions for the protection of consumers' interests.[6] The injunction procedure introduced by the Directive does not, however, enable those who claim to have suffered detriment as a result of an illicit practice to obtain compensation.

(12) Procedures to bring collective claims for compensatory relief have been introduced in some Member States, and to differing extents. However, the existing procedures for bringing claims for collective redress vary widely between the Member States.

(13) This Recommendation puts forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States. These principles should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards.

(14) This Recommendation addresses both compensatory and – as far as appropriate and pertinent to the particular principles – injunctive collective redress. It is without prejudice to the existing sectorial mechanisms of injunctive relief provided for by Union law.

(15) Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such

[6] OJ L 110, 1.05.2009.

as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.

(16) Alternative dispute resolution procedures can be an efficient way of obtaining redress in mass harm situations. They should always be available alongside, or as a voluntary element of, judicial collective redress.

(17) Legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified.

(18) In the case of a representative action, the legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner.

(19) The availability of funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest.

(20) In order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met.

(21) A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.

(22) In fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, it is important to ensure consistency between the final decision concerning that violation and the outcome of the collective redress action. Moreover, in the case of collective actions following a decision by a public authority (follow-on actions), the public interest and the need to avoid abuse can be presumed to have been taken into account already by the public authority as regards the finding of a violation of Union law.

(23) With regard to environmental law, this Recommendation takes account of the provisions of Articles 9(3), (4) and (5) of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') which, respectively, encourage wide access to justice in environmental matters, set out criteria that procedures should respect, including criteria that they be timely and not prohibitively expensive, and address information to the public and the consideration of assistance mechanisms.

(24) The Member States should take the necessary measures to implement the principles set out in this Recommendation at the latest two years after its publication.

(25) The Member States should report to the Commission on the implementation of this Recommendation. Based on this reporting, the Commission should monitor and assess the measures taken by Member States.

(26) Within four years after publication of this Recommendation, the Commission should assess if any further action, including legislative measures, is needed, in order to

ensure that the objectives of this Recommendation are fully met. The Commission should in particular assess the implementation of this Recommendation and its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust.

HAS ADOPTED THIS RECOMMENDATION:

I. Purpose and subject matter

1. The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.

2. All Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation. These principles should be common across the Union, while respecting the different legal traditions of the Member States. Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.

II. Definitions and scope

3. For the purposes of this Recommendation:

   (a) ‘collective redress’ means (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress);

   (b) ‘mass harm situation’ means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons;

   (c) ‘action for damages’ means an action by which a claim for damages is brought before a national court;

   (d) ‘representative action’ means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings;

   (e) ‘collective follow-on action’ means a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law;

   This Recommendation identifies common principles which should apply in all instances of collective redress, and also those specific either to injunctive, or to compensatory collective redress.

III. ***Principles common to injunctive and compensatory collective redress***

Standing to bring a representative action

4. The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:

   (a) the entity should have a non-profit making character;

   (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

   (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

5. The Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met.

6. The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 6 or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.

7. In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.

Admissibility

8. The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.

9. To this end, the courts should carry out the necessary examination of their own motion.

Information on a collective redress action

10. The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, ad hoc certified entity, a public authority or for the group of claimants should be ensured as regards the information on the on-going compensatory actions.

11. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court.

12. The dissemination methods are without prejudice to the Union rules on insider dealing and market manipulation.

Reimbursement of legal costs of the winning party

13. The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law.

Funding

14. The claimant party should be required to declare to the court at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party,

    (a) there is a conflict of interest between the third party and the claimant party and its members;

    (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;

    (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

    (a) to seek to influence procedural decisions of the claimant party, including on settlements;

    (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;

    (c) to charge excessive interest on the funds provided.

Cross-border cases

17. The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.

18. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.

IV. Specific principles relating to injunctive collective redress

Expedient procedures for claims for injunctive orders

19. The courts and the competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation.

Efficient enforcement of injunctive orders

20. The Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation.

V. Specific principles relating to compensatory collective redress

Constitution of the claimant party by 'opt-in' principle

21. The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

22. A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.

23. Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.

24. The defendant should be informed about the composition of the claimant party and about any changes therein.

Collective alternative dispute resolution and settlements

25. The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial, taking also into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[7].

26. The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case.

27. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.

28. The legality of the binding outcome of a collective settlement should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.

[7] OJ L136, 24.5.2008, p.3

Legal representation and lawyers' fees

29. The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.

30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.

Prohibition of punitive damages

31. The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.

Funding of compensatory collective redress

32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

Collective follow-on actions

33. The Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.

34. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.

VI. General information

Registry of collective redress actions

35. The Member States should establish a national registry of collective redress actions.

36. The national registry should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods.

37. The Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability.

VII. Supervision and reporting

38. The Member States should implement the principles set out in this Recommendation in national collective redress systems by [ADD date 24 months from the publication of the Recommendation] at the latest.

39. The Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases.

40. The Member States should communicate the information collected in accordance with point 39 to the Commission on an annual basis and for the first time by [ADD date: 36 months from the publication of the Recommendation] at the latest.

41. The Commission should assess the implementation of the Recommendation on the basis of practical experience by [ADD date: 48 months from the publication of the Recommendation] at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

Final provisions

42. The Recommendation should be published in the Official Journal.

Done at Strasbourg,

For the Commission
…
Member of the Commission

EUROPEAN
COMMISSION

Brussels, XXX
COM(2013) 401/2

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

"Towards a European Horizontal Framework for Collective Redress"

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

"Towards a European Horizontal Framework for Collective Redress"

1. INTRODUCTION

1.1. Objectives of this Communication

In economically challenging times, a sound legal environment and efficient justice systems can contribute decisively to the European Union's goal of achieving competitive growth. The major policy objective for the EU is to remain competitive at global level and to have an open and functioning single market, as stressed in the Europe 2020 strategy and in the Single Market Act. Legal certainty and a reliable legal environment are of key importance in this context.

EU justice policy aims to develop a genuine area of freedom, security and justice that serves citizens and businesses[1]. Both citizens and businesses should be able to obtain effective redress, in particular in cross-border cases and in cases where the rights conferred on them by European Union law have been infringed. This may require procedural law solutions on the basis of EU law. Work carried out in the area of procedural law so far has produced a number of solutions facilitating effective redress: the European Small Claims Procedure[2] is a simplified and cost-effective European civil procedure that facilitates consumer claims resulting from cross-border sales. The European Order for Payment Procedure[3] contributes to fast cross-border debt recovery, making it easier for businesses to manage their claims. The Mediation Directive[4], which is applicable in all cross-border civil disputes, promotes Alternative Dispute Resolution that saves costs and efforts and reduces the time needed for cross-border litigation. In the field of consumer policy[5] the recently adopted Directive on consumer Alternative Dispute Resolution[6] together with Regulation on consumer Online Dispute Resolution[7] go further by requiring Member States to ensure that contractual disputes

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1 See the Commission's Communication "Action Plan Implementing the Stockholm Programme" COM (2010) 171 20.4.2010. See Stockholm Programme — An open and secure Europe serving and protecting citizens, adopted by the European Council on 9.12.2009, OJ C 115, 4.5.2010, p.1.

2 Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007.

3 Regulation (EC) No 1896/2006 creating a European Order for payment procedure, OJ L 399, 30.12.2006.

4 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008.

5 Communication from the c-Commission to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy strategy 2007-2013 Empowering consumers, enhancing their welfare, effectively protecting them", COM(2007)99final, {SEC(2007)321}, {SEC(2007)322}, {SEC(2007)323}, 13.03.2007 and Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "A European Consumer Agenda - Boosting confidence and growth", COM(2012)225final,{SWD(2012) 132 final}, 22.05.2012.

6 P7_TA(2013)0066 Alternative consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.749 European Parliament legislative resolution of 12 March 2013 on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2011)0793 – C7-0454/2011– 2011/0373(COD)).

7 P7_TA(2013)0065 Online consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.752 European Parliament legislative resolution of 12 March 2013 on the proposal for a regulation of the European Parliament and of the Council on online dispute resolution for

between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an alternative dispute resolution entity.

The above-mentioned legal instruments, together with other instruments that go to make up the European Union's *acquis* in the area of justice and consumer protection, respond to very concrete and well identified needs of citizens and businesses. In accordance with the principle of subsidiarity, they leave room also for national judicial solutions and redress systems.

Collective redress is one of the mechanisms that has been analysed since several years by the EU institutions on the basis of experience made in several Member States as to its capacity to contribute to the development of the European area of justice to ensure a high level of consumer protection and to improve the enforcement of the EU law in general, including the EU's competition rules, while serving economic growth and facilitating access to justice. The Commission has continued and deepened this analysis between 2010 and 2012 to provide answers to three basic questions:

(1) what is the problem that is not yet satisfactorily addressed by existing instruments,

(2) could a particular legal mechanism, such as a possible European collective redress mechanism, solve this problem?

(3) how could such a mechanism be reconciled with the requirement of Article 67(1) TFEU, according to which the Union, while establishing a European area of freedom, justice and security, is asked to respect the different legal systems and traditions of the Member States, in particular in areas (such as procedural law) which are well established at national level while being rather new at EU level.

For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.

In 2011, the Commission carried out a horizontal public consultation 'Towards a coherent European approach to collective redress'. Its aim was, inter alia, to identify common legal principles on collective redress and to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States. The consultation also explored the areas in which different forms of collective redress could help to better enforce EU legislation or protect the rights of EU citizens and businesses.

The European Parliament decided to provide its input to the European debate by adopting a resolution based on a comprehensive own-initiative report on collective redress[8].

This Communication reports the main views expressed in the public consultation and reflects the position of the Commission on some central issues regarding collective redress. It is accompanied by a Commission Recommendation, which recommends that all Member States of the European Union have national collective redress systems based on a number of common European principles. The Recommendation advocates a horizontal approach, and its content therefore also applies to the field of competition law, an area for which specific rules

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consumer disputes (Regulation on consumer ODR) (COM(2011)0794 – C7-0453/2011– 2011/0374(COD)) (Ordinary legislative procedure: first reading)

8 European Parliament resolution of 2 February 2012 "Towards a Coherent European Approach to Collective Redress".

– justified by the specificities of competition law – are included in a proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[9]. While the Recommendation encourages all Member States to follow the principles suggested therein, the proposed Directive leaves it to Member States whether or not to introduce collective redress actions in the context of the private enforcement of competition law.[10]

1.2. What is collective redress?

Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.

Depending on the type of claim, collective redress can take the form of *injunctive* relief, where cessation of the unlawful practice is sought, or *compensatory* relief, aimed at obtaining compensation for damage suffered. This Communication and the Commission Recommendation accompanying this Communication address both forms of collective redress, without interfering with means of injunctive relief already in place in Member States on the basis of Union law.

It is indeed important to bear in mind that actions seeking injunctions or damages for alleged violations of different rights or cessation of unlawful practice are civil disputes between two private parties[11], including when one party is a 'collective', e.g. a group of claimants. Any violation of rights and any consequent injunction or compensation for damage is determined only at the time of the court decision[12] in the case[13]. In line with the principle of the rule of law, the defending party (respondent) to the civil litigation is not considered as having acted improperly or violated any rights unless and until this is ruled by the court[14].

1.3. State of play on collective redress in the European Union

EU legislation and international agreements ratified by the EU require Member States to provide for collective *injunctive* relief in certain areas. In the area of consumer law, as a result of the Directive on Injunctions[15], qualified consumer protection authorities and consumer organisations are authorised to commence proceedings before the courts or public authorities

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9 [ADD reference COM(2013)XXX when known]

10 For the Commission, the horizontal Recommendation and the sector-specific Directive are a "package" that, seen as a whole, reflects a balanced approach deliberately chosen by the Commission. While the adoption procedures differ for both measures under the Treaties, significant changes to this balanced approach would require the Commission to reconsider its proposal.

11 Also a public authority could be a claimant or defendant in civil disputes when it is not exercising its public power but acting under civil law.

12 Unless it is a 'follow-on' damages action that requires the prior finding of an infringement by a competent public authority, such as a competition authority.

13 For this reason, it is not appropriate to refer to 'victims', 'harm' or 'infringements' in the context of private collective actions before the court decides that damage has been caused by a particular violation of the law.

14 Research carried out in Germany showed that around 60% of (injunctive) actions brought by consumer protection authorities or associations were successful in a given time period. This percentage is high because the claimants select the cases carefully. Nevertheless, in 40% of the cases no violation or illegal activity was found by the court. See Meller-Hannich: Effektivität kollektiver Rechtschutzinstrumente, 2010.

15 Directive 2009/22/EC, OJ L 110, 1.5.2009, p. 30.

in all Member States to request the prohibition of practices that infringe national and EU consumer protection rules. In the area of environmental law, the Aarhus Convention requires Member States to ensure access to justice with regard to infringements of environmental standards[16]. All Member States thus have procedures in place which allow claimant parties, acting in a collective or representative way, to seek an injunction to stop illegal practices.

Procedures to bring collective claims for *compensatory* relief have been introduced also in a number of Member States, so far as a result of national developments in justice policy. Instruments on collective compensatory relief do not yet exist at EU level. Existing mechanisms whereby compensation can be claimed by a group of individuals harmed by illegal business practices vary between the Member States[17]. Major differences in the mechanisms have to do with their scope, their availability to representative organisations or individuals as claimants, their availability to businesses and in particular SMEs, how the claimants group is formed ('opt-in' or 'opt-out'), how an action is financed and how an award is distributed.

The Commission has worked for several years to develop European standards of compensatory collective redress in the field of competition and consumer law. It adopted a Green Paper on antitrust actions in 2005[18] and a White Paper in 2008[19], examining the idea of integrating collective redress as a further instrument for the enforcement of EU competition rules by private parties. In 2008, the Commission also published a Green Paper on consumer collective redress[20].

Stakeholders raised the issue of inconsistencies between the different Commission initiatives on collective redress, a fact which points to the need for a more coherent system. Indeed, collective redress is a procedural tool that can be relevant for EU policies in areas other than competition or consumer protection. Good examples are financial services, environmental protection, data protection[21] or non-discrimination. The Commission therefore deems it necessary to increase policy coherence and to take a horizontal approach on collective redress on the basis of a public consultation carried out in 2011[22].

2. MAIN OUTCOMES OF THE PUBLIC CONSULTATION

2.1. Stakeholders' contributions

The Commission's public consultation on collective redress met with a considerable response: 310 replies were received from other stakeholders, and 300 people attended a public hearing on 5 April 2011. In addition, over 19 000 replies were received in the form of mass mailing

16 The Member States have implemented this by giving non-governmental organisations standing to challenge administrative decisions in environmental matters before the courts.

17 See e.g. the 2008 study 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' requested by the Commission and available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Studies.

18 COM(2005)672, 19.12.2005.

19 COM(2008)165, 2.4.2008.

20 COM(2008)794, 27.11.2008.

21 A form of representative collective redress has been proposed by the Commission in its proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). Here, the judicial remedy for data protection violations could be exercised by any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data, if they act on behalf of one or more data subjects (see COM(2012)11, 25.1.2012, Articles 73(2) and 76). In these cases, the action is thus brought on behalf of the represented data subject and only goes as far as the data subject himself/herself would be entitled to bring an action.

22 COM(2010)135, 31.3.2010.

from citizens[23]. The quality of most responses demonstrates the substantial interest in and the importance of this issue. The contributions informed the Commission's understanding of the varying positions taken by stakeholders, and highlighted which issues are controversial and which are more consensual.

The primary difference of opinion concerning the benefits that could flow from introducing new mechanisms of collective redress for the enforcement of EU law is between citizens/consumers and business: consumers are generally in favour of introducing new mechanisms, while businesses are generally against. Academics are generally in favour. Lawyers are divided on this issue, although those who are sceptical or opposed outnumber those in favour.

The Member States[24] which responded to the consultation also expressed diverging views, ranging from support for binding EU rules on collective redress to strong scepticism.

Some Member States would consider binding EU rules with regard to specific policy fields or issues only (Denmark – with regard to cross-border collective redress, the Netherlands– with regard to private international law aspects of collective redress, Sweden – in policy fields with harmonised substantive rules, such as competition, the UK - in the competition field; Latvia would consider a set of binding minimum requirements in the area of consumer and competition law for cross-border cases).

Several contributors, representing various categories of stakeholders, took the view that collective redress as a form of private enforcement should normally be independent of enforcement by public bodies, but that a certain level of coordination is required between public and private enforcement; in effect they should complement each other. Some contributors argued that collective redress should only come into play after public enforcement, as "follow on" actions.

Most stakeholders agree that establishing common principles for collective redress at EU level is desirable. However, such principles should fit into the EU legal system and the legal orders of the 27 Member States, and take into account the practical experience of collective redress systems already operating in several Member States. According to many stakeholders, the principles should ensure effective proceedings, prevent threats of abusive litigation, encourage collective consensual resolution of disputes, and provide a mechanism for the cross-border enforcement of judgments.

More specifically, many stakeholders agree with the following basic parameters of a collective redress system in terms of effectiveness and safeguards: any collective redress mechanism should first and foremost be capable of effectively resolving a large number of individual claims that raise the same or common issues and relate to a single alleged infringement of rights granted under EU law. It should be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved. At the same time, it should incorporate safeguards against abusive litigation and avoid any economic incentives to bring speculative claims. In examining the concrete building blocks needed to ensure effectiveness and safeguards, the public consultation has confirmed that collective redress mechanisms vary significantly amongst Member States. These mechanisms differ from each other as regards the type of available collective action and its main features, such as admissibility, legal standing, the use of an opt-in or an opt-out system, the role of the judge in collective proceedings and requirements on informing

[23] Almost all were uniform responses from French and German citizens.

[24] 15 Member States responded to the public consultation (AT, BG, CZ, DE, DK, EL, FR, HU, IT, LV, NL, PL, PT, SE, UK).

potential claimants about a collective action. Furthermore, each collective redress mechanism operates in the broader context of general civil and procedural rules, rules regulating the legal profession and other relevant rules, which also differ amongst Member States. Given this diversity, stakeholders naturally have very different views as to whether any specific national system of collective redress — or its features — may be particularly instructive when formulating EU-wide standards on effectiveness and safeguards.

2.2. Potential advantages and disadvantages of collective redress according to the public consultation

In numerous responses, various stakeholders pointed out the inherent advantages and disadvantages of collective redress mechanisms. These potential advantages and disadvantages are to be viewed in the context of the values and policies of the European Union, in particular as expressed in the Treaties and legislation. Advantages can be achieved and the disadvantages can be mitigated if the common principles to be followed under the Commission Recommendation are appropriately implemented.

2.2.1. Advantages: access to justice and stronger enforcement

Under Article 47(1) of the Charter of Fundamental Rights, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. Effectiveness of the remedy depends on various factors, including practical accessibility to the remedy offered by the legal system.

The European Council emphasised in the Stockholm Programme that access to justice in the European judicial area should be made easier, particularly in cross-border proceedings. One obstacle to access to justice can be the cost of judicial proceedings. Where a large number of persons claim to be harmed by an alleged infringement of rights granted under EU law but the potential loss of each individual is small in comparison to the potential costs for each claimant, the pooling of similar claims in a collective redress scheme allows persons claiming damages to share the costs, thereby reducing the financial burden on individual claimants. The possibility of collectively bringing an action encourages more persons who have been potentially harmed to pursue their rights for compensation[25]. The availability of collective court action in national legal systems — together with the availability of collective consensual dispute resolution methods — may therefore contribute to improving access to justice.

In addition, when potential claimants can enforce their rights granted under EU law against possible violators more effectively, this contributes to the overall level of enforcement of EU law. In policy areas where the designated public authorities have powers to enforce the rules in the public interest, public and private enforcement are complementary: while the former is aimed at prevention, detection and deterrence of infringements, the latter aims to secure compensation for victims. In policy areas with weaker public enforcement, collective actions may, besides their compensatory or preventive function, also serve a deterrence function.

2.2.2. Disadvantage: risk of abusive litigation

The main concerns voiced against the introduction of collective judicial redress mechanisms were that it would attract abusive litigation or otherwise have a negative impact on the economic activities of EU businesses[26]. Litigation can be considered abusive when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them.

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[25] According to a 2011 Eurobarometer survey, 79% of those polled in the 27 Member States stated that they would be more willing to defend their rights in court if they could join with other consumers. Flash Eurobarometer 'Consumer attitudes towards cross-border trade and consumer protection', March 2011.

[26] Opinion expressed by the majority of all stakeholders, in particular businesses.

There is the risk that the mere allegation of infringements could have a negative influence on the perception of the defendant by its existing or potential clients. Law-abiding defendants may be prone to settle the case only in order to prevent or minimise possible damage. Furthermore, the costs of legal representation in a complex case may constitute substantial expenditure, in particular for smaller economic operators.

'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation. Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded. Such features are for instance contingency fees of attorneys or the discovery of documents procedure that allows 'fishing expeditions'. A further important feature of the US legal system is the possibility to seek punitive damages, which increases the economic interests at stake in class actions. This is enhanced by the fact that US class actions are legally 'opt-out' procedures in most cases: the representative of the class can sue on behalf of the whole class of claimants possibly affected without them specifically requesting to participate. In recent years, U.S. Supreme Court decisions have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation.

2.3. The 2012 Resolution of the European Parliament

The European Parliament's resolution 'Towards a Coherent European Approach to Collective Redress' of 2 February 2012[27] takes well note of the widely divergent opinions of stakeholders expressed on the issue of collective redress.

The European Parliament welcomes the Commission's work towards a coherent European approach to collective request stressing that "victims of unlawful practices – citizens and companies alike – must be able to claim compensation for their individual loss or damage suffered, in particular in the case of scattered and dispersed damages, where the cost risk might not be proportionate to the damages suffered".[28] Moreover, it underlines "the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims"[29].

However, the Parliament also calls on the Commission to first of all carry out a thorough impact assessment before any further regulatory action is undertaken.[30] According to the European Parliament, the Commission should demonstrate in this impact assessment "that, pursuant to the principle of subsidiarity, action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus to contribute to consumer confidence and smoother functioning of the internal market." The European Parliament also recalls "that, currently, only Member States legislate on national rules quantifying the amount of compensation that can be awarded".[31] The European Parliament furthermore calls on the

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27 European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

28 Point 1 of the Resolution.

29 Point 5 of the Resolution.

30 Point 4 of the Resolution.

31 Point 7 of the Resolution.

Commission "to examine thoroughly the appropriate legal basis for any measure in the field of collective redress"[32].

The European Parliament concludes by calling "in the event that is decided after detailed consideration that a Union scheme of collective redress is needed and desirable", for any proposal in the field of collective redress to take the form of **a horizontal framework** including a common set of principles providing uniform access to justice via collective redress within the EU and specifically but not exclusively dealing with the infringement of consumer rights."[33] The Parliament also stresses "the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States"[34].

As regards the scope of the possible horizontal framework on collective redress, the European Parliament finds that EU action would deliver most benefit in cross-border cases and in cases involving infringements of EU law.

The Parliament also finds that the European rules of private international law should apply to collective actions in general; however, the horizontal framework itself should lay down rules to prevent forum shopping. It points to the need to examine conflict of law rules.

Furthermore, the European Parliament raises several issues concerning specific features of collective redress. It supports the 'opt-in' principle as the only appropriate European approach to collective redress. Legal standing should be given to representative organisations that should be qualified in advance. Punitive damages should be clearly prohibited and full compensation should reach individuals once the court confirms that they are right in their claims.

It stresses that one way of fighting abusive litigation is to exclude certain features from the scope of the horizontal framework, in particular punitive damages, third-party financing of collective redress and contingency fees for lawyers. As one of the central safeguards against abusive litigation, the European Parliament points out that the 'loser pays' principle usually prevailing in civil disputes should apply also in collective cases. The European Parliament is not in favour of setting out conditions or guidelines for the private funding of damages claims at EU level.

3. ASPECTS OF A EUROPEAN HORIZONTAL FRAMEWORK ON COLLECTIVE REDRESS

Careful analysis of the views and arguments put forward during the public consultation, and notably of the position of the European Parliament, together with the expertise gathered by the Commission in the course of previous activities in the area of consumer protection and competition, makes it possible to identify the main issues that must be addressed in a coherent manner in a European horizontal framework on collective redress.

In particular, it is common ground that any European approach should:

– be capable of effectively resolving a large number of individual claims for compensation of damage, thereby promoting procedural economy;

– be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved;

– provide for robust safeguards against abusive litigation; and

[32] Point 8 of the Resolution.
[33] Point 15 of the Resolution.
[34] Point 16 of the Resolution.

– avoid any economic incentives to bring speculative claims.

3.1. The relationship between public enforcement and private collective redress — compensation as an object of collective action

There is a consensus among stakeholders that private and public enforcement are two different means that should normally pursue different objectives. Whereas it is the core task of public enforcement to apply EU law in the public interest and impose sanctions on infringers to punish them and to deter them from committing future infringements, private collective redress is seen primarily as an instrument to provide those affected by infringements with access to justice and — as far as compensatory collective redress is concerned — possibility to claim compensation for harm suffered. In this sense, public enforcement and private collective redress are seen as complementing each other.

Collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punishment and deterrence functions should be exercised by public enforcement. There is no need for EU initiatives on collective redress to go beyond the goal of compensation: Punitive damages should not be part of a European collective redress system.

3.2. Admissibility of collective redress

Conditions for the admissibility of collective actions vary in Member States depending on the concrete type of collective redress mechanism. Typically, the basic conditions are set by the law regulating a given type of collective action. There are also systems leaving the assessment of admissibility to the discretion of the courts. The extent of discretion given to the court to decide on admissibility conditions varies between Member States, also when the legal conditions are codified in a law.

Some collective actions are available for all types of civil damages claims; others are only available for claims concerning damages for alleged breaches of specific legal rules: consumer protection rules, environmental protection, investor protection, competition law, etc. There are also systems in which particular types of collective action are only admissible once a public authority has established an infringement of the relevant rules: i.e. follow-on actions[35].

It should be ensured that collective actions for damages (compensatory relief) can only be brought when certain admissibility conditions are fulfilled. In any event, the court should decide on the admissibility of a concrete collective action at a very early stage of the proceedings.

3.3. Legal standing

Legal standing to bring a collective action in the Member States depends on the concrete type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is fairly straightforward. In the context of representative actions, the issue of legal standing needs to be defined. A representative damages action is an action which is brought by a representative entity (which in some systems can also be a public authority) on behalf of a defined group of individuals or legal persons who claim to have been harmed by the same alleged infringement. The individuals are not parties to the proceeding; only the representative entity acts on the claimant side. It should therefore be ensured that the representative entity acts genuinely in the best interest of the group represented, and not for own profit. The

[35] E.g. the UK follow-on representative action for damages arising from breaches of competition law that have been determined by competent authorities.

Commission believes that under a European horizontal framework on collective redress it is desirable that collective actions are available in all Member States to natural or legal persons as a means of collectively asking for injunctions or claiming compensation for harm caused to them by infringements of rights granted under EU law.

There are different systems as regards qualifying criteria for representative entities which are not public authorities. One possible approach is to let the court check whether the representative entity is fit for purpose on a case-by-case basis (*ad hoc* certification). Another approach is to set certain qualification criteria by law and, thus, define the standing upfront. It can be left to the court to check whether such qualification criteria are met, or an authorisation system can be introduced where a public authority is in charge of checking the fulfilment of qualification criteria. Mass harm situations could span across the border, especially in the context of a further developed digital single market, therefore representative entities originating from other Member States than the one where a collective action is brought before the court should have the possibility to continue performing their role.

Whereas some stakeholders, in particular businesses, are strongly in favour of granting the standing to bring representative actions only to qualified entities that fulfil express criteria, other stakeholders are opposed to determining standing by law, arguing that this might unnecessarily restrict access to litigation seeking compensation for all those who have potentially suffered harm. The Commission considers it desirable to define the conditions for legal standing in representative actions in the Commission Recommendation.[36]

3.4. 'Opt-in' vs. 'opt-out'

There are two basic approaches to the way in which the represented group is composed: 'opt-in', where the group includes only those individuals or legal persons who actively opt in to become part of the represented group, and opt-out', where the group is composed of all individuals who belong to the defined group and claim to have been harmed by the same or similar infringement unless they actively opt out of the group. In the 'opt-in' model, the judgment is binding on those who opted in, while all other individuals potentially harmed by the same or similar infringement remain free to pursue their damages claims individually. Conversely, in the 'opt-out' model, the judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out. The 'opt-in' model is used by most Member States that provide for collective redress. The 'opt-out' model is used in Portugal, Bulgaria and the Netherlands (in collective settlements) as well as in Denmark in clearly defined consumer cases brought as representative actions[37].

A significant number of stakeholders, in particular businesses, strongly oppose the 'opt-out' model, arguing that it is more prone to abuse and that it may be unconstitutional in some Member States, or at least incompatible with their legal traditions. On the other hand, some consumer organisations argue that 'opt-in' systems may fail to deliver effective access to justice for all consumers who have been harmed[38]. In their view, the availability of 'opt-out' is therefore desirable, at least as an option in appropriate cases and subject to approval by the court.

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36 See points 6-9 of the Commission Recommendation.

37 The 'opt-out' system has two advantages that explain why some Member States have introduced it: first, it facilitates access to justice in cases where individual damage is so small that some of the potential claimants would not opt in to the proceedings. The second is that 'opt-out' proceedings give more certainty to the defendant, since the judgment would not bind only those who opted out.

38 The UK consumer organisation Which? refers to its experience in the Replica Football Shirts case, where an 'opt-in' collective action (follow-on damages action in the competition field) ultimately secured compensation for only a tiny percentage of those harmed in the terms of the decision of the competent authority.

In the Commission's view, it should be ensured that the represented group is clearly defined so as to allow the court to conduct the proceedings in a manner consistent with the rights of all parties, and in particular with the rights of the defence.

The 'opt-in' system respects the right of a person to decide whether to participate or not. It therefore better preserves the autonomy of parties to choose whether to take part in the litigation or not. In this system the value of the collective dispute is more easily determined, since it would consist of the sum of all individual claims. The court is in a better position to assess both the merits of the case and the admissibility of the collective action. The 'opt-in' system also guarantees that the judgment will not bind other potentially qualified claimants who did not join.

The 'opt-out' system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate. The right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not. In addition, an 'opt-out' system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them.

The Commission therefore takes the view in the Commission Recommendation that under the European horizontal framework on collective redress the claimant party should be formed on the basis of the 'opt-in' method and that any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

3.5. Effective provision of information to potential claimants

Effective information on collective action is a vital condition for ensuring that those who could claim to have been harmed by the same or similar alleged infringement learn of the possibility to join a representative action or a group action and, thus, can make use of this means of accessing justice. On the other hand, it cannot be overlooked that advertising (e.g. on TV or via flyers) of the intention to bring collective action may have a negative impact on the reputation of the defendant, which could have adverse effects on its economic standing.

There is a consensus among stakeholders on the importance of rules stipulating that a representative entity has an obligation to effectively inform potential members of the represented group. Many stakeholders suggest that the court should play an active role in checking that this obligation is fulfilled.

For any type of collective action, any rules regarding the provision of information to potential claimants should balance concerns regarding freedom of expression and the right to access information with the protection of the reputation of the defendant. The timing and conditions in which the information is provided will play an important role in ensuring that this balance is kept.

3.6. Interplay of collective redress and public enforcement in specific policy areas

With regard to EU policy fields where public enforcement plays a major role — such as competition, environment, data protection or financial services — most stakeholders see the need for specific rules to regulate the interplay between private and public enforcement, and protect the effectiveness of the latter[39].

[39] In the competition field, many stakeholders emphasise the need to protect the effectiveness of leniency programmes applied by the Commission and national competition authorities when enforcing EU rules against cartels. Other issues frequently mentioned in this context include the binding effect of infringement decisions by national competition authorities with regard to follow-on collective damages actions and setting specific limitation periods for bringing such follow-on actions.

Collective damages actions in regulated policy areas typically follow on from infringement decisions adopted by public authorities and rely on the finding of an infringement, which is often binding on the civil court before which a collective damages action is brought. For example, in the competition field, Regulation (EC) No 1/2003 provides that when national courts rule on issues concerning EU antitrust rules which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

In such cases, follow-on actions essentially concern the questions of whether damage has been caused by the infringement and, if so, to whom and in what amount.

It is necessary to ensure that the effectiveness of public enforcement is not put into jeopardy as a result of collective damages actions or actions that are brought before courts while an investigation by a public authority is still on-going. This may typically require rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation, or specific rules on limitation periods allowing potential claimants to wait with a collective action until the public authority takes its decision as regards infringement. Beyond the purpose of protecting public enforcement, rules of this kind also facilitate effective and efficient redress through collective damages actions. Namely, the claimants in a follow-on action can to a significant extent rely on the results of public enforcement and, thus, avoid the (re-)litigation of certain issues. Due account should be taken of the specificities of collective damages actions in policy areas where public enforcement plays a major role, to achieve the twofold goal of protecting the effectiveness of public enforcement and facilitating effective private collective redress, particularly in the form of follow-on collective actions.

3.7. Effective enforcement in cross-border collective actions through private international law rules

The general principles of European international private law require that a collective dispute with cross-border implications should be heard by a competent court on the basis of European rules on jurisdiction, including those providing for a choice of court, in order to avoid forum shopping. The rules on European civil procedural law and applicable law should work efficiently in practice to ensure proper coordination of national collective redress procedures in cross-border cases.

With regard to jurisdictional rules, many stakeholders asked for collective proceedings to be specifically addressed at European level. Views differ, however, as to the desirable connecting factor between the court and the case. A first group of stakeholders advocate a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a collective claim. A second category argues that jurisdiction at the place of the defendant's domicile is best suited since it is easily identifiable and ensures legal certainty. A third category suggests creating a special judicial panel for cross-border collective actions with the Court of Justice of the European Union.

In this respect, the Commission considers that the existing rules of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation')[40], should be fully exploited. In the light of further experience involving cross-border cases, the report foreseen on the application of the Brussels

[40] As amended by Regulation (EC) no 1215/2012 that will enter into application 10 January 2015. OJ L 351, 20.12.2012.

I Regulation should include the subject of effective enforcement in cross-border collective actions.

Finally, some stakeholders raised the problem that, under the EU's current conflict of law rules[41], a court to which a collective dispute is submitted in a case involving claimants from several Member States would sometimes have to apply several different laws to the substance of the claim. The general rule for tort cases is that the law applicable for the obligations arising out of tort is the law of the country in which the event giving rise to the damage occurred. In tort cases concerning product liability, the law is determined by the habitual residence of the person sustaining the damage. Furthermore, for cases on unfair competition, the law applicable is the law of the country where competitive relations or the collective interests of consumers are or are likely to be affected. Admittedly, there can be situations where the conflict of law rules can render cross-border litigation complex, in particular if the court has to apply several compensation laws to each group of persons sustaining the damage. However, the Commission is not so far persuaded that it would be appropriate to introduce a specific rule for collective claims which would require the court to apply a single law to a case. This could lead to uncertainty when this is not the law of the country of the person claiming damages.

3.8. Availability of collective consensual dispute resolution

Stakeholders agree that consensual dispute resolution can provide parties with a fast, low-cost and simple means of resolving their disputes. Consensual dispute resolution can also reduce the need to seek judicial redress. Parties to collective proceedings should therefore have the possibility to resolve their disputes collectively out of court, either with the intervention of a third party (e.g. using a mechanism such as arbitration or mediation) or without such intervention (e.g. settlement among the parties concerned).

The large majority of stakeholders including small and medium enterprises (SMEs) are of the opinion that the consensual collective resolution of disputes should not be a mandatory first step before going to court. Indeed, this approach could trigger unnecessary costs and delays and may in certain situations even undermine the fundamental right of access to justice[42]. Resorting to the consensual collective resolution of disputes should therefore remain voluntary , with due regard to existing EU law in the ADR area. However, judges in collective redress proceedings should not be prevented from inviting the parties to seek a consensual collective resolution of their dispute[43].

Verification of the legality of the outcome of consensual collective resolution of the dispute and its enforceability is of particular importance in collective cases, as not all members of the group claiming to be harmed by an alleged illegal practice are always able to directly take part in the consensual collective resolution of the dispute. The court should therefore confirm the outcome. The Commission recommends this to the Member States.[44]

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41 Regulations (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, and (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007.

42 Article 47 of the Charter of Fundamental Rights of the European Union.

43 This is already the case for mediation in cross-border disputes, where, in accordance with Article 5 of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, courts before which an action is brought may invite the parties to use mediation in order to settle the dispute.

44 See point 30 of the Commission Recommendation. In cross-border civil and commercial disputes, under Directive 2008/52/EC, the content of an agreement resulting from mediation is to be made enforceable by the court requested unless it is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

The Commission sees therefore that a useful complementary role can be played by consensual dispute resolution mechanisms. Building on the steps that have already taken in this direction, namely the Mediation Directive, Directives on consumer Alternative Dispute Resolution and Regulation on consumer Online Dispute Resolution, the Commission considers that it is a useful further step to recommend to the Member States to develop collective consensual dispute resolution mechanisms[45].

3.9. Funding of collective action

In the case of collective redress, costs[46] usually borne by parties engaged in civil litigation could be relatively high, in particular where there are many claimants. While lack of funding should not limit access to justice[47], funding mechanisms available for collective actions should not create incentives for abusive litigation.

3.9.1. Third-party financing

Financial support by a private third party who is not a party to the proceedings could take different forms. Direct third-party financing of collective actions is seen as a potential factor driving abusive litigation, unless it is properly regulated. Legal expenses insurance is perceived by some as more neutral and 'after-the-event' insurance could have some relevance for collective actions.

Contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management constitute *de facto* third-party financing. The variety of the solutions adopted in this sphere by the Member States ranges from prohibition to acceptance. Some stakeholders consider the abolition of contingency fees as an important safeguard against abusive litigation while others see contingency fees as a useful method of financing collective actions.

Third-party financing is an area which needs to be designed in a way that it serves in a proportionate manner the objective of ensuring access to justice. The Commission therefore takes the view in the Commission Recommendation that it should be made subject to certain conditions. An inappropriate and non-transparent system of third party financing runs the risk of stimulating abusive litigation or litigation that does little to serve the best interests of litigants.

3.9.2. Public funding

In the public consultation some stakeholders, namely consumer organisations and some lawyers, favoured the creation of public funds that would provide financial support for potential claimants in collective redress cases.

However, given that collective redress would be a procedure arising in the context of a civil dispute between two parties, even if one of them is composed of a number of claimants, and deterrence will be a side-effect of the proceedings, the Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs.

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45 See points 27-30 of the Commission Recommendation. The Directive on consumer Alternative Dispute Resolution does not prevent Member States maintaining or introducing alternative dispute resolution procedures that deal jointly with identical or similar disputes between a trader and several consumers, thus enabling collective alternative dispute resolution procedures to develop.

46 Such costs include court fees, remuneration of legal representatives, costs of participation in the hearing, costs of general case management, costs of expert's analyses.

47 The national legal aid systems should be appropriately used to prevent this.

3.9.3. 'Loser pays' principle

The principle that the losing party should bear the costs of the court proceedings is well embedded in the European legal tradition, although it is not present in every jurisdiction of the European Union and the way in which it is applied differs between jurisdictions.

In the public consultation all stakeholders agreed that the 'loser pays' principle should apply to collective redress cases. The Commission has no doubt that the 'loser pays' principle should form part of the European approach to collective redress, and thus it recommends to follow that principle in collective actions.[48]

4. CONCLUSIONS

The Commission's public consultation in 2011, the European Parliament Resolution of 2 February 2012 and the Commission's own analyses have made it possible to identify particular issues to be addressed in developing a European horizontal framework for collective redress. As a principal conclusion the Commission sees the advantage of following a horizontal approach in order to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules, in the interest of the functioning of the internal market.

Taking into account the complexity on the one hand and the need to ensure a coherent approach to collective redress on the other hand, the Commission adopts, in parallel with this Communication, a Recommendation on the basis of Article 292 TFEU that suggests horizontal common principles of collective redress in the European Union that should be complied with by all Member States. After adoption and publication of the Commission Recommendation, the Member States should be given two years to implement the principles recommended by the Recommendation in national collective redress systems. On the basis of practical experience to be made with the Recommendation, the Commission will, four years after the publication of the Recommendation, assess whether further legislative measures to consolidate and strengthen the horizontal approach reflected in the present Communication and in the Recommendation should be proposed. The Commission will in particular assess the implementation of the Recommendation and its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust.

[48] See point 15 of the Commission Recommendation.

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Administrative and Judicial Enforcement in Consumer Protection: The Way Forward

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Abstract

The paper analyses the relationship between administrative and judicial enforcement in Consumer Protection. It first sets out the European state of development with regard to injunctions, thereby focusing on the different models of the European group actions and the regulation of standing, as well as comparing ex post ante and ex post intervention. The second part reframes the European debate in the light of the US and Canadian experiences and formulates a whole set of policy options. In the final part we propose a set of policy recommendations that the Commission should consider in the process of reviewing the collective redress directive and more in general the European policies concerning collective redress

Keywords

Collective enforcement – administrative and judicial enforcement – injunctions – damages – group and class actions – standing

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Administrative and Judicial Enforcement in Consumer Protection: The Way Forward

Fabrizio Cafaggi and Hans-W. Micklitz*

1. The relationship between administrative and judicial enforcement in consumer protection: the way ahead

Consumer protection law is in great transformation. Global market integration requires new modes of governance to tackle new forms of risk interdependencies affecting consumer safety and, more broadly, consumer choices. While emerging markets are posing serious problems concerning risks and safety, trilateral or multilateral agreements are far from being frequently used. The main legal instruments are still bilateral agreements concerning co-operation about risk management in product safety.[1]

Consumer protection strategies need to be defined in relation to the broader framework, linking the different regulatory policies, including competition and environment. The relationship between consumer regulation and the level of market competitiveness has become a milestone of enforcement policies. This is not to say that competitive markets need less consumer protection and enforcement; more simply they need different devices and institutions. Competition and consumer law interplay in different ways in highly competitive and non-competitive markets.[2] Thus consumer protection policies need to internalise the current and future level of competitiveness in their design.

Policies interdependencies require coordination among the different actors but how are the main players developing their regulatory strategies.

The US, Canada and Europe still differ quite significantly in relation to enforcement policies although some signs of convergence are stronger than in the past.[3] In South America, recent legal reforms have introduced or reinforced class actions and astreintes.[4] In Europe a new stream of legislation concerning group actions has been

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* The contribution will be published in F. Cafaggi/H.-W. Micklitz (eds.), New frontiers of consumer protection: combining private and public enforcement, Kluwer Intersentia, 2009 forthcoming. References in the footnotes 'to this volume' are referring to contributions to be published in that book.

1 See the EU/US agreements but see also the Memorandum of Understanding (MoU) between China and EU, both available at http://ec.europa.eu/consumers/safety/int_coop/index_en.htm.

2 See Trebilcock, in Rickett/Telfer (eds.) 2003, p. 68 ff. at 72 ff.

3 For a comparative analysis see Cafaggi/Micklitz, 2008, p. 391; Issacharoff/Miller, 2009, forthcoming; Ramsay, in Rickett/Telfer (eds.) 2003, p. 42 ff. part. 50 ff.; Kagan, 2007, pp. 17, 165, where the author speaks of 'institutional convergence at least with regard to some policy fields'.

4 See in Argentina Law n. 26.361 which has modified law n. 24240, *Normas de proteccion y defensa d los Consumidores. Autoridad de Aplicacion. Procedimiento y sanciones. Disposiciones finales*. In particular Article 54 concerning a form of opt-out class action, and Article 52 bis introducing a form of astreinte named *daño punitivo*. For a synthesis see Pellegrini Grinover and Mullenix, in Pellegrini Grinover/Calmon (eds.), 2007.

enacted. In the US CAFA has changed the balance between states and federal level impacting also on substantive law. The key questions concern modes of regulation and combinations of different actors at the stage of enforcement: in particular agencies and courts.[5] In both the US and EC these two dimensions have to be framed within a multilevel system, encompassing both federal and state levels. The main differences are related to the levels of market integration: while in the US the market is fully integrated, in Europe integration has only been partially achieved. These differences are also reflected on the legal frameworks. In the US it is more uniform, while in Europe it is characterised by a higher degree of differentiation at Member State (MS) level.

Conventionally the analysis presents a contrasting picture: the US is characterised by a model grounded on regulation through litigation and organised around the paradigm of private lawyer general,[6] the result being adversarial legalism;[7] public regulation plays a less relevant role ever more 'protected' from judicial interference.[8] For pre-emption to occur, the superiority of federal regulatory law over state common law in contract or torts has to be expressly legislated.[9] Regulatory agencies in the US are substantially immune from tort liability and are based on accountability systems grounded on participatory rights, transparency and judicial review.

In Europe MS have been displaying a much stronger level of public regulation, featuring a collective judicial enforcement model, predominantly based on public institutions (ombudsmen, consumer agencies) or private organisations (consumer associations). European legislation on consumer protection has focused primarily on substantive law, leaving MS the task to provide for effective enforcement. This choice has been partly influenced by lack of competence and by the principle of procedural autonomy.[10] The separation between substantive and remedial law is causing uneven effectiveness in MS and potentially undermines the goals pursued by the legislative reforms of the last 20 years. For this reason collective redress has recently become a priority in the European and MS agenda. Interestingly enough, implementation of European legislation at MS level reveals a relative preference for private over public enforcement. When MS have been left with the option, they have chosen more judicial than administrative enforcement (AE), although choices vary form field to field, i.e. between unfair contract terms where private enforcement prevails and unfair trade practices where there is more balance.[11]

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5 See Micklitz, in van Boom/Loos (eds.), 2007, p. 13.

6 On the private lawyer general model see Coffee, 1986, p. 669; the same, 1983, p. 215; Issacharoff/Rubinstein, 2004, p. 2130 ff.

7 Kagan, 2001.

8 See Riegel v. Medtronic, Inc., 552 US (2008); Sharkey, 2008, p. 449.

9 Justice Scalia writing the opinion for the Court stated 'State requirements are pre-empted under the MDA only to the extent that they are "different from or in addition to" the requirements imposed by federal law'. See Riegel v. Medtronic, cit.

10 See on a US/EC comparison, Lindholm, 2007, p. 386 See also Commissioner Kuneva Speech at the Leuven Brainstorming Meeting on Collective Redress, 29th June 2007 http://ec.europa.eu/consumers/redress_cons/docs/kuneva_leuven_speech290607.pdf; and the New Consumer strategy 2007/2013, SEC (2007) 321, 13th March 2007.

11 See with regard to unfair terms and unfair commercial practices the analysis of 25 Member States, Micklitz/Rott/Docekal/Kolba, 2007.

Viewed from the consumers' perspective, the two systems, US and EC, present different accountability mechanisms to promote access to justice for consumers and compliance with consumer legislation.

The US system relies primarily on market mechanisms, based on a relatively mature competitive market for legal services that ensures incentives to select the relevant claims and to grant compensation for injured parties.[12]

Europe relies more on social and political mechanisms, associated with liability devices. Effectiveness of public and private institutions to bring claims is predominantly ensured by exerting political pressure and channelling public resources to private organisations and, to an increasing extent, to liability systems. Public entities are held liable for lack of control and even for not enacting proper regulation.[13] Private entities have been held liable for mismanagement of cases.[14]

If we locate the US and EC in the broader global perspective we discover firstly that the models of enforcement of consumer law varies across a wider range of alternatives and that internal differences in Europe, despite the increasing role of European legislation, make it very difficult to speak yet of an integrated European strategy.[15]

Changes are taking place in both environments. In the US there is an increasing deference towards regulatory agencies, limiting the role of state common law in the area of consumer protection, coupled with the introduction of a stricter federal legislation on class actions.[16] In Europe the more recent trend shows an increasing effort to create public regulators in charge of coordinating transborder monitoring and enforcement issues with a volume of MS legislation introducing judicial collective enforcement. The former change is complemented by the increasing role of co-regulation in consumer matters, taking the form of bilateral (public and industry) or trilateral (public, industry, consumer associations) agreements.[17] The latter contribute to creating a multilevel structure where injunctive reliefs are primarily legislated at EU level and display

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12 Consensus over the effectiveness of this system is far from being unanimous. There is a strong debate over the level of consumer protection and the rents generated by the litigation system in the US. Hotly debated is also the level of competitiveness of the market for legal services see below.

13 See with regard to product safety control, Micklitz/Roethe, 2008; particularly telling ECJ, 17.4.2007, Case C-470/03, COS.MET, [2007] ECR I-2749; Reich, 2007, p. 410.

14 In Germany, a regional consumer advice centre organised in the form of an association went bankrupt after mismanagement. The German Supreme Court indirectly recognised the liability of tenant advice centres for misleading advice, BGH 25.10.2006 VIII ZR 102/06, NJW 2007, p. 428.

15 According to an OECD study, published at the end of 2006, there are five principal models of enforcement
"i) those relying on the criminal justice system for penalties
ii) those in which administrative agencies have power themselves to impose financial penalties
iii) those in which the administrative agencies have power themselves to impose financial penalties
iv) those relying primarily on consumer complaints to an Ombudsman
v) those relying primarily on self-regulatory arrangements and on the enforcement of private rights".
See OECD, Best Practices for consumer policy: report on effectiveness of enforcement regimes, p. 12, available at www.oecd.org

16 On the regulatory changes see Epstein/Greeve (eds.), 2007, Hensler, 2007, p. 883.
On the role of CAFA (Class action Federal Act), see Nagareda, 2006, Sharkey, 2008, Erichson, 2008.

17 See Cafaggi, 2006.

relative uniformity, while damages are regulated at MS level and reflect a high level of differentiation partly due to an experimental phase.

Another important development in Europe is related to consumer protection for infringements of competition law. Here there is a strong push towards judicial private enforcement driven by European institutions, with sometimes strong resistance from Member States.[18] While the traditional consumer protection seems to be characterised by an increasing importance of public regulation, mainly in the form of co-regulation, consumer protection, related to infringements of competition law, has witnessed a fast growing trend towards private enforcement.[19] The proposal in the White paper by the European Commission is to combine representative actions and opt-in collective actions.[20] The open question is whether the choices to be made in relation to competition infringements about collective redress may be applied to consumer protection law in general. It shall be recalled that the driving force behind private enforcement in competition law has been the ECJ, pushing the European Commission into action.[21] Certainly, at least when consumers are the claimants, coordination between collective redress for violations of consumer law and violations of competition law should take place. Incentives from the ECJ, however, are missing.

The direction of the changes drives towards complementarity between administrative and judicial enforcement and induces a focus on the variables affecting this combination. But first we need to identify the meanings of public and private enforcement.

Public enforcement includes criminal and administrative regulation which can have different institutional implications: the former is administered primarily by Courts, the latter primarily employed by agencies or governmental entities with an increasing involvement of private actors.

Private collective judicial enforcement, in theory, includes injunctions, compensatory damages, profit disgorgement, pecuniary penalties, publicity orders and compliance programmes. A central role in administering these remedies is played by Courts through different forms of aggregate (collective) litigation.[22] In the US the ALI project on the

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18 See White paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, (hereinafter White paper on damages in antitrust) and Commission staff working paper accompanying the White Paper on Damages actions for breach of EC antitrust rules SEC (2008) 404, and Mansel/Dauner-Lieb/Henssler (eds.), 2008.

19 Fostering the legal framework for greater effectiveness in antitrust private enforcement is not only aimed at providing full compensation for victims of violations but also at enhancing deterrence. The approach in the White paper is that of complementarity between public and private enforcement; see White paper on damages in antitrust at p. 3: "the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement".

20 According to the White paper the two instruments should complement each other.

21 The seminal Courage and Manfredi judgments: ECJ, 20 September 2001, Case C-453/99, Courage, [2001] ECR I-6297; ECJ, 12 July 2006, Case C-295/04, Manfredi, [2006] ECR I-6619.

22 Aggregate or collective litigation includes different forms of aggregation: mass joinder, mass consolidation, model cases, and test or bellwether cases, assignment of rights, group actions and class actions. These different forms of aggregation presuppose different rules and roles for judges and counsel. See also ALI Principles of the law of aggregate litigation, tentative draft, April 2008 book 1 on general principles.

law of aggregate litigation is making an attempt to introduce a functional differentiation among aggregate proceedings and to provide a more structured set of principles concerning settlements.[23] To these proceedings, ADR should be added, given the increasing importance that it is gaining in consumer disputes.[24]

In this framework, monitoring within public enforcement is done by agencies, while in private enforcement the burden is primarily on private actors, the potentially injured parties and, where existing, by private organisations representing them. Monitoring in private enforcement is thus highly context-dependent on the incentives such that private parties have to detect injuries and bring legal claims to Court. The marketability of the potential legal claim provides incentives to monitor which claims may bring about inefficient results. It can help to select which unlawful conducts have to be detected and eventually deterred. Not always the incentives of private parties to monitor correspond to social welfare. For this reason complementarity between public and private actors is necessary.

Important differences occur if the public entity can monitor and enforce directly or can monitor but not enforce, and has to use the Court system to enforce the sanctions. In theory the use of public agencies to monitor and directly sanction would seem to be more effective than separating administrative monitoring from judicial enforcement. But especially in relation to cooperative enforcement, when the enforcer has to conclude agreements with the infringer, the resort to an independent judiciary may ensure transparency and reduce capture. Thus the higher the use of cooperative enforcement the more necessary it is to resort to separation between monitoring and enforcement.[25]

Important differences between administrative and judicial enforcement are related also to the players. While in relation to Administrative enforcement (AE) the main players are agencies and enterprises, in litigation consumers play a much more active role. Recent changes at Member States level[26] in participatory rights and standing have expanded the voice of consumers, both individually and collectively in AE but still the main responsibility and discretionary power is on the public entity.

However some qualifications to the above described picture are needed. Many European legal systems use a mix: monitoring is passed to public entities, being them agencies, ombudsmen or governmental entities, while enforcement is delegated to the Courts.

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[23] § 1.02 Of ALI Principles of the law of aggregate litigation defines 3 types of aggregate proceedings
(a) An aggregate lawsuit is a single lawsuit that encompasses claims or defences held by multiple parties or represented persons.
(b) An administrative aggregation is a collection of related lawsuits, which may or may not be aggregate lawsuits, proceeding under common judicial supervision or control.
(c) A private aggregation is an informal collection of the claims or defences of multiple parties, represented persons, claimants or respondents proceeding under common non-judicial supervision or control."
Principles of the law of aggregate litigation p. 14 ff.

[24] Scherpe, 2002.

[25] See Cafaggi, 2008.

[26] The European Community has done little in secondary consumer legislation to strengthen participatory rights of consumers in product regulation. Two prominent examples are the Product Safety Directive 2001/95/EC and the Regulation on Transborder Enforcement 2006/2004 where MS rejected respective proposals during the law-making process. That is why participation depends on the MS; see with regard to energy, telecommunications and transport, Keßler/Micklitz, 2008.

Often monitoring is the result of cooperative efforts between public and private entities. Private individuals and organisations report to the public entity which is empowered, *de jure* or *de facto*, to bring the legal claim before the Court. While reporting by private entities does usually not imply a duty to act, in many legal systems public authorities would have to give reasons for inaction if a serious and well structured complaint has been produced. Public authorities differ as to their monitoring policies, giving more or less weight to their own internal systems of control or to external reporting.[27]

Even when there is no legal monopoly of standing on the public entity, as is the case in the UK or in the Scandinavian countries, the OFT and the Ombudsmen have *de facto* the most relevant role to decide whether or not a certain case should be litigated. The development of cooperative ventures between public and private entities suggest that there is no coincidence between judicial and private enforcement because often judicial enforcement is triggered by public entities on the basis of information gathered through a complex network composed of private and public actors.

For these reasons we prefer to speak of administrative versus judicial enforcement rather than juxtaposing public and private enforcement.

In this contribution we consider administrative regulation more than criminal penalties although some MS have so far heavily relied on the use of criminal penalties to enforce consumer protection law.

The provision of adequate and effective collective redress to European consumers should be based on the combined use of administrative regulation and collective judicial enforcement. While rule-making has become increasingly European, enforcement remains strongly in the hands of national authorities, be they administrative agencies or Courts. This separation, partly justified by the principle of procedural autonomy, makes it necessary to engineer coordination in enforcement policies at State level. Such coordination has to occur at national level between administrative authorities and courts, and at European level among the judiciaries and the administrative agencies. The recent case-law on damages in competition infringements shows perfectly this point. Common rules, in primary legislation, translate into very different outcomes when enforced at national level.[28]

2. Administrative and/or judicial co-operation in Europe

Setting the US aside where there exists a Federal Rule on class actions and a procedure to overcome competing multi-state jurisdictions, Canada and the EU seem to face similar challenges: the absence of common rules on class actions/group actions at the "federal" level and therefore the absence of a court with exclusive jurisdiction in transborder cases.

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[27] The most developed system seems to be the super-complaint procedure under which consumer organisations may address the OFT in the UK which then is obliged to investigate the complaint within 90 days, EA Section 11 and 205 2002.

[28] See White paper, Commission staff working document and Impact assessment available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html. See on these questions Basedow, 2007.

2.1. Actions for injunction

2.1.1. Shift from judicial collective enforcement to administrative co-operation?

The Regulation 2006/2004[29] on transborder co-operation in consumer law aimed at shifting the balance from judicial to administrative enforcement. Although Directive 98/27/EC left it to the Member States to determine whether the competent entity, an administrative authority or a consumer organisation may be the competent entity, it was guided by the overall spirit to foster private judicial enforcement via consumer organisations.[30] This attempt more or less failed, since very few transborder cases have been brought to court. This might be largely due to the still underdeveloped, understaffed and underfinanced consumer organisations all over Europe. The Directive has produced partially satisfactory results in regions where the cross-border trade is constantly high and where consumers are used to shop across the borders, such as in Austria/Germany, the triangle Belgium/Netherlands/Germany and in the Scandinavian countries.[31]

Whilst Directive 98/27/EC was clearly adopted in the aftermath of the *Homeshopping* case,[32] which blatantly demonstrated the deficiencies in getting to grips with transborder litigation, the history of Regulation 2006/2004 is more complex. It is closely linked to the elaboration of Directive 2005/29/EC[33] on unfair commercial practices. Although Directive 2005/29/EC did in no way change the enforcement mechanism, which was literally taken over from Directive 84/450/EEC[34] on misleading advertising, the European Commission was convinced that there was a need to strengthen transborder enforcement in the advertising law and more broadly in consumer law. As it is well-known, the Regulation obliges Member States to establish or to designate a public body to serve as co-operation partner in the network.[35] Passing the overall difficulties of dealing with transborder litigation in review, it seems plausible to try to find solutions to transborder consumer conflicts by way of co-operation. However, the scope of the Regulation is bound by a set of directives and the type of infringement is typically one which results either from unfair contract terms or from unfair commercial practices.

In the following part we address separately different remedies and then suggest that coordination problems between injunctions and pecuniary remedies have arisen in the EU. We provide some examples and then suggest that at least for transborder litigation, a rapid intervention is needed.

2.1.2. The European minimum standard – action of injunctions

Since the adoption of Directive 84/450/EEC on misleading advertising, the action of injunction belongs to the core of consumer law remedies. It is enshrined in two major fields of consumer law, unfair trade practices law, now condensed in Directive

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29 OJ L 364, 9 December 2004, 1.

30 See in particular recital 2 of the Regulation and preparatory documents.

31 See for a full account of the empirical analysis, Micklitz/Rott/Docekal/Kolba, 2007.

32 Micklitz, 1993, p. 411; Id., in Bernitz/Weatherill, 2007, p. 235.

33 OJ L 149, 11 June 2005, 22.

34 OJ L 250, 19 September 1984, 17.

35 On this shift already, Cafaggi/Micklitz, 2008, p. 391.

2005/29/EC, and unfair terms law, Directive 93/13/EC[36] currently under review.[37] The European Commission could rely on a longstanding regulatory strategy in Austria, Germany and some other old Member States. This solid background allowed the European Community to harmonise the regime for injunctions, a development which nevertheless stimulated changes in quite a number of Member States. Directive 98/27/EC on injunctions is meant to give shape to the remedy in national *and* in transborder litigation. Injunctions are aiming at setting an end to unfair or misleading advertising or the use and recommendation of unfair standard contract terms. It is a stop order mechanism that can prohibit future infringements but also include cease and desist orders.[38] Directive has also promoted the introduction of penalties for lack of compliance with injunctions.[39] In case of default, MS legislation can choose between payment to the public purse or to the claimant.[40] These resources are generally devoted to promote further litigation.

The Directive provides for a mechanism which MS may implement whereby the claimant has to seek an agreement concerning the injunction before the legal claim is brought before the Court.[41] Prior consultation is required but no reference to the legal value of the agreement reached by the parties is made especially in relation to preclusion issues.[42] This provision shows the importance of the bargaining model in Europe and the attempt to reduce the level of litigation that might arise.[43]

The draft Directive on injunctions went further.[44] The original draft did not even mention injunctions[45] and the European Parliament[46] did not even discuss the purpose of the action, whereas the Social and Economic Committee[47] advocated for the integration

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36 OJ L 95, 21 April 1993, 29.

37 Green Paper on the Revision of the Consumer Acquis, COM (2006) 744 final, for a deeper analysis see Loos, 2008, p. 40.

38 See Article 2.2 (a) EC Directive 98/27.

39 See Article 2.1 (c) "insofar as the legal systems of the MS concerned so permits an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event that a failure to comply with the decision within the a time limit specified by the courts to administrative authorities, of a fixed amount for each day' s delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions."

40 See Article 2.1. (c) EC Directive 98/27.

41 See for example Article 4 of the Cooperation agreement between the Nordic Consumer Ombudsmen available at http://www.forbrug.dk/english/dco/icpen0/nordic-cooperation/ncoagreement/; see on the degree to which MS have introduced this obligation, Micklitz/Rott/Docekal/Kolba, 2007, p. 234.

42 See for references concerning the differences between agreements concerning injunctive relieves and those concerning compensatory damages Cafaggi/Micklitz, 2008, p. 391 ff.

43 For the different models of adjudication developed in Europe and the US, see Cafaggi/Micklitz, 2008, p. 391 ff.

44 Article 1 (1) of the Draft ran as follows: The purpose of this Directive is to coordinate the laws, regulations and administrative provisions of MS relating to certain remedies designed to protect consumers' interests, so as to ensure the smooth functioning of the internal market. The "action for injunction" was only mentioned in recital 3 and reappeared in the heading of Article 2., OJ C 1007, 13 April 1996, 3.

45 OJ C 107, 13 April 1996, 3.

46 OJ C 362, 2 December 1996, 236.

47 OJ C 30, 30 January 1997, 312 under 2.4, see in more detail Micklitz/Rott 2006, Rdnr. 6-9.

of liability claims. This is worth recalling as the European Commission intends to publish a proposal for the revision of Directive 98/27/EC.[48] It would not be the first time that the European Commission goes back to its earlier proposals. Harmonisation of EC remedies could then be extended beyond injunctions. As EC law stands, it is fair to conclude that injunctions constitute the sole harmonised remedy all over Europe.

Directive 98/27/EC regulated standing, identifying two groups of potential claimants that MS could choose: independent public bodies and consumer organisations. They can select one or both. The Directive set up a notification procedure under which Member States notify the European Commission of 'qualified entities' which defend the collective interests of consumers. A principle of mutual recognition has been established by the Directive in order to empower foreign entities to act.[49] Member States benefit from considerable leeway in choosing not only between administrative or judicial enforcement via consumer organisations, but they are also relatively free in setting their own standards on what they define as a consumer organisation. The Commission publishes regularly a list of qualified entities which are granted standing in their home countries and to which national courts of other Member States are legally bound.[50]

2.2. European group actions and American class actions

In the late 70th and early 80th a debate in some European Member States took place on the feasibility and transferability of the US class action to Europe. This discussion blossomed when consumer policy in Europe was at its peak. However, it seems as if the time was not yet ripe for going beyond individual litigation. France failed after lengthy discussions around the codification of consumer law as well as Germany, where collective actions were debated in the field of unfair commercial practices for many years.[51] Both projects were however of paradigmatic importance.

In France the ambitious project of the Commission de la Refonte aimed at developing a fully fledged consumer code standing side-by-side to the Code Civil and setting standards for the development in Europe. In the end, a Code de la consommation was adopted but it was more a compilation of laws than a codification in the proper sense. The rather ineffective "action des la représentation conjointe", regulated in Article L-422, could hardly substitute a class action type of regulation.[52]

In Germany the ground was well prepared with comprehensive empirical studies meant to analyse the potential damage of unfair and misleading advertising in relation to consumers.[53] The outcome was a right of withdrawal if the consumer had been driven by misleading advertising. It never gained any importance. Similar experience could be reported from the Scandinavian countries.

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48 See EC Commission.

49 See recital 11 and Article 4.1 of EC Directive 98/27.
For the implementation of the mutual recognition principle through specific agreements see, for example Article 3 of the Cooperation agreement between the Nordic Consumer Ombudsmen available at http://www.forbrug.dk/english/dco/icpen0/nordic-cooperation/ncoagreement/

50 OJ 63, 8 March 2008, 5.

51 See for Germany Micklitz, 1996, p. 383. For France Calais-Auloy, 1985.

52 See Franck, 2006, p. 153.

53 See von Falckenstein, 1977.

Directive 98/27 on injunctions was enacted in 1998. In less than 10 years the scene has dramatically changed. Again Member States have taken the lead. Today it seems that Member States are convinced that they need some sort of a collective redress mechanism to reach beyond mere injunctions and aims at collective compensation. Why is that so? And why now? As mentioned we seek the change in the separation between substantive vs. procedural remedies and in the development of a proper common community interest.[54]

This does not mean that the common incentives have led to similar solutions. Member States' legislative attempts to get to grips with collective private enforcement may serve as a perfect example for making the overall formula "united in diversity"[55] a leading principle. Each Member States follows its proper legal culture and tradition. The result is an enormous variety of solutions, each grounded in national particularities and in a bewildering confusion in terminology which renders difficult a deeper comparison of the models. Furthermore it may also constitute more a barrier to European justice than an incentive for competition between legal orders. The development is so fast that research is outdated before it is published. The 2006 Stuyck study does no longer represent the state of art in Europe.[56] Stanford and Oxford University have taken the initiative to install a stable network of researchers aiming at keeping pace with the ongoing development not only in Europe but world wide.[57]

However, this does not mean that there are no common denominators at all. The benchmark of the European debate has been the US class action regulation. In the European political debate the US class action is characterised by three constitutive elements: opt-out, jury trial and contingency fee.[58]

As the jury trial is rather alien at least to continental procedural systems, the debate has focused on opt-out vs. opt-in and on contingency fee vs. the loser pays principle. There is no public hearing or no political conference where the US class action does not show up, either favoured as the sole solution to protect effectively consumers or as a "*horror juris*" which is blamed for destroying the much more balanced European legal systems. Such a rough dichotomy clearly overlooks the mutual convergence tendencies. In the US, there are constant and ongoing efforts to cut back the misuses of the class action, to introduce a second opt-out option after the settlement has taken place and to intensify the judicial control of contingency fees.[59]

In Europe, there is a strong move towards a group action, based on opt-in. Sweden has set the standard after long-lasting debates and a last minute shift in Parliament from opt-out to opt-in. However, not only Portugal, Spain, and to some extent Denmark and

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54 See for an account Micklitz, 1996, p. 21 at 29.

55 Taken from the Treaty, http://europa.eu/abc/symbols/motto/index_en.htm

56 An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report, Study for the European Commission, (hereinafter Stuyck Report), available at http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

57 See www.globalclassactions.stanford.edu. 26 country reports are available on the internet as well as some of the national legislation.

58 See the already paradigmatic documentation of Mansel/Dauner-Lieb/Henssler, 2008, where representatives from industry and the academia discussed the pros and cons of group actions; Stadler in this volume.

59 See Beuchler, 2007.

Norway have introduced an opt-out solution, but also the UK and Germany, at least with regard to unfair commercial practices allow for opt-out type actions.[60] The liberalisation of the verdict of contingency fees at least in some Member States, documents the growing preparedness to take into consideration the fact that the success or failure of group actions in the European sense depends to a large extent on lawyers who have to be remunerated for the higher intensity of work and the higher risk.[61]

We will not try to compare the different solutions adopted in the Member States. Application of the new laws is still rather limited. The experience is even more circumscribed with regard to collective judicial enforcement of consumer law. At this stage we can analyse the law in the books and identify the regulatory strategies lying behind the diversity.

2.3. Three models of group actions in 27 Member States

Some clarifications on the terminology are needed. Collective action is used as the overarching category in contrast to individual action. This complies to a large extent with the US terminology of aggregate litigation.[62] However, subcategories have to be built to reflect the European approach. We distinguish between representative action, group action (opt-in or opt-out), model cases or test case and US class actions.[63]

2.3.1. The search for the perfect European model

The search for a European approach to aggregate litigation is largely determined by the strong desire to develop a perfect legal model which avoids the so-called deficiencies of the US class actions in response to the separation between substantive and remedial law in a multi-layered Europe. The European Commission is, at least in theory, not bound to the US agenda. It could and it does to some extent more openly and less ideologically address the question whether and why collective actions, to put in neutral terms are needed. This comes clear in the White Paper on Private Enforcement in Competition law. The shift to private enforcement is fostered by European institutions, the ECJ with *Courage*[64] and *Manfredi*[65] and the European Commission with the Green and White Paper on private enforcement following suit.

Outside and beyond competition law that is in consumer law, the position of the European Commission is weaker, not least because of its reduced legislative competence. One may wonder, however, whether the rather weak position of the

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60 Country reports in www.globalclassactions.stanford.edu, Denmark: Werlauff, Germany: Baetge, Finland: Viitanen, Norway: Bernt-Hamre, Portugal: Sousa Antunes, Spain: Gutiérrez de Cabiedes Hidalgo, Sweden: Lindblom as well as the more comprehensive national reports on Germany, the United Kingdom, Sweden in Micklitz/Stadler, 2005.

61 Sweden has introduced risk agreements; Italy has got rid of the prohibition concerning fee agreements between lawyers and clients, see for a fuller presentation of the laws of the MS, Ros, 2006, p. 299.

62 See ALI project on the law of aggregate litigation Chapter 1.

63 See already, Cafaggi/Micklitz, 2008, p. 391; Stuyck in this volume.

64 ECJ, 20 September 2001, Case C-453/99, Courage, [2001] ECR I-6297.

65 ECJ, 12 July 2006, Case C-295/04, Manfredi, [2006] ECR I-6619.

European Commission in consumer law would not enable the arguments in favour of private collective enforcement strategies to be openly addressed. The envisaged green paper of DG Sanco, to be expected in 2008/2009, will have to demonstrate whether the European Commission is willing to discuss and rethink the principle of the procedural autonomy of the MS in a European Community.

Be that as it may, Sweden has set the agenda not only for the Scandinavian countries in the long established spirit of Nordic legislative co-operation[66] but for most of the old Member States in its long and intensive political debate over the pros and cons of transferring the US class action model to Europe. The result has been an opt-in solution, which was lately based on the need to respect the right to be heard of all those who are involved in mass actions but are not leading the case.[67] None of the Member States, perhaps with the exception of the UK, undertook such a serious effort to do justice to the US experience beyond oversimplification and the horror of an open political debate. In Germany the then competent Ministry of Consumer Protection launched a research project which led to the development of an academic draft.[68] A public hearing in France in June 2006 did not go beyond the rather simplified debate over the pros and cons of opt-in and opt-out.[69] In Germany and in the Netherlands the respective legislation is not so much the result of public debate of the pros and cons of a group action and its possible outlook, but of social events which pushed the legislature into action. The German Capital Markets Model Case Act is the result of the so-called Telecom case.[70] The Dutch Law on mass damages is very much going back to a huge litigation over the disastrous effects of hormones.[71]

The Swedish law on Group Actions[72] takes up all issues which are discussed in the US class action. However, the overall aim is to set up a perfect legal model which avoids the incriminated pitfalls of the US solution and embeds the European version of the group action into a tight legally formalised legal jacket. The act devotes careful attention to the determinants of what constitutes a group action, to the commencement of the procedure, to the choice of the appropriate group representative, his or her control by the judges, the tasks and duties of lawyers and judges during the litigation to carefully manage the litigation, to settlement in courts and its possible legal effects.[73]

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66 See Bernitz, 2002, p. 95.

67 See Micklitz/Stadler, 2005, p. 497.

68 See Micklitz/Stadler, 2005, p. 497. However, neither the research nor the draft ever reached the political level. This might be due to the fact that the study had been undertaken by the 'wrong' ministry. For legislative matters the Ministry of Justice claims competence.

69 See www.globalclassactions.stanford.edu the French report written by Magnier. The new French government has not yet decided whether to take up Chirac's initiative again which led to a proposal in Parliament which might be regarded as a developed form of the l'action de la representation conjointe.

70 Nearly 16,000 private investors sued German Telecom at the Court of First Instance in Frankfurt for having published relevant information too late which would have affected the emission of the second tranche of telecom shares.

71 See Mom, in Micklitz/Stadler, 2005, p. 435; Hondius in this volume and Tzankova, Country report Netherlands, available at www.globalclassactions.stanford.edu.

72 Reprinted in Micklitz/Stadler, p. 628, translated by the Government Office, Office for Administrative Affairs, Stockholm Sweden.

73 See Micklitz, in van Boom/Loos, 2007, p. 3; from a Swedish perspective, country report Sweden, written by Lindblom, available at www.globalclassactions.stanford.edu

The respective legislative acts adopted in Denmark, Finland and Norway follows the Swedish opt-in model though allowing opt-out claims in particular circumstances.[74] The German "Academic" Draft Act was inspired by the Swedish model as well.[75]

The UK Group Litigation Order[76] does not copy the US class action, but it fits nevertheless into the overall search for an appropriate European model. In essence it maintains the individual character of the litigation and reduces the collective elements to the strict minimum.[77] The beginning and end of the procedure are and remain individual claims. However, the GLO recognises the need for the judge to shape the procedure and even explicitly refers to the "managing judge".[78]

2.3.2. The key role of consumer associations

The role and function of consumer organisations varies considerably in Europe. It is tempting to use the distinction between pluralistic and corporatist societies as a paradigm to assess and to define the role of associations. In such a rough pattern the US appears as a pluralistic society, whereas in particular the Scandinavian countries, Austria, Germany and the Netherlands are generally roughly associated with corporatist societies. This might suggest that consumer organisations are strong in corporatist countries. This, however, is only partly true. It might fit with regard to Austria, Germany and the Netherlands, but it is less true with regard to the Scandinavian countries where public agencies are the key players in collective enforcement. However it must equally be admitted that the distinction is superficial and might vary with regard to different policy fields even among Member States.[79] This seems to be true even within the same policy field. Consumer organisations are playing an ever increasing role even in countries which are not regarded as prototypes of corporatist states such as France and Italy. In France, for example, the state is traditionally regarded as representing the public interests which include consumer policy.[80]

So alternative explanations to the role of consumer organisations in enforcement policies are needed which reach beyond the dichotomy of pluralistic vs. corporatist societies. They may be found in the interplay between public government and consumer organisations. We may observe Member States with strong public and private institutions (Germany and France), countries with strong private and weak public institutions (Italy) or countries with weak public and weak private institutions (the new Member States). Such a distinction might provide for new insights, but is again of limited value. Germany has strong public institutions, but not in the field of consumer law, not even with regard to product safety. More or less the same applies to France, where consumer organisations are the key players as public institutions have no or limited regulatory power in the field of consumer law enforcement. More research is

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74 See Viitanen, 2007, p. 83, as well as the respective country reports for Denmark, Finland and Norway available at www.globalclassactions.stanford.edu

75 Stadler/Micklitz, p. 1471.

76 See Mulheron, 2004; Stadler/Micklitz, p. 795 at 891.

77 See Mulheron, 2004.

78 See GLO Rule 19.13 and Hodges, 2001, p. 321.

79 See Strünck, 2006, p. 18 and 44.

80 Baumgartner, 1996, p. 9, 1.

needed to explain the role and function of consumer organisations. However, in contrast to the US it is obvious that consumer organisations have a role to play in the shaping and in the implementation of consumer law via collective actions. The introduction of the action for injunction and the Member States preparedness to give exclusive standing to consumer organisations has certainly contributed to the current situation in Europe.

The prototype is the representative action "invented" in Austria and then co-opted for by Germany. Both countries rely heavily on consumer organisations in private collective enforcement. This is largely due to a common history under which private organisations rather than administrative bodies were regarded as the appropriate enforcers of unfair commercial practices legislation.[81] When the pressure grew to extend the available remedies beyond injunction, the Austrian consumer organisations managed to get confirmation in the Supreme Court for their strategy, to litigate on behalf of consumers who had individually transferred their rights to claim compensation to the organisation.[82] Since then the Austrian consumer organisations improved their management skills and developed a fine-tuned strategy to collect claims in appropriate cases and to claim compensation.[83] They have filed more than twenty cases and successfully managed them.[84] The key to the success has been the role of the so-called process insurer, an insurance company which bears the risk, but claims 30 % of the profit. Consumers who transfer their rights to the organisation have to sign a document that they agree with this form of 'contingency fee'.

The parallel German rule has been the result of a 'clandestine' co-operation between German consumer organisations and the competent Ministry of Justice.[85] Both managed to smuggle the new power into the much debated law on the reform of the German Civil Code. German consumer organisations started a test case and had to learn how reluctant German Courts react against any attempt to stretch the civil procedural law beyond the boundaries of individual litigation. In the end the legislator had to intervene to correct the imperfections.[86] German consumer organisations seem now to be prepared to go down the Austrian way in seeking support from so-called process insurers.[87]

The French action en représentation conjointe comes near to the Austrian/German approach, but never played a role in practice, mainly because of the high risk consumer organisations run in financing the litigation. The French Draft Act which was officially withdrawn, pointed in the same direction.[88]

The Dutch and the Italian laws rely heavily on consumer organisations. The Dutch law requires collective litigants, consumer organisations as well as associations or

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81 Bakardjieva Engelbrekt, 2003.

82 See Klauer, 2005, p. 79, where the development of the Austrian Sammelklage is presented in full, from a German perspective Stadler/Mom, 2006, p. 199.

83 Which does not mean that the representative action is the appropriate means in all constellations where consumers suffer damages; see the different contributions in Gabriel/Pirker-Hörmann, 2005.

84 Klauer, 2005, p. 79.

85 See Brönneke, 2001.

86 See BGHZ 170, 18 and then the amendment in § 8 Abs. 2 Rechtsdienstleistungsgesetz, BGBl. 2007, 2840.

87 This is the case in the pending litigation initiated by the Hamburg consumer advice centre against a telecom company.

88 See www.globalclassactions.stanford.edu, the French report written by Magnier.

foundations established just for that very purpose, to conclude a settlement, which is then approved by the courts and extended to the whole class. It is an opt-out mechanism based on the assumption that litigants are able to find a compromise which is not only acceptable for both sides but also for the court. It is quite a unique procedure which has been applied twice.[89] The Italian law on group actions, which shall enter into force on 1 January 2009, grants standing to consumer organisations.[90] Those consumers and users who intend to benefit from the protection afforded by Article 140-bis must notify the association in writing and their intention to join the collective action. Just in line with the dominating philosophy in Europe, Italy has introduced an opt-in procedure.

2.3.3. Collective consumer actions in new democracies

The southern new Member States of Portugal, Spain and Greece have introduced collective consumer actions shortly after their transformation into democracies. It is a major characteristic of these countries that consumer law and consumer policy formed an integral part of the democratisation process. This is overtly documented in the respective consumer legislations.[91] The historical background might explain why the respective rules on collective action in these countries are rather broad and policy oriented. They sometimes look more like policy programmes needing further fine-tuning by the legislator than fully fledged laws.[92] However, the rules on collective actions in the consumer protection acts have gradually been supplemented by more detailed rules in regulations enshrined in the civil procedure or in separate legislative acts.[93]

The original versions tend to refer in a large sense to the collective or diffuse interests somewhat inspired by the French concept of the "intérêt collectif".[94] Article 20 of the Spanish Law on Consumer Protection 26/1984 and Article 11 of the Civil Procedure Act refer to the diffuse and collective interests that consumer organisations have to defend.[95] Article 12 (4) and (5) of the Portuguese Law 24/96 refers to liability claims and regulates standing in Article 13 *inter alia* of the Public Prosecutor who may intervene to protect the collective and diffuse interests of consumers.[96] However, Portugal has introduced new legislation to be added to that introducing popular action enacted in 1995.[97] The system of aggregation established by the legislator in Decree-Law 108/2006, of 8 June, pursuant to Council of Ministers Resolution 100/2005, of 30 May, is of substantially more limited reach. The measure allows the judge to operate

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89 See Stadler/Micklitz, p. 343.

90 Article 140-bis of the Italian Consumer Code; see for details www.globalclassactions.stanford.edu, Silvestri, Italian report.

91 See Gerlach, 1986, p. 247; Micklitz/Roethe/Weatherill, 1994.

92 See Stadler/Micklitz, p. 169 (Greece), p. 655 (Spain).

93 www.globalclassactions.stanford.edu Portugal: Sousa Antunes; country report Spain: Gutiérrez de Cabiedes Hidalgo.

94 See on this concept Micklitz/Stadler, p. 115.

95 www.globalclassactions.stanford.edu Spain: Gutiérrez de Cabiedes Hidalgo with an English translation of the respective Acts.

96 www.globalclassactions.stanford.edu Portugal: Sousa Antunes with English translations.

97 Law 83/95 and Decree-Law 108/2006.

through "mass acts" so long as there is an element of connection between the actions and the combined performance of a procedural act or diligence simplifies the court's task. The intervention of the legislator was the result of an increase of mass non-compliance, in particular with regard to "small debts of communications companies, consumer credit, car leasing and, in general, all the natural litigation of a consumer society".[98]

It seems as if the Middle and Eastern European countries have chosen a different path. Early hopes that the transformation process will equally yield strong civil societies with active consumer organisations that collaborate with public agencies has not become true or if any to a much more limited extent.[99] Whilst market building was certainly fostered in particular in the pre-accession period, last but not least under pressure from the European Community, the middle and Eastern European countries were reluctant to integrate collective actions into their respective consumer laws, meant to implement the various EC directives. The action for injunction constituted the bottom-line of reform, sometimes undertaken much more to pay lip service to the EC law requirements than to vitalise a new remedy in a changed economic and political environment.[100] However, the wave of law making has now reached the new Member States as well. Nearly twenty years after the break down of communism, the middle and Eastern European countries are undertaking major efforts to keep up with the development in the old Member State.[101] It is suggested, however, that not all new Member States are prepared to introduce collective remedies beyond injunctions. Poland[102] and the Czech Republic[103] belong to countries where there are not even concrete plans.

2.4. Regulating entry and exit – Comparing ex ante and ex post intervention

Regulation in collective judicial enforcement relates to various aspects of standing, financing and entry and exit options. Legally speaking Member States are free to regulate *ex post* or *ex ante*. Directive 98/27/EC, which adopts an *ex ante* approach with highly regulated entry, applies only to injunctions.[104]

Standing differs quite significantly across countries in group litigation. In some MS, standing is open to private, both individual representative and collective organisations,

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98 www.globalclassactions.stanford.edu Portugal: Sousa Antunes, with English translations.

99 Micklitz, 2001, pp. 137-182.

100 This is the overall finding of empirical investigation in 25, not 27 MS, Micklitz/Rott/Docekal/Kolba, 2007; see also Bakardjeva, 2006, pp. 1-36 and Ead, in this volume.

101 See Bakardjieva in this volume.

102 See Safjan/Gorywoda/Janczuck in this volume; www.globalclassactions.stanford.edu Poland: Tulibacka.

103 See Tichy/Balarin, in this volume; Tichy (ed.), 2008.

104 See Cafaggi/Micklitz, 2008, p. 391 ff.

and public;[105] in others only to individual representatives and *ad hoc* organisations;[106] in others only to private organisations.[107]

Ex ante governmental intervention occurs when States organise civil society by limiting standing to consumer organisations and/or public agencies, by excluding self-organisations from acting as claimants and in providing funding from the public purse. The practical effect of *ex ante* intervention is control over access to justice. According to this perspective, collective judicial enforcement shall not be driven by market forces, but shall develop and grow, if at all, under the auspices of state control. European business arguing against US class action directly or indirectly supports *ex ante* intervention. The flood gates to the judiciary should not be opened.

Ex post intervention refers to a regulatory model where states leave the organisation and the funding of collective actions to civil society or even beyond where the state sets incentives to promote that goal. It relies on self-organisation, be it on an *ad hoc* basis or on lawyers which organise claimants and bundle consumer complaints. Such a regulatory model requires room for competition between possible plaintiffs; it implies more leeway for civil society, more economic incentives for lawyers and more powers for the managing judge.

One may wonder whether there is a silent but steady shift in Europe from the *ex ante* state control to the market based *ex post* US control of access to the judiciary in collective actions. Although, Europe is in a test phase, our tentative answer to a paradigm shift is a cautious yes. Collective actions might then become a regulatory device to rebalance matters of (social) justice.[108]

Prominent candidates for such a move are the UK Group litigation order, the Dutch settlement approval concept and the German Capital Market Model Case Act. The UK model allows for self-organisations and fosters the concept of the managing judge.[109] The societal Dutch model puts moral pressure on the conflicting parties to settle the conflict. The feasibility of this concept seems to be linked to particularities of Dutch society.[110] The standard method in aggregate litigation works exactly the other way around. Litigation in court ends up in a settlement.[111] The German model shows promising tendencies since the Capital Markets Model Case Act favours enforcement via lawyers and lead plaintiffs and no longer relies only on consumer organisations. Typically for Germany, however, it is a rather mixed scene. Representative actions lie in the hands of registered public consumer organisations alone.

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105 See the Swedish Act of 2002, more generally in the Scandinavian countries, see Viitanen, 2007, p. 83, as well as the respective country reports for Denmark, Finland and Norway in www.globalclassactions.stanford.edu.

106 This is the case in the German Capital Markets Model Case Law.

107 See the Italian model in Article 140 bis codice del consumo and the Dutch group actions, Hondius in this volume.

108 Gidi, 2005, p. 37; Meller-Hannich, 2008, p. 13; sceptical on this issue Stürner, 2008, pp. 113, 118.

109 See Micklitz/Stadler, p. 857; Hodges: country report UK, www.globalclassactions.stanford.edu

110 See Mom, 2007, and Hondius in this volume.

111 See Klauer, 2005 and Stadler/Mom, 2006.

We will give shape to the *ex ante* and *ex post* regulation of entry with regard to the four potential sets of plaintiffs: consumer organisations, *ad hoc*-organisations, statutory agencies and lead plaintiffs in tandem with lawyers.

2.4.1. Consumer organisations

Consumer organisations exist in all Member States with different weight, legitimacy and accountability.[112] The policy question is whether and why consumer organisations should have standing in group actions.

Their organisation and performance requires skills and resources. It is useless to grant standing to consumer organisations if they are unable to monitor effectively violations and to select claims to be brought before courts. This, however, happens in nearly all Member States. The long list of notified consumer organisations does in no way correlate with their practical importance.[113] In Europe only a few consumer organisations are effective litigants. As long as the question of funding is not solved, it remains somewhat artificial to discuss the pros and cons of standing for consumer organisations in group actions.

None of the Member States has adopted particular laws on consumer organisations to regulate solely and particularly the status and the potential funding of consumer organisations to promote litigation. Their regulatory status is generally based on the law of associations and on constitutional freedoms of speech and self-organisation. Funding does not play a role here.

Particular requirements related to standing might be found in the respective EC rules on actions for injunctions.[114] These requirements, however, define only a minimum and are rather vague. The European Commission does not have the power to impose on Member States an obligation to provide adequate funding.[115] It is for the Member States to decide standing – and funding.

In the laws implementing Directive 98/27/EC and some of the Consumer Codes they have laid down criteria on the characteristics of consumer organisations.[116] There are no commonly agreed criteria on consumer organisations. It is obvious, however, that consumer organisations are submitted to much more stringent criteria in the new than in the old Member States.[117]

The role of consumer organisations in group actions varies across MS, lacking a European directive. Although consumer organisations are particularly strong in Austria and Germany, last but not least because these states provide nearly 100 % of the funds,

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112 See Article 3 EC Directive 98/27 on which Cafaggi/Micklitz, 2008, p. 391 ff.

113 See Micklitz/Rott/Docekal/Kolba.

114 See Article 3 EC Directive 98/27.

115 However, the European Commission may ask MS to provide for adequate funding, which it has done in the consumer strategy 2007-2013.

116 See for example the Italian Consumer Code Article.

117 The old MS leave the organisation of consumers to civil society and limit the regulatory requirements to the strict minimum. Often these criteria are not even enshrined in mandatory legislation but are the result of diverse court rulings. See Micklitz/Rott/Docekal/Kolba, 2007. In this volume see Bakardjeva.

it can by no means be taken for granted that they will be entrusted with group actions in the here defined terminology.[118] Germany has excluded consumer organisations from the Capital Market Model Case Act, but granted them a monopoly in test cases. The distinction should not be overestimated, however, as the adoption of the respective law is more erratic than systematic. Which way Austria will go is by no means clear. The Netherlands and in particular Italy have granted consumer organisations alone standing, thereby excluding all other potential players.[119] In countries with strong public authorities, consumer organisations are often relatively weak. This is true with regard to the UK and the Scandinavian countries. In the UK and in the Scandinavian countries strong agencies form an integral part of the respective form of capitalism.[120] Denmark, Finland, Norway and Sweden have granted standing to both; in practice, however, the Ombudsmen are the key players.[121]

In the new Member States weak public authorities and weak consumer organisations go hand in hand. Public institutions in socialist times were weak because the party was the running leader. To limit private constituencies' power the new Member States have chosen primarily to rely on public institutions. This leads to the problematic effect that weak state authorities tend to control the access of consumer organisations to the judiciary beyond mere minimum standards. It seems as if consumer organisations and public authorities are competing in the enforcement of consumer law. The constant need for public funding provides a prominent ground for playing off consumer organisations against each other by providing limited funding to a large number of organisations. Such a strategy keeps the influence of consumer organisations low and enhances the position of the statutory authorities.[122]

2.4.2. Self or ad hoc organisations

Under the framework of Directive 98/27 organisations need to be registered to be granted standing.[123] Only organisations with a stable infrastructure and long standing experience should be regarded as qualified entities having standing to sue. The Directive sets precedents which run counter to the idea of self-organisations, where these elements are missing or only available in rudimentary form.

Ad hoc organisations are the result of incidents and accidents. Self-organisations emerge on an *ad hoc* basis as the result of homogenous interests in collective litigation.[124] The victims or better the parents of the thalidomide catastrophe or of the hormone case in the Netherlands have organised themselves into the form of an associations.[125] In

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118 Taken from CLEF.

119 See Article 140 bis of the Italian consumer code.

120 See Hall/Soskic, 2001.

121 Lindblom: National report Sweden available at www.globalclassactions.stanford.edu.

122 Bakardjieva in this volume.

123 OJ L 166, 11 June 1998, 51.

124 Such self-organisations may be reported in particular from the field of product safety, where the victims of an accident gather together to better defend their interests. Then a stable organisation is needed which may be organised according to the law of associations or company law as far as this applies also to non-profit making institutions.

125 See Hondius in this volume.

Germany the companies which suffered from a cement cartel have established a BGB-Gesellschaft Partnerhship under the German Civil Code.[126] In Belgium a company has been created to defend injured parties in competition law infringements.[127]

The question then is whether self-organisations should have standing. There are policy arguments for and against penalising *ad hoc* organisations while privileging rooted and stable organisations.

The main reasons why longstanding, representative organisations are given standing in those countries where *ad hoc* organisations are not granted standing are twofold: a) to prevent opportunism[128] and b) to empower existing organisations and avoid competition and to some extent the emergence of a strong civil society.

The arguments to grant standing to *ad hoc* organisations are a) to favour the creation of groups of victims in order to generate economies of scale and b) to put pressure on existing organisations and, promote social and legal pluralism and to avoid rent-seeking.

In Europe the picture is rather scattered which reflects to some extent the distinction between liberal and corporatist societies. Corporatist societies, such as Germany, prevent the formation of new and *ad hoc* organisations to negotiate with existing and well recognised organisations or make them even mandatory, like the Dutch law on group actions.[129] Liberal societies, such as the UK, favour the formation of new organisations and try to prevent rent-seeking of the existing ones. However, the picture becomes blurred once the comparison is extended. In Austria, a classical corporatist country, self-organisations have been granted standing by the highest court in the country.[130] As to group actions in Sweden self-organisations are allowed.[131]

2.4.3. Administrative agencies

Consumer agencies in Europe take very different forms. They may be (1) independent regulators, (2) they may be part of the government or (3) something in between. It has to be recalled that the policy of the European Commission is bound so far to the establishment of public enforcement bodies with regard to transborder litigation only.[132] There is no (not yet) EC policy similar to the services of general economic interests to advocate for the setting up of independent consumer agencies dealing also with internal national matters. But even the ideal type of consumer agency, the independent and separate public body with proper competences and well equipped, runs similar risks as those of a consumer organisations. If the public body launches a collective action, it

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126 Hess, 2008, pp. 61, 70-71 with references to the diverse forms of self-organisation.

127 Cartel Damages Claims (CDC), http://www.carteldamageclaims.com/english/press.htm.

128 An *ad hoc* organisation can be created to exploit specific opportunities without being grounded in civil society.

129 However, the former relatively strict approach of the German Federal Supreme Court which prohibited the transfer of rights to an association which then could sue on behalf of the assignees is going to be softened now; see references in Hess, 2008, fn. 99.

130 See the documentation of the case law in Klauer, 2005, p. 79.

131 Compare Sweden where *ad hoc* organisations can be created, see Lindblom: National Report Sweden available at www.globalclassactions.standford.edu

132 See Regulation 2006/2004 Article 1.

runs the same financial risk. It cannot go bankrupt, but it can be held liable for improper judicial advice.[133] What matters even more is that consumer agencies differently from other national regulators such as cartel offices or the network regulators (energy, telecom) often do not have their own sources of income and depend entirely on transfers from the government. Only when competition agencies have been given enforcement tasks in the field of consumer protection can they use the resources generated by infringements of competition law.

In Member States with strong public enforcement structures in the field of consumer law and weak consumer organisations, the former often play a relevant role in collective judicial enforcement. In the Scandinavian countries, consumer law judicial enforcement lies in the hands of the Ombudsmen, entitled to file collective compensation claims. Similar tendencies are to be reported from the UK where the enforcement lies primarily in the hands of the Office of Fair Trading and from the new Member States, where often separate units of the competent Ministries are in charge of the enforcement.[134] The EC move towards the establishment of consumer agencies in each Member States may even strengthen this development. Consumer organisations are then reduced to mere watch dogs which might file motions to the consumer agency, at the best establishing co-operation mechanisms.

2.4.4. Lead plaintiffs and lawyers in tandem

Lead plaintiffs are relatively new actors in European collective judicial enforcement. The terminology and the category are definitely borrowed from the US class action. There is overall agreement that group actions of several, maybe hundreds, of claimants need a plaintiff to lead the case. In Europe this is predominantly the claimant who has the strongest economic interest in the outcome. Member States do not apply the first come first serve principle.[135] This might be due to the fact that there is less fear in the Member States that lawyers are competing against each other with their respective claimants on the basis of ill-founded and less-settled claims. So far, this has not happened or where there are tendencies like in financial services litigation, these seem to be under the control of the competent judges.

The true problem for the EU Member States is the definition of the role and function of the lawyer. In the US, lawyers are the driving force behind the class action, due primarily to the contingency fee structure. Collective judicial enforcement, in the field of consumer protection, is regarded as business which needs investment. Europe, at least European governments, are far away from such approach. Whilst there is a strong move to look at lawyers as service providers, they are still regarded as being part of the judicature, thereby fulfilling quasi statutory tasks.[136] EC law too remains ambivalent. Whereas lawyers are regarded in competition law as enterprises, the ECJ exempted the

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133 There are two famous examples both from the area of product safety and both concern the public warning against health risks. See OLG Stuttgart NJW 1990, 2690 – Birkel and ECJ, 17 April 2007, Case C-470/03, COS.MET, [2007] ECR I-2749; Reich, 2007, p. 410.

134 On the enforcement powers of OFT see Ramsay, 2007; Howells/Weatherill, 2005.

135 See references in a comparative perspective, Stadler/Micklitz, p. 1390.

136 Ros, 2006, p. 299.

chambers of advocates from the scope of application of EC law.[137] Europe is not willing to go down the American road which means in essence that new forms of funding should be considered. This, however, is not really the case.

3. Reframing the European debate in the light of the US and Canadian experiences

Two different yet related questions concerning consumer enforcement policies are before Europe: (1) the definition of a consistent multilevel system with strong coordination between European and MS legislation, (2) the relationship between administrative and judicial enforcement and within the latter between injunctive reliefs and pecuniary remedies. Furthermore, should the strategy distinguish between transborder and domestic litigation? Should specific rules and policies be devised to promote European aggregate litigation?

We try to address these points by breaking them down into 5 issues:

(1) the constitutional dimension of collective redress, (2) the relationship between administrative and judicial enforcement, (3) the role of hybrid class actions and the interplay between injunctions and pecuniary remedies, (4) the effects of remedial strategies on consumer substantive laws and (5) the players.

We end with a brief analysis of what European institutions should do next (6).

3.1. The constitutional balance between collective and individual redress in light of the debate between public and private enforcement

Aggregate litigation often involves separation between ownership of the claims and control over litigation. This separation raises agency problems with constitutional relevance. The degree of separation and the rights of principals (consumers) to monitor the agents (public entities, private consumer organisations, lead plaintiffs, law firms, etc.) is limited by constitutional principles.

The right to access the class, the definition of the class, the limits of res-judicata, preclusion of subsequent litigation, the effects of settlements and the right to opt out all bear constitutional relevance both in the US and EU.[138]

In the US the focus has been on due process rights to individualised treatment and a right to trial by the same jury of non-separable issues. The tension between aggregate litigation and individual rights has been at the core of judicial and scholarly attention. The principles are differentiated in relation to the type of remedy.[139] Due process

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137 ECJ 19 February 2002 C-303/99, [2002] ECR I-1577.

138 See Hazard, 2008, S. Burbank, 2008.

139 Significant differences exist between aggregate litigation seeking injunctive reliefs and that seeking pecuniary rewards. Individual rights are not considered insuperable obstacles to collective redress. In the area of injunctions opt-out rights are often reduced or eliminated, in that of damages individual rights are given greater importance but limitations to opt out are still held admissible. See Ortiz v.

requires broad opt out opportunities in divisible remedies while it does not require the same for indivisible remedies.[140] In the former case, rights of individual claimants are generally characterised by exit, voice and loyalty.[141] The right to opt out and escape the preclusive effect of the judgement (exit), the right to participate and be heard (voice) and the right to adequate representation constitute the pillars of individual protection and define the boundaries of aggregate litigation.[142] Lately a shift towards opt-out policy has been explicitly advocated in the field of securities litigation to improve accountability.[143]

In Europe the general principles focus on the individual rights to limit modes of collective enforcement, sometimes even in a human rights dimension.[144] Differences exist at MS level not only between old and new MS but within Western Europe. The new generation of Constitutions, introducing consumer protection clauses, have balanced the individual and collective dimensions, often providing constitutional basis for collective redress.[145] Thus they strike a different balance from the framework defined in the first half of the XX century in western democracies. These differences may require some balancing at EU level.

European legal systems seem to give greater importance to individual rights and limit the possibility to introduce opt-out systems in national legislation due to constitutional principles concerning access to justice.[146] New legislation in the Scandinavian countries

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Fibreboard Corp. 27 U.S. 815 (1999, Molski v. Gleich 318 F3d 937, 948-9 (9th Cir 2003), for a review, see Daniels, 2005, p. 499 ff.).

140 See ALI Principles § 2.08 comment c:
"Aggregate treatment of related claims need not afford claimants an opportunity to avoid the preclusive effect of any determination of those claims if the court finds that the aggregate proceeding should be mandatory in order
(1) to manage fairly and efficiently indivisible relief
(2) to allocate equitably a pre-existing limited fund among claimants; or
(3) to facilitate the fair and efficient adjudication of claims asserted in individual lawsuits subject to court-ordered consolidation."

141 See Issacharoff, p. 337 at 366 and Coffee, 2000, p. 370 ff. at 376-7.

142 See ALI Principles § 2.08 comment c: "In the context of aggregate litigation the right of exit in subsection (a) (1) consists of the opportunity to escape the preclusive effect of the aggregate proceeding. The right of voice in subsection (a) (2) consists of the opportunity to participate in the aggregate proceeding and, as its antecedent, notice of that proceeding. The right of loyalty in subsection (a) (3) consists of judicial review, as a precondition for aggregate treatment, to ascertain whether any structural conflicts of interest exist in representation of claimants."

143 See Coffee, Jr., 2008, suggesting, in relation to securities class actions, that Courts should: "not certify the class action before the settlement's terms have been publicly disclosed....reject proposes settlements that have disproportionate reductions for opt outs. But Courts should not reject settlements that give the class the benefit of any higher payment made to an opt out..." (p. 52)

144 See Stadler in this volume.

145 This is the case in Portugal where Article 52 (3) of the Constitution as amended in 1989 states "Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for compensation", and in Spain Constitution 1978, Section 125 of the Constitution 'Citizen may engage in popular action and take part in the administration of justice through the institution of the jury, in manners and respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.

146 See for example the debate on the constitutional right to be heard which has taken place in Germany with the introduction of KapMuG. Constitutional arguments imposed the right to be heard on

has introduced some forms of aggregate litigation with the possibility to opt out where standing is attributed exclusively or primarily to Public organisations.[147] The debate is not entirely consistent. There is some tension between the emphasis on individual rights in the group action debate and the legislation on injunctions granting, *de jure* or *de facto*, monopoly of standing to consumer organisations and public organisations, without providing strong accountability mechanisms, especially towards non-members and the public.

A more balanced set of solutions is needed. On the one hand some trade-off between benefits and costs of aggregate litigation needs to be made with some detriment to individual consumer rights. The necessity to ensure stable solutions reached either through judgements or settlements may preclude individual claimants to litigate the matters over and over in different jurisdictions. On the other hand, higher protection of individual rights in systems may be ensured by increasing accountability mechanisms associated with public and private organisations to which standing is granted. Delegation to private organisations of consumer protection should be combined with specific rules protecting non-members who may be affected by the binding effects of the judgement or the settlement concluded by private organisations.

3.2. Administrative and judicial enforcement

The interplay between administrative and judicial enforcement works differently across the Atlantic both for institutional and cultural reasons.[148] The operations of the two basic institutions, Courts and Agencies, still widely differ and the main players, on both the plaintiff's and defendant's sides, are provided with very different incentive systems.

Given that both enforcement mechanisms are aimed at regulating conducts and deterring unlawful behaviour it is necessary to differentiate sanctions and penalties to achieve the desired level of deterrence. In theory both enforcement mechanisms concern relative homogeneous risks and conducts however they may differ as to temporal and spatial dimension and to the ways conflicting interests of those negatively affected are balanced. When risks and injuries are highly specific clearly judicial should be preferred over AE.

Two important conclusions may be drawn on the relationship between judicial and administrative enforcement:

a) While it is acceptable and sometimes even desirable to combine administrative and judicial enforcement in relation to different remedies, institutional overlap for the same remedy should be avoided. Conferring power to delete an unfair term, to enjoin an unfair trade practice or to recall a defective product at the same time on administrative and judicial authority may bring about inconsistent

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interested parties other than the chosen plaintiffs and limits to the binding effects only on those who were able to 'influence' the outcome of the proceedings. See Baetge, 2007. Similar issues have arisen in Italy in relation to the introduction of the new regime. For a summary of the discussion on the constitutional dimension in Italy see Giussani, 2008.

147 See Denmark and Norway which for many other issues have followed the opt-in Swedish model, www.globalclassactions.stanford.edu, (see for Denmark, Werlauff and for Norway Bernt-Hamre).

148 See Cafaggi/Micklitz, 2008, p. 391.

results, increasing social costs without adding any substantial benefit.[149] The case of different institutions employing identical remedies should be avoided. Institutional complementarity should operate between remedies not within the same remedy unless the requirements to administer the remedy are so different to pursue different goals.

b) The coordination between enforcers does not necessarily imply the definition of hierarchy between the two types of enforcement when they concern the same subject matter. Coordination imposes prioritisation. Combined use of administrative and judicial collective enforcement in consumer protection poses questions of priority/pre-emption. Should administrative have priority over judicial enforcement? To what extent may divergent conclusions between agencies and courts be allowed about infringements, i.e. can the same conduct be considered lawful by an administrative agency and unlawful by a court?

The institutional complementarity approach suggests that divergences are not problematic if and when the two modes of enforcement perform complementary goals.[150] They only become an issue if the same standards and goals lead to different and conflicting outcomes.

It is important to decide rules about sequencing between administrative and judicial enforcement, especially if information costs are taken seriously.[151] Most of the debate in the US about cost-effectiveness of administrative versus judicial enforcement gravitates around cost-effectiveness in information acquisition.[152] Often, however, as the case of competition clearly shows, private enforcement follows public enforcement and adds little information to that generated by public enforcers. Thus appropriate sequencing and the possibility of allocation of tasks between administrative and judicial enforcers, making available the evidence already produced may translate into welfare enhancing policies. Some form of participation of public enforcers to private enforcement may therefore be desirable.[153]

An open question concerns the different methods to define penalties and damages in relation to the deterrence effect and how the power to use penalties should be allocated

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149 This does not mean, however, that private collective judicial enforcement should and could be played off against administrative enforcement, but see for such an argument, Säcker, 2006; Jahn, 2008, 19, 24.

150 See Cafaggi, in Cafaggi, 2006.

151 In the field of damages for breach of competition law the White Paper recalls that once the European Commission finds a breach of Article 81 and/or 82 victims can rely on this decision as binding proof in civil proceedings for damages. Different rules apply in MS as to the relationship between Competition authorities and Courts. To enhance coordination and avoid different results, the Commission has proposed the following rule: "national courts that have to rule in actions for damages on practices under Articles 81 or 82 on which and NCA (National competition authority) in the ECN (European competition network) has already given a final decision finding an infringement of those Articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling." White paper on damages in antitrust, at p. 6.

152 See Rosenberg/Sullivan, 2006, p. 159 ff.

153 See Fisch, 1997, p. 167 ff.

between Courts and Agencies.[154] How should they be coordinated when both a fine and damages can be inflicted upon the infringer as the cases of unsafe product or competition infringements show?

3.3. Injunctions and pecuniary remedies

Judicial collective enforcement can ensure deterrence, provide redress and contribute to risk management in case of latent injuries. The gap being filled by the introduction of group actions at MS level not only refers to compensation but also to deterrence, to a lesser extent, so far, to risk management.[155] Effective aggregate litigation will ensure that small individual claims will be brought before Courts. But it will also ensure that claims that would hardly justify huge investments to generate evidence at the individual level can be brought at a collective level given the possibility to spread the costs across a large number of claimants.

The combined use of injunctions and pecuniary remedies will thus enhance deterrence and perhaps reduce or better qualify the role of administrative regulation. It is beyond the scope of this essay to deal in depth with the optimal combination but it is clear that no uniform principles can be drafted in Europe across different consumer fields. A different balance between the two remedies is needed in unfair contract terms, trade practices, product safety, etc. The role of damages in unfair contract term litigation is different from that in unfair trade practices and product liability. Each sub-sector of consumer law will have to strike its own balance, partly drawn from legislation partly on procedural strategies that claimants will choose case by case.

In the US, the possibility to combine remedies in class actions is ensured when monetary reliefs concern the whole class. These are hybrid class actions.[156]

In addition to compensatory damages other types of pecuniary remedies exist or have recently been introduced: in particular, restitutionary damages, unjust enrichment and penalties. The new legislation on group actions is generally not limited to compensatory damages but it refers to disgorgement of profits or the so-called skimming off.[157] While now it is possible to seek injunctive reliefs and different forms of pecuniary remedies, the prerequisites are still different; thus an unfair term may be subject to injunctive relief and restitutionary damages but not qualify for compensatory damages. An unfair commercial practice may be stopped by injunction without giving rise to compensatory damages unless negligence is proved.[158]

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154 See OECD, Best Practices for consumer policy: report on effectiveness of enforcement regimes, available at www.oecd.org.

155 In Europe the level of deterrence seems still lower than desirable, given the lower than expected effectiveness of injunctions, especially in transborder litigation, and the compelling necessity to combine it with pecuniary remedies. In relation to the latter it is evident that purely compensatory damages may often be insufficient and need to be combined with restitutionary damages when the level of profit gained by the unlawful term or practice is much higher than the amount of compensation the injured consumers can claim.

156 Solutions among circuit Courts are not convergent. See Sherman, 2006, p. 707 ff.

157 Micklitz/Stadler, 2003.

158 This might be the case if intention is required for restitution or skimming off while it is not for the injunctive relief. In Germany, skimming off requires intention unlike injunctive relief where not even negligence is required, Micklitz/Stadler, 2003; Stadler/Micklitz, p. 559-562, now OLG

Two issues stand out for legislative intervention: the regulation of entry to litigation, including but not limited to standing; (2) the conclusion of the litigation either with a judgment or settlement, both in relation to injunctions and damages and their binding effects on 'third parties'.[159]

(1) We have extensively discussed the differences in standing between injunctions and damages.[160] While in relation to the former consumer associations and public entities have the monopoly, a wider range of claimants can bring claims for pecuniary remedies. The ex ante model for injunctions is complemented by a mixed model for pecuniary remedies. This difference partly reflects the different preferences and models at national level and partly the different incentives especially in the private realm. Injunctions are more appealing for consumer organisations than for lawyers, at least for profit driven ones. A different balance may be struck in relation to public interest litigation in the field of fundamental rights.

(2) Both in relation to injunctions and to pecuniary remedies, settlement is a likely, at times even desirable, outcome. However the incentives to settle differ quite significantly whether the leading claimant is a public entity, a consumer organisation or a lawyer representing a group of consumers and whether the 'dominant' remedy sought is an injunction or damages. The nature of repeat player and the extent to which litigants are also involved in negotiations over rule-making play a substantial role in defining the incentive structure.

The extent to which consumers' ability to reduce risks, individually and collectively, may affect the choice between individual and collective litigation and that between injunctions and pecuniary remedies is not sufficiently debated.[161] It is an underinvestigated question which deserves much more attention by legislators and judges.[162]

3.4. The 'indirect' effects of national legislation concerning group actions on substantive consumer law

Divergences in procedural rules concerning group actions should affect substantive rules which are already harmonised. European consumer legislation was enacted without specific references to mass litigation. The implicit reference was to individual litigation but the procedural and remedial part was just outlined. In fact due to the principle of procedural autonomy, often references to remedies was generic or incomplete, leaving MS the power to complete the legislation either in the implementing Act or by reference to existing law.

Stuttgart, 24.03.2006, 2 U 58/6 Lidl v. Verbraucherzentrale Bundesverband. Pending before the German Supreme Court. The conflict deals exactly around the question of intention and what is meant and needed to provide evidence.

159 See Hazard Jr./Gedid/Sowle, 1998, p. 1849 ff.

160 See above text and footnotes.

161 See Cafaggi, 2003, p. 393; Id., 2005, p. 191.

162 But see in the US context a thoughtful yet not necessarily convincing analysis Judge Posner opinion in In re Rhone Poulenc Rorer, INC 51 F3d 1293 (7th Cir. 1995); Castano v. American Tobacco Co. 84 F.3d 734 (5th Cir. 1996).

The enactment of national legislation concerning mass litigation poses numerous challenges to substantive consumer legislation. On the one hand it will certainly improve effectiveness and discourage unlawful conduct when infringements cause a large amount of small size claims. On the other hand it will underline the necessity to distinguish between substantive rules applied to individual and to mass litigation. Questions concerning causation, harms and damages have to be treated differently in aggregate litigation as the US experience clearly shows. In particular, damages in aggregate litigation have a fairness dimension[163] which is foreign to individual litigation. The compensation has to be defined according to the general principle of full compensation but within the constraints of a fairness criterion related to the distribution among the injured parties given the level of available resources often below the level of full compensation that should in principle be satisfied. The challenges may be solved by judicial discretion, through a process of adaptation. Potential divergences in national solutions may however require coordination among judiciaries to reach consistent solutions. It would be desirable that both the review of the Consumer *Acquis* and the DCFR will take due consideration of aggregate litigation in drafting the new rules.

3.5. The players

Who are or should be the litigants? The creation of an integrated European market suggests that the institutional framework should favour transborder litigation. On the defendant side this does not represent a contested issue. On the claimant side, major differences exist, depending on the nature of the claimant.

We have contrasted different standing regulations concerning injunctions and pecuniary remedies to highlight the different models of centralised and decentralised control over access to litigation.

Ex ante regulation may be understood as a device to exercise state control over those who may file collective actions in courts. The market for mass litigation is thus limited by entry regulation. These systems empower the State to choose among organisations with a top-down centralised decision-making process. They often may reduce legal pluralism and hinder legal innovation.

Ex post intervention leaves much room for market forces and self-organisation in civil societies to decide who emerge as litigants. It is a decentralised system that may increase competition and to some extent accountability if well governed. Lack of rules in *ex post* systems may however also produce *de facto* monopolies and thus reduce accountability and legal innovation.

Engineering effective aggregate litigation requires both public policies and new rules concerning the major players and their agency relationships with claimants. These interventions may vary according to the specific strategy, whether based on consumer organisations or more 'market' oriented but the current state is not satisfactory in both cases. Whichever preference will be expressed by each MS, it is clear that both groups will be involved and that some degree of competition between law firms and consumer organisations will arise. But this competition, if limited, can be beneficial.

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[163] Meller-Hannich, 2008, p. 13; Stadler, 2008, p. 93.

The relationship between the claimant and the represented consumers is regulated by national laws, very different both between public and private organisations and within the latter between consumer organisations and plaintiff lawyers.

The typical duty of loyalty, characterising the lawyer/client relationship, differs significantly from the duties owed by the private organisations to the class members where the law of association generally applies, and from those related to public bodies, where administrative law applies.[164]

Funding affects incentives but also rules concerning aggregate litigation. The differences within Europe are conspicuous. Consumer organisations, which receive financial subsidies out of the public purse are financed on a yearly basis. If they are well equipped like in Austria or Germany, France and Italy, they have an annual budget for filing law suits. This means that they have to make a choice and to invest where the return rate – in particular in public reputation – is high. When a collective action, an action for injunction or a representative action, ends up in a high cost risk due to the loser pays principle, the consumer organisation has to seek approval from the Ministry.[165] They may be held liable by consumers who may argue that the organisation has not properly led the case.[166] The result is a bargaining process over the question whether the organisation shall file the law suit and more generally how many collective actions should be brought to court. In essence the state exercises control of collective judicial enforcement by restricting standing and channelling funding. Notice however that even those MS known as being more market oriented like the UK, select consumer organisations quite strictly which can play regulatory or enforcement functions. For example in the UK only one organisation has been recognised in the field of unfair contract terms.[167]

The specificity of transnational litigation requires *ad hoc* interventions. Strategies will vary depending on the nature of the claimants. The different forms of coordination should mainly refer to homogeneous parties. Separate coordinating strategies are required for public organisations (e.g. ombudsmen or OFT), for private consumer organisations or law firms to bring legal claims before national Courts on behalf of consumers coming from different jurisdictions.

Promoting a market for European legal services to individual consumers and their organisations should become an institutional priority. Public policy requires rules that can promote the birth of an efficient market. This implies not only funding pilot litigation at EU level but also introducing stricter regulation to avoid opportunistic behaviour and to ensure that lawyers act as loyal agents of consumer-principals.[168] Major reforms concerning law of lawyer-client relationships are thus needed. The principles should be defined in a European legislative act. Alternatively soft law should be drafted, concerning lawyer-client relationships and association-claimant

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164 See Cafaggi, Adequate representation of consumers in public and private collective enforcement, unpublished manuscript. In relation to the US, see Hazard Jr., 2003, p. 1397 ff.

165 There are no rules in Austria and Germany, but it is current practice which results out of the public financing.

166 In Germany, BGH 25 October 2006, VIII ZR 102/06, NJW 2007, 428.

167 Hodges, 2007, p. 207.

168 This has already happened in the home-shopping case which forestalled Directive 98/27/EC, see Micklitz, cit., p. 411.

relationships. These principles should operate in relation to judicial collective enforcement, including both injunctions and damages, and then be implemented through national legislation or co-regulation.

Different arrangements can be devised among private organisations to bring claims. Cooperation can have different forms or degree. It may be centre-driven or based on decentralised market driven patterns. In the first case the role of the BEUC can become extremely important.[169] Coordination among national consumer organisations is far from being satisfactory. It is, however, bound to the availability of the necessary resources and skills. Funding, if any, is provided on a national basis. Ministries might face problems in funding, e.g. transborder litigation, where not only nationals benefit.

The same need for coordination has to occur among law firms.[170] In the US the effort to aggregate claims has pushed towards cooperation among law firms.[171] Often this cooperation has reduced competition at the expense of consumers who have been proposed settlements at an early stage and for lower amounts they would have been able to obtain.[172] More recently the use of opt-out options, in the field of securities where big institutional investors play a major role, has triggered more competition and it is reshaping the relationship among plaintiffs and defendants' lawyers.[173] In the field of consumer protection, where no reasons to opt out exist, the level of competition is low and often there is collusion to define the lead plaintiff.

Differences in Europe concerning legal systems make these developments necessary and urgent. But learning from the US experience, private contractual arrangements among law firms located in different MS may not be sufficient. The role of national judiciaries to promote the creation of European litigants must increase. Here again the powers given to judges by national legal systems may differ significantly. This may engender judicial activism in some legal systems higher than in others. But to avoid the formation of jurisdictional monopoly, judicial cooperation in consumer collective litigation is necessary.

The increasing role of aggregate litigation in Europe will empower national judiciaries. Judges will have to select meritorious claims and avoid frivolous litigation. They will have to ensure adequate representation of consumer interests in litigation; they will have to ensure fair distribution at the end of the proceedings, be it a judgment or a settlement.

For these reasons it is of strategic importance to devise coordination mechanisms among national judiciaries, similar to the Multidistrict litigation Panel in the US that can contribute to coordinating transboundary litigation. Absent a federal judiciary, a European coordinating body will not be able to exercise the same powers but certainly

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169 The BEUC has among its institutional tasks that of co-ordinating the activities of the national consumer organisations. This is however a touchy issue, as Member State organisations enviously defend their autonomy. The BEUC is nevertheless in the CLEF which is sponsored by the European Commission.

170 Ingenious franchise agreements to generate evidence have been devised in the US in order to promote cost-sharing and economies of scale. With regard to Germany, see the references in Hess, 2008, p. 61, 70-71.

171 See for an historical analysis Burbank 2008.

172 See Eisemberg/Miller, 2004, p. 27 ff.

173 See Coffee, Jr., 2008.

can provide information to the national Courts involved in litigation and try to ensure some consistency in outcomes.

The litigation will also depend on agencies. They are generally empowered to bring legal claims concerning injunctions and in some MS also group actions. In this perspective they are part of the judicial enforcement system not of the administrative one. As a potential claimant has to select the claims to be litigated and the remedies to be sought, to perform this task, two requirements should occur: a) independence from political power and (b) accountability to the injured parties whose interests will be involved in litigation.

It is hard to imagine that a consumer agency is totally freed from political influence when it does not have financial independence. The solution is that consumer agencies are guaranteed and given independency, last but not least by allowing them to raise their proper funds, e.g. via fines. The question whether individual consumers or consumer organisations may sue the inactive public agency for not taking action, may then lose importance. This remedy seems to play a certain role in the new Member States.[174]

3.6. The role for European governance to foster effective aggregate litigation in consumer law

Europe is facing a period of intense change. Several MS have enacted or are about to enact national legislation concerning group actions.[175] These statutes will have to be combined with those on injunctions and to administrative regulation to define an integrated and coordinated design of effective consumer protection.[176]

Differences concern not only institutional engineering but the basic options and the scope of litigation. The different weight attributed to settlements, the different relationships with individual litigation reveal that not only the rules but also the scope of the game varies extensively.

Europe should promote experimentalism in the future. MS should continue to produce legislation according to their constitutional principles, preferences and traditions. These developments should however internalise the necessity to build appropriate institutions for coordination. For example the lack of a competitive market for legal services on the claimants' side may suggest the adoption of opt-in mechanisms in the first stage while shifting towards some form of opt-out only when sufficient competition in the market for legal services will generate incentives to produce information to enable informed choices by potentially injured plaintiffs.[177]

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174 Bakardjieva, in this volume.

175 See above.

176 Some level of coordination has been introduced only in a few states. For example the group action Swedish Act allows the seeking of both injunctions and damages.

177 Different arguments have been provided to suggest that scarce participation of consumers suggest the desirability of opt-in systems. See Mulheron, 2007. These arguments focus on the current institutional setting and do not place particular importance on institution building. We suggest that the long-term goal of building appropriate institutions for aggregate litigation may justify lower rates of participation in litigation. Furthermore a distinction between effective participation and coverage should be made. Opt-in solutions may ensure broader coverage and thus have strong deterrence

MS will learn from each other but this process will have costs. Legislative differentiation may, to some extent, prevent effectiveness of transnational consumer litigation if it is not well coordinated. To the extent that the predominance requirement operates, it will be difficult to find common questions of law in such a differentiated legal landscape.[178] This differentiation can even be instrumentally promoted by introducing apparently consumer-friendly and legally binding jurisdictional clauses in contractual relationships which would bind parties to apply consumer-based jurisdiction to the potential class action.[179] In this case, aggregating consumers coming from different jurisdictions may become difficult because applicable rules to the disputes are different according to consumer nationalities and it would be hard, if not impossible, for the same judge to apply as many rules as the jurisdictions involved by way of aggregation. Transborder litigation concerning consumers coming from different jurisdictions should permit the choice of one single substantive law or a limited number. The alternative, quite costly, is the subdivision in class according to nationalities.

At the same time a European solution might be needed to handle arbitration clauses. The US and Canadian courts have taken a liberal approach to the detriment of consumers. In Europe the landscape is highly segmented, in particular since the ECJ refused to set common standards under Directive 93/13/EC.[180]

The effects of aggregate litigation on substantive law should thus be monitored and changes should occur to ensure consistency between consumer protection laws and aggregate litigation at EU level.

For the time being, the role of European institutions should be limited to ensure that national legislation promotes transnational litigation by offering a framework for:

a) coordinating collective redress for violations in consumer and competition laws;

b) allowing the creation of claimants' groups beyond national areas; this may require different strategies when MSs adopt opt-out legislation by permitting opt-in by non-residents;

c) devising public policies, including funding and information, to promote aggregate litigation.

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effect but certainly they do not 'promote' consumer active participation. On the contrary they favour consumer apathy.

178 The predominance requirement is very relevant in the US. According to rule 23(b) (3) Rules of Civil Procedure questions of law or fact to the members of the class predominate over any questions affecting the individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defence of separate actions (B) the extent and nature of any litigation concerning the controversy already commenced by or against any members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum (D) the difficulties likely to be encountered in the management of the action. On the issue of predominance in the US context see Nagareda, 2003.

179 The ECJ decided in favour of consumers, Judgment 27 June 2000, Case C-281/98 [2000] ECR I-4139.

180 It reminds one to recall Claro to highlight the differences, ECJ, 26 October 2006, Case C-238/05 [2006] ECR I-11125 and Reich in this volume.

(1) The funding policy in particular should be inspired by two concurring principles: contributing to the creation of a solid market for legal services and promoting pilot transboundary litigation.[181] Rules at EU level should also regulate the lawyer-client relationship in aggregate litigation and accountability or consumer organisations to non-members when they act on their behalf, to ensure loyalty and adequate representation. Liberalising agreements concerning fees in aggregate litigation can contribute to increase incentives to engage in selective litigation.[182] The role and function of process insurers which play an increasing role in collective litigation should be openly addressed.[183]

(2) Setting up a European notification scheme where all pending cases are made publicly available European-wide; likewise creating a data-file and making all national legislations on collective actions available in English.

d) Promoting judicial coordination in transborder litigation. European institutions should promote coordination among MS' Courts before which are tried cases including consumer claimants coming from other MS. Procedural economies would be required to choose one court and thus one MS, but the differences in substantive and procedural law may not make the choice costless.[184] Subclassing, according to different applicable state laws, may also be a solution that can favour aggregation without being subordinated to the existence of a uniform body of laws across MS;[185]

e) providing the ground for mutual references to the facts as determined by a court or by a public authority in transboundary litigation;[186]

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[181] Interesting proposals concerning costs allocation rules have been made in the White paper on damages in antitrust pp. 9 and 10 " The Commission encourages Member States:
- to design procedural rules fostering settlements as a way to reduce costs
- to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims
- to give national Courts the possibility of issuing cost orders derogating in certain justified cases from the normal cost rules, preferably upfront in the proceedings".

[182] Especially when the English rule applies, the possibility to share part of the financial risks of litigation between clients and lawyers is of the outmost importance. This liberalisation would also encourage law firms to be accurate in selecting claims and to devise financial instruments that may reduce the risks.
See for recent law reforms Sweden, within the Group litigation Act, regulating risk agreement among lawyers and clients (sec. 38, 39, 40, 41).

[183] They are the key to the success of the Austrian representative action and they can be found in Germany too, Hess, 2008, p. 72 with references to the debate and the case law, pleading for statutory rules.

[184] Similar issues have arisen in the Canadian experience where the Uniform Law Commission of Canada has produced a set of proposals available at www.chlc.ca.

[185] This path is chosen sometimes in the US. See In re Welding Fume Products Liability Litig. 245 F.R.D. 279 (N.D. Ohio 2007): "*A Court could manage the differences in medical monitoring law among the eight states chosen by the plaintiffs by holding separate separate trials for each state-wide sub class, or perhaps a combined trial for a few statewide subclasses, where the law in those states is similar enough to allow the creation of jury instructions and a verdict form that is not too complex.*", cited by the Reporters note in the ALI Principles, p. 162.

[186] Stürner, 2008, p. 113, 127.

f) fostering mutual recognition of judgments to a higher extent than it has so far been achieved;[187]

g) regulating uniformly Courts' approval of settlements with particular concern for fair distribution of proceedings and preclusion effects, also in order to avoid replicating litigation for the same case in different MS.[188] In particular for settlements involving consumers, coming from different jurisdictions, trying cases before different courts, it would be useful to draft common rules given the differences in national regimes of contract law, predominantly regulating settlement arrangements;

h) modifying the consumer *acquis* to adjust substantive law to aggregate litigation;

i) improving private international law rules in both Rome I and Rome II to adjust substantive law of tort and contracts to mass litigation in a uniform way;[189]

j) coordinating with the review process of Injunctions Directive 98/27;[190]

k) coordinating with the strategy concerning disputes on small claims defined by Regulation 861/2007.[191]

The overall question will nevertheless be to what extent it is possible to elaborate guidelines or recommendations on how jurisdictional conflicts between multiple competent courts might be solved. Ideally the above mentioned actors of civil society should participate. However, the four parties do not share common interests. Judges might be interested in avoiding duplication of work and favour a single court solution. Lawyers are squeezed between efficiency considerations which speak in favour of a single court solution, and profit interests which might be better served in regionalised judicial markets. Only consumer organisations are structurally bound to a single court solution at least as long as the interest of 'their' consumers are taken into account. The role and function of the Member States and the European Commission needs to be redesigned. Member States are reluctant to grant powers to the EU to adopt a European group action. They might be less reluctant in supporting the search for appropriate

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187 Rott, in this volume demonstrates that the Brussels Convention, as well as the Brussels Regulation does not face the phenomenon on the mutual recognition of group action judgments and/or settlements.

188 In the US, state court settlements are much less stable than federal court settlements, where the approving Court can provide better preclusion safeguards, see Nagareda, 2008.

189 In case of aggregate litigation where consumers come from different jurisdictions regulated by different substantive laws it is necessary to engage in a choice of law analysis and verify whether common legal issues arise. The ALI Principles § 2.05 suggest this.
(b) The Court may authorise aggregate treatment of multiple claims, or of a common issue therein, when the Court determines that:
(1) a single body of laws applies to all such claims or issues
(2) different claims or issues are subject to different bodies of law that are the same in functional content; or
(3) different claims or issues are subject to different bodies of law that are not the same in functional content but do present a limited number of patterns that the Court, for reasons articulated pursuant to § 2.12, can manage means of identified procedures at trial:

190 See SEC.

191 OJ L 199, 31 July 2007, 1.

solutions of multiple competent courts. However, the born leader in such an initiative is certainly the European Commission.

4. Concluding remarks

Consumer law enforcement laws have been subject to important changes both in Europe and the US. The meaning of enforcement and its modes have changed. The public/private divide does not overlap with administrative versus judicial enforcement. Judicial enforcement encompasses both administrative and market-based regulatory devices (contract and extra-contractual liability).

Both in relation to administrative and judicial enforcement the adversarial approach is losing its appeal due to an increasing number of settlements and more broad contracting.

The use of contracting affects not only rule-making but also enforcement. It may increase compliance especially when repeat players are the infringers. The role of negotiation and settlement is expanding, both in administrative regulation and in adjudication. The differences cannot be located in the process of contractualization, affecting both types of enforcement, but in the modes of contractualization which still widely differ.

We have developed the analysis along the relationship between administrative and judicial enforcement, focusing predominantly on the remedial alternatives provided by the latter. The premise is that subfields of consumer legislation diverge significantly and often require different enforcement strategies, especially as to the combination between injunctions and pecuniary remedies. The goal of expanding consumer choices has an impact not only on rule-making and on the regulatory choices but also on the selection of enforcement strategies.

In Europe from the second half of the nineties of the last century law reforms have been enacted introducing first injunctions and then, at the national level group actions; these changes have not materialised in a floodgate of litigation. On the contrary the first analyses reveal a certain degree of ineffectiveness if measured only by the rate of litigation.[192] Even from a theoretical standpoint, however, it is debatable that the success of the new statutes should be measured by the increase of litigation. The deterrence effect may play in the opposite direction; the best laws are those that ensure a higher level of safety and lower levels of litigation.

The main goal of the law reforms was not, of course the quantitative increase of litigation, but its qualitative improvement, certainly coupled with a higher degree of justice accessibility. But it is clear that a higher level of litigation than before is expected and socially desirable. Costs and time effective litigation is an important

[192] See for example the analysis of Lindblom concerning the low level of litigation in Sweden. He identifies numerous potential factors: "the plaintiff's cost liability – which also applies to public organisation actions – the absence of state funds that support litigation, the absolute opt-in requirement, the lack of pre-trial discovery, the lack of a post-trial calculation mechanism and standardized computation of damages … the negative attitude among insurance companies, and the negative stance of the Swedish bar association as well as the general problems – primarily slowness, costs and lack of expertise – which make it hard for even ordinary litigation to compete against arbitration and other forms of alternative dispute resolution in a free market."

public good for modern democracies. Some efforts should be made, especially by political scientists and economists to improve methodologies in measuring effectiveness and impact so that more rapid readjustments concerning collective enforcement can be adopted at EU level. Which combinations of judgments and settlements are socially desirable is hard to predict but certainly some regulation of settlements and a higher level of transparency will contribute to consumer protection.

A European path towards aggregate litigation is developing but the differences with the US regime are still very significant. This is certainly due to the different institutional frameworks but it is also related to the high level of knowledge that Europeans have about the advantages and disadvantages of the US systems. The learning process has involved other common law experiences, particularly those of mixed jurisdictions like Canada, but also Australia, where effective law reform have taken place. South American countries have developed interesting law reforms that deserve more attention than it has been so far devoted.

Europeans will proceed towards an integrated path to combine administrative and judicial enforcement. This combination will partly depend on how effective administrative and judicial coordination will be within and between them. The opt-in/opt-out alternative is losing policy attraction. It has become clear that integrating the two might be the most desirable solution. The opt-in, at least for the time being, seems the most desirable when private claimants act; the opt-out may be a viable alternative when public bodies act, since they are bound by stricter rules of compliance with the rule of law, accountability, transparency and openness. Due process rights would thus still be guaranteed in an opt-out system when public entities bring the claims before the Courts.

In the US, important changes have also been taking place. On the one hand, the use of litigation as a regulatory device has been limited and channelled to be complemented by administrative regulation. The transformation moves in two directions from the State to the federal level and from the judicial to the administration. CAFA and the recent Supreme Court case law show a movement towards federalisation of judicial collective enforcement.[193] Supreme Court case law has also rebalanced federal statutory regulation and state common law of torts, strengthening administrative regulation.

The move towards a stronger role for administrative regulation has different meanings across the Atlantic. Different accountability systems have been associated with this development in the US and Europe. While in the US stronger procedural rights have been associated with tort immunity, in Europe weaker procedural rights are combined with a fast growing expansion of tort liability of public regulators. Other differences are related to the internal changes of the regulatory process and the shift from *ex ante* to *ex post* within public regulation.[194]

To what extent the comparative scenario just described will affect the modes of consumer international litigation? The new challenge ahead is consumer international litigation, where different models will be compared not as a purely academic exercise but as a matter of concrete litigation strategy for litigating consumer matters.[195] Today,

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193 See Hazard, Jr., 2008; Issacharoff, 1999.

194 For references see Cafaggi/Micklitz, 2008, p. 391 ff.

195 See Nagareda, 2009.

unlike thirty or forty years ago, it is possible to respond to worldwide consumer violations with an international strategy where choice of forum but also the best available means can be chosen by consumer advocates. While AE both at EU and US level is not only a viable complement to judicial enforcement but at times the most effective path, at the international level, judicial enforcement seems to represent the way ahead for the years to come until hybrid effective and accountable institutions emerge.

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Consumer Collective Redress- Experiences of the South Eastern European countries

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Overview

- Processes significant for the development of consumer collective redress mechanisms
- EU Member States / Non EU Member States
- Croatia — Serbia
- Austria — Bosnia and Herzegovina
- Hungary — Montenegro
- Legislative framework
- Credit loans in Swiss franc case (2005-2008)
- Conclusion

Overview of the development

A search for a functional system of legal protection and securing access to justice

balance between resolution of individual disputes in judicial proceedings and implementation of public interest (public policy)

A system for providing legal protection of individual rights

weakened by expensive, long and inefficient court proceedings, difficulties in enforcement procedures

EU consumer protection policy not directed exclusivelly towards the integration of the common market

but also towards realisation of fundametal procedural human rights

the idea of consumer collective redress developed at EU level

Introduction of consumer collective redress

In EU Member States (Croatia, Austria, Hungary) – harmonisation of existing national legal framework with EU legislature

In non-EU Member States (Serbia, Bosnia and Herzegovina, Montenegro) -similar developments

Croatia – legislative framework

- New Consumer Protection Act in 2014
- Novelties to the regulation of consumer collective redress
- *Standing* – legal persons and entities prescribed by a government decision
- *Only* associational claim for injunctive relief available - damages in an additional individual proceedings
- Individual proceedings for damages - based on a *res judicata* effect of a decision delivered in a collective redress proceedings

Credit loans in Swiss francs case

- **September 2011** associational claim against:
- Currency clause in Swiss francs bank loan agreements
- Variable interest rate clause
- Associational claim declared INADMISSABLE
- Associational claim initiated again
- **July 2013** First instance judgement (Commercial court)
- Currency clause in Swiss francs bank loan agreements NULL and VOID
- Variable interest rate clause inadmissable

- **July 2014**
- Second instance judgement (High commercial court)
- Variable interest rate clause inadmissable
- Currency clause in Swiss francs bank loan agreements NOT NULL and VOID
- **May 2015**
- Judgement of the High commercial court CONFIRMED **by the Supreme court in Croatia**

Austria-legislative framework

- Several forms - model case proceedings (Musterprozess), associational claim (Verbandsklage), class action (Sammelklage)
- Decision in a model case proceedings - *inter partes* effect/ decision on preliminary matters in relation to other cases
- Injunction of the use of unfair terms in associational claim proceedings also *inter partes* effect
- Compensatory relief -not available in this types of proceedings
- In 2001 an *opt-in* consumer class action for compensatory relief (damages)

- **Several successful damages class actions**
- Unilateral change of variable interest in credit loans
- Outbreak of stomack diseases in airplanes
- Damages suffered by investors from different bank and insurance products

Credit loans in Swiss francs case

- **July 2013** Austrian Supreme Court ruling (individual proceedings)
- Currency clause in Swiss franc bank loan agreements is NULL and VOID
- **March 2015**
- VKI - Compensatory relief (damages) for 170 bank clients caused by STOP-LOSS-ORDER
- VKI – associational claim (*Verbandsklage*) – because of the variable interest rate clause –banks have to pay money to clients

Hungary-legislative framework

- Only injunctive relief is available
- Designated public bodies (e.g. the Bureau of Consumer Affairs, the public prosecutor), consumer associations
- If the court rules that a provision in a contract is unfair-the clause may be declared null and void (*erga omnes* effect)
- Publication of judgements in newspapers and on the Internet
- The average duration of an injunction procedure is one year

Credit loans in Swiss francs case

- **December 2013** Hungarian Supreme Court ruling
- Currency clause in Swiss franc bank loan agreements is NOT *null* and *void*
- **June 2014** Hungarian Supreme Court ruling
- Variable interest rate clause admissable ONLY according to strict rules (in most cases inadmissable)
- In case of conversion of Swiss franc loans to Hungarian forint banks are liable for cost
- CJEU preliminary ruling (30 April 2014) C-26/13 on unfair terms in consumer contracts
- **July 2014** Act on convertion of the loans (damages)
- **September 2014** Act on damages for loss because of currency moves

Serbia-legislative framework

- Possibility for consumer associations and unions to seek injunctions of the use of unfair terms - first made available in Consumer Protection Act from 2010 and in Civil Procedure Act from 2011
- Provisions of the CPA – unconstitutional - no definition of collective interest
- Amendments to both acts
- Abstract legal protection of consumer interest

Credit loans in Swiss francs case

- **February 2013** first consumer collective redress proceedings initiated at First fundamental court in Belgrade (Commercial court-Third fundamental court in Belgrade)
- **June 2014**
- first court hearing in collective redress proceedings
- 600 individual proceedings (30 judgements, 1 *res judicata* in favourt of the plaintiff for unilateral change of variable interest rate)
- Collective claim INADMISSABLE

Bosnia and Herzegovina

- Consumer collective redress in Consumer Protection Act from 2006
- Developed on the basis of the Scandinavian model
- Consumer Ombudsman entitled to seek injunctions of any act or practice which infringed collective interests of consumers or to seek **compensatory relief**.
- Publication of judgements delivered in collective redress proceedings in newspapers and on the Internet

Credit loans in Swiss francs case

- **April 2015** Association of bank clients "The Swiss franc"
- Three individual court proceedings
- Bank loan agreements with variable interest rate clause NULL and VOID

Montenegro

- In 2013 new Consumer protection act was introduced
- Consumer association entitled to seek injunctions Ministries, administrative entities and associations are also entitled
- Publication of judgements delivered in collective redress proceedings in the media
- Along with the claimant, every consumer entitled to initiate enforcement procedure.
- An electronic registry of collective redress proceedings is available at the Monenegro Ministry for consumer protection

Credit loans in Swiss francs case

- **March 2014**
- First court hearing in collective redress proceedings
- 1 individual court proceedings – judgement prohibits use of variable interest rate clause and currancy clause in a same bank loan agreement
- Montenegro's Parlamentary board recommendation
- Fixed course for payment of credit loans (at the date of the conclusion of the contract)

Conclusion

- **Cost** – value of the dispute -lawyer fee-court fee
- ***Standing*** – limitations (requirements)
- **Available type of claim**
- Injunctive relief – only *abstract* legal protection
- Compensatory relief (damages) –in a individual court proceedings
- Obstacles:
- Lack of interest (low value of dispute/high cost)
- Fear of a strong and well equiped counterparty
- Duration of the proceedings
- **Success????Faith????**

Thank you for your attention

pporetti@pravos.hr

ESCP Regulation EC No. 861/2007

Assistant Professor Paula Poretti, PhD

Legal framework

- Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure
- Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure
- Art 507 o-507 ž Croatian Civil procedure Act (CPA)

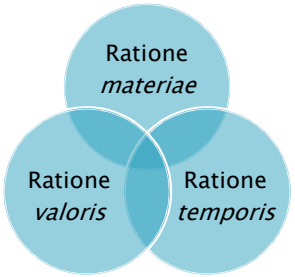
Regulation 861/2007

September 1, 2009 /Croatia July 1, 2013

Procedural law of the MS which has jurisdiction over the dispute (Art 507o -507 ž ZPP)

- EXPEDIENT
- SIMPLE
- EFFICIENT

Scope of application



Subject matter

- COMMERCIAL DISPUTES
- CIVIL DISPUTES
- CROSS-BORDER DISPUTES
- VALUE (interest,taxes excluded...) *do not exceed* **2000 eur**
- *Alternative to national disputes*

2000 eur

Proposal of revised Regulation (2013)

Does not exceed **10 000** eur

- Does not apply to matters concerning:
- (a) the status or legal capacity of natural persons;
- (b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession;
- (c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (d) social security;
- (e) arbitration;
- (f) employment law;
- (g) tenancies of immovable property, with the exception of actions on monetary claims; or
- (h) violations of privacy and of rights relating to personality, including defamation.

Claim within the scope of ESCP?

Court jurisdiction?

Requirements for initiating the proceedings (e-justice portal)

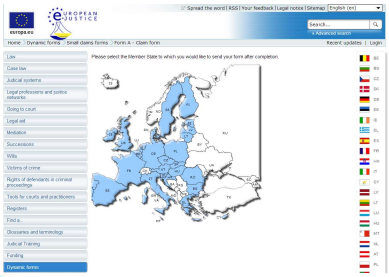
Initiating the proceedings

The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A.

Claim not within the scope of Rgulation – the court informs the plaintiff

Plaintiff does not withdraw the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the MS

European e-justice portal https://e-justice.europa.eu



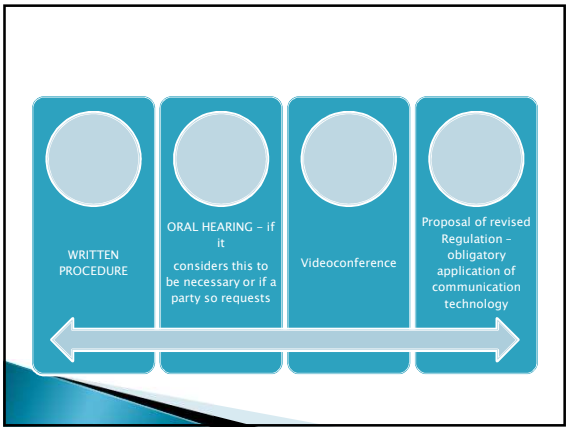
- **MS should ensure available forms at all the court which have jurisdiction in ESCP (e-justice portal)**

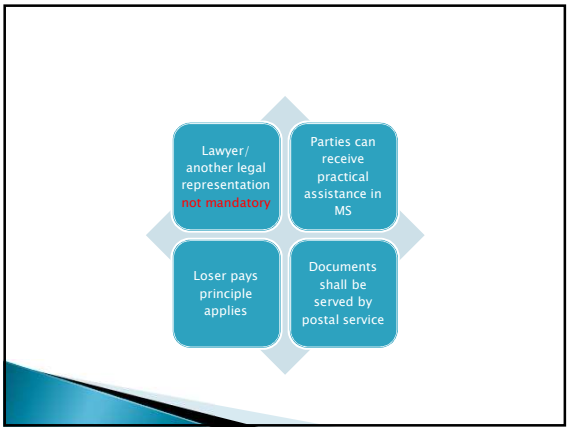
Form A claim

Form B confirm/rectify the claim

Form C answer form/ claim

Form D certificate of the judgment





Minimum standards (Art 18 Regulation 861/2007)

- REVIEW OF THE JUDGMENT
  - the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally
  - service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part
  - the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part

Regulation 2015/2421

- **Basis**
- **EC Report to the European Parliament, the Council and the European Economic and Social Committee** (2013)
- **Purpose**
- **Efficient/cost effective legal protection in cross-border disputes**
- **Application**
- Since July 14, 2017

Scope of application

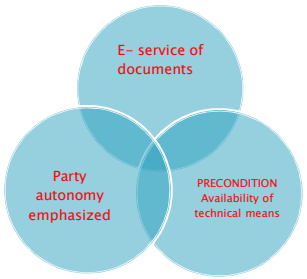
Commercial/civil
Cross-border disputes
2000 eur
5000 eura

Initiating the proceedings

Standard form A in MS available through national web sites

Application of communication technologies emphasized /reduction of costs and duration

Service of documents



Thank you for your attention!

Collective redress/ESCP

Assistant Professor Paula Poretti, PhD
Faculty of Law
J.J. Strossmayer University of Osijek

- (Individual) civil procedure / court proceedings
- Summary proceedings (ESCP) / collective redress
- ADR /CDR

EU Policy

- Maintaining and developing an area of
- freedom, security and justice
- *facilitating access to justice, as well as* a high level of consumer protection
- Individual actions, such as the small claims procedure for consumer cases usual tools to address disputes to prevent harm and also to claim for compensation
- In addition to individual redress, different types of collective redress mechanisms
- introduced by all MS

Collective redress

- A legal mechanism that ensures a possibility to claim cessation of illegal behavior collectively by **two or more natural or legal persons** or by an **entity entitled to bring a representative action** (injunctive
- collective redress);
- A legal mechanism that ensures a possibility to claim
- compensation **collectively by two or more natural or legal persons** claiming to have been harmed in a mass harm situation or by an **entity entitled to bring a representative action** (compensatory collective redress)

Common principles

- 1. **Standing to bring a representative action**
- **2. Admissibility**
- **3. Information on a collective redress action**
- **4. Reimbursement of legal costs of the winning party**
- **5. Funding**
- **6. Cross-border cases**

Specific principles relating to injunctive collective redress (1) and to compensatory collective redress (2)

- **(1)**
- **1. Expedient procedures for claims for injunctive orders**
- **2. Efficient enforcement of injunctive orders**

- **(2)**
- **1. Constitution of the claimant party by 'opt-in' principle**
- **2. Collective alternative dispute resolution and settlements**
- **3. Legal representation and lawyers' fees**
- **4. Prohibition of punitive damages**
- **5. Funding of compensatory collective redress**

Lilla Király[*]
Paula Stojčević[**]

Multi-party actions and the legal aid

I. Introduction

The terms *class action*, *group action*, *mass claim*, *representative action*, *association claim*, *joint action* are different forms of multi-party actions used in legal systems around the world.[1] This paper attempts to explain the term and to show the features of the most common forms of collective legal protection mechanisms within several legal systems. Considering the fact that some of the models of collective legal protection which are subjects of our interest belong to the civil law and the remainder to the common law legal family, we should start from the basic features of the civil procedure in the legal systems of both legal families. While defining the very term of collective legal protection we shall use the definition of the traditional two-party civil procedure Namely, the sole term 'collective legal protection' was developed through the recognition of the need for the widening of the two-party civil procedure concept and this can be particularly seen in the development process of the collective legal protection models of EU Member States. Therefore it is necessary to give at least a brief overview of the historical and legal context of the formation of collective legal protection mechanisms in the EU. In the central part of the paper we will show the legal sources and the main features of the collective legal protection models in four legal systems[2] (German,

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[**] Paula Stojčević, mag.iur., teaching assistant, Department of Civil Law, Osijek, pstojcev@pravos.hr (Abstract, Introduction, Multi-party Action models in the EU (German model), Multi-party Action models outside EU (American, Croatian model), Conclusion)

[1] Class action-skupna tužba, group action-grupna tužba, mass claim-masovna tužba, representative action-reprezentativna tužba, association or interest group action / joint action (Verbandsklage)-udružna tužba, multi-party action-višestranačka tužba. Here the author gives possible terminological solutions (translation to Croatian language) for different mechanisms of collective legal protection (most of which are for now unknown in Croatian legal system) which will be used further in the paper.

[2] The German, Hungarian and the Croatian (German subgroup) legal systems belong to the civil law legal family and American legal systems belong to the common law

Hungarian, American and Croatian). Finally, questioning the relationship between collective legal protection and legal aid will serve for examining the possible efficiency of legal aid in the advancement of the collective legal protection mechanisms and also for the anticipation of future directions of its development. The civil procedure is a general, regular and basic method for the protection of subjective civil rights which have been threatened or violated, provided by the state judiciary.[3] However, there are two legal families, the civil law and the common law legal family which have different civil procedure rules. Legal systems of civil law countries are marked by principles which have their source in the Constitution as the fundamental legal act of each country.[4] The most significant principles of civil procedures in the civil law legal family are principles of party control, the principle of party control of the facts and the means of proof of and the right to be heard which combines the right to access to justice, equality of arms and adversarial proceedings.[5] Legal systems of common law countries draw their principles and procedural rules from the jurisprudence as the main legal source and that is why the common law system is usually referred to as case law system.[6] The basic principles and features immanent to the civil procedure in the common law legal family are due process, pre-trial discovery, trial by jury, the American rule on cost, contingency fees (which differ greatly from the rules of the civil procedure in civil law legal family) and also class action.[7]

As mentioned earlier, the very term collective legal protection was developed from a kind of recognition of the need for the widening of the civil procedure concept. Logically, the easiest way to recognize the basic features and come to a definition of collective legal protection is to put the term collective procedure and traditional civil procedure in a

legal family. N. Gavella, *Građansko pravo i pripadnost hrvatskog pravnog poretka u kontinentalnoeuropskom pravnom krugu* [Civil law and the affiliation of the Croatian legal system to the civil law legal family] (Zagreb, Pravni fakultet 2005) p. 18.

[3] S. Triva and M. Dika, *Građansko parnično procesno pravo* [Civil procedural law] (Zagreb, Narodne novine 2004) p. 3.

[4] Gavella, op. cit. n. 2, at p. 11-19.

[5] Triva and Dika, op. cit. n. 3, at p. 127-158.

[6] Gavella, op. cit. n. 2, at p. 18-20.

[7] B. Hess, 'Aktuelle Brenpunkte des translantischen Justizkonflikts', 50 *DIE AKTIENGESESELLSCHAFT* [DIE AG] (2005) p. 897.

relation. But it is not possible to perceive or to define the term collective legal protection and its forms today without foreknowledge of the mode of its formation. Therefore we will first provide a description of the development of collective legal protection, with the emphasis on the context of EU legal space. Namely, twenty years ago theorists Cappelletti and Garth in the *Access to Justice* volume argued that it is 'necessary to go beyond the scope of individuals'.[8] This need was recognized because of the frequent injury or harm to the rights of large groups of individuals which emerged as a consequence of the growing mass production, distribution and consumption. That is why it was necessary to find mechanisms for the realization of adequate legal protection of groups of individuals whose quality would not differ from the level of the protection provided by the existing mechanisms of individual legal protection. These problems were first observed in the field of consumer protection but soon similar trends were also detected in the fields of environmental protection, competition and industrial law.[9] Taking into account that it is not possible to show the complexity and diversity of the collective protection regulation in each of the aforementioned fields, we shall be satisfied with the review of the field of consumer protection.

In the context of the EU, collective legal protection in the field of consumer protection was first mentioned in the Commission paper from 1984.[10] Until then, many EU Member States had some form of

[8] The Florence Access to Justice Project (a series under the general editorship of Mauro Cappelletti); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, The World Survey*, Vol. I. Book I., (Milan, Dott. A. Giuffré Editore 1978); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice* Vol. I. Book II. (Milan, Dott. A. Giuffré Editore 1978); Mauro Cappelletti and John Weisner, eds., *Access to Justice, Promising Institutions, Vol II., Book II.* (Milan, Dott. A. Giuffré Editore 1979); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, Emering Issues and Perspectives, Vol III. Book II.*, Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, Emerging issues and perspectives, Vol III. Book II.* (Milan, Dott. A. Giuffré Editore 1979); Klaus-Friedrich Koch, ed., *The Antropological Perspective, Vol IV. Book II.* (Milan, Dott. A. Giuffré Editore 1979)

[9] P. H. Lindbloom, 'Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure', XLV *The American Journal of Comparative Law*, Symposium: Civil Procedure Reform in Comparative Context, (1997) p. 805 at p. 817.

[10] Memorandum from the Commission: Consumer Redress COM(84)692, 12.12.1984

representative action in their national legislations which enabled consumer protection organizations to request legal protection for consumers whose interests they represented. However, these mechanisms had not proven to be particularly efficient given that organizations for consumer protection usually were not able to finance the conduct of proceedings nor bear the costs of eventual losing the proceedings. In some EU Member States representation and realization of interest of groups of consumers is entrusted to state attorneys or another authorized state entity. Taking into account the inconsistency and complexity of the regulations of collective legal protection mechanisms within the EU Member States, the EU Commission concluded in the Commission paper that it is not possible to propose a harmonization of national collective legal protection mechanisms.[11] The diversity of European mechanisms of collective legal protection perhaps can be best described by a picturesque remark on the European legal space which resembles 'a mixed bag filled with different collective legal protection mechanisms'. [12]

Precisely this conclusion seems to be one of the reasons why the definition of collective legal protection is still complex and incorporates the diversity of all the above forms:

> 'test cases to resolve/potentially resolve similar claims of multiple potential litigants, or defenses of multiple accused; Litigation undertaken by groups or individuals in the wider public interest, e.g. environmental, consumer, administrative law proceedings; Proceedings involving multiple plaintiffs with similar cases of action against a single/common class of defendants; Representation of multiple defendants in criminal proceedings arising out of a common/related incident; and proceedings under any relevant group proceedings, class, representative actions legislation.[13]

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[11] C. Hodges, *Global Class Actions Project: Summary of European Union Deve*lopments (2007) p. 1. at p. 2., available at: <http://www.law.stanford.edu/library/globalclassaction/PDF/EU_Report_2007.pdf>, (last accessed on 08.15.2010).

[12] Sorabji et al, *Improving Access to Justice through Collective Actions-Developing a More Efficient and Effective Procedure for Collective Actions*, (2008) p. 3., available at: <http://www.civiljusticecouncil.gov.uk/files/Improving Access to Justice through Collective Actions.pdf>

[13] D. Fleming, 'Responding to New Demands: Legal Aid and Multi-party Actions', in: F. Regan et al., eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford , Oxford University Press 2002) pp.259-275., p. 261.

If we return to the beginning of this paper where the definition of the civil procedure was first mentioned and if we compare it with the definition of collective legal protection, the following can be said on the latter term: Collective procedures, that is, procedures initiated by a class or representative actions are also considered a part of the civil procedure independent of the difference between two-party and collective procedure made by, for example, the issue of legal interest for the initiation of the proceedings.[14] Namely, legal interest is one of the prerequisites which have to be satisfied in order to commence the proceedings. Therefore in a two-party procedure the right to initiate the proceedings belongs to the person who has a legal and concrete interest to seek legal protection, that is, the expected benefit from the involvement of the courts should be reflected on the rights of that person.[15] The collective procedure often serves for the realization of a wider social, public interest.[16] But, private disputes, the harm or injury of subjective rights are also considered to be the source of the legal interest of members of the group for the initiation of collective procedures. This justifies the procurement of the term collective procedure under the term civil procedure.[17] Indisputably, legal interest for initiation of the proceedings is not the only feature which characterizes the mutual differences between the two-party and collective procedure. There are also differences between the parties to

[14] See W. H. Van Boom, *Collective Settlement of Mass Claims in The Netherlands* (2009) p. 4., available at: < http://ssrn.com/abstract=1456819>; Greiner, op. cit. n. 1, at p. 125-131.

[15] Triva and Dika, op. cit. n. 3, at p. 139.

[16] However, it should be mentioned that although American class action is used for the realization of a wider public interest (especially in declaratory and injunctive relief class actions in the field of consumer or environmental protection or anti-discrimination) they are primarily considered as private actions. This is notable from the definition of the institute in which the entitlement for the commencement of a class action in their own and in the name of others is given to one of more persons (representative plaintiff). Also, the Rule 23 FRCP prescribes monetary claim class actions, while there is no such possibility in the representative actions and this fact emphasizes the private character of the American class action. See R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford-Portland Oregon, Hart 2004) p. 5.

[17] C.H. (Remco) van Rhee & R. Verkerk, 'Civil Procedure' in J. M. Smits, ed., *Elger Encyclopedia of Comparative Law*, (Maastricht, Maastricht University 2006) at. p. 120-121.

the procedure, rules on representation, the subject matter, rules on discovery, costs of the proceedings, types of judgment and the binding effect of the judgment. But the differences are not only apparent when we compare the terms two-party and collective procedure because there are also great differences among the mechanisms of collective legal protection. The most significant differences can be observed in the comparison between the US class action and the associations claim which latter is typical of the civil law legal family. However, given the extent of the problems it is not possible to give a detailed view of all the differences in this paper. Therefore, within the presentation of the collective legal protection models of different legal systems we will also try to refer to some of the most characteristic similarities and differences among them.

Finally, unlike the traditional civil procedure whose European foundations were laid down over a half a century ago,[18] it is obvious that the collective legal protection concept is in its formation, at least when it comes to the European legal space because regardless of the fact that some forms have been existing for a longer period of time in the national legal systems and regardless of their principle flexibility to the single legal system, they have not proven to be especially efficient in the realization of the threatened or injured rights of groups of individuals. Defining one prevailing, common form for all EU Member States would certainly eliminate current difficulties and enable a better use of the collective legal protection mechanisms in the framework of the European legal space.[19] Surely, the comparison of several currently

[18] M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford, Claredon Press 1989) at p. 18-20.

[19] 'There has been very considerable debate on possible reforms and extensions to current procedures both at European and national level in Europe. Important issues that are being discussed relate to the technical aspects of representative mechanisms for collective damages claims, to the problems of funding mass claims especially those of low value, but the essence of the debate relates to whether private damages claims should be enlisted as supplementary mechanisms for regulatory enforcement, and whether it is possible to so balance civil procedures and funding systems for multiple claims such that excessive litigation and cost are avoided. Although the question of whether the EU possesses jurisdictional competence to propose harmonizing legislation in relation to class or collective actions, either generally or in specific sectors is an unresolved issue, there is now a considerable level of debate over whether collective remedies should or should not be introduced and, if so, what checks and balances should be included.' Hodges, loc. cit. n. 11, at p. 6.

existing models in Europe and beyond is useful for observing the advantages and disadvantages of every single model. This analysis will certainly not offer final solutions but may provide for recognition of significant issues of which at least several will be the subject of future discussions on the direction of the development of collective legal protection.

II. German model

The German legal system is the most significant representative of the German subgroup in the civil law legal family. A constitutional guarantee of the right to access to justice and fair proceedings, the principles of party control and the party control of the facts and the means of proof are the foundation of the civil procedure in the German legal system.[20] Although not the only, the Code of Civil Procedure from 1877[21] is the basic source of rules of German procedural law. While the association claim (*Verbandsklage*) dates back to 1896 when it was introduced in the Act against Unfair Competition[22] it is still considered as the most common mechanism of collective legal protection in German law. In the beginning, the purpose of the association claim was to bring a claim for injunction in case of deceptive advertising but in 1965 the possibility to bring a representative action was extended to the field of consumer protection. Later, an association claim in a form adjusted to the needs of Acts regulating very different legal fields was introduced in the Law Regulating the Use of Standard Contract Terms from 1977,[23] The Act on Injunctive Relief from 2002[24], The German

[20] Arts. 2 and 103(1) of the German Constitution (Grundgesetz, GG from 23 May, 1949). There is also a guarantee from Art. 6 of the European Convention on Human rights and Fundamental freedoms. D. Baetge, 'Class Actions, Group Litigation & Other Forms of Collective Litigation', p. 3. available at: <http://law.stanford.edu/library/PPDF/.../Germany_National_Report.pdf>, (last accessed on 20.05.2010)

[21] Zivilprozessordnung [ZPO] from January 1877, Bundesgesetzblatt I (BGB1. I) [Federal Gazette, Part I]. The final important reform was in 2001, and it came into force on 1 January, 2002. Baetge, loc. cit. n. 20, at p. 2.

[22] Gesetz gegen den unlauteren Wettbewerb or UWG. The last reforms of the Act have come into force on July, 3rd 2004, BGB1. I.

[23] Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen or AGB-Gesetz from 9 December 1976 BGB1. I.

[24] Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstoßen from 26 November 2001 which came into force on 27 August 2002, BGB1. I.

Competition Act from 1998,[25] The Telecommunications Law from 2004[26] and Federal Environmental Protection Law from 2002.[27]
It is obvious that the application of association claims in German law is very wide today and the most common application is in the fields of consumer protection and unfair competition.[28] Therefore we will try to determine the most significant features of the association claim by observing the forms defined by the provisions of the Acts which regulate these legal fields. Basic principles and procedural rules of the Code of Civil Procedure apply to the association claim unless it is otherwise proscribed by special regulations.[29] An association for consumer or merchant protection is a legal person, has a certain number of members and sufficient financial and organizational means for the promotion of interests of a group which the association represents and is entitled to bring an association claim. Before an action has been brought an association is required to notify the opponent of the wrongful act he allegedly has committed and to send a declaration which he should sign stating that he will refrain from such action in the future. If the opponent refuses to sign a statement, an association is entitled to bring an association claim.[30] Members of a group are not considered parties to the procedure. Therefore there is no obligation of the notification of members of the group of filing of the association claim. Considering that the binding effect of the final judgment is restricted exclusively to

[25] Gesetz gegen Wettbewerbsbeschränkungen or GWB from 26 August 1998, BGB1. I.
[26] Telekommunikationsgesetz or TKG from 22 June 2004, BGB1. I.
[27] Gesetz über Naturschutz und Landschaftspflege ili BNatSchG from 25 March 2002, BGB1. I.
[28] Wettbewerbszentrale (*Zentrale zur Bekämpfung unlauteren Wettbewerbs*) situated in Bad Homburgu near Frankfurt and as the most significant organization for the protection of merchants it has filed 600 association claims actions in 2006, and the Verbraucherzentrale Bundesverband (*vzbv*) from Berlin as the most significant organization for consumer protection together with regional centres has filed 450 association claims in the period between the year 2000 and 2005. Wettbewerbszentrale, Annual Report 2006; Verbraucherschutzbilanz 2006: Gerichtserfolge serienweise-aber Verbraucher gehen leer aus, available at: <www.vzbv.de>.
[29] There is an exception in the provisions of the Act on Injunction. Baetge, loc. cit. n. 20, at p. 14.
[30] The notification may be regarded as one of the procedural requirements which have to be satisfied in order for an association claim to be brought.

the rights and obligations of the parties to the proceedings there is no impediment for the members of the group to bring an individual action during the collective procedure.

German laws which have provisions on association claims do not have provisions on opt in and opt out since they are not considered as especially purposeful solutions.[31]

Recently, a need for the introduction of new mechanisms of collective legal protection in the German legal system appeared. More precisely, the initiative came from the courts after the Deutsche Telekom case which has been considered to be the largest case of that type in the German history because of the thousands of claims that had been filed by the shareholders. Model proceedings introduced in the experimental[32] Capital Markets Model Case Act from 2005[33] were seen as a solution for similar future situations. The Act was designed to facilitate filing of a damage claim for shareholders by securing an efficient procedure and at the same time reducing the costs of the proceedings. Namely, the court is obligated to discuss and decide on all factual and legal issues equally and the effect of a judgment is binding for all shareholders who have participated in the proceedings. This solution not only provides acceleration and increase of efficiency of the proceedings but also contributes to legal certainty.

Model proceeding begins by filing an application for a model proceeding to the State District Court. The applicant has to prove that the decision brought in the model proceedings has a significance for all future proceedings beyond the proceeding for which the application has been brought. The application may be filed by any plaintiff or defendant who is member to the proceedings that preceded the model proceedings and often more applications[34] are filed simultaneously among which a court is entitled to select one for conducting model proceedings. Usually the court requests that the application, that is, the model claim contains both the claim of the applicant and also fully reflects all aspects of the

[31] Baetge, loc. cit. n. 20, at p. 13-21.

[32] The Act is introduced in 2005 and it will be in force until 1 November 2010. If the provisions prove to be satisfactory during the trial period its provisions will be implemented in the Code of Civil Procedure.

[33] Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten from 16 August 2005, BGB1. I.

[34] If 10 or more of the same claims have been brought State District Court will refer them to the Court of Appeals.

claims of all other applicants which are relevant for the subject matter of the proceedings. When the court certifies the model proceeding it submits it to the court of appeals (*Oberlandesgericht*) which conducts the model proceeding and delivers a judgment. From the moment the court certifies the model claim there is a model plaintiff and other plaintiffs whose claims will not be decided on until a judgment in a model proceeding is delivered.[35] The plaintiffs are not parties to the proceedings so they are not entitled to opt in or opt out. Nevertheless, there is a possibility for a plaintiff who has not filed an application to join the proceedings afterwards as an interested party. Also, the plaintiff has the right to withdraw his claim but if the claim is withdrawn after the model proceedings has begun, he is still bound by the effect of the final judgment in the model proceeding. Therefore, the model proceeding judgment is obligatory for the parties as well as for the plaintiffs as interested parties, but only if they had an opportunity to influence the conduct of the proceeding and the delivering of the final judgment.[36] After delivering of judgment in model proceedings the State District Court will deliver a judgment in all pending cases.

In Germany there is currently debate on defining the direction of future development of the collective legal protection mechanisms. Encouragement as well as the first concrete proposals for reform of the German collective legal protection system has been put forward by legal theorists in 1998.[37] It seems that at least some of these proposals have

[35] The notification on the decision of the commencement of model proceedings is announced in the complaint registry on the Internet. The court suspends all other pending cases and the suspension order at the same time serves as notification to the plaintiffs that they are regarded as interested parties (*Beigeladene*). The position of the interested parties is very similar to that of an auxiliary intervener (*Nebenintervenient*) who is entitled to take action in the proceedings in accordance with the provisions of the Code of Civil Procedure. Baetge, loc. cit. n. 20, at p.19.

[36] According to the position of the German doctrine American class action in which members of the group do not take active part in the proceedings is in violation of the fundamental guarantee of their right to be heard (*Recht auf rechliches Gehör*). In the German model proceedings the right of the interested parties as the plaintiffs to take a more active role is strongly emphasized since the effect of the final judgment is binding on their rights and obligations. Baetge, loc. cit. n. 20, at p. 20.

[37] Max Planck Institute for Comparative and International Private Law has made a proposal of the reform for an expansion of association claim to all the fields in which interests of individuals could be threatened or injured in a similar way by the action of the same person (the defendant) and whose rights could be realized in a

found approval since the application of association claim has been expanded outside the field of consumer protection and unfair competition. Also, a significant shift has been made with the introduction of model proceedings which are still in the phase of experimental legal solution. It is expected that should some of the disadvantages be removed,[38] model proceedings will be successfully introduced into the Code of Civil Procedure.[39]

III. Multi-party action in Hungary

The right of addressing the court has been recognized as both a basic human right and a civil right in Hungary and in other democratic countries worldwide.[40]

According to the traditional Hungarian case model, the rightful collective right can be enforced only by the state. No private individual is given the right to, on behalf of a group, bring a lawsuit for a collective grievance. Accordingly, the Hungarian Civil Procedure is dominated by individual actions, thus it can be said that the 'individually approached civil case model'[41] is completely compelled by the claim to represent

representative proceedings. The proposal also included the introduction of model proceedings. However the most interesting is the idea of the introduction of a model similar to the American class action (especially if we consider the position of the German doctrine of the unconstutionality of the American class action) which would be based on an opt-out principle. Also, a very significant proposal was made by Professor Astrid Stadler which suggested the introduction of 'voluntary' group actions based on the opt-in principle. Together with Professor Hans-W. Micklitz Professor Stadler suggested the introduction of a new Association Complaints Act (*Verbandsklagegesetz*) which would include regulation on group action and model proceedings. Baetge, loc. cit. n. 20, at p. 28-30.

[38] The criticism of the Capital Markets Model Case Act relates to the duration of the proceedings, especially in the first stage when the State District Court decides on the approval of the model proceedings and then refers the case to the Court of Appeals for the conduct of the proceedings and of delivering the judgment. Further, there is no effective mechanism for pressuring the parties to settle the case and the provisions on sharing the costs of the proceedings give no incentive to the plaintiff. Baetge, loc. cit. n. 20, at p. 31.

[39] Baetge, loc. cit. n. 20, at p. 31.

[40] Art. 57 (1) the Constitution of the Republic of Hungary.

[41] M. Kengyel, 'A jogérvényesítés akadályai és a „joghoz jutás" lehetőségei a polgári igazságszolgáltatásban' [Difficulties of Prosecution of a Right and Opportunities of 'Access-to-Justice' in the Civil Jurisdiction] *Jogtudományi Közlöny* (1988) p. 185.

collective interests in legal forms. Not even after the change of social system was the regulation of the Hungarian statutory law susceptible to integrating instruments of collective legal defense into the legal system; however, an attempt was made at initiating the 'specialized attorney general' and 'intercessor'.[42] Nevertheless, today there is an increasing need for the procedural legitimization of groups aiming at collective prosecution of a right. The opportunity of collective validation of subjective rights has long been available in several countries around the world.

In the last decade, establishing the opportunity of prosecution of a right was put on the agenda in several, mainly European countries where, by reasons of legal culture and negative experiences, the application of this legal solution had been strongly resisted before. The essential grounds of this change is the realization that in the modern and globalized societies, numerous individuals or legal entities experience several kinds of injury that fail to be remedied on account of difficulties arising out of prosecution of a right, the high expenses compared to the amount of individual claims or the social status of the subjects suffering the injuries. Grievance caused by violations of the prohibition of prejudicial discrimination, regulations regarding the consumers' information, or the rules of environmental protection might especially be such kinds of injuries.[43]

On the basis of the bill (T/11332), submitted to the Parliament on 22 February 2010, in case of a legal dispute involving private or legal individuals, the court approved that it is possible on demand to collectively bring an action, if the right wished to be collectively enforced in court is essentially based upon similar (objectively definable) facts. Collective bringing of an action can be proposed by any private or legal person who has a direct interest in the outcome of the litigation respectively any social structure which represents interests regarding the subject of the litigation. Moreover, the attorney and the administrative organ in the attorney's cases are also entitled to initiate a collective bringing of an action. The primary aim of the project is to make the collective prosecution of a right available to social groups

[42] Gy. Gátos, '*Perbeli igényérvényesítés közösségi érdeksérelem esetén. Az amerikai "Class Action"'* [Assertion of Claim at Court in Case of Offended Interests. The American "Class Action"], 2 *Magyar Jog* (1992) p. 100-103.

[43] T/11332 Bill 'General Preamble'.

where the prosecution of a right is restrained by financial means and other conditions.

In lawsuits brought collectively, according to Civil Procedure Code Article 51 section a) provided that the conciliation and dropping of charges are effective exclusively with the legal representative's assent or with all plaintiffs' undivided decision, the plaintiffs unite in a *joinder of parties*. The members of the suing group can be represented by a legal representative. The advocate's contract of agency, which regulates the plaintiffs' relations, must be handed in at court under complete discretion of the lawyer. The Proposal states in particular that in case of court approval of collective bringing of an action, the plaintiff has the right to call upon the members of the group interested in the dispute to join the suit whereas otherwise it could be against laws or advocate ethical rules. However, with respect to the well-known prejudicial international experiences, it is important to prevent such abuses of 'recruitment' of plaintiffs and promise of unjustified benefits. In case of collective bringing of an action, the initiating party is responsible for advancing the legal costs resting upon the plaintiff; in addition, with the cost of legal expenses taken into account, with no respect to its exemption from charges, the initiating party is imposed upon by joint and several liabilities. With a special order, the court establishes the conditions of a collective bringing of an action that can be independently challenged by an appeal. The Proposal provides that following the disclosure of the definitive judgment, a member of the group not engaged in the lawsuit can preclude the legal force of the decision from extending it to the member's enjoyment of a right. For this possibility, the Proposal grants one year reckoned from the disclosure of the decision.

The bill was not generally successful among experts. The Budapest Bar Association,[44] in a letter addressed to the President of the Republic,[45] summed up its concerns as follows:[46]

> '[e]luding essential constitutional regulations, the law changes the fundamental function of the legal system; in addition, it might produce major tensions that the judiciary, and legal representatives find hard to

[44] Chairman: Dr. László Réti.

[45] Dr. László Sólyom, President of the Republic of Hungary (2005-2010).

[46] Before the final poll, also the Minister of Justice and Security (Dr. Imre Forgács) received a written complaint regarding the Bill. 19 February 2010. Ref.n. E/1002/35.

> remedy, since they are not supported by normative rules and adequate preparation.'[47]

The Bar disapproves that the necessary impact studies failed to be performed in the course of codification, and without them introduction of the law is highly risky in terms of legal certainty, also it might result in possible misuses and an enforcement different from the legislator's wish.[48] However, the harmful economical influence has an effect on both the ventures obliged to pay compensation and the collective individuals as the other party in the litigation. In case of collective prosecution of a right the compensation for the individuals is often inequitable and does not satisfy the participants' expectations. As a consequence of the expanded administration and the advocate's and other legal costs, only a portion of the amount of money in suit is distributed among just 45% of the individuals of the collective. To become the collective bringing of an action integrated into the Hungarian legal system, the constitutional problems brought up by the law need to be resolved. Such a problem for instance is the so-called opt-out rule which conflicts with the fundamental principles when it provides that the members of the collective might withdraw from the effect of the decision within 1 year (if they were not involved in the lawsuit), thus being exempted from losing the lawsuit on the one hand, and from the charge of the *res judicata* on the other hand (in this latter one-sidedly), they might bring further actions against the defendant.[49] It means additional problems that the concept of the collective is not clearly defined. It is a constitutional requirement[50] that the terms used in the norm are clear, understandable and definitely interpretable. On the other hand, in spite of the fact that both terms have a major influence on the outcome of the lawsuit, the law does not give a proper definition of

[47] Letter from the Chairman of the Budapest Bar Association to the President of the Republic, 4 March 2010, Ref.n. E/1003/04.

[48] In the western countries where the legal institution is well-known, the misuses of collective lawsuits are common. In the US, the masses of continuously brought big budgeted actions cause significant economic losses. H-J. Rabe, 'Kollektivklagen', 1 *ZEuP* (2010).; M R Bloomberg and C E Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* (2007)

[49] V. Csabai, 'Érvek pro és kontra: A csoportos kereset Magyarországon' [Reasons, Pros and Cons: Collective Suits in Hungary], Jogi Fórum 12.04.2010., available at: <http://www.jogiforum.hu/hirek/22851>.

[50] Decision 42/1997 (VII. 1.) of the Constitutional Court of Hungary

the concepts ‘significantly numerous’ and ‘similar factual basis’. The Bar also found errors with the representative’s legal status, the attorney’s role and the regulations related to costs of the proceedings.
Having regarded to the objections, on 10 March 2010 the President of the Republic returned[51] the bill to the Parliament for reconsideration. As a reason for this, the President of the Republic expressed his concerns about the possible misuses and suggested that ‘the legislators need to come up with detailed and special norms relating to certain possible scopes (such as consumer protection, product liability, competition law etc.), contrary to the Law’s general regulations in effect on all scopes.’ Also, he draws attention to Act CXX of 2009 (proposition of a new Civil Code) Art. 2.961),[52] according to which rules of collective bringing of an action could be enforceable for vindicating personal rights which can have a harmful effect. It is a stressed problem that authorizing the collective bringing of an action produces an inadequately prejudicial discrimination of the adverse, defendant party. This means that the number of plaintiffs is changeable and that the risk the members of the plaintiff party take is significantly reduced.

> ‘The objections on the merits facing the Law could be further specified: the permissibility of the collective bringing of an action is not adequately explicit, therefore the notions of forming a group, relations among the plaintiffs and decision-making rules are not obvious nor are the rules on representation especially if the procedure is initiated by an attorney or an administrative organ. With respect to especially the chances of opt-in and opt-out, the special rules of conciliation and its approval, rules of bearing the legal costs are objectionable as well as the compensation for legal costs of the initiative social structure.’[53]

[51] File No. 11332/05 the President of the Republic returns the proposal for reconsideration
[52] This law must not be in force by the Decision 111/E/2008 of the Constitutional Court of Hungary
[53] File No. 11332/05 the President of the Republic returns the proposal for reconsideration

IV. Multi-party actions outside the EU

1. American model

The legal system of the United States of America (USA) belongs to the common law legal family[54] and it was developed through the assumption of legal principles and methods from the English law which even today have strong influence on the legal institutes, principles and the terminology of American private law.[55] In the American civil procedure whose rules are contained in the Federal Rules of Civil Procedure (hereinafter: FRCP) an individualistic, liberal model is emphasized, that is, the understanding that the main purpose of the state is to ensure protection of life, liberty and property.[56] Its main features are the guarantee of due process[57] [58] requirements, party control of the procedure and a trial by the jury. There are three stages of the procedure, pleadings which is usually followed by a pre-trial discovery and a trial as a final stage.[59] [60] The American legal system is considered to be 'the home of class action'[61] but a representative action model which served as a base for the class action originates from the English system from

[54] Along with England and the USA, Canada, Australia and the legal systems of a large number of countries in Africa, Asia and Oceania belong to the common law legal family. Gavella, op. cit. n. 2, at p. 20.
[55] Gavella, op. cit. n. 2, at p. 20.
[56] This understanding was taken over from the teaching of the English thinker and author of liberalism John Locke from 1690 which further suggests a very strong link between the English legal thought and the American legal system. Gavella, op. cit. n. 2, at p. 19.
[57] U. S. Const. amend. V, XIV § 1. *Nowak/Rotunda*, Constitutional Law, 1995, Ch. 13.
[58] The constitutional guarantee of the 'due process' includes a ban of arbitrary and unlawful encroachment of the fundamental civil rights (life, liberty and property) and the obligation of the state to ensure a fair process for the protection of rights which have been threatened or injured. Further, the due process also includes the right to information (notification) the right to adversarial proceedings and the right to impartial proceedings. S. Eichholtz, *Die US-americhanische Class Action und ihre deutschen Funktionsäquivalente* (Tübingen, Mohr Siebeck 2000) p. 55-56.
[59] Institutes of civil law and common law legal family are very different and for some of the institutes from the American legal system there are no adequate terminological solutions in Croatian and Hungarian language so we give both a translation and original denomination.
[60] Eichholtz, op. cit. n. 58, at p. 55-60.
[61] Mulheron, op. cit. n. 16, at p. 9.

which it was taken in the 12th century. The original class action was regulated in Rule 23 of the Federal Rules of Civil Procedure from 1938[62] but Rule 23 was changed drastically in 1966, and the most significant change was abandoning the division of the class action to the true, hybrid and spurious. Although it was partly changed in 1998 and 2003, the essence of Rule 23 remained the same and the version which is in use today resembles greatly the 1966 version.[63] The latest changes of the class action procedure have been initiated because of the preoccupation about the lack of uniformity of the statutes and case law of class action procedures. Namely, the possibility that a class action brought in one of the states affects citizens residing in another state (and in some cases 49 other states) is one of the core arguments which have contributed to the success of the proposers of the Class Action Fairness Act (hereinafter: CAFA) from 2005 which federalized many class action procedures which would normally be conducted in the state court.[64]

> 'The importance of CAFA is that it affects two areas, that is, the jurisdiction of federal courts over multi-state class actions involving state-law claims and various types of class action settlements in federal court. In the area of jurisdiction, CAFA significantly expands the original jurisdiction of federal district courts over class actions involving state law claims giving federal courts jurisdiction over state-law class actions in cases which involve 100 or more class members and there is "minimal diversity" between the parties and that the aggregate amount in controversy for the class exceeds $5 million. In order to expand federal jurisdiction to cover many more state-law class actions, CAFA also authorizes removal of the cases covered by the Act from state to federal court. In the area of settlements, CAFA imposes significant restrictions on both, how class counsel can be compensated for so-called "coupon"

[62] Class action was regulated in the Equity Rule 48 from 1842 and it was used strictly in procedures which were conducted according to the rules of equity. Rule 23 from 1938 was preceded by Rule 38 from 1912 which was also used in the proceedings which were conducted according to the rules of equity. The main difference between the two Rules was in the effect of the final judgment on the absent parties which was significantly restricted in the Rule 38 in comparison to the earlier Rule 48. R. H. Klonoff, *Class Actions and other Multi-party Litigation in a Nutshell* (Thompson/West 2007) at p. 17.

[63] Klonoff, op. cit. n. 62, at p. 19-23.

[64] N. M. Pace: 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', p. 3., available at: <http://www.law.stanford.edu/library/globalclassaction/PDF/.../USA__National_Report.pdf>, (last accessed on 15.08.2010).

> settlements[65] and also on "net loss settlements".[66] It also prohibits settlements in which some class members receive more merely because of their closer proximity to the court house.'[67]

From the definition of the class action it is apparent that it differs from other presented mechanisms of collective legal protection since the class action is

> '[…] a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in one suit. In a class action, one or more persons ("representative plaintiff") may sue on his or her own behalf and on behalf of a number of other persons ("the class") who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ("common issue"[68]). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issue, whether favorable or adverse to the class, although they do not, for the most part, take any active part in that litigation.'[69]

The definition will serve for distinguishing fundamental features of the class action, that is, the parties to the proceedings, the claim and the effect of the binding judgment on the parties and others involved in the proceedings. The integrity of the analysis requires us to first look at the requirements[70] of Rule 23 of the Federal Rules of Civil Procedure which have to be satisfied in order for the court to certify a class action. There are four requirements: numerosity, commonality, typicality and adequacy of representation and additionally, class action has to belong

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[65] 'Coupon' settlements are settlements in which class members receive, for example, coupons for discounts on future purchases of the defendant's product.

[66] 'Net loss settlements' are settlements which result in monetary loss to class members.

[67] Klonoff, op. cit. n. 62, at p. 24-25.

[68] 'The class members and the representative plaintiffs common claims need to be based on the same legal theories of liability and arise from the same events or practices.' Pace, loc. cit. n. 64, at p. 7.

[69] Mulheron, op. cit. n. 16, at p. 5

[70] Before the court begins to examine whether the class action complies with all four requirements of Rule 23 of the Federal Rules of Civil Procedure, it is necessary to establish that i) the class exists and it is capable of ascertainment; ii) the class representatives are members of the class; iii) the claim is live, not moot. Klonoff, op. cit. n. 62, at p. 21.

to one of the (b)(1), (b)(2) or (b)(3) categories of Rule 23.[71] It is obvious from Rule 23 that regardless of the fundamental features prescribed by the definition of the class action, the specificities of the features of a certain kind of a class action and procedural rules that apply to it are determined by the affiliation of the class action to one of the categories within Rule 23. Therefore, among these categories we have chosen the class action prescribed in Rule 23(b)(3), that is, a financial claim[72] in the field of consumer protection.

The procedure is initiated by a damage claim class action. The plaintiffs to the proceedings have to be named. Often, from the wording of the claim it is obvious that the plaintiff has initiated the procedure in his own name and also in the name of a group of individuals who are similarly situated. In some cases the claim does not indicate initiation of a class action procedure but intention of the representatives to commence a class action procedure is obvious from the communication between the parties. Defendants are sometimes notified of the class action procedure in the moment that the plaintiffs request a certification of the class action. Independent of the manner in which the defendant has been notified of the class action procedure, the moment of his notification is considered to be the moment of the commencement of the procedure. Rules of the two-party procedure in pre-trial procedure apply to the class action procedure. In this stage if the requirements are fulfilled the parties are entitled to require transfer of the case to a federal court. The request for certification is used for establishing whether collective proceedings are more efficient than individual proceedings, if the claims of the representative plaintiffs (usually named plaintiffs) contain same factual or legal issues as the claim of the members of the

[71] Each of this categories defines a certain type of class action and we can differentiate: '[i]njunctive and Declaratory Relief Class Actions under Rule 23(b)(2) and Rule 23(b)(1)(A) (civil rights cases and other suits seeking social change or to implement institutional reforms), Monetary Class Actions under Rule 23(b)(3) and Rule 23(b)(1)(B) (*mass torts*, *securities & shareholders*, and various other *financial injury* claims, consumer claims, antitrust cases) and Hybrids (single class action can involve multiple bases for certification and multiple theories of liability)'. Pace, loc. cit. n. 64, at p. 2.

[72] Namely, as already mentioned, Rule 23(b)(3) and Rule 23(b)(1)(A) category is much wider and includes a large number of different forms of class action for financial damage and it is unnecessary to include all of them in the analysis since in other legal system we have also concentrated on the features of collective legal protection forms in the field of consumer protection.

group and if they are prevailing. If the court declines certification the claim is not dismissed. The plaintiffs are entitled to initiate individual proceedings to which rules of the regular two-party civil procedure apply. Also, the parties are entitled to file another request for the certification of a class action.

If the court certifies a class action, the representative plaintiffs are entitled to notify[73] members of the group of the commencement of the proceedings and their right to opt-out.[74] The effect of the final judgment is binding for all members of the group who do not opt-out and the members who opt-out are entitled to initiate individual proceedings. Procedural rules which apply to the regular two-party proceedings also apply to the trial in the class action procedure. The final judgment has a binding effect to the rights and obligations of all parties to the proceedings, that is, representative plaintiff, defendant and members of the group. However, judgments in class action proceedings are very rare since often parties agree to a settlement in earlier stages of the proceedings. The settlement contains a defined number of members of the group, an aggregate amount of money for resolving all claims of all class members and all costs of the proceedings, the mechanisms for distribution of the aggregate amount among the class members, the amount for attorneys' fees and other expenses. The judge is entitled to review and approve the content of the settlement.[75] In this way the rights of the class members which are not directly involved in the proceedings or reaching of the settlement between the class counsel or representative plaintiffs and the defendant are protected. In certain cases another notice

[73] Attorneys appointed as class counsel bear the costs of the notification of class members but in the case that parties reach a settlement or are successful at trial such expenses could be recovered from the defendants. Pace, loc. cit. n. 64, at p. 40.

[74] In other two categories, that is, class actions under Rule 23(b)(1) and (b)(2) the participation in the class is mandatory and there is no obligation of the direction of notification of class members on the certification or the right to opt-out. As an exception, the court may permit class members to step out of the proceedings, that is, to opt-out and in these situations the court usually directs an appropriate notice. Klonoff, op. cit. n. 62, at p. 22.

[75] When the judge decides whether to approve the settlement he usually considers fairness, reasonbless and adequacy of the proposed of the amount. Also, the judge decides on the height of attorney's fees and especially considers whether the amount will come from the aggregate amount, if there will be a common fund or the defendant will pay the fees on top of amount he had to pay to the class. Pace, loc. cit. n. 64, at p. 41.

of the content of the settlement and the right of the class members to object to the provisional terms and sometimes also to opt-out of the settlement is sent to the class members.

Unlike rather new forms of multi-party actions in legal systems of most European countries, class action in the American legal system has been existing for a relatively long time and it could be assumed that the assessment of its utility in providing legal protection for a large group of individuals whose rights have been threatened or injured should be facilitated by that fact, since there is enough basis in the doctrine and case law which could confirm these allegations. Surprisingly, it seems that although there has been a long tradition of the application of class action in the American legal system, there is no systematic monitoring of its development and there is still no detailed analysis of its real efficiency and applicability. There is still rather limited perception of class action as the 'knight in shining armor'[76] or 'Frankenstein monster'.[77] Accordingly, the critics of class action are divided to those who emphasize its efficiency to provide social change, eliminate or reduce damage from unlawful conduct and prevent similar conduct in the future; and to those who emphasize its contribution strictly to facilitation of limiting the liability for unlawful conduct of corporations and enrichment of lawyers. Nevertheless, the fact its application in realization of collective legal protection has a long tradition on the federal as well as on the state level, it is very broad[78] and the rules which

[76] This expression is used by the author of the national report on class action in the USA, Nicholas M. Pace. Pace, loc. cit. n. 64, at p. 95. Similar expressions as 'one of the most important procedural developments of the century' can be found in the work of many authors among which we will mention JP Fullam, 'Federal Rule 23-An Exercise in Utility' 38 *Journal of Air Law and Commerce* (1972) p. 369 at p. 388. in R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (Oxford-Portland Oregon, Hart 2004) p. 4.

[77] The expression 'Frankenstein monster' originates from the case law, from the case *Eisen v. Carlisle and Jacquelin*, 391 F 2nd 555, 572 (2nd Cir 1968) (Lumbard CJ, dissenting) where it was used for the first time. 'The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action'. Mulheron, op. cit. n. 16, at p. 3.

[78] It should be mentioned that most of the states in the USA have some type of a class action and the rules which regulate it do not differ significantly from Rule 23 which regulates federal class action (the state of Mississippi is an exception because it lacks a class action procedure, Virginia does not have a specific statutory claim rule, but a common law class action is allowed, Iowa and North Dakota follow the

have not been subjected to excessive change say enough of the constant and efficient character of class action. In part, this is due to the numerous legal practitioners, especially judges and lawyers, theorists and also representatives of interest groups who by constant reference to the shortcomings, necessary adjustments and corrections of the regulation on class action try to supplement it and maintain it as a vital part of the legal protection system as it was initially imagined. The understanding of the position of class action in the American legal system is concinsely depicted by the sentence that class action is a mechanism 'which is generally successful but there is considerable room for improvement'.[79]

2. Multi-Party Actions in Croatia

The affiliation of Croatian legal system to the civil law legal family can be best seen from the rules on civil procedure which is marked with traditional features originating from Roman law and also show that Croatian procedural law rests in a certain way on the German legal system. Croatian civil procedure is regulated by the provisions of Civil Procedure Act[80] and the basic features of the procedure are the guarantee of the right to be heard,[81] the principle of party control, the

Uniform Class Action Rule, Nebraska and Wisconsin follow the Field Code rule on group litigation same as California which has adopted the equivalent of FRCP 23, Missouri and North Carolina have their own version of the original form of FRCP 23, while Georgia and West Virginia have only recently adopted a new version of Rule 23, and the remainder of the states have a somewhat modified form of the Rule 23). Pace, loc. cit. n. 64, at p. 2.

Also, the field of application on the federal as well as on the state level is very broad and includes mass damage claims, insurance frauds and discrimination of employees, securities etc. Exclusion or limitation of the possibility for the class action procedure refer to small claims cases, domestic relations, taxpayer claims, administrative proceedings or other types of procedures under statutes with specific restrictions on class actions. Pace, loc. cit. n. 64, at p. 4.

[79] Pace, loc. cit. n. 64, at p. 95.

[80] Civil Procedure Act (Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 84/08).

[81] The constitutional guarantee of the right to be heard was not included in the original version of the Constitution from 1990. After Republic of Croatia became a party to the European Convention on human rights and fundamental freedoms from 1950 (hereinafter: ECHR) in 1997 Art. 29 of the Constitution which is almost identical with Art. 6 of the ECHR was implemented in the Constitution. Triva and Dika, op. cit. n. 3, at p. 16.

principle of party control of facts and the means of proof and the principle of immediacy.

Over the past few decades the European Union has taken large steps in ensuring free access to justice for consumers and thus significantly contributed to ensuring effective functioning of the internal market. A large number of European countries along with the possibility of direct legal protection of consumers which can be realized by launching proceedings against the merchant introduced the possibility of indirect collective legal protection, where an association for consumer protection acts as a representative of consumer interests. In the process of harmonizing legislation with the *acquis communautaire* the Republic of Croatia had to make significant adjustments in the Croatian legislation in order to ensure the same level of protection which the European Union provides in the area of consumer protection. Therefore, the Consumer Protection Act[82] of 2003, among others, introduced the so-called joint (class, representative) action[83] (the equivalent of the German *Verbandsklage*)that allows abstract consumer protection and realization of their collective interests.

According to the provisions of the Consumer Protection Act, association for consumer protection as plaintiff shall be entitled to initiate court proceedings for the protection of consumers *in abstracto*, in which it will require a ban on certain conducts of the merchant, or the defendant, which has to be individually determined, that is, individualized. It shall also be entitled to demand that the defendant restrains from the usage of unallowed bussiness practice, unfair terms in the consumer contracts or misleading and deceptive advertising. Obviously, associations for consumer protection can file a joint action only in cases where they are authorized by law to seek such protection. Since the Consumer Protection Act does not provide otherwise, associations for consumer protection would not be entitled to claim damages incurred from the certain unlawful actions of the merchant. The Act also provides for the possibility that more associations file a joint action against the same defendant and in such cases, the court would be obliged to render the same judgment in respect of all claims filed. Under the provisions of the

[82] The Consumer Protection Act, Official Gazette no. 79/07, 125/07, 79/09

[83] Professor Mihajlo Dika used the term 'joint (class) action' in the 'Udružna tužba kao instrument apstraktne zaštite potrošača' [Joint claim as an instrument of abstract consumers' protection] 3 *Hrvatska pravna revija* (2003) p. 37.

Consumer Protection Act from 2003 the final judgment should have *inter partes* validity between the association as the plaintiff and a merchant as a defendant or any another defendant, if they are parties to the dispute. However, the possibility of the extention of the validity of the convicting judgment to consumers and consumers' protection associations that have not participated as a party to the dispute, would enable the binding effect of such judgments to be invoked in any future disputes agains the merchant, for example, over damages. That is why in amendments to the Consumer Protection Act from 2009[84] explicit provisions were added to the Act on the effects of the final judgment on third parties and the binding judgment in proceedings concerning the protection of collective consumer rights which have been threatened or injured.[85] However, if the judgment was rejected, merchants should not be able to invoke it in future litigation against a consumer or associations for consumer protection that had not participated as a party to the dispute. This extension of subjective limits of legal validity of judgments could contribute to the full realization of the purposes for which joint action was introduced in the Croatian legal system. Namely, joint action became a genuine abstract instrument of repressive and preventive legal protection. Its abstract nature is reflected in the fact that the associations are authorized to initiate proceedings regardless of whether specific consumer rights have been threatened or violated. If the court finds that the claim is well founded, the judgment has a repressive effect in relation to the particular practice of the merchant and preventive effect in relation to future conduct of the merchant by forcing a ban on similar practices in the future. But more importantly, extension of the subjective limits of legal validity of judgments enables the same preventive and repressive legal effect of the judgment on the consumers' protection organizations and consumers who were not involved in the dispute.[86]

[84] Arts. 138 and 138a of the amendments to the Consumer Protection Act (Official Gazette No. 79/08). See A. Uzelac, 'Proceedings before the court' in A. Grgić et al, A guide to Anti-discrimination Act (Zagreb, Government of the Republic of Croatia, Office for Human Rights 2009) p. 109.
[85] Uzelac, loc. cit. n. 84, at p. 109.
[86] Dika, loc. cit. n. 83, at p. 37.

Soon after the introduction of the joint action (or associational claim[87]) in the Consumer Protection Act, this model has been extended to anti-discrimination actions in the Anti-discrimination Act[88] in 2008 making it possible for the persons and associations which themselves do not claim to be a victim, to initiate court proceedings. The requirements for active legitimation in joint (associational) action do not particulary differ from the requirements for individual anti-discrimination action and the only difference is in the stronger emphasis on the legitimation of organizations generally dealing with human rights. However, there is a great difference in the requirements which have to be met in order for the court to allow a joint claim. The organization or a body as a plaintiff, initiating the court proceedings do not have to ask for the consent of the potential victims to file the claim. But since the plaintiff has to have a legitimate interest to file the claim, it needs to prove that one of its goals is either to protect the rights and interests of the group in question or that it is generally engaged with anti-discrimination, including the protection of the right to equal treatment of the group in question. A final and binding ruling on a joint action in case discrimination is determined, has an *ultra partes* effect. Due to this effect, the court is bound by determination of discrimination not only for the parties in the proceedings, that is, association, body or other organization as the plaintiff and the natural person or legal entity as the defendant, but also for all members of the group discriminated against. This extension of the subjective limits of legal validity of the judgment enables the members of the group to invoke the prejudicial effect of this judgment in all future disputes against the defendant. Since one cannot seek damages with joint action, this prejudicial effect would be particularly interesting if the damages were to be sought by individual claims because the court would not have to establish the defendant's liability. However, if the claim for determining discrimination was rejected, it will have no effect on future disputes between the members of the group as the plaintiff and the defendant. Also, a member of the group is not precluded to file an individual anti-discrimination claim once the joint action for determination of discrimination was brought to court. In the case that the judgment rendered on the individual claim is different from

[87] Professor Alan Uzelac used the term 'associational claim' in '*A guide to Anti-discrimination A*ct', Uzelac, loc. cit. n. 84, at p. 105-108.
[88] The Anti-discrimination Act, Official Gazette no. 85/08

the judgment on the joint action, this situation could be a basis for the request to reopen the proceedings.[89]

As already mentioned, collective legal protection has been introduced in Croatian legislation as a result of approaching the European and global trends in the field of legal protection. Throughout Europe, various instruments of collective redress mechanisms have been recognized for the effective realization of certain social goals. Class action has been accepted as one of the most widespread instrument of collective legal protection, although its manifestations in different legal systems differ considerably. However, what they have in common is their usage for the purpose of achieving economic and social interests of the state and also individuals. On the one hand, collective legal protection mechanisms contribute to the alleviation of the efficiency of court proceedings, saving time and resources that are usually spent on individual procedures, and to legal certainty in terms of reconciliation practice of the courts in making decisions. Overall, this largely contributes to achieving economic and social interests of the state. On the other hand, the economic interests of individuals are met by the possibility of participating in a lawsuit even in cases when they alone could not bear the costs of individual proceedings. At the same time, collective legal protection mechanisms can also serve as instrument for the achievement of social interests of individuals as well. This is reflected in the guarantee of the right of access to court which belongs to individuals as members of a particularly vulnerable group in the society. Also, as an example of the wider social significance of collective legal protection mechanisms for the state and for the individuals, there is the possibility of its use for so-called test-cases that can be used to test the effectiveness of provisions of a new law.[90]

For now, it appears that the solutions which have been introduced into the Croatian legislation are adequate to achieve economic and social effects of collective legal protection. Conditionally, it could be said that a form of the joint action introduced by the Consumer Protection Act is used to a greater degree for the achievement of economic goals, while the form introduced by the Anti-discrimination Act is mostly aimed at

[89] Uzelac, loc. cit. n. 84, at p. 107.

[90] If there are laws which seem to be ambiguous or contraversial and unfairly impact particular groups, for example, a legal aid office could bring a test case to the court to test the fairness or effectiveness of such a law.

the protection of social interests. However, these two laws are *lex specialis* and they are primarily used for the regulation of specific legal areas of consumer protection and anti-discrimination and the joint action is only subsidiary regulated as one of the instruments by which this protection can be achieved. Therefore, individual solutions and their interpretation in connection with the joint action within these laws differ greatly. In order to achieve uniformity in terms of recognizing and defining joint action as an instrument of collective legal protection similar to forms of other civil law countries (in our case in the sense of provisions on *Verbandsklage* in German law) it is necessary to consider its possible regulation within the provisions of Civil Procedure Act or the special law on collective legal protection (as in the legislation of other European countries).

V. Multi-party actions and the legal aid

In the late 1970s 'Access to Justice' was defined as 'enabling every citizen to vindicate his or her substantive rights, while other conceptions advocated the equal treatment of parties in pending litigation in almost absolute sense'.[91]

> 'In a way, "access to justice" became a part of the legal services the modern welfare state provided for "disadvantaged parties". The main aim was to reduce barriers derived from costs, duration and difficulties of communication in judicial proceedings.'[92]

It was obvious that the term access to justice could not be confined only to legal aid in the traditional civil proceedings, but also had to include collective remedies, and so the access to justice concept was broadened to ensure the right of the consumers to a swift and affordable redress in civil courts, including the right of being represented by consumer associations.[93]

> 'In the European Union "access to justice" in the context of consumer protection has been strongly advocated for a long time. There are several communications and Green papers of the European Commission which

[91] P. Moorehead and R. Pleasence, 'Introduction', in P. Moorehead and R. Plesence, eds., *After Universalism, Re-engineering Access to Justice* (Oxford, Blackwell Publishing 2003) p. 1-10.
[92] R. Kocher, *Funktionen der Rechtsprechung* (Tübingen, Mohr Siebeck 2007) p. 95.
[93] Kocher, loc. cit. n. 92, at p. 95.

> stress the link between the aspect of access to justice in judicial proceedings and the proper functioning of the Internal Market.'94

But group or 'multi-party' actions, as they came to be known, also faced problems being heard in court because procedural rules were usually designed for individual cases. Mass claims are usually long-running and complex cases and soak up vast amounts of court resources. These cases involve law firms in an extensive commitment of time and resources over long periods of time. Private firms were therefore reluctant to take on multi-party actions unless there was a very high prospect of success. They were even more reluctant if contingency fees were not available.[95]

> 'Contingency fees as a typical characteristic of civil litigation in the United States are very common in individual monetary actions. However, their use in class action is not so broad. Their main characteristic is to shift the financial risk in the event of the failure of the action from the class representatives to the class lawyer, that is, to ensure that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation.'[96]

Contingency fees are not at all common in the European civil procedures. The latest amendment made in the German law[97] permitted contingency fee arrangements in specific situations. For now, their use is restricted to the arrangements between lawyers and private plaintiffs. Since it has been recognized that their main value is in alleviating access to justice in cases with a risk of high costs and an open outcome it seems that their expansion on the collective redress should be considered as well.[98]

One of the most important problems was to solve the question of funding. In the absence of contingency fees, publis funds were to be used. The resources of national legal aid schemes could be used to fund the actions. The pressure for multi-party action reforms emerged at the

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[94] Green paper of the Commission of the 2 September 2000; Recommendation 98/257/EC, *OJ* 1998L 115/31; Directive 98/27/EG

[95] Fleming, loc.cit. n. 13. at p. 260.

[96] Mulheron, loc. cit. n. 16, at p. 469.

[97] The Federal Government introduced a new bill on attorneys' fees in October 2007.

[98] J.T. Johansen and F. Regan, 'An international 'best policy' model and Finnish Legal Aid' in C. H. Ree and A. Uzelac, eds., *Civil Justice between Efficiency and Quality: From Jus Commune to CEPEJ* (Antwerp-Oxford-Portland, Intersentia 2008) pp.151-189., at p. 155.

time when many societies began to lose faith in legal aid.[99] We can say that the declining legal aid schemes responded to the new demand, the rising of multi-party actions.

Although at the Community level there are initiatives to improve access to justice which include collective redress as one of the measures,[100] it is difficult to establish a Community competence for the introduction of the harmonization of collective remedies. Due to the lack of Community competence there is still no compulsory mechanism which can impose the introduction of collective remedies, contingency fees and punitive damages for its enforcement by national courts in the European Union so the problem of the improving efficiency of the collective redress by making it more available for the potential plaintiffs to use remains unsolved and needs to be approached[101] in the future.[102]

Let us see how legal aid responds to multi-party actions. First we have to establish that multi-party proceedings are not the major part of the national legal aid scheme, probably because there have not been many applications for multi-party legal aid but without legal aid funding these multi-party actions would have faced great difficulty in proceeding to court.[103] Altough in some cases the general opinion is that according to the low standard application fee a class of people should be able to afford the likely cost of the proceeding. Second, the generally low profile of multi-party proceedings is reflected in the management response to such actions. Most agencies in the national legal aid scheme have not developed special guidelines, contributions formulae or policies for the proceedings.[104] Third, in matters where there is a 'common interest in the outcome amongst various applicants' it can cause difficulties to decide whether the presence of an applicant in a multi-party application whose personal income and assets exceeds standard allowances shall lead to the refusal of legal aid or not by assessing on a collective basis.[105] Fourth, in many countries[106] the

[99] Fleming, loc. cit. n. 13. at p. 260.
[100] Green paper on Damage Actions for the Breach of EC antitrust rules, COM(2005)672 final
[101] *Manfredi* case (ECJ), case C-294-298/04, [2006] ECR I-6619
[102] Hess, loc. cit. n. 98, at p. 201.
[103] Fleming, loc. cit. n. 13, at p. 264.
[104] Fleming, loc. cit. n. 13, at p. 264.
[105] Ibid.
[106] Eg., in Australia. See Ibid.

application fee is not demanded of applicants whose claims are representative of a wider class of people whose interest stand to be protected by the proceedings.[107] Fifth, where group proceeding law does not apply and there is a high probability of plaintiffs obtaining favourable individual settlements, legal aid is unlikely to be approved for a multi-party action. Conversely, where group procedures exist legal aid may be granted for a multi-party action, even though the monetary value of individual claims is low.[108] Sixth, legal aid helps special groups of people (e.g. public welfare agencies, church groups) which have charitable objectives or protection of human rights to sue in the form of multi-party actions. In the multi-party civil proceedings which have been funded by the legal aid commissions[109] on the cross-regional basis there is no inter-commission protocol governing these types of national multi-party actions but there are cost-sharing agreements of some kind which are documented by exchanges of letters.[110] Legal aid could be a very good means to develop multi-party actions, for example by developing policies and procedures to process the resources more effectively in the complex and long-running cases by coordination between legal aid agencies if more cases emerge.[111]

Is legal aid the most appropriate option to fund multi-party cases? Should public funds support multi-party actions by legal aid funds or special funds and might alternative organizations (e.g., NGOs) provide a better way to proceed? The number of cases which have a wider public interest has been increasing and it is a new approach to rationalize the costs of proceedings considering a very large number of plaintiffs, very high cost of investigating the difficult technical issues involved and relatively modest level of likely awards of damages in most individual cases. Therefore the main engine room for the public interest litigation for the next few years will continue to be the legal aid.[112] The very important factors in the connection of legal aid and multi-party actions are the provisions of legal assistance, duty lawyer services and legal

[107] Ibid.
[108] Ibid., p. 265.
[109] Eg., Copper 7IUD Products case (1997), Australia, Atomic Radiation case (1997) Australia, See also Ibid., pp. 269-271.
[110] Ibid., p. 269.
[111] Ibid., p. 273.
[112] R. Clayton, 'Public interest litigation, costs and the role of legal aid', *Public Law* August (2006) pp.429-442 at p.442.

advice to individual litigants and accused, the lower fees for the members of the group of litigants, and the legal experience in the regional and cross-regional multi-party litigation.

VI. Conclusion

Comprehensive 'massification' in production, distribution, and consumption immanent to today's society has had certain consequences on interpersonal relationships. Often a large number of individuals have been influenced by the negative consequences of deceptive advertising, environmental pollution or faulty products, so there was a need to create mechanisms by which the rights of individuals, threatened or injured by these actions could be adequately protected. The first forms of collective redress in the form of multi-party actions occurred within the common law legal family and the American model of class action proved to be the most successful among them. In recent decades a number of similar forms have been introduced into the legal systems of many European countries. However, this process was somewhat difficult due to the fact that it was necessary for the EU Member States to reject the concept of an individual two-party civil procedure.

According to Professor Cappelletti it can be said that 'a profound metamorphosis, indeed a real explosion of the traditiona concepts, rules and structures of the judicial process has been advocated, and, in part at least, achieved in some countries'[113]

However, within this process certain trends are noticeable. First, while legal systems in common law legal family have certain mechanisms of collective legal protection, in most of the EU Member States which belong to civil law legal family a possibility of collective legal protection was introduced in the process of harmonization with the *acquis commuautaire.* Some legal systems prescribe collective legal protection mechanisms in civil codes, in some legal systems they are prescribed by provisions of civil procedure acts and in others collective legal protection mechanisms are regulated by a special act on collective legal protection. Collective legal protection mechanisms in different legal systems differ significantly and in most part these differences come from the affiliation of the legal system to common law or civil law legal family. Namely, the biggest differences are emphasized in the

[113] Cappelletti, loc. cit. n. 18, at p. 25.

perception of who is a party to the proceedings, what is the legal position of the party in collective proceedings, who is entitled to represent interests of parties and members of the group, is there a right to opt in and opt out of the proceedings, who is bound by the effect of the final judgment and if only declaratory and injunctive claims are allowed or is there also a possibility for a damage claim. These differences are influenced by specificities of procedural law of countries which belong to different legal families and not the features of collective legal protection mechanisms. That is why there are categories of collective legal protection, group actions with certain features of the American class action, representative actions which include different forms in which a foundation or an organization is entitled to commence proceedings and test cases. However, this comparison provides for establishment of differences as well as similarities of collective legal protection mechanisms in several European countries which belong to civil law family and their comparison to the American model as the representative of the common law legal family. The most important feature is the perception of the purpose of collective legal protection in securing access to justice, economy and efficiency of the conduct of the proceedings, especially in procedures in which the ratio between the costs and the benefit of the proceedings does not justify individual commencement of the proceedings.That is why the forms of collective legal protection first emerged in the areas of consumer and environmental protection and gradually also in the field of anti-discrimination. Its introduction has a wider social significance and therefore the EU emphasizes the importance of securing effective instruments for achieving it. One of these instruments is guaranteed legal aid for ensuring access to justice, which has for some time been recognized as an important mechanism for the functioning of the EU internal market. However, despite the perceived importance of legal aid for ensuring access to justice within the framework of collective legal protection the EU has no jurisdiction to force the introduction of mechanisms that would encourage its development in the area of multi-party action.

The overview of the development of different models of collective redress in the legal systems of Germany, Hungary and Croatia) and its comparison to the American model engaged in this paper has shown that European countries have great difficulty in introducing multi-party action, partly due to the fact that the legal systems which belong to civil

law family so far have been adapted exclusively to individual two-party civil procedure which provides for the realization of state guarantee of legal protection and also because regulations on multi-party action are still incompatible with other regulations on civil procedure of national legal systems, and this fact further complicates its operation.

Although collective legal protection is an indicator of a positive step forward in legal systems of European countries, the process of its development within the European legal space has only begun. A lot of work will be required both on improvement and equalization of multi-party actions to develop a recognizable form which could be used in legal systems of EU Member States. Also, necessary adjustments are alignment of multi-party actions with existing mechanisms for legal protection and also finding the most adequate mechanism for achieving access to justice in the context of multi-party action in cases where such access is denied, whether by legal aid or another form of funding. Of course, in the future the EU will continue trying, as part of its legislative action, to create policies and procedures for harmonizing the existing forms of collective legal protection which should significantly contribute to its development as well.

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JEAN MONNET SUMMER SCHOOL
"Procedural aspects of EU Law"

Topic: Enforcement of EU Law within the CJEU with the focus on preliminary ruling procedure

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Learning objectives:

The main objectives of this part of course are to give an overview of the structure and composition of the ECJ. Further, to understand the main branches of Jurisdiction of the ECJ with special reference to preliminary ruling procedure as the main tool to ensure uniform application of EU Law in all member states.

Topics to be covered:

- Court of Justice of the EU – ECJ (composition and organization)
- The jurisdiction of the ECJ (Types of proceedings with special reference to preliminary ruling procedure)

PART I: The Court of Justice of the EU – CJEU (composition and organization)

The Court of Justice of the EU is one of the EU institutions.[1] Its internal organization and jurisdiction are provided by the Treaty while the procedure before the ECJ is provided by the Statute of the Court and its Rules of Procedure.[2]

According to article 19 of TEU (Lisbon):

> *"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."*

[1] See art. 13 of the Treaty on European Union (TEU).
[2] Consolidated version of this acts are available at the web page of ECJ http://curia.europa.eu

At the beginning of the integration process, there was only one court – Court of Justice of the European Communities. The later courts were added only because the workload of the CJEU grew beyond what the Court was able to cope with. The jurisdiction of the Court as an institution, though, did not change with the establishment of new courts. Only, some jurisdictional headings were devolved in the first instance to the newly established courts.

It is very important to mention that the CJEU as all other EU institutions is limited by the principle of enumerated powers as it is prescribed in article 13 par. 2: ''*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them...*"

Because, CJEU has only limited jurisdiction, it was necessary to involve the national courts in application of the EU Law. When applying EU law, natonal courts act as european courts.

1.1. The Court of Justice

The Court of Justice is composed of **28 Judges** and **nine Advocates General**. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognized competence.

It is interesting that academic lawyer could be appointed even if he is not eligible to be appointed to the judiciary in his own country.

Prior to the Treaty of Nice, there was no express rule that there should be one judge from each member state, but an amendment brought by the Treaty of Nice introduced it as a rule.

The Judges of the Court of Justice elect one of themselves as President for a renewable term of three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber.

The Advocate General assists the Court. They are responsible for presenting, with complete **impartiality and independence**, an 'opinion' in the cases assigned to them.

The Advocate general have the same legal status as a judge and the same legal provisions regarding appointment, qualifications, tenure and removal apply to them as to the judges. One of them is appointed as a **First Advocate general**.

Regarding the number of Advocates General, the rule was that five largest member states (Germany, France, UK, Italy and Spain) appoints one AG permanently while the remaining posts are rotating. It was not prescribed by the treaties but it was rather political decision.

According to the Treaty of Lisbon:'' *Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General."*[3] According to Declaration 38 to the ToL, if that happens, the Poland will get permanent AG. On 16 January 2013 the Court of Justice requested that the number of Advocates General be increased by 3. The Council decided, by decision of 25 June 2013, to increase the number of Advocates General to nine with effect from 1 July 2013 and to eleven with effect from 7 October 2015. Now the six posts are permanent (old five + Poland) while 3 (5) are rotating.

The routs of this institution could be found in French judicial system where the *Conseil d'Etat* is assisted by *commisaire du gouvernement*. The opinion of AG is not binding for the Court but it will be considered by great care by the judges when they make their decision.

The Opinion of AG is usually published, together with the judgment. An AG is appointed for very case and gives an opinion on the matter. Formerly, AG gave an Opinion on the merits in every single case but today, in case raises no new point of law, the submission of AG may be omitted.[4]

AG is the voice of the public. He represents neither the EU nor any member state or person involved in case.

As it is pointed out by Hartley: ''*this opinions show the judges what a trained legal mind, equal in quality to their own, has concluded on the matter before them. It could be regarded as a point of reference, or starting point, from which they can begin their deliberation. In many cases they follow the AG fully, in other they deviate from it either wholly or in part. But always, his view is of great value.''*

Judge is working as a member of a committee. There is no concurring and dissenting opinion like e.g. at the European Court of Human Rights. So the judge can not put his personal stamp upon a judgment. The result of the judgment is always anonymous and no one outside the closed circle will know the standpoint of each judge. As Kieran Bradley says ''*it is the best kept secrets in the Community (today EU).''*[5] In that sense, the job of AG is more satisfying than that of the judge. His opinion is his own work and he is alone responsible for it. The AG's opinion is much easier to read than the judgment. The later, because of previously described working methods of the ECJ is often lacking clarity.

In the Opinion of AG, you can find a clear discussion of the facts, references to the relevant legal provisions and full consideration of previous ECJ's case law. AG will also discuses the arguments of the parties and finally gives his own view about issues before the Court. It is interesting that the AG in reaching his conclusions is not restricted to the arguments made by the parties. E.g. in case *Transocean Maritime Paint Association*[6], concerning assessment of the validity of the Commission's decision, AG suggested that the decision should be annulled because of the failure the comply with the principle of natural justice or more

[3] See art. 252 TFEU.

[4] See art. 20/5 of The statute of the Court of Justice of the EU: *"Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate- General."*

[5] Bradley, n. 2, pp. 120.

[6] See case 17/74 *Transocean Marine Paint Association v Commission of the European Communities*, ECR-01063.

precisely principle *auditur et altera pars*. The ECJ accepted his opinion and annulled decision despite the fact that the parties didn't invoke this reason.

In essence, there is no appeal against the judgment of the Court of Justice. Hartley considers the opinion of AG as a kind of first instance judgment. But, it is an appeal of special nature since the parties have no opportunity to comment AG's opinion before Court starts its deliberation. In that sense, it is necessary to mention *Emesa Sugar*[7] case.

By letter of 11 June 1999 sent to the Registry of the Court, Emesa Sugar (Free Zone) NV (hereinafter Emesa) sought leave to submit written observations after the Advocate General had delivered his Opinion at the hearing on 1 June 1999. By letter of the same date, the Government of Aruba applied to be joined as a party in support of that application.

The EC Statute of the Court of Justice and the Rules of Procedure of the Court make no provision for the parties to submit observations in response to the Advocate General's Opinion. However, Emesa relies on the case-law of the European Court of Human Rights concerning the scope of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention), and in particular on the judgment of 20 February 1996 in *Vermeulen v Belgium*.[8] In the Emesa case, the ECJ stated that function of AG could not be compared to those one of Procureur Gènéral's department, because AG is not public prosecutor who is subordinate to other body and they are not entrusted with the defence of any particular interest in the exercise of their duties. The role of the Advocate is to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. ECJ decided: "*Having regard to both the organic and the functional link between the Advocate General and the Court, referred to in paragraphs 10 to 15 of this order, the aforesaid case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court's Advocates General.*[9]*...Emesa's application for leave to submit written observations in response to the Advocate General's Opinion must therefore be dismissed*".[10]

1.2. The General Court

The General Court is made up of **at least one Judge from each Member State** (28 in 2014). The Judges are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on candidates' suitability. They are appointed for a term of office of six years, which is renewable. They appoint their President, for a period of three years, from amongst themselves. They also appoint a Registrar for a term of office of six years.

[7] See: Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, ECR I-665.
[8] Reports of Judgments and Decisions, 1996 I, p. 224
[9] See par. 16 of judgemnet.
[10] See par. 20 of judgement.

The Judges perform their duties in a totally impartial and independent manner. Unlike the Court of Justice, the General Court does not have permanent Advocates General. However, that task may, in exceptional circumstances, be carried out by a Judge. The General Court sits in Chambers of five or three Judges or, in some cases, as a single Judge. It may also sit as a Grand Chamber (thirteen Judges) or as a full court when this is justified by the legal complexity or importance of the case. More than 80% of the cases brought before the General Court are heard by a Chamber of three Judges.

The Presidents of the Chambers of five Judges are elected from amongst the Judges for a period of three years.The General Court has its own Registry, but uses the services of the Court of Justice for its other administrative and linguistic requirements.

1.3. The EU Civil Service Tribunal

The Treaty of Nice made a basis for the establishment of Civil Service Tribunal as a judicial panel. The intention was to reduce the workload of The Court of Justice and The court of First instance.

The European Union Civil Service Tribunal is composed of seven Judges appointed by the Council for a period of six years which may be renewed, following a call for applications and after taking the opinion of a panel of seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence.

When appointing the Judges, the Council ensures a balanced composition of the Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented. The Judges of the Tribunal elect their President from among their number for a term of three years which may be renewed.

The Tribunal sits in Chambers of three Judges. However, whenever the difficulty or importance of the questions of law raised justifies it, a case may be referred to the full court. Furthermore, in cases determined by its Rules of Procedure, it may sit in a Chamber of five Judges or as a single Judge. The Judges appoint a Registrar for a term of six years. The Tribunal has its own Registry, but makes use of the services of the Court of Justice for its other administrative and linguistic needs.

It has jurisdiction to hear and determine at first instance disputes between the European Union and its servants pursuant to Article 270 TFEU. An appeal form their decisions is possible to the General Court but on points of law only.

PART II The jurisdiction of the ECJ (Types of proceedings with special reference to preliminary ruling procedure)

2.1. Actions for failure to fulfil obligations (so called ''Infringement procedure'')

The Treaty basis are articles 258-260 TFEU. Reason: „*Failure to fulfil on obligation under the Treaties.*" - it doesn't mean that only violations of Treaties proper can be alleged, but rather of the entire law that is based on the Treaties.

Defendant is always Member State. The expression Member State that may commit the violation is very broad. Violation is usually made by national parliament (e.g. failure to implement directive) but it could be also done by executive i.e. central government or local and regional authorities but also by judiciary (e.g. case Köbler).[11]

These actions enable the ECJ to determine whether a Member State has fulfilled its obligations under EU Law. It is the only procedure that empowers the ECJ to directly review validity of Member State law. In all other situations, judicial review of domestic law is performed by domestic courts, not by the European Court.

The Commission is vested with the primary responsibility for ensuring that the member states comply with their obligations. Commission acts as a ''guardian of a Treaty''. Before bringing the case before the ECJ, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the ECJ.

It should be noted that only a small percentage of the cases initiated by the Commission in fact end up in the ECJ, because MS make a final effort to comply with their obligations during the preliminary procedure.

The action may be brought by the Commission - as, in practice, is usually the case - or by a Member State.

If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. The ECJ itself doesn't have the power to strike down national legislation, though the member state is under an obligation to take all the necessary measures to comply with the judgment. The states usually do that. But, if state doesn't take necessary measures, and after a further action is brought by the Commission, the ECJ finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. That possibility of follow-up procedure was introduced by the Maastricht Treaty. E.g. the ECJ in July of 2000 ordered the Greece to pay 20.000,00 € per day until it had complied

[11] See case: C-224/01 Gerhard Köbler v Republik Österreich (2003), ECR I-10239. Applicant was a professor at an Austrian University, who after ten years of service with this university applied for a special length-of-service increment under a particular law. This increment was due after fifteen years' service. Professor Köbler claimed that, although he only had ten years' service with this university, he had worked for five years at other universities, in other Member States of the European Community. When his request was refused, he claimed that the refusal to take into account services with other universities of other Member States amounted to unjustified indirect discrimination under Community Law. Professor Köbler instituted proceedings before a domestic administrative court, which initially sought a preliminary ruling from the European Court of Justice, but later withdrew the request and dismissed his application on the grounds that the special length-of-service was a loyalty bonus that objectively justified a derogation from the Community law provisions on freedom of movement for workers. Köbler brought an action for damages against the Republic of Austria, claiming that the judgement of the administrative court infringed directly applicable provisions of Community law. The Court observed that in the joined cases *Brasserie and Factortame* (C-46/93 and C-48/93) the principle of State liability holds good in any case in which a Member State breaches Community law, whichever the organ of the State responsible for the breach. However, in the *Köbler* case it went on to rule that although the administrative court had in fact breached Community law, the infringement was neither manifest nor sufficiently serious (i.e. the criteria for establishing liability were not all satisfied).

with a judgment from 1992 holding that the Greece failed to implement a number of environmental directives.

The finding that the MS has been in breach of EU Law, it may be relevant for its liability in damages.

2.2. Action for annulment

This type of procedure is regulated by articles 263-264 TFEU. We can distinguish between 3 different groups of potential applicants. First group, usually called privileged applicants, because they do not have to show any legal interest to bring the action, comprises Member States, and three Community institutions: EP, the Council and the Commission.

The second category of potential applicants consists of the so-called quasi-privileged applicants – bodies which have the power to ask for annulment of an EU act in order to protect their own prerogatives. Nice Treaty granted such right to the Court of Auditors and the ECB. The Lisbon Treaty expanded the list with the Committee of the Regions.

It is the direct way of review of validity of EU law. The indirect way is so called preliminary ruling procedure, which will be discussed later. By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union.

The ECJ has exclusive jurisdiction over actions brought by a Member State or by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.

2.3. Actions for failure to act

These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed. This type of action is the other side of the coin to annulment procedure. However, such an action may be brought only after the institution concerned has been called on to act.

Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.

2.4. The mechanism of preliminary ruling procedure and role of national courts in its functioning

National courts are also European courts and they are primarily responsible for the proper application of EU Law. As European parliament had pointed out, EU law would remained a dead letter if it is not properly

applied in the Member States, including by national judges, who are therefore the keystone of the EU judicial system and who play a central role in the establishment of a single European legal order.[12]

But, national courts do not have full jurisdiction to decide disputes on EU Law brought before them, since the ECJ hold the sole power to declare act of EU law invalid and have the final word in questions of interpretation of EU Law.[13] For this purpose, the Treaty provides a mechanism of preliminary ruling procedure, regulated by article 267 of TFEU.[14]

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.[15] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.[16] If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.[17]

The ECJ described the role of Article 267 of TFEU (ex. Art. 234 EC) as ''*...essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of Community.''*[18]

There is strong consensus over the importance of preliminary ruling procedure both for uniform application of EU Law but also for the whole process of the European integration. Most of the landmark judgments by the ECJ (e.g. *Van Gend en Loos, Costa v. ENEL* and *Simmenthal)* were handed after a national court requested the ECJ to give a judgment on the interpretation of EU Law in a preliminary ruling.

Under the preliminary ruling procedure, the role of ECJ is to give an interpretation of EU law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. [19] It should be also mentioned that for the referring court, the preliminary ruling procedure is only one step of the national procedure.[20]

The effectiveness of this system is based on healthy dialogue and direct cooperation between national courts and ECJ.

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[12] See *European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system*, 2007/2027(INI) (access on 10th July 2010), p. 1.

[13] H. Briem, *The preliminary ruling procedure as part of a complete system of remedies*, Master thesis, (Faculty of Law, University of Lund, 2005), p. 29., available at http://web2.jur.lu.se/ Internet/english/essay/ Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/$File/xsmall.pdf?OpenElement (access on 13th April 2010).

[14] The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19/3b of the Treaty on European Union (OJEU 2008 C 115, p. 13) and Article 267 of the Treaty on the Functioning of the European Union (OJEU 2008 C 115, p. 47) . The preliminary ruling procedure is additionally regulated by the Statute of The Court of Justice of EU, by the Rules of Procedure and by Information note on references from national courts for a preliminary ruling. Consolidated version of this acts are available at the web page of The Court of Justice of EU http://curia.europa.eu

[15] See Art. 267/2 of TFEU.

[16] See Art. 267/3 of TFEU.

[17] This is a new provision in par. 4 of article 267 TFEU regarding a person in custody. It could be brought in connection with the *new urgent preliminary ruling procedure (so called PPU – from French procédure préliminaire d'urgence*).

[18] See par. 2 of Judgment in case C-146/73 (Rheinmühlen).

[19] See point 7 of the Information note, op.cit., n. 7. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

[20] See T. Ćapeta, *Sudovi Europske unije – Nacionalni sudovi kao europski sudovi [EU Courts – National Courts as European Courts]*, Zagreb, IMO (2002) p. 251.

I am not going to deal with the procedure before the ECJ in course of preliminary ruling procedure; rather I will deal with some more important aspects of this procedure.

2.4.1. Role of ECJ in course of preliminary ruling procedure

Under the preliminary ruling procedure, the Court's role **is to give an interpretation of EU law or to rule on its validity**, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court.

It is not for the Court to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

In ruling on the interpretation or validity of Community law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question (see: Simmenthal).

2.4.2. Which courts can refer?

The Treaty says: **''...**any court or tribunal of a Member State..." without defining the term court.
The ECJ explained that the concept of 'court or tribunal' is an EU law concept. It, therefore, falls on the ECJ to explain its meaning. The ECJ has never given complete definition of that expression, but rather stated some elements which an institution has to fulfil in order to be deemed a 'court or tribunal':

a) the institution has to be established by law,
b) apply rules of law in deciding,
c) end up proceedings with binding decisions of definitive character,
d) be established as lasting,
e) conduct procedure *inter partes*,
f) be independent,
g) its jurisdiction must be compulsory (that is does not depend on the acceptance of the parties)...

'Court or tribunal' can also be an institution common to more Member States, as is, *e.g.* Benelux Court. An institution can sometimes lack some of the enumerated elements, especially *inter partes* procedure requirement, and still be considered a 'court or tribunal'. In any case, as the concept of the court is not national, but rather European, some institutions that are not considered courts under national law might still be in position to require preliminary ruling from the ECJ, and *vice-versa*, some institutions understood as courts under national legal system, might not be courts for the purpose of preliminary ruling.

2.4.3. Obligation to refer?

According to third paragraph of Article 267 ToFEU, the courts of last instance (i.e. a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law) cannot choose whether to refer a question to the ECJ, if the answer to it is necessary to solve the dispute. They must refer.

According to **abstract theory**, in obligation would be only the highest national courts against whose decisions there is no judicial remedy under national law.

ECJ accepted so-called concrete theory. Whether a court is the court of last instance is judged in every particular case. Thus, for example, in *Costa v ENEL*, the ECJ considered the *Giudice conciliatore* to be the court of last instance in the sense of par. 3. *Giudice* was judge against whose decisions an appeal usually lies. However, in the case in question this was not so, as it involved a very small amount of money.

2.4.4. Preliminary reference concerning validity of EU law

Art. 267 does not make distinction between requests concerning validity and those for interpretation. Since the case *Foto-Frost* was decided by the ECJ, the judicial review of EU acts was centralised, making only the European Court competent to decide on invalidity of EU acts. The consequence of the case *Foto-Frost* is that the national court confronted with the possibly invalid EU act cannot decide on its invalidity and leave it disapplied on its own, but has to initiate preliminary ruling proceedings on invalidity in front of the ECJ. This applies to courts of last instance, but also to the courts of lower instances in the domestic procedure.

2.4.5. Hypothetic questions

In *Foglia (No 2)* the ECJ made clear that it would be the ultimate decider of the scope of its own jurisdiction. If necessary it would have to examine the circumstances of the reference in order to determine whether the court's jurisdiction had been properly invoked, but it would not answer hypothetical questions.
In *Foglia v Novello*, a French resident, had ordered some wine from Foglia, an Italian wine grower. The contract provided that Novello would not be liable for any French or Italian taxes that were contrary to the free movement of goods between the two countries. When a charge was subsequently levied by French customs, Novello claimed it was unlawful under Art 90 (formerly Art 95 EC). The ECJ said that both parties agreed that the French law was incompatible with Community law and the legal action had been a device to obtain a ruling that the French legislation was invalid. The Court went on to say that such arrangements obliging such rulings would jeopardise the system of legal remedies available to protect private individuals against tax provisions that were contrary to the Treaty. A subsequent second reference by the Italian judge was an attempt to clarify the role of Art 234 and the relationship between the national courts and the ECJ.

The court retains its discretion. The ECJ too might refuse to accept a request for a preliminary ruling if there is an absence of a genuine dispute[21], or it is not provided with the factual information[22], or the question concerns the compatibility of national law with community law as the ECJ can only interpret EC law[23].

2.4.6. When to refer?

By virtue of Article 267 (2) TFEU, a national "court or tribunal" ask the Court to give a preliminary ruling if it considers that a decision on the question is "necessary" to enable it to give judgment. So, the lower courts enjoy discretion to refer. However, the Court of Justice has decided that a national court or tribunal must request a preliminary ruling if it considers that an act of the Union is not valid or wishes to prevent its application for that reason. (see case: Foto-Frost).

[21] Foglia v Novello [1981] Case 104/79.
[22] Telemarsicabruzzo SpA v Circostel [1993] C320/90.
[23] Costa v Ente Nazionale per l'Energia Elettrica (Enel) [1964] Case 14/1964.

By virtue of Article 267, (3) TFEU, a court is under the obligation to refer where a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy in domestic law and the answer is necessary for the court to reach a decision.

So, the courts of last instance are in obligation to refer the question to the ECJ but to avoid automatic sending of every case concerning application of EU Law, ECJ decide to leave some discretion to them.

In *Da Costa* case, ECJ said that its ruling has impact on all national courts not only to that which requested ruling. To reinforce the power of ruling as precedent in CILFIT the ECJ said that its rulings were to be authoritative in situations where the point of law was the same, even though the questions posed in earlier cases were different, and even the types of legal proceedings in which the issue arose differed.

In CILFIT, the ECJ also expressly accepted the French concept of *acte clair.*

No reference to the ECJ need be made if:

- the question of EU law is irrelevant, or
- the relevant provision has already been interpreted by the ECJ,
- or the correct application of EC law is so obvious as to leave no room for doubt (so called *acte clair*)

2.4.7. Form of request

The decision by which a national court or tribunal refers a question to the Court of Justice for a preliminary ruling may be **in any form allowed by national law** as regards procedural steps.
It must however be borne in mind that it is that document which serves as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the latter to give a reply which is of assistance to the national court.
Moreover, it is only the actual reference for a preliminary ruling which is notified to the parties entitled to submit observations to the Court, in particular the Member States and the institutions, and which is translated.

Owing to the need to translate the reference, it should be drafted **simply, clearly and precisely**, avoiding superfluous detail.

A maximum of about ten (10) pages is often sufficient to set out in a proper manner the context of a reference for a preliminary ruling.

In particular, the order for reference must:

a) include a brief account of the subject-matter of the dispute and the **relevant findings of fact**, or, at least, set out the factual situation on which the question referred is based;
b) set out the tenor of any applicable national provisions and identify, where necessary, the relevant national case-law, giving in each case precise references (e.g. page of an official journal or specific law report, with any internet reference);
c) identify the EU provisions relevant to the case as accurately as possible;

d) explain the reasons which prompted the national court to raise the question of the interpretation or validity of the Community provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings;
e) include, where appropriate, a summary of the main arguments of the parties.
f) In order to make it easier to read and refer to the document, it is helpful if the different points or paragraphs of the order for reference are numbered.

Finally, the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.

It is so called **green light procedure** system whereby national judges could include their proposed answers to the questions they refer to the ECJ, which could then decide within a given period whether to accept the proposed judgment or whether to rule itself in the manner of an appellate court.

The question or questions themselves should appear in a separate and clearly identified section of the order for reference, generally at the beginning or the end.

It must be possible to understand them without referring to the statement of the grounds for the reference, which however provides the necessary background for a proper assessment.

A reference for a preliminary ruling in general calls for the national proceedings to be stayed until the Court has given its ruling. However, the national court may still order protective measures, particularly in a reference on determination of validity

Proceedings for a preliminary ruling before the Court are free of charge and the Court does not rule on the costs of the parties to the main proceedings; it is for the national court to rule on those costs.

If a party has insufficient means and where possible under national rules, the national court may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid.

ECJ would welcome information from the national court on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision.

2.4.8. Effect of ECJ's rulings

A preliminary ruling binds the national court that requested the judgment as well as all bodies, which may have to decide the same case on appeal.
Although the decision is binding, the court may request a second preliminary ruling in the same case.

Preliminary rulings do not bind courts in other cases. However, these courts should realise that the interpretation of the Court of Justice is incorporated in the provisions and principles of the EU law to which it relates. The binding effect of the interpretation then simply coincides with the binding effect of the provisions and principles to which it relates and which has to be observed by all the national courts of the member-states.

If an act of an institution of the Community is declared void in a judgment, this is sufficient reason, not only for the referring court, but also for any other national court of the member-states, to consider that act as void.

However, should the national court have doubts as to the grounds, the scope and possibly the consequences of the nullity established earlier, then this court is free to raise a question before the Court of Justice once again.

2.4.9. Simplified, accelerated and urgent preliminary ruling procedure

a) Simplified procedure

A simplified procedure may be applied, by virtue of Article 104(3) of the Rules of Procedure of the ECJ. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law.
The Court may also give its decision by reasoned order, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Statute and after hearing the Advocate General, where the answer to the question referred to the Court for a preliminary ruling admits of no reasonable doubt.

b) Accelerated procedure

This type of procedure is introduced in 2000 and is regulated by the Article 104a of the Rules of Procedure of the ECJ.
At the request of the national court, the President may exceptionally decide, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to apply an accelerated procedure derogating from the provisions of these Rules to a reference for a preliminary ruling, where the circumstances referred to establish that a ruling on the question put to the Court is a matter of **exceptional urgency**.
In that event, the President may immediately fix the date for the hearing, which shall be notified to the parties in the main proceedings and to the other persons referred to in Article 23 of the Statute when the decision making the reference is served.
The parties and other interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a period prescribed by the President, which shall not be less than 15 days. The President may request the parties and other interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the question referred.
The statements of case or written observations, if any, shall be notified to the parties and to the other persons referred to above prior to the hearing.
The Court shall rule after hearing the Advocate General.

The Court of Justice is very reluctant to apply such procedures (a few of the rare examples include cases C-189/01, Jippes, and C-127/08, Metock).

c) The Urgent preliminary ruling procedure -PPU (french; *procédure préliminaire d'urgence*)

It is the new type of procedure or we can even say the sub-type of the preliminary ruling procedure that is applied only in the area of freedom, security and justice. Although the PPU came into force on 1 March 2008, it has already become part of the case-law of the European Court of Justice.

The procedure is governed by Article 23a of Protocol (No 3) on the Statute of the Court of Justice of the European Union (OJEU 2008 C 115, p. 210) and Article 104b of the Rules of Procedure of the Court of Justice.

National courts may request that this procedure be applied or request the application of the accelerated procedure under the conditions laid down in Article 23a of the Protocol and Article 104a of the Rules of Procedure.

The urgent preliminary ruling procedure is applicable only in the areas covered by Title V of Part Three of the TFEU, which relates to the area of freedom, security and justice.

The Court of Justice decides whether this procedure is to be applied. Such a decision is generally taken only on a reasoned request from the referring court. Exceptionally, the Court may decide of its own motion to deal with a reference under the urgent preliminary ruling procedure, where that appears to be required.

The urgent preliminary ruling procedure simplifies the various stages of the proceedings before the Court, but its application entails significant constraints for the Court and for the parties and other interested persons participating in the procedure, particularly the Member States. It should therefore be requested only where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible.

Although it is not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

To enable the Court to decide quickly whether the urgent preliminary ruling procedure should be applied, the request must set out the matters of fact and law which establish the urgency and, in particular, the risks involved in following the normal preliminary ruling procedure.

In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred. Such a statement makes it easier for the parties and other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

The request for the urgent preliminary ruling procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file must be dealt with in a particular way. Accordingly, the referring court is asked to couple its request with a mention of Article 104b of the Rules of

Procedure and to include that mention in a clearly identifiable place in its reference (for example at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court can usefully refer to that request.

As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

As regards communication with the national court or tribunal and the parties before it, national courts or tribunals which submit a request for an urgent preliminary ruling procedure are requested to state the e-mail address or any fax number which may be used by the Court of Justice, together with the e-mail addresses or any fax numbers of the representatives of the parties to the proceedings.

A copy of the signed order for reference together with a request for the urgent preliminary ruling procedure can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

If you carefully read the first paragraph, you will mark that the Treaty makes distinction in jurisdiction of the ECJ to interpret Treaty only, while ECJ has jurisdiction to interpret or to rule about the validity of secondary legislation. That is because; the Treaty could be changed only by common accord of all member states.

National courts are also European courts and they are primarily responsible for the proper application of EU Law. As European parliament had pointed out, EU law would remained a dead letter if it is not properly applied in the Member States, including by national judges, who are therefore the keystone of the EU judicial system and who play a central role in the establishment of a single European legal order.[24]

But, national courts do not have full jurisdiction to decide disputes on EU Law brought before them, since the ECJ hold the sole power to declare act of EU law invalid and have the final word in questions of interpretation of EU Law.[25] For this purpose, the Treaty provides a mechanism of preliminary ruling procedure, regulated by article 267 of TFEU. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.[26] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.[27] If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.[28]

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[24] See *European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system*, 2007/2027(INI) (access on 10th July 2010), p. 1.

[25] H. Briem, *The preliminary ruling procedure as part of a complete system of remedies*, Master thesis, (Faculty of Law, University of Lund, 2005), p. 29., available at http://web2.jur.lu.se/Internet/english/essay/Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/$File/xsmall.pdf?OpenElement (access on 1th April 2012).

[26] See Art. 267/2 of TFEU.

[27] See Art. 267/3 of TFEU.

[28] This is a new provision in par. 4 of article 267 TFEU regarding a person in custody. It could be brought in connection with the *new urgent preliminary ruling procedure (so called PPU – from French procédure préliminaire d'urgence*). See Petrašević, T.,

The ECJ described the role of Article 267 of TFEU (ex. Art. 234 EC) as ''*...essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of Community."*[29] There is strong consensus over the importance of preliminary ruling procedure both for uniform application of EU Law but also for the whole process of the European integration. Most of the landmark judgments by the ECJ (e.g. *Van Gend en Loos, Costa v. ENEL* and *Simmenthal)* were handed after a national court requested the ECJ to give a judgment on the interpretation of EU Law in a preliminary ruling. That, most important cases will be discussed later in part III.

As it is already mentioned, under the preliminary ruling procedure, the role of ECJ is to give an interpretation of EU law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. [30] It should be also mentioned that for the referring court, the preliminary ruling procedure is only one step of the national procedure.[31]

Novi hitni prethodni postupak za područje slobode, sigurnosti i pravde – PPU [New urgent preliminary ruling procedure in the area of freedom, security and justice – PPU], 2 Hrvatska javna uprava (2010) p. 427- 463.

[29] See par. 2 of Judgment in case C-146/73 (Rheinmühlen).

[30] See point 7 of the Information note. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

[31] See T. Ćapeta, *Sudovi Europske unije – Nacionalni sudovi kao europski sudovi [EU Courts – National Courts as European Courts]*, Zagreb, IMO (2002) p. 251.

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Erasmus+ PFO PRAVNI FAKULTET OSIJEK

Summer School "Procedural aspects of EU Law"

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2

Judicial system of the EU with the focus on preliminary ruling procedure

3

Objectives of the lecture:

- Overview of the structure and composition of the CJEU
- Main branches of jurisdiction
- Special reference to preliminary ruling procedure

The Court of Justice of the EU
(composition and jurisdicition)

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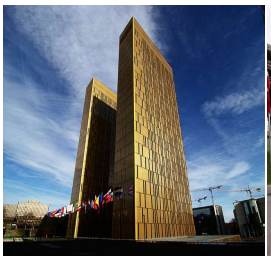
5

Structure of lecture:

- Composition of the CJEU
- how the judges are appointed?
- who appoints them and for how long?
- how does the Court work internally – in chambers or as plenary?
- how do the judges communicate?
- how do judges deliberate?
- The role of Advocate general?
- Jurisdicition?

6

The CJEU



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- term "**CJEU**" denotes three different courts:

1. Court of Justice (ECJ)
2. General Court and (GC)
3. Civil Service Tribunal (CST)

- Its internal organization and jurisdiction are provided by the **Treaty**
- the procedure is regulated by the **Statute** of the Court and its **Rules of Procedure**

8

Art. 19 of TEU (Lisbon): "The Court of Justice of the European Union shall include the Court of Justice, the General Court and **specialized courts**. It shall ensure that in the interpretation and application of the Treaties the law is observed."

- Prior to ToL? – CFI (GC)
- At the beegining of integration?
- Why the later courts were added? (new MS + expansion of competences of the EU)
- Jurisdictions?
- Is regulated for the Court as one institution
- Division of jurisdiction beetwen 3 courts?
- Some jurisdictional heading were devolved in the first instance to the new courts
- principle of enumerated powers - limited jurisdiction of the CJEU
- National courts as European courts (dirrect effect, supremacy, state liability etc.)

9

1.1. The Court of Justice (ECJ)

- 28 Judges and 11 Advocates General (AG)
- Appoinment?
- qualifications required for appointment?
- Term of office?
- impartiality and independence
- Rule:one judge from each member state

10

Article 253 (ex Article 223 TEC) TFEU:
"The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255."

11

Art. 255 TFEU:
"A panel shall be set up in order **to give an opinion on candidates' suitability** to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.
The panel shall comprise **seven persons** chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and."

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Advocate General

- Routs? (*commisaire du gouvernement*)
- Task: assists the Court
- they are responsible for presenting, with complete **impartiality and independence**, an 'opinion' in the cases assigned to them.
- the same legal status as a judge
- the same legal provisions regarding appointment, qualifications, tenure and removal apply to them as to the judges
- Impartial and independent OPINION
- First AG

13

- Each of the 6 largest member states - Germany, France, **UK,** Italy, Spain and Poland (2013.) appoints one AG permanently
- the remaining 5 posts are rotating
- It is not prescribed by the treaties but it is **political decision**
- According to the Treaty of Lisbon***:" Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General."***
- Declaration No 38

14

- On 16 January 2013 the Court of Justice requested that the number of Advocates General be increased by 3
- The Council decided, by decision of **25 June 2013**, to increase the number of Advocates General to 9 with effect from 1 July 2013 and to 11 with effect from **7 October 2015**
- the representatives of the governments of the Member States appointed Mr **Maciej Szpunar** as Advocate General

15

38. Declaration on Article 252 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice

"The Conference declares that if, in accordance with Article 252, first paragraph, of the Treaty on the Functioning of the European Union, the Court of Justice requests that the number of Advocates-General be increased by three (eleven instead of eight), the Council will, acting unanimously, agree on such an increase.
In that case, the Conference agrees that Poland will, as is already the case for Germany, France, Italy, Spain and the United Kingdom, have a permanent Advocate-General and no longer take part in the rotation system, while the existing rotation system will involve the rotation of five Advocates-General instead of three"

16

- Is appointed in every case but in **cases which raise no new point of law**, opinion may be omitted (art. 20/5 Statute)
- The opinion of AG is **not binding** for the Court but
- it will be considered by great care by the judges when they make their decision.
- The Opinion of AG is usually published, together with the judgment.
- AG is the **voice of the public**
- He represents neither the EU nor any member state or person involved in case.

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- As it is pointed out by Hartley:
- *''this opinions show the judges what a trained legal mind, equal in quality to their own, has concluded on the matter before them. It could be regarded as a point of reference, or starting point, from which they can begin their deliberation. In many cases they follow the AG fully, in other they deviate from it either wholly or in part. But always, his view is of great value."*
- Why his opinion is so important and interesting?

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- The AG's opinion is much easier to read than the judgment
- Judge is working as a member of a committee – unanimity (authority and credibility)
- There is no concurring and dissenting opinion like e.g. at the ECHR
- The judgment, because of working methods of the ECJ is often **lacks clarity**.

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- In the Opinion of AG, you can find:

a) clear discussion of the facts,
b) references to the relevant legal provisions and
c) full consideration of previous ECJ's case law
d) AG will also discuses the arguments of the parties
e) gives his own view about issues before the Court

- It is interesting that the AG in reaching his conclusions **is not restricted to the arguments made by the parties**

20

- e.g. in case ***Transocean Maritime Paint Association (TMPA)***
- assessment of the validity of the Commission's decision
- AG suggested that the decision should be annulled because of the **failure to comply** with the principle of natural justice or more precisely principle ***audiatur et altera pars.***
- The ECJ accepted his opinion and annulled decision despite the fact that the parties didn't invoke this reason.

21

- there is no appeal against the opinion of the AG
- the parties have **no opportunity to comment AG's opinion** before Court starts its deliberation
- Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, ECR I-665
- By letter to the ECJ, Emesa sought **leave to submit written observations** after the Advocate General had delivered his Opinion at the hearing on 1 June 1999
- Emesa relies on the case-law of the ECtHR concerning the scope of Article 6/1 of the Convention

22

- The role of the Advocate is to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed
- The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in **carrying out the judicial function** entrusted to it

23

- The Court may sit as **a full (plenum)**, in a **Grand Chamber** of 13 judges or in **chambers of 3 or 5** judges
- The Court sits as a full only in particular cases prescribed by the Statute and where the Court considers that a case is of exceptional importance
- It sits in a Grand chamber when a MS or an EU institution so requests and in particularly complex or important cases
- All other cases by chambers of 3 or 5 judges

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1.2. The General Court (GC)

- is made up of **at least 1 Judge** from each MS
- Appointment?
- Unlike the ECJ, the GC does not have AG
- that task may, in exceptional circumstances, be carried out by a Judge.
- The General Court sits in Chambers of **3 or 5** or, in some cases, as a **single Judge**.
- It may also sit as a **Grand Chamber** (13) or as a full court when this is justified by the legal complexity or importance of the case.
- More than **80%** of the cases brought before the GC are heard by a Chamber of 3!

25

- General Court did not acquire jurisdiction:

1. Action against MS brought by the COM
2. Preliminary ruling

- Reform of the GC - 2019

26

1.3. The EU Civil Service Tribunal (CST)

- The Treaty of Nice made a basis for the establishment of Civil Service Tribunal as a **judicial panel**
- The intention was **to reduce the workload**
- The CST is composed of **7 Judges** appointed by the Council for a period of **6 years** which may be renewed
- It has jurisdiction to hear and determine at first instance disputes between the EU and its servants (art. 270 TFEU)

27

Reform of GC

- merging of the Civil Service Tribunal with the General Court + increasing the number of judges
- 12 + 7 + 9 = 28
- 56 judges in 2019
- CJEU abandoned the idea of creating new specialized courts

28

Croatian judges at the CJEU

ECJ – Siniša Rodin	GC – Vesna Tomljenović

29

German judges at the CJEU

ECJ – Thomas von Danwitz	GC - Alfred Dittrich

30

- Court of Justice accomplishes three main functions:

1. Ensure that Member States comply with EU Law
2. Control Institutions (Commission, Council, Parliament) and other EU bodies
3. To settle upon questions of interpretation or validity of EU Law

31

The CJEU has been given clearly defined jurisdiction:

1. Actions for failure to fulfil obligations (The so called infringement procedure)
2. Action for annulment of an EU act
3. Actions for failure to act
4. **The preliminary ruling procedure**
5. Opinions on international agreements

32

- **Draft Accession Agreement** of the EU accession to the ECHR - 5 April 2013
- European Commission requested an Opinion of the compatibility of the draft agreement with the Treaties
- CJEU published its **negative Opinion 2/13** on 18 December 2014

33

- Every year, the CJEU offers a limited number of **paid traineeships** of a max. duration of **5 months**
- traineeship periods:

a. from 1 March to 31 July (form to be sent no later than 30 September)
b. from 1 October to 28 February (form to be sent no later than 30 April)

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To be continued…

Preliminary ruling procedure before the CJEU

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- National Courts (NC) as European courts
- They apply Union law as an essential part of the Ms's national law (Van Gend)
- EP resolution: "*EU law would remained a dead letter if it is not properly applied in the MS*"
- national judges are the **keystone of the EU judicial system**
- ECJ hold the sole power to declare act of EU law invalid and have the final word in questions of interpretation of EU Law

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. [PPU, *procédure préliminaire d'urgence*]

The purpose of PR procedure?

- Rheinmühlen ***"…essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of Community."***
- main tool in ensuring the **uniformity in application of EU Law** in the MS
- There is strong consensus over the importance of PR procedure both for uniform application of EU Law but also for the whole process of the European integration.
- it gave the ECJ the opportunity to develop the most important **constitutional doctrines** (direct effect in *Van Gend en Loos*, and supremacy in *Costa v ENEL* emerged from the preliminary ruling).

The main purpose of the preliminary ruling procedure is to ensure the uniform application of EU law.

- Statute of the CJEU, art. 23 allowes for **large number of participants** in the preliminary ruling:

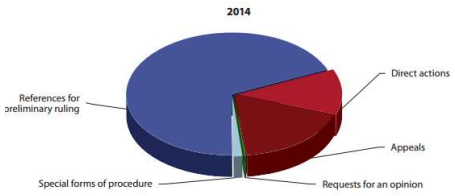
a) parties to the domestic dispute
b) all MS,
c) Commission
d) if the act originates from the Council, EP, or the ECB they may as well intervene in the case

- invited to give **their opinions** to the Court as to the proper construction of the EU rule in question.
- The **possibility of participation** of many different interests in constructing the meaning of EU law **legitimizes the 'final word' status** of the preliminary rulings given by the Court.

7

Chart: workload of the ECJ

2. *New cases* — Nature of proceedings (2010–14) (1)



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Role of ECJ in course of preliminary ruling procedure?

- Separation of powers
- the role of ECJ is **to give an interpretation of EU law or to rule on its validity**
- **Question can't concern interpretation or validity of national law!**
- NC often need PR in order to decide wheter the provision of domestic law is contrary to EU law
- Is the provision X conratry to EU Z?
- Reformulation of question – to extract relevant issues
- What is relevant meaning of Z when it has to be applied in the situation as those before...?

8

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Task:

- DZODZI: When internal law was explicitly or implicitly relying on EU rule, the ECJ considered itself competent under 267 TFEU to give interpretation of such EU rule
- Read the case Dzodzi and the Opinion of AG Darmon. Who, according to you is right? Why?

10

Case: Dzozi

- Very disputed situation
- the ECJ has considered itself to have jurisdiction, but this was opposed by several of its AG and some scholars
- internal laws of Member States adopt EU law solutions even for **purely internal situations**.

12

RULE:

Question has to concern 'interpretation', not the 'application' of EU law!

Think about...

- What is the dividing line between interpretation and application?
- Do you consider such practice of giving very concrete answers to the national courts good or bad, and why?

13

- the PR procedure is **only one step of the national procedure** – interlocutory procedure
- It is not an appeal's procedure
- The effectiveness of this system is based on **healthy dialogue and direct cooperation** between NC and ECJ
- That cooperation was very good during the years but the ECJ became overloaded and there is a **risk of breakdown** of cooperation
- The workload has been a **cause for concern** for some years in view of the resulting delays
- The Annual Reports of ECJ show that **the number of references** is **rising steadily** but also the time needed to proceed it

14

- The numbers of steps to reduce the length of procedure were already taken at the supranational level
- the question is **what national courts can do to improve the functioning of preliminary ruling procedure?**
- national courts as European courts should **take more active role**
- E.g. domestic court should deal with the case as exhaustively as possible before formulating the preliminary questions.
- It should **try to solve all the issues of fact and law involved in the case** in such a way that the only aspect left is the decision of the ECJ

15

Which courts can refer?

- Art. 267: ***"...any court or tribunal of a Member State...***"
- without defining the term court
- an **EU law concept**
- It, therefore, falls on the ECJ to explain its meaning
- The ECJ has never given complete definition of that expression, but rather stated some elements:

1. established by law,
2. apply rules of law in deciding,
3. end up proceedings with binding decisions of definitive character,
4. be established as lasting,
5. conduct procedure *inter partes*,
6. be independent,
7. its jurisdiction must be compulsory

- Arbitration?

15

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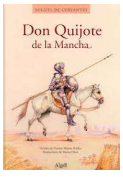
- 'Court or tribunal' can also be an institution common to more Member States, as is, *e.g.* Benelux Court.
- as the concept of the court is not national, but rather European, **some institutions that are not considered courts under national law might still be in position to require preliminary ruling from the ECJ**
- E.g. State Commision for Supervision of Public Procurement Procedure
- *vice-versa*, **some institutions understood as courts under national legal system, might not be courts** for the purpose of preliminary ruling

17

- Critisism by it's own AG
- AG Colomer in case *C-17/00 De Coster* gives the overview and critique of the ECJ's case law on this issue.



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- **AG Colomer in De Coster**: *"The result is case-law which is too flexible and not sufficiently consistent, with the lack of legal certainty which that entails...**The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted.**"* (par. 14)
- ...if the question is interesting for the court

19

Think about which bodies in your country could be deemed to be 'court or tribunal' in the sense of Article 267 TFEU!?

Task:
The national 'courts or tribunals' have either discretion or obligation to refer to the ECJ for the interpretation of EU law.

Compare in this respect paragraphs 2 and 3 of the Article 267 TFEU!

21

Obligation to refer?

- **May, shall**
- Art. 267/3 TFEU (the courts of last instance)
- **Abstract vs. Concrete theory**
- in *Costa v ENEL*, the ECJ considered the *Giudice conciliatore* to be the court of last instance in the sense of par. 3. *Giudice* was judge against whose decisions an appeal usually lies.
- *"BY THE TERMS OF THIS ARTICLE, HOWEVER, NATIONAL COURTS AGAINST WHOSE DECISIONS, **AS IN THE PRESENT CASE**, THERE IS NO JUDICIAL REMEDY, MUST REFER THE MATTER TO THE COURT OF JUSTICE SO THAT A PRELIMINARY RULING MAY BE GIVEN UPON"*
- Small amount claim

21

22

Does it mean that a NC that falls within 3rd par. MUST refer every question, automatically!?

23

II CILFIT (duty to refer, effects of preliminary rulings)

1. CILFIT = the obligation to refer under Article 267 TFEU is not absolute one but under certain criteria. Identify those criteria!
2. In CILFIT, the ECJ repeated a statement from an early decision in the case 28-30/62 Da Costa. Read that paragraph of the judgment. What can you conclude about the effects of the preliminary rulings? Who do they bind?

24

Case 283/81 *CILFIT Srl*

- Case before Italian Supreme Court (the Cassazione)
- It is a court falling within Art 267 (3)
- Issue in the proceedings had already been addressed by ECJ in earlier case
- Was the Italian court still bound by Art 267 (3) to seek a ruling **even where it had no doubt as to the meaning of the provision** because the ECJ had already given a ruling?

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CILFIT criteria?

- It will not be necessary to refer a question where:
  - (a) the question raised was **not relevant**
  - (b) where the question is relevant then the national court should consider whether previous decisions of **the Court have already dealt with the point of law in question**
  - (c) where the correct application of Community law is so obvious so as to leave no scope for reasonable doubt- **acte clair**
  - **Abuse to avoid the obligation to refer?**

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Acte clair

- doctrine from French administrative law
- where a provision of law is so clear no question of interpretation arises
- *Lat. "In claris non fir nterpretatio"*
- if a national court concludes that a point of EU law is *acte clair* then it is not necessary to seek a preliminary ruling
- but national court or tribunal **must be convinced that the matter is equally obvious to the courts of the other MS and to the Court of Justice!**

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Criteria for application of *acte clair*

1. EU legislation is **drafted in different languages** and the different language versions are equally authentic
2. EU law uses **terminology** peculiar to it
3. legal concepts have **different meanings** in EU law and the law of the MS every provision of EU law **must be placed in its context** and interpreted in the light of the provisions of EU law a whole

28

What happens if NC disregards its obligations to refer?

29

- Principle of loyal cooperation (art. 4/3 TEU)
- This includes the cooperation of NC with the CJEU
- The treaty do not specifies sanctions

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

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Four possible sanctions:

1. **Infringement proceeding** *("the NC must give reasons why it has not made the reference if its judgment cannot be appeled against")*
2. **Action to the Constituational Court** (BvG – *the right to a lawfull judge*)
3. **Claim for damages** (*Köbler*)
4. **Breach of art. 6 ECHR** – there was no right to have a case reffered to the CJEU but if NC arbitrarily refuse to make reference it could be a breach

31

- Hungary – decision of the HCC 3165/2014
- Rejected the constitutional complaint because of the breach of the right to a fair trial (art. XXVIII of HC)
- The decision of Curia of Hungary was arbitrary?
- HCC: *"there is no conflict with the Fundamental law and there is no constitutional law issues of fundamental importance"*
- Open question? –whether the CJEU is to be considered as an indepndent and impartaial court established by the art. XXVIII of HC

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Preliminary reference concerning validity of EU law

- Art. 267 does not make distinction between requests concerning validity and those for interpretation.
- Since the case ***Foto-Frost***, the judicial review of EU acts was centralised
- The consequence: the NC confronted with the possibly invalid EU act **cannot decide on its invalidity and leave it disapplied on its own**, but has to initiate preliminary ruling proceedings on (in)validity in front of the ECJ

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Hypothetic questions

- The ECJ usually does **not scrutinize the need for a ruling but**
- In ***Foglia (2)*** the ECJ made clear that it would be the ultimate decider of the scope of its own jurisdiction
- If necessary, it would have to examine the circumstances of the reference in order to determine **whether the court's jurisdiction had been properly invoked**, but it would not answer hypothetical questions
- The ECJ might refuse to accept a request for a preliminary ruling if there:

1. is an absence of a **genuine dispute**
2. it is not provided with the **factual information** (e.g. Telemarsicabruzzo)
3. or the question concerns the **compatibility of national law** with community law as the ECJ can only interpret EU law

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When to refer

- Is not defined neither by Treaty neither by Statute or ROP
- Discretion of national judge but:

I. Preferable if the **facts have been decided** and legal issues clarified
   - Case 36/80 *Irish Creamery Milk Suppliers v Government of Ireland*

II. national court must **define factual and legal circumstances** in which the question arises Case
   - C-320-322/90 *Telemarsicabruzzo SpA*

III. cannot be made **after the principal issue has been decided**
   - Case 338/85 *Pardini*

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- Rule: the preliminary ruling should help the judge who decides the case to solve the case
- Therefore, the judge can only ask for the interpretation **in his/her own name**
- That means that only the judge in front of who **the case is still pending** can ask the question (case *338/85 Pardini*).

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Form of request

- **in any form allowed by national law**
- According to Recommendations of the ECJ (ex. Information note) the order for reference must (point 22):

1. include a **brief account of the subject-matter** of the dispute and the relevant findings of fact,
2. set out the **tenor of any applicable national provisions**
3. **EU law provisions** relevant to the case
4. explain **the reasons** which prompted the national court to raise the question
5. include, if need be, a **summary of the main relevant arguments of the parties**
6. view on the answer to be given to the questions referred **(green light procedure)**

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Effect of ECJ's rulings

- preliminary ruling **binds the national court** that requested the judgment but
- as well as all other courts
- Although the decision is binding, the court may request **a second preliminary ruling** in the same case
- *Erga omnes* effects

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Specialised types of PR procedure

- **Simplified**
- **accelerated**
- **urgent preliminary procedure (PPU)**

39

The simplified procedure

1. Where a question referred for a preliminary ruling is **identical** to a question on which the Court has already been called on to rule, or
2. where the answer to the question admits of **no reasonable doubt** or
3. may be **clearly deduced from existing case-law**,
- the ECJ may, after hearing the AG, give its decision by **reasoned order**, citing in particular a previous judgment relating to that question or the relevant case-law.

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Accelerated procedure

- At the request of the national court or *ex officio*
- matter of **exceptional urgency**
- Derogesion from the provisions of RoP
- The Court of Justice is very reluctant to apply such procedures (a few of the rare examples include cases C-189/01, Jippes, and C-127/08, Metock).

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The Urgent procedure - PPU

- french; *procédure préliminaire d'urgence*
- *only in the areas covered by **Title V** of Part Three of the TFEU, which relates to the area of **freedom, security and justice***
- At the request of national judge or *ex offo*
- simplifies the various stages of the proceedings before the Court, but **its application entails significant constraints for the Court and for the parties and other interested persons** participating in the procedure

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- Although it is not possible to provide an exhaustive list of such situations

1. in the case, referred to in the fourth paragraph of Article 267 TFEU, of **a person in custody** or deprived of his liberty,
2. where the answer to the question raised is decisive as to the assessment of that person's legal situation or,
3. in proceedings concerning **parental authority or custody of children**,
4. where the identity of the **court** having **jurisdiction** under EU law depends on the answer to the question referred for a preliminary ruling

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15. *Miscellaneous* — Expedited procedures (2010–14)

	2010		2011		2012		2013		2014	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Direct actions		1			1			1		
References for a preliminary ruling		8	2	7	1	5		16	2	10
Appeals				5		1				
Total	**4**	**9**	**2**	**12**	**2**	**6**	**17**	**2**	**10**	

16. *Miscellaneous* — Urgent preliminary ruling procedure (2010–14)

	2010		2011		2012		2013		2014	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Area of freedom, security and justice	5	4	2	5	4	1	2	3	4	1
										1
					4	**1**	**2**	**3**	**4**	**2**

	2010	2011	2012	2013	2014
References for a preliminary ruling	385	423	404	450	428
Direct actions	136	81	73	72	74
Appeals	97	162	136	161	111
Appeals concerning interim measures or interventions	6	13	3	5	
Requests for an opinion			1	2	1
Special forms of procedure (2)	7	9	15	9	8
Total	**631**	**688**	**632**	**699**	**622**
Applications for interim measures	3	3		1	3

Implementation of Preliminary Ruling Procedure in the legal systems of New Member States

- The PR procedure is **a *sui generis*** procedure and it is not dependent of any national procedural law
- The article 267 of TFEU has **direct effect**
- such questions are often regulated by a **combination of case law of the ECJ and general procedural codes** of the different Member States
- So, the national legal rules can supplement the provision of art. 267 of TFEU but it can't in no way restrict it
- Some of new Member States including Slovenia and Hungary have regulated PR procedure by national law

- the main purpose is to assist judges
- the national judges, especially at the beginning of membership in EU are not aware of this procedure at all
- If it is prescribed by national law it is more realistic to expect that national courts will really use it
- the problem is because national rules don't have always the desirable effect as it is case in Hungarian supplementary rules.

PR procedure in Hungary

- the aim of amendments of the Hungarian procedural rules regarding the PR procedure is to remove any suspicion and uncertainties about this procedure.
- The both procedure codes prescribe **the suspension of national proceedings as mandatory**
- it is not good solution to completely terminate procedure while waiting the ECJ's ruling.

- Concerning the content of reference, both the criminal procedure code and civil procedure code provide the same content.
- the decision to refer shall contain the question referred, the facts of the case to the extent necessary for answering the question and the relevant Hungarian legal rules
- But there are some other things which should be included in the content of reference.
- Hungarian legislator should indicate all the information necessary to include in order for reference.
- In the case of partial regulation, **the national judge could be misleading** about it
- It should be amended or removed from procedural codes.

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- The Hungarian courts are very active in referring questions to the ECJ.
- e.g. in the first 3 years of membership (from 2004-2007), Hungarian courts referred **11 questions** to the ECJ while the other nine Member States had altogether 14 questions
- It is not clear why some member states refer more question than the others
- Scholars have proposed numerous explanations

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Statistics Court of Justice

20. *General trend in the work of the Court (1952–2014) — New references for a preliminary ruling*
(by Member State and by court or tribunal)

			Total
Italy	Corte Costituzionale	2	
	Corte suprema di Cassazione	130	
	Consiglio di Stato	107	
	Other courts or tribunals	1 040	1 279
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	3	7
Latvia	Augstākā tiesa	21	
	Satversmes tiesa		
	Other courts or tribunals	16	37
Lithuania	Konstitucinis Teismas	1	
	Aukščiausiasis Teismas	11	
	Vyriausiasis administracinis teismas	9	
	Other courts or tribunals	8	29
Luxembourg	Cour supérieure de justice	10	
	Cour de cassation	12	
	Cour administrative	10	
	Other courts or tribunals	51	83
Hungary	Kúria	17	
	Fővárosi Ítélőtábla	5	
	Szegedi Ítélőtábla	2	
	Other courts or tribunals	83	107

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Preliminary ruling procedure in Slovenia

- is implemented into Slovenian Law by Art. 113a of the **Courts Act** (*Zakon o sodiščih*)
- Art. 113a incorporates the Article 267 of TFEU but there are also some supplementary rules
- General provision which is applied to all types of courts – the best model
- Slovenian courts were active in submitting references.
- The first one was in case *Detiček* and was decided in PPU

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Preliminary ruling procedure in Lithuania

- As a preparation for EU membership, Lithuania amended its: Courts act, Law on administrative procedure, Criminal procedure code and civil procedure code (2003)
- Basis for national courts to apply EU law!?
- Special refernce to preliminary rulings :" the national court hearing a case should also apply EU law and be guided by the decisions of EU institutions and by preliminary ruling of the ECJ"

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- Amendments introduce a clause which allows national courts to refer the questions to the ECJ when its rulling is needed by NC hearing a case that inculdes unclear points of EU law
- Nc are relatively active, till 3/2014 they refered 25 cases to the ECJ

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Preliminary ruling procedure in Croatia

- Regarding criminal procedure, the Croatian Criminal procedure code was amended and it has **express provision** about the possibility of making a reference to the ECJ.
- Article 18
- Obligatory stay of proceeding!?

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- In the Civil Procedure Act, title XVII regulates stay, termination and suspension of proceedings.
- The only mentioning of preliminary ruling procedure is **Article 213**,
- which states that: ''*the court shall also order the stay of the proceedings*:

a) *if it has decided that it does not resolve a preliminary issue itself*,
b) *if it has decide to refer the question to the ECJ about the interpretation or validity of acts of EU institutions.*

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- Having in mind **positivistic and formalistic legal culture** in Croatia and to avoid possible doubts before Croatian judge it is better to prescribe this procedure by national law BUT
- **Partial, unsystematic and hasty** regulation
- Many questions remained open (e.g. form of reference, content of reference, appeal, stay of proceedings etc.)

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Concluding remarks:

- main tool in ensuring the **uniformity in application of EU Law** in the MS
- highly depends on **effective cooperation between national courts and the ECJ**
- **national courts as European courts** should take more active role in ensuring that the preliminary rulings procedure operates as efficiently and effectively as possible
- The preliminary ruling procedure is a ***sui generis procedure*** and it is not dependent of any national procedural law.
- The article 267 of TFEU has **direct effect** and it is not necessary to make any special national legislation

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- National legal rules can **supplement** the provision of art. 267 of TFEU but it can't in no way restrict it.
- the problem is because national rules don't have always the desirable effect as it is case in Hungarian supplementary rules (e.g. obligatory stay of proceeding before the Hungarian courts when court decides to refer the question to the ECJ and the rules prescribing the content of an order for reference).

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II part – PR procedure before the CJ

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Steps to be taken:

- **Registration of the case** by the Registrar of the CJEU (e.g. C-297/15)
- **Translation of the reference** into all official languages (or only summary on account of the length but the full text of questions)
- **NOTIFICATION** to all ''parties'' (art. 23 of the Statute) by registered letter or electronic means
- **Publication** (but only names of the parties and questions referred) in the OJ – series C

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Submission of written observation

- because of the *erga omnes* effect of the ruling, the MS are interested
- If several MS have the same arguments, the Court invites them to coordinate themselves, especially at the oral hearing
- deadline = 2 months + 10 days (on account of distance)
- the absence of the right to make comments on the others observations
- 10 pages in ''normal'' and 30 pages in very complex cases

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- **Translation of written observations** into French – a working language of the Court
- The President of the Court assigns the case to the so called **Judge Rapporteur** and the first AG assigns it to the one of the **AG**
- Judge Rapporteur makes a PRELIMINARY REPORT

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Preliminary report

- **confidentia**l, only for internal use
- it identifies a legal issues and serves as a basis for the Court to decide:

a. should the reference been dismissed or not
b. if not – how many judges (formation of the chamber - 3, 5 or 13 judges)
c. whether there is need for oral hearing
d. whether there is need for an OPINION OF THE AG

- report is discussed at the **GENERAL MEETING**

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- Judge Rapporteur drafts a **REPORT FOR THE HEARING**
- a factual presentation of the case and written observations received
- translated and transmitted to all those who are entitled to participate in the oral hearing
- at least 3 weeks before the oral hearing
- **ORAL HEARING** + opinion of AG (If necessary)
- If case raises no new point of law, Court may decide that AG shall not give an Opinion; if Court decides to rule by reasoned order...

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Oral hearing

- possibility to dispense with the oral hearing
- usually public
- lawyers are required to be robed
- 20 minutes (3 judges – only 15 min.)
- questions by the judges
- brief ''private meeting'' before hearing (to settle arrangements for the hearing, to indicate particular matters, to concentrate on certain points etc.)

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Aim of oral procedure

i. provide **more detailed analysis** of the dispute
ii. to submit any **new arguments** (occurred after the written procedure have been closed)
iii. **reply to** the arguments by others in their written observations
iv. **reply to** the others arguments put forward in the oral pleadings
v. **answer to the questions** putted by the judges

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The order of giving the oral observations?

1. plaintiff (or appelant) from in the main proceeding before the NC
2. defendant (or respondent)
3. other participants of the national proceeding
4. the member states (A-Z)
5. the Council, Parliament or EFTA
6. Commission

- It is necessary to **speak slowly** and clearly
- Interpreters can hear only what is spoken into the **microphone**

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- After the oral observation the **AG delivers its OPINION** but only conclusion - written opinion in 2 months
- **DELIBERATION** (secret, without dissenting and concurring opinion)
- judges do not deliberate immediately after the oral hearing but after the opinion of AG and after the Judge Rapporteur prepares the **draft of the judgment**

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- **TRANSLATION** of the preliminary ruling (all languages)
- **DELIVERY** of the ruling to the national court

- Important:
- In the preliminary ruling procedure there is no parties *stricto sensu*
- It is means of cooperation of the national judges and the Court and the PR procedure is non-contentious in its nature

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Erasmus+

JEAN MONNET SUMMER SCHOOL

"Procedural aspects of EU Law"

Topic: Cross border family relations in international and EU context

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Learning objectives:

The main objectives of this part of the course is to give an overview of the structure and composition of judicial cooperation in civil matters, with particular emphasis on cross-border family matters. First part serves to set the scene of legal regulation in the field, where in the second part interplay of various instruments and provisions is described through CJEU rulings.

Topics to be covered:

- Judicial cooperation in cross-border family matters – setting the scene
- Methods of private international law unification and harmonization
    - Interplay of various instruments and provisions – selected topics

PART I: • Judicial cooperation in cross-border family matters – setting the scene

1.1. EU and international cooperation in cross-border family matters

Legal cooperation in cross border family law has gained more importance with human migrations and mobility being fostered. Legal problems facing modern family can no longer be adequately solved in a national framework because, by their very nature, they move beyond national frontiers. Origins of

international cooperation in cross border family cases date back to the beginning of the 20th century. Later on it was periodically fostered on the worldwide scene, especially due to humanitarian concerns after the Second World War. So far many conventions were drafted both on regional and bilateral level.[1]

The new decade of international judicial cooperation in family matters started with the European Community's engagement. Evolution of legal and political mandate for activities of EU institutions in this field is marked as a most prominent and most intensive international judicial cooperation ever. The European Union influences private legal status of its citizens by means of policies promoting free markets and the freedom of movement of persons[2] but also through the ideas of common identity and affiliation to modern Europe. While encouraging free trade, the EU raises the issue of cross border elements with respect to families to the surface but, at the same time, it contributes to frequent dilapidation of family life. An increase in number of disputes with international elements has a potential of unfavourable accumulation of family matters at courts. If the assumption that the EU actually renders private aspects of its citizens' life more difficult is accepted, it should remedy this unfavourable effect by creating sophisticated systems for dealing with numerous consequences of discontinuation of life unions.

1.2. The scheme of action

The scheme of European judicial cooperation in cross border family matters is twofold, as it can be inspected from narrow or wide perspective. These two aspects are often interconnected and interplay among each other.

1.2.1. European judicial cooperation in family matters – *stricto sensu*

Core of modern EU action to this area lies with activities of EU institutions, which ends with secondary acquis enactment – "regulations" most often in this area. EU functions according to the principle of conferral, requiring that an appropriate legal basis is established for each activity.[3] From a historical perspective, the process of full competence to deal with private international family law was long-lasting. Treaty of Maastricht of 1993 provided an institutional framework for intergovernmental cooperation and authorized the EU to act in the area of judicial cooperation in civil matters,[4] which is now constituent part of

[1] Župan, M., European judicial cooperation in cross border family matters, in: Drinoczi, T., Takacs, T., (eds.), Cross-border and EU legal issues: Hungary – Croatia. Osijek-Pecs, 2011. pp. 621-647. (in English), available download at www.eunicop.eu
[2] Art. 18(1) Treaty establishing the European Community – EC Treaty (consolidated version) *OJ* C 115, 9.5.2008; Art. 45. Charter of Fundamental Rights of European Union, *OJ* C 2000, 364/01
[3] Art. 5(1) Lisbon TEU (ex art. 5(1) TEC). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ* C 306/10
[4] Treaty on the European Union, *OJ* C 1992. 191, Art. K.1

the 'European integration phenomena'. Treaty of Amsterdam of 1997 moved judicial cooperation (from the third) to the first pillar, where 'communitarization' gave a new legal basis.[5] The foundations for judicial cooperation in family matters are significantly fostered with the Lisbon Treaty. Art. 81 TFEU extended the Union's competences in the field of judicial cooperation in family matters, since decision to adopt measures no longer depends on the Internal Market criterion.

As TFEU prescribes unanimity in the Council as a precondition to enact legislation on cross-border family matters, some new legal sources of EU action in the area of private international law were found. However, regulations introduced under the enhanced cooperation heading are not applicable in all Member States equally, which contributes to creation of „multi-speed Europe." This syndrome first occurred in the area of civil justice in Amsterdam Treaty Protocols on special position of UK, Ireland and Denmark. These Member States are thus empowered with the possibility to „opt-in" – „opt-out" of any regulation in the area of civil justice.

Table 1. Multi-speed Europe syndrome

	TEMPORAL	**GEOGRAPHICAL**	**MATERIAL**
Brussels II bis	-as of 1.3.2005 -for Croatia as of 1.7.2013 (Art 64/1)	-all MS of the EU, except Denmark	- divorce - legal separation - marriage annulment - parental responsibility
Rome III	-as of 21.6.2012	-enhanced cooperation -14 participating MS	- divorce - legal separation
Rome IV proposal	-to be adopted	-presented in 2011 but failed legislative action;	- matrimonial property/ property of

[5] Chapter IV entitled 'Visas, Asylum, Immigration and Other Policies Related to Free Movement of Goods' (Articles 61 to 69), stipulated a regulation on judicial cooperation in civil matters, Article 65 clarified the meaning of the notion of judicial cooperation in civil matters

		-in 2016 launched as enhanced cooperation	registered partners

From EU policy perspective the process is developing:

- 1999 Tampere programme
    - places mutual recognition of decisions at focus
- 2005 – 2010 Hague programme
    - mutual recognition agenda remained a priority
    - called for the development of EU action in family law: the Commission is invited to submit proposals on maintenance, matrimonial property, and divorce
- 2010-2014 Stockholm Programme
    - mutual recognition transfers to abolished exequatur in family matters
    - innovation: promoting alternative dispute resolution in cross border family cases
- 2014 – now on
    - Further exequatur abolishment

1.2.2. Interplay with other actors on international scene

Wider aspect of legal regulation in the field of judicial family matters centred cooperation relates to participation of Member States in the framework of various international institutions as well as to their bilateral cooperation. The dominance of EU raises the issue of the prospects of EU Members States' further engagement in any other form of universal or regional judicial cooperation with third states. EU has gradually taken over competence to conclude agreements with third countries regarding family matters, whereas in parallel to this, the competence of Member States eroded. Doctrine of "external competences" was founded on CJEU rulings, where external competence is attributed to any matter already seized with

internal competence and action. This "mirror effect" of internal to external competences significantly influenced the bilateral regime as well.[6]

International organizations that interplay with EU in this regulatory field are:

1. Hague conference on private international law (hereinafter: HCCH).[7] Hague conference early convention on custody (1902) is first in the row of today approximately 20 conventions regulating cross border family matters within this organization. Since 3 April 2007 the EC has become a member of HCCH[8], where it now acts and accedes to conventions on behalf of EU Member States.
2. United Nations (hereinafter: UN) with it's Convention on the rights of the child (1989) are an important actor as well. Besides general principles, such as Art. 3 prescription on the best interests of a child or Art. 12 and a right of a child to express it's views, Art. 27(4) particularly aims at promoting enforcement of cross border family maintenance by encouraging judicial cooperation among signatories.
3. Council of Europe (hereinafter: CoE) assures legal protection of cross-border families with conventions and resolutions directly dealing with the matter.[9] However, it most significantly influences this area of legal regulation through fundamental human rights protection embodied in European Convention of 1950. Most important principles are with Art. 8 on the right to private and family life and principle of prohibition of any kind of discrimination of Art. 14.
4. Commission on European Family Law is promoting the soft law unification (ceflonline.net/).

PART II Methods of private international law unification and harmonization

2.1. Methods of private international law unification

[6] Regulation No. 664/2009 establishes a procedure for the negotiation and conclusion of agreements between Member States and third countries in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations. Similarly No. 662/2009 does concerning the law applicable to contractual and non-contractual obligations.

[7] The early Hague convention on custody (Convention du 12 Juin 1902 pour régler la tutelle des mineurs) is of the old conventions not applying any more. A full list of conventions is available at: www.hcch.com).

[8] Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law. *OJ* L 297, 26.10.2006, pp. 1-14.

[9] For a comprehensive overview see: Secretariat of the Directorate General of Human Rights and Legal Affairs (DG-HL): *Council of Europe achievements in the field of law: family law and the protection of children*. (Strasbourg, 2008).

In vast majority EU is introducing "regulations" to enact provisions in cross-border family matters. Regulations are directly applicable in Member States and prevail over national law. Autonomous interpretation guided by CJEU is required. Autonomous or „*Europautonomous*" interpretation means that national courts must refrain from referring to national concepts / national case law. Systematic and purposive interpretation means that each individual article is to be interpreted in the context of a Regulation as a whole; in accordance to its objectives (Recitals). Final and exclusive interpretation authority is CJEU. Overall *ratio* of free circulation of judgements in embedded on mutual trust, so the consequences of *acquis* non application /fault application are widespread. Here we underline two main features relating to the situation in the court of origin and in the court of enforcement.

- court of origin:
    - If the court does not apply (either not apply at all / or not apply properly) the EU regulations in the stage of decision making, party is empowered with all of the remedy at disposal in national procedural law (appeal – revision- constitutional claim), as well as any remedy introduced by EU law (for example Art. 17 of the Maintenance Regulation as an additional „EU remedy").

- court of recognition/enforcement
    - It has been confirmed in relevant CJEU case law that despite the fact that some courts would not apply the regulation properly, some mistakes are not to be inspected by the court of other Member State in the stage of recognition/enforcement. In other words, only the grounds of non-recognition prescribed by the regulation are at disposal for inspection by the recognizing Member State. There is no possibility to refuse recognition of a judgment of another Member State if a judgement is based on non-existent / fault grounds of jurisdiction/contains untrue statements.

Aguirre Zarraaga v Pelz (Case C 491/10 PPU) of 22 December 2010[10]

This proceedings deals with a parental child abduction over a child A. born in 2000 to a Spanish father and a German mother. They all lived together in Spain until the end of 2007, when divorce proceedings were commenced before the Spanish courts. As for the child custody both parents sought sole custody rights. In May 2008 court in Bilbao provisionally

[10] ECLI:EU:C:2010:828

awarded custody to the father. In June 2008 the mother moved to Germany where she settled with her new partner. While child A. was in Germany for contacts she refused to return her to Spain but retained her in Germany. In October 2008 the same Spanish court issued a provisional measures which prohibited the child from leaving Spain and suspending any access to mother.

Proceedings on the merits over custody continued in 2009. Expert report ordered ascertainment of the views of the child. Mother's request that the child is allowed to leave Spain, following the hearings they were supposed to attend in Spain, were refused by the Court. Court equally declined to allow evidence to be given by video conference. Consequently the child was not heard. In December 2009 sole custody was awarded to a father. The mother appealed, including on the fact that the child was not heard, but for some procedural reasons her appeal was refused.

In parallel, child abduction return proceedings brought by the father were ongoing in Germany. German court issued a non-return order relying on Article 13(2), since the child expressed objection to a return. Spain court proceeded with the return process, now on the bases of Art. 11(8) and Art. 42 of the Brussels II a. In April 2010 German court refused to recognise and enforce the return order. It held that the judgment was false due to the fact that child was not heard before handing down Spanish judgment. German court particularly objected to the fact that certificate of Art. 42 contained false statements: the box that the child was heard was marked as positive! Father appealed to that judgement, subsequently German court asked CJEU for a clarification:

> *"1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Regulation No 2201/2003] in conformity with the Charter of Fundamental Rights?*
> *2. Is the court of the Member State of enforcement obliged to enforce the judgment of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin*

under Article 42 of [Regulation No 2201/2003] contains a declaration which is manifestly inaccurate?"

CJEU inspected closely the B IIa provisions, to come up with a conclusion that Article 11(6-8) set up a system where in the event that there is a difference of opinion between the court where the child is habitually resident (court competent for the merits) and the court where the child is wrongfully taken (court of abduction), the former retains exclusive right to decide whether the child is to be returned. Consequently, a judgement of that court ordering a return, with a certificate of Art. 42,
has to be recognised by the court of abduction and has to be automatically enforceable in that Member State. Member State of abduction may not review any aspect of that judgement. It is solely for the national courts of the Member State of origin to examine the lawfulness of such judgment – any other power of the court of enforcement would undermine the effectiveness of the system.

We may reconsider this conclusion: if the court is not hearing the child and there is no possibility to oppose such judgment of the other Member State as Article 42 is applied, isn't the mutual trust placed on pedestal in comparison to fundamental rights?

P v Q (C-455/15 PPU), of 19 November 2015[11]

The request has been made in proceedings between a couple that met in 1997. in Lithuania, both Lithuanians by origin. P and Q had together two children V, born in 2000, and S, born in 2009. They separated in 2003. In 2006 Lithuanian court ordered that V was to reside with her mother Q, but the rights of custody were shared. Family left Lithuania in 2005 to move to Sweden, children speak Swedish and attended school there. In 2013 father P discovered that Q and the two children had disappeared. Mother claimed father has offended them, she and the children were placed in protected housing. Investigation against father was dropped but he was prohibited from having contact with Q and the children pro futuro. He still retained shared custody rights.

In 2014 mother took two children to Lithuania, where she registered them to civil records. Shortly after removal mother brought proceedings before Lithuanian asking that court to make an interim order on the residence and custody of S and maintenance for both children. In parallel father

[11] ECLI:EU:C:2015:763

brought proceedings before Swedish courts asking to be granted sole custody of the two children. He also initiated the Hague child abduction return procedure.

Outcomes of the procedures in Lithuania: on the merits full custody was given to the mother; Lithuanian courts refused to return the children based on Article 13 of the 1980 Hague Convention. In Sweden court gave the full custody to the father.

The referring Swedish court considers that its jurisdiction is based on Article 8(1) of BIIa. At the time when proceedings were brought in Lithuania both children were habitually resident in Sweden within the meaning of that provision! Lithuanian court infringed Article 15, however, by assuming jurisdiction without being requested to do so by the referring court. Swedish court claims that due to the general prohibition of reviewing the jurisdiction of the court of the Member State of origin provision does not refers to Article 15 of the regulation, on which Lithuanians based its jurisdiction.

> *In those circumstances the Varbergs tingsrätt (District Court, Varberg) decided to stay the proceedings and to refer the following question to the CJEU:*
>
> *'Should the [referring court], in accordance with Article 23(a) of [Regulation No 2201/2003] or any other provision and notwithstanding Article 24 of that regulation, refuse to recognise the judgment of the [Šilutės rajono apylinkės teismas (District Court, Šilutė)] of 18 February 2015 … and consequently continue the proceedings in the custody case pending before the [referring court]?'*

CJEU gave a negative answer. "It follows from all the above considerations that the answer to the question is that Article 23(a) of Regulation No 2201/2003 must be interpreted as meaning that, in the absence of a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of a Member State or of a right recognised as being fundamental within that legal order, that provision does not allow a court of that Member State which considers that it has jurisdiction to rule on the custody of a child to refuse to recognise a judgment of a court of another Member State which has ruled on the custody of that child."[53]

It derives that a court with jurisdiction according to the regulation may not refuse recognition of a judgement of the court that clearly had no jurisdiction but it grounded it on a non-existent facts! CJEU confirms that the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

2.2. Construction of the system

EU regulations are based on

- harmonized direct jurisdiction rules,
- proper service,
- elimination of procedural irregularities,
- avoidance of parallel procedures and passing opposed decisions,
- exequatur repeal (with several approaches),
- applicable law – at low extent so far.

Table 2. Various methods of unification

<table>
<tr><th>JURISDICTION</th><th>RECOGNITION / ENFORCEMENT</th><th>COOPERATION OF CENTRAL AUTHORITY</th><th>APPLICABLE LAW</th></tr>
<tr><td colspan="3">Brussels II bis (2201/2003)</td><td><u>divorce matters:</u>
-Rome III, 1259/2010
-national PIL
<u>parental responsibility:</u>
-Hague 1996 convention
-Hague 1980 convention
- national PIL</td></tr>
<tr><td colspan="4">Maintenance obligations regulation (4/2009) + Hague protocol (2007)</td></tr>
</table>

Succession regulation (650/2012)
Marriage/civil partnership property regimes regulation (2016 draft)

2.3. Logistics to the system

EU system of provisions would not work without proper logistics to cooperation. Therefore it leans on several devices.

- **Fostered cooperation of Central Authorities (CA)**

  Although the mechanism of employing central authorities to foster legal cooperation in family matters is an ultimate trend of modern law, it certainly is not a contemporary innovation.[12] The central authority presents an essential structure in each country to facilitate effective access to legal and administrative procedures for parents and children affected by cross-border family disputes.

  Within the Brussels II *bis* (Article 53) and Maintenance Regulation (Article 49) regimes each Member State designates a central authority which is given general and specific functions. In general they are to promote exchanges of information about national legislation and procedures, cooperate with each other in order to solve problems arising from the application of relevant regulations; facilitate communication between courts etc.

  - Special functions within Brussels II bis are in providing assistance to holders of parental responsibility seeking to recognize and enforce decisions; help in resolving disagreements between holders of parental responsibility through alternative means to mediation; activities regarding placement of a child in another Member State, etc. (Articles 53-55).
  - Special functions within the Maintenance Regulation relate to transmission and reception of applications, initiation of the related proceedings for the establishment or modification of maintenance or for the enforcement of a maintenance decision, helping to locate the debtor or the creditor etc. (Articles 50-53).

- **Fostered cooperation through judicial networking: European Judicial Network (EJN)**

[12] It was first introduced by the UN Convention on the Recovery Abroad of Maintenance (1956).

and Hague international judicial network (HIJN)

One of the most important elements of judicial cooperation in family matters is judicial networking, cross border communication and other judicial collaboration. Foundations for a European judicial networking were laid down in 2001 when European Judicial Network (EJN) in civil and commercial matters was established.[13] The EJN is intended to enable smoother conduct of cases with cross-border elements; it facilitates judicial cooperation among Member States judges (e.g., aid with the service of documents, taking of evidence); it aims at ensuring the proper practical application of *acquis* along with international agreements and conventions among Member States and in the end aims at the establishment and maintenance of an information system for the public about EU *acquis*, international instruments and the domestic law of the Member States, especially regarding the access to justice. The new framework for EJN applies as of 1.1.2011[14] innovatively reinforces relations with other European Networks that facilitate co-operation between judicial systems or access to justice, but also networks established by third countries and with international organizations that are developing judicial co-operation.

Networking of European officers of justice has occurred on the above elaborated regional, but also on global level. The creation of a universal judicial network, the *Hague* International *Judicial Network (HIJN)* is to be viewed in conjunction of the so-called "Malta process". HIJN completes the Malta declaration emphasizing the added value of direct judicial communications in international child protection cases.[15]

2.4. Demarcation among legal sources

As indicated above, functioning of judicial cooperation in cross-border family matters requires wider knowledge of the pertaining legal sources, as well as their proper hierarchy and demarcation. One can speak of several layers of demarcation, depending on the origin legal source: demarcation among different regulations; demarcation amongst regulations and international conventions, demarcation amongst regulations and national law. Case law can be perfectly illustrative.

Since EU has limited competences in this area of regulation and it's actions is burdened with unanimity, it is enacting legislation with rather narrowed material scope. It results with a situation that all of the subjects matters that create a claim cannot be deals with one and single legal source. Different matters may be

[13] Council Decision 2001/470/EC of 28 May 2001.
[14] Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters. *OJ* L 168/35 30.6.2009
[15] More on www.hcch.net

spread over regulations, but they can be left out of the regulation as well. In the latter case court has to find another legal source to rule on such subject matters (ezg. international conventions, national law.) Sometimes judge would have to settle some preliminary issues. If we take for example the succession procedure, judge would has to establish the list of successors, which would sometimes require him first to establish proper relationship of father/mother and a child, or existence of a marriage / divorce. Some of these matters are dealt within EU acquis, some are left for national law. If one looks at the divorce petition which is attributed with a claim on parental responsibility and maintenance, the list of legal sources to be applied in Member States is long.

Scheme 1. Procedure of divorce with children and attributed claims - legal sources

- Regulation 2201/2003
    - jurisdiction for divorce (3-7)
    - jurisdiction for parental responsibility (8-15)
- Regulation 4/2009
    - jurisdiction for maintenance
- Regulation Rome III / national law
    - applicable law for divorce (status issues)
- Hague 1996
    - applicable law for parental responsibility

2.4.1. Demarcation amongst regulations

Each regulation has a precise material scope of application, with additional list of matters that are outside it's scope of application. However, situations that trigger attribution of some matter to one or the other regulation may occur.

CJEU A v B. (C 184/14) of 16 July 2015[16]

Here the Court of Justice of the European Union gave a preliminary ruling as to the interpretation of the Maintenance Regulation 2009, in connection to BIIa regulation. Concretely the matter dealt with

16 ECLI:EU:C:2015:479

jurisdiction as to child maintenance where there were concurrent proceedings on legal separation of the parents and proceedings concerning parental responsibility.

State of facts: Italian parents and their two children, which are all solely Italian nationals, live in London for years of their marriage. After their separation father initiated proceedings for a legal separation in Italy. Mother lodged a counterclaimed claiming that Italian courts have no competence to rule of parental responsibility and child maintenance matters. Court held that it had jurisdiction to entertain the legal separation proceedings but not in relation to matters of parental responsibility based upon the fact that the children were habitually resident in England. Therefore a parental responsibility claim was initiated in England. Further question arose in jurisdiction for child maintenance. Italian court held that it has jurisdiction to determine spousal maintenance, but not also the child maintenance. Court haled that claim in respect of children was ancillary to the parental responsibility proceedings. Since father appealed that decision Italian court stayed the proceedings and made an application to the CJEU for a preliminary ruling on the question:

> *„May the decision on a request for child maintenance raised in the context of proceedings concerning the legal separation of spouses, being ancillary to those proceedings, be taken both by the court before which those separation proceedings are pending and by the court before which proceedings concerning parental responsibility are pending, on the basis of the prevention criterion, or must that decision of necessity be taken only by the latter court, as the two distinct criteria set out in points (c) and (d) of [Article 3 of Regulation No 4/2009) are alternatives (in the sense that they are mutually exclusive)?“*

Here two courts were seized of proceedings: one involved proceedings concerning the separation/dissolution of marriage between parents of minor children, and the other proceeding involved parental responsibility for those children. An application for maintenance in respect of those children could not be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Art. 3(d) and to the proceedings concerning the status of a person, within the meaning of Art. 3(c).

CJEU held that Art. 3(c) and (d) of the Maintenance Regulation must be interpreted as meaning that, where a court of a Member State was seized of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State was seized of proceedings in matters of parental responsibility involving the same child, an

application relating to maintenance concerning that child was ancillary only the proceedings concerning parental responsibility, within the meaning of Art. 3(d).

2.4.2. Demarcation amongst regulations and national law / matters outside the scope of EU regulation

Regulations are applied by national bodies in any case that falls within it's scope of application. It means that national bodies, even in a procedures that is purely national must apply the regulation if the subject matter as hand is within it's material scope. Again, it would mean that a judge has to make a proper demarcation of subject matters in the claim, and apply more legal sources to deal with one case. We may take the issue of representation of a child in different procedures. Case law is again very illustrative.

CJEU Googova v Iliev (Case C-215/15) of 21 October 2015[17]

Googova relates to a preliminary question posted by Bulgarian administrative authority regarding the issue of a passport for the Bulgarian child living in Italy. Child of 10, solely Bulgarian national lives in Italy for years. Both parents live in Italy – but separated. Mother sought to renew the child's Bulgarian passport, but the father refused to grant his consent. Under Bulgarian administrative law both holders of parental responsibility were obliged to hive consent. Mother initiated the procedure in Bulgaria, asking of the court to substitute the lacking consent of the father, but it was not possible to serve the documents to the father as his address was unknown. A legal representative was appointed to represent him. This legal representative haven't submitted any documents to contest the jurisdiction of the court; as far as the merits is concerned, he only stated that dispute should be resolved in the best interests of the child. Appellate court held that the child was habitually resident in Italy and pursuant to Article 8 of BIIA any Bulgarian court lacked jurisdiction to determine matters of parental responsibility. Upon appeal before the Bulgarian Supreme Court it made a reference for a preliminary ruling to the CJEU, asking

> *"By its first and second questions, which should be considered together, the referring court asks essentially whether an action in which one parent asks the court to remedy the lack of agreement of the other parent to their child travelling outside his Member State of residence and a passport being issued in the child's name is within the material scope of*

[17] ECLI:EU:C:2015:710

Regulation No 2201/2003, even though the decision in that action will have to be taken into account by the authorities of the Member State of which the child is a national in the administrative procedure for the issue of that passport." [25]

CJEU responds positively, meaning that the concept of parental responsibility is given a broad definition in BIIa where this action is certainly falling within it's material scope. CJEU further clarifies that nature of the related proceedings (here being national administrative procedure for issuing the passport for a child that is only Bulgarian national), is not decisive for the aspects that clearly relate to parental responsibility. Court confirms that Bulgarian administrative authorities would have to take into account later Italian ruling which substitutes the consent of the father. Bulgarian courts would be competent to deal with this matter only if both parents would 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' such prorogation of the jurisdiction under 12(3)(b). According to CJEU legal representative of the defendant was appointed by the court on it's own motion due to the impossibility of serving the document instituting the proceedings on the defendant, has no capacity to consent to prorogation. His omission to plead the lack of jurisdiction of the court may not be interpreted as a manner of prorogation under Article 12(3)b.

CJEU Matouškova (C-404/14) of 6 October 2015[18]

The request has been made in proceedings brought by Ms Matoušková in her capacity as court commissioner, in order to determine jurisdiction to approve the agreement on the sharing-out of the estate concluded by the guardian ad litem on behalf of minor children.

On 27.4.2010. Brno Municipal Court commenced succession proceedings concerning the estate of Ms Martinus. Deceased died in the Netherlands on 8.5.2009. Ms Matoušková was a notary authorised to act as court commissioner in this succession proceedings. Matouškova established that at the time of her death deceased was Czech Republic citizen, with permanent address in Brno. The heirs: deceased's spouse and two minor children lived in the Netherlands. Due to possible conflict of interest between the heirs Czech law prescribes that a guardian ad litem has to be appointed to represent the

[18] ECLI:EU:C:2015:653

interests of the minor children: he was appointed by the Brno Court. Heirs declared that no succession proceedings were pending in the Netherlands.

On 14.7.2011. heirs concluded an agreement on the sharing-out of the estate.

On 2.8.2012. in the course of notary inheritance proceedings the surviving spouse states that deceased had actually lived her life in Netherlands, her Czech address was not real, and that on 14.3.2011. succession proceedings were commenced in the Netherlands.

Since two of the parties to the agreement were minor children Matoušková submitted the agreement on the sharing-out of the estate to the jouvenile court, which then returned the file to Matoušková (without any examination of the substance of the dispute) explaining that minors were long-term residents outside Czech. Court instructed Matouškova to ask of the Supreme Court to determine the court having jurisdiction. Matoušková asked the Supreme Court to designate the court with local jurisdiction to decide the matter of approval of the agreement on the sharing-out of the estate at issue in the main proceedings.

Supreme court examined the material scope of BIIa closely, to end up with dilema. A measure intended to protect the interests of minors may fall within the scope of that regulation. But, since in this concrete case such measure would be a preliminary step adopted in the succession proceedings Court finds it might also be classified as a matter relating to succession - such are excluded from the scope of BIIa by Article 1(3)(f)!

In those circumstances Supreme Court stayed the proceedings and referred the question to the CJEU:

„... Therefore, it must be held that, by its question, the referring court asks essentially whether Regulation No 2201/2003 must be interpreted as meaning that the approval of an agreement on the sharing-out of an estate concluded by a guardian ad litem on behalf of minor children constitutes a measure relating to the exercise of parental responsibility within the meaning of Article 1(1)(b) thereof, falling as a result within the scope of that regulation, or whether such a procedure constitutes a measure relating to succession, within the meaning of Article 1(3)(f) thereof, excluded from its scope.“ [26]

CJEU deeply elaborated nature of each of these proceedings and actions, to conclude that the approval of an agreement for the sharing-out of an estate concluded by a guardian ad

litem on behalf of minor children constitutes a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of that regulation and thus falls within the scope of the latter, and not a measure relating to succession, within the meaning of Article 1(3)(f) thereof, excluded from the scope thereof.

2.4.3. Demarcation amongst regulations and international conventions

Founding Treaty give precedence to EU acquis on other legal sources. That means that if the same subject matter is dealt with regulation and a convention, regulation would in principle have priority in use. For example in parental child abductions Hague 1980 Convention is in force in all of the Member States, and is continued to be applied: BUT Brussels IIa regulation introduced some additional rules for abductions among Member States, which have to be given priority.[19]

Other example is the situation in relation to applicable law. In some cases EU rules do not deal with it at all – for example in parental responsibility matters, but all of the Member States apply Hague 1996 Convention to these issues. There is also an example where at first glance EU deals with applicable law for maintenance, but actually it is only directing towards application of an international convention „Hague 2007 Protocol" which is accepted by EU.[20]

There is a special interplay of EU rules with international conventions regulating fundamental human rights. Most prominent example is the principle of the best interest of a child.[21] It is particularly interesting to note that the same concepts: as the best interest of a child in relation to the parental child abduction were disputed and inspected both by the CJEU and ECHR. One of the most prominent examples is the Povse case.[22]

[19] Brussels II a introduces rules on jurisdiction and possibility and conditions to issue a non-return order by Article 10-11.
[20] Župan, M., "Innovations of the 2007 Hague Maintenance Protocol", in Beaumont et.al. eds. Cross border recovery of maintenance, Hart Law Publishing, Oxford 2014. (311-328)
[21] Župan, M. "The best interest of the child – a guiding principle in administering cross-border child related matters?", in: T. Liefaard and J. Sloth-Nielsen (eds.) 25 Years CRC. Brill | Nijhoff, 2016.
[22] CJEU (C-211/10 PPU) Povse / ECHR Povse v. Austria – No. 3890/11 Vesna L., Povse rulings in: Župan M. "Private International Law in the Jurisprudence of European Courts – family at focus", Faculty of Law in Osijek, Osijek 2015. (p. 436, in English), available for download and e-reader at http://www.pravos.unios.hr/katedra-medunarodnog-privatnog-prava

ANEX – list of legal sources

REGULATIONS directly applicable to cross-border family matters

- Council Regulation (EC) no. 2201/2003 of 27 November 2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility which revokes the Regulation (EC) no. 1347/2000 (abbreviation: BIIa)
- Council Regulation (EC) no. 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations (abbreviation: Maintenance Regulation)
- Council Regulation (EU) no. 1259/2010 of 29 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (abbreviation: Rome III)

REGULATIONS indirectly applicable in cross-border family law

- Council Regulation (EC) no. 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters,
- Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters,
- Regulation (EEC, Euratom) no. 1182/71 of the Council of 3 June 1971 Determining the Rules Applicable to Periods, Dates and Time Limits,
- Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims

- REGULATIONS indirectly applicable in cross-border family law
- Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters,

- Council Directive 200/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.
- Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

Private international law conventions applicable to cross-border family law

- Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,
- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children,
- Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance +
- Hague Protocol of the Law Applicable to Maintenance Obligations.

HUMAN RIGHTS conventions and *acquis*

- Convention for the Protection of Human Rights and Fundamental Freedoms (COE), 1950;*abreviation ECHR*
- Convention on the rights of a child (UN), 1989. (abbreviation: *CRC)*
    - Charter of fundamental rights of the European Union (EU), 2009 (ab*breviation CFR)*

EU ADMINISTRATIVE LAW

Over the last decades, the European Union has developed a series of ad hoc administrative procedures for the direct implementation of its rules in a number of areas - such as competition policy, trade policy, sate aids, access to EU documents, the EU civil service - , which resulted in a fragmented body of rules, whether in the form of law or soft law.

The need to depart from this sector-specific approach to ensure consistent EU administrative procedures has therefore started to be debated in the academic sector as well as within the EU institutions. In this respect, following the entry into force of a new legal basis on administrative law introduced by the Lisbon Treaty the European Parliament has called for the adoption of a single European Administrative Procedure binding on its institutions, bodies, agency and offices including enforceable procedural rights for citizens when dealing with the Union's direct administration.

LEGAL FRAMEWORK

Article 298(1) of the Treaty on the Functioning of the European Union (TFEU), which is an innovation of the Lisbon Treaty, provides that in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an **open, efficient and independent European administration**.

Article 41 of the Charter of Fundamental Rights of the European Union enshrines the **right to good administration** by granting to every person the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken; the right of access to files, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and the duty of the administration to give reasons for its decisions.

The **case-law of the Court of Justice of the European Union** has contributed to shape EU administrative law by developing over the years general principles of administrative law and procedure, especially those related to the rights of defence. In this respect, landmark decisions acknowledged the right to be heard, the duty for the administration to give reasons and to adopt decisions within a responsible time, the privilege against self-incrimination.

Working Group on EU Administrative Law

During the 7th legislature the Committee on Legal Affairs set up a Working Group on EU Administrative Law aiming at **tacking stock of the existing EU rules** on administrative law and at **examining the possibility of legislative action** on the basis of Article 298 TFEU. The findings of the activities of research, analysis and discussions of the Working Group are summarised in a **working document suggesting the adoption of a**

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legislative initiative for a single general administrative procedure binding on the Union's administration. The working document was approved by the Committee on Legal Affairs at its meeting of 22 November 2011.

European Parliament's resolution

Following the recommendations of the Working Group and the own-initiative report by the Committee on Legal Affairs on 15 January 2013 Parliament adopted a **resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union.** The resolution was adopted under Article 225 TFEU (legislative initiative). Parliament requested the Commission to submit a proposal for a regulation on a European Law of Administrative Procedure codifying the fundamental principles of good administration and regulating the procedure to be followed by the Union's administration in its relations with the public. The **scope** of the Regulation should be limited to the **direct administration of the EU** and should lay down a procedure applicable as a ***de minimis* rule** where no *lex specialis* exists. Furthermore, the resolution lays down a number of detailed recommendations as to the content of the proposal requested. Parliament's request has not been followed up by a Commission proposal yet.

EXPERTISE PROVIDED BY THE POLICY DEPARTMENT C

The Policy Department provided the Working Group on EU Administrative Law with extensive independent expertise from representatives of the academia and the law practice.

As a first step, the following in-depth analyses carried out the **stocktaking of the existing EU administrative rules**, an **assessment of their interaction** as well as the **analysis of the possibility of a EU single legal framework on administrative procedure** following the entry into force of the Lisbon Treaty: 'EU Administrative Law - The Acquis, Towards an European Regulation on Administrative Procedure and Relevant provisions of the Lisbon Treaty on EU Administrative Law.

In the context of the debate on EU rules on access to documents, an overview on how **transparency and participation** have been ensured in EU law and practice is provided in the in-depth analysis on Citizens and EU Administration - Direct and indirect links.

Furthermore, with a view to delivering an insight into a **selection of sector-specific EU administrative procedures** the following in-depth analyses were commissioned: Administrative Procedures in EU External Trade Law, Administrative Procedure in EU Civil Service Law, Administrative Procedure in Environment Files Linked with Article 258 TFEU Proceedings : A Lawyer's Perspective, Administrative procedures files linked with Article 258 TFEU proceedings: an academic perspective.

In addition to that, during a delegation of the Legal Affairs Committee, the Policy Department organized a **Workshop on the state of play and future prospects of EU administrative law** at the University of León (27 - 28 April 2011), focusing on a number of aspects and questions related to EU administrative law, including the scope and evolution of EU administrative law; the administrative law aspects of the EU rules on access to documents and data protection; the need for increased coherence in EU administrative law. A collective edition contains the contributions for this Workshop commissioned by the Policy Department to several academic experts as well as law practitioners.

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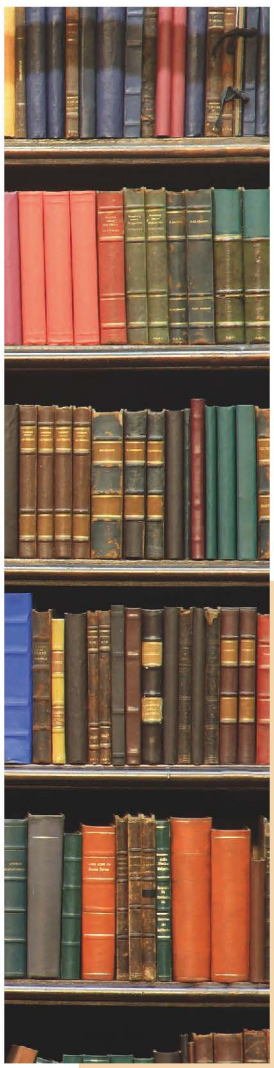
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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The General Principles of EU Administrative Procedural Law

In-depth analysis for the JURI Committee

EN

2015

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The General Principles of EU Administrative Procedural Law

In-depth Analysis

Abstract

Upon request by the JURI Committee this in-depth analysis explains what general principles of EU administrative procedural law are, and how they can be formulated in the recitals of a Regulation on EU administrative procedure.

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DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS

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DISCLAIMER

CONTENTS

LIST OF ABBREVIATIONS

Charter	Charter of Fundamental rights of the European Union
CJEU	Court of Justice of the European Union
EEC	European Economic Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
TEU	Treaty on European Union
TFEU	Treaty on the functionning of the European Union

EXECUTIVE SUMMARY

Background

The Committee on Legal Affairs of the European Parliament has requested an In-depth Analysis on "The general principles of EU administrative procedural law". The In-depth Analysis is intended to be presented at a meeting of the Working Group on Administrative Law.

Aim

- The Analysis puts forward drafting proposals for the general principles of EU administrative procedural law to be included in the Recitals of a draft Regulation on EU Administrative procedures.
- More specifically, the Analysis tries to clarify the content of the general principles of EU administrative procedural law and suggest the most accurate formulation for the corresponding recitals.
- The following general principles, which are related to the Right to good administration embedded in Article 41 Charter, to the principle of an open, efficient and independent European administration enunciated in Article 298 TFEU are translated into recitals: [1] Access to information and access to documents; Access to the file ; Duty of care; Data protection; Data quality; Effective remedy; Equal treatment and non-discrimination; Fair hearing; Fairness; Good administration; Impartiality; Legal certainty; Legality; Legitimate expectations; Participatory democracy; Proportionality; Reason giving; Rule of Law; Timeliness; Transparency.

[1] Listed in alphabetical order in the key findings, but in a different, structured order in the recitals themselves.

1. WHAT ARE GENERAL PRINCIPLES OF EU ADMINISTRATIVE PROCEDURAL LAW?

KEY FINDINGS

- An established authoritative catalogue of general principles of EU administrative procedural law does not exist - neither as an instrument of primary or secondary EU law, nor in the jurisprudence of the CJEU, nor is there a minimum consensus in scholarship about such a list.
- Many rules and/or principles of EU law that focus on administrative procedures or which are at least especially relevant to administrative procedures are embedded in the EU Treaties and in the Charter. Of these principles, most have the status of 'general principles of European Union law', i.e. principles that have been expressly qualified as such by the EU courts. There are also principles and/or rules of EU administrative procedures which are established by soft law instruments, especially in codes of conduct, guidelines, communications etc.
- Given the nature of principles, the purpose of legislation consists of explaining how their sometimes competing commands are to be balanced in a way allowing to maximise the scope of each. In this context, it is not possible to establish a hierarchy ranging from the most important to the least since such hierarchy simply does not exist.
- As these principles are laid down in various provisions of the EU treaties and the case law of the CJEU the purpose of the recitals is not to redefine or to limit the principles referred to. Instead, the purpose of the recitals is to enhance the visibility of their implementation through procedural rules.

1.1. Sources of general principles of EU administrative procedural law

The European Parliament resolution of 15 January 2013 on a Law of Administrative Procedure of the European Union includes a Recommendation on the general principles which should govern the Union's administration.[2] Section 2 of this note will explain the reasons for dealing with general principles in the recitals of a Regulation on EU administrative procedures[3] rather than attempting to codify them in the form of articles of the operative part of such a regulation. This however requires asking the preliminary question what general principles of EU administrative procedural law are.

An established authoritative catalogue[4] of such principles does not exist - neither as an

[2] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)), Annex, Recommendation 3.

[3] The issue saying law on administrative procedure or 'procedures' has been discussed at length in earlier occasions in the framework of the ReNEUAL network (http://www.reneual.eu/), of which the authors of this note are members. The native speaking members of the ReNEUAL network, while conceding that procedure in singular was grammatically also possible, thought that from a legal point of view 'procedures' was better in English than 'procedure'; while the French, German, Italian and Spanish members of the network confirmed that in their language the singular is to be used.

[4] Recommendation 3, quoted above, contains a list of 9 principles, while Recommendation 4 contains a list of 10 'rules governing administrative decisions', and they are followed by Recommendation 5 (on the review and

instrument of primary or secondary EU law, nor in the jurisprudence of the CJEU, nor is there a minimum consensus in scholarship about such a list. This absence can be explained primarily by the multiple meanings of the expression 'general principles' in the context of European Union law. Although the scholarly literature on the possible doctrinal differences between 'principles' and 'rules' is abundant,[5] the distinctions drawn therein are not relevant for the specific context of EU positive law. For all practical purposes it is therefore primarily necessary to recall the sources of general principles of EU administrative procedural law before trying to indicate what the principles to take into account are.

A number of rules and/or principles of EU law that focus on administrative procedures or are especially relevant to administrative procedures are embedded in the EU Treaties.[6] Already the ECSC Treaty of 1951 had in its Article 15 made reference to the obligation of reason giving – which has been taken over in the EEC Treaty of 1957 (nowadays Article 296 TFEU second indent) – and in its Article 5 a general principle of 'publicity' that is the antecedent of the principle of transparency embedded in Articles 11 and 15 TFEU and of the principle of openness embedded in Articles 1 and 10 TEU, 15 and 298 TFEU.

Within the Charter of Fundamental rights of the European Union, which with entry into force of the Treaty of Lisbon acquired the same legal status as the Treaties, EU procedural law is codified in Article 41 on the Right to good administration, as well as in Articles 42 on the Right of access to documents, 43 on the European Ombudsman, and also in Articles 47 on the Right to an effective remedy and to a fair trial and 48 on Presumption of innocence and right of defence. Further Articles 8 on Protection of personal data, 20 on Equality before the law and 21 on Non-discrimination are equally of particular relevance for administrative procedures. This being said the scope of most, if not all, of the provisions which have just been recalled is not limited to administrative procedures.

There are also rules and/or principles contained in international agreements to which the EU is a party. The foremost example of these agreements is the Aarhus Convention,[7] which guarantees the right of everyone to receive environmental information that is held by public authorities, the right to participate in environmental decision-making, and the right to review procedures to challenge public decisions that have been made without respecting environmental law and the two aforementioned rights.
A very important number of principles applicable to EU administrative procedures has the status of 'general principles of European Union law'. General principles of EU law are principles that have been expressly qualified as such by the EU courts. Many such principles have been established by the Court of Justice on the basis of a comparative study of Member State's law, such as typically and as early as 1957, the principles applying to the withdrawal of decisions of EU institutions.[8] With the EEC treaty of 1957 an explicit recognition of the Court's method has been given to 'the general principles common to the laws of the Member States', by the provision on non-contractual liability (now Article 340 TFEU second indent) which is restated in Article 41 (3) Charter on the right to good

correction of own decisions).

[5] See e.g., to quote just a few of the most famous pieces of literature on the topic: Josef Esser, *Grundsatz Und Norm In Der Richterlichen Fortbildung Des Privatrechts* (1956); Ronald Dworkin, T*aking Rights Seriously* (1977); Robert Alexy, *Zum Begriff Des Rechtsprinzips* (1979) and *Theorie der Grundrechte* (1985).

[6] For more details see e.g. the *Working document State of Play and Future Prospects for EU Administrative Law to be submitted to the Committee on Legal Affairs by the Working Group on EU Administrative Law*, 19 OCTOBER 2011, p. 9-10, available on http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/juri_%20wdadministrativelaw_/juri_wdadministrativelaw_en.pdf.

[7] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998.

[8] Joined Cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 0039.

administration. Many principles have also been derived by the Court of Justice from 'constitutional traditions common to the Member States', as acknowledged in Article 6 (3) TEU as well as in the Preamble and Article 52 (4) Charter. Last but not least a number of general principles of EU law have been established by the Court of Justice on the basis of the ECHR, as acknowledged equally by Article 6 (3) TEU as well as in the Preamble and Article 52 (3) Charter. The differences in sources of general principles of EU law does not generate any hierarchy between such principles: the status which they acquire by being so declared by the CJEU entails that all EU institutions, as well the legislature as other institutions, bodies, offices and agencies are bound by those principles; and the same goes for the Member States in the scope of application of EU law. Any legal act based on Union law has to comply with the general principles of EU law and will, as far as possible, be interpreted in compliance with them. Where that is not possible, Union acts will be declared invalid by the CJEU in a case before it. As long as the CJEU itself does not change its jurisprudence only a revision of primary EU law might impede the further application of a general principle of EU law or change its meaning.

We would like to stress that the above concerns only 'general principles of EU law' properly so recognised by the CJEU. Not all principles of EU administrative procedural law have the status of 'general principles of EU law'. A principle that has been established in secondary law but has not been explicitly declared to be a 'general principle of EU law' by the CJEU may be overridden by the EU legislature. Furthermore while the scope of 'general principles of EU law' coincides with the scope of EU law, the scope of a principle that has been established only in secondary law is limited to the scope of the relevant piece of legislation.

Last, there are also principles and/or rules of EU administrative procedures which are established by soft law instruments, especially in codes of conduct, guidelines, communications etc. While those soft law instruments are not formally binding – contrary to secondary legislation and decisions of EU institutions, bodies, offices and agencies – they can nevertheless generate legal effects in application of the EU courts' jurisprudence on legitimate expectations.[9]

1.2. Nature of general principles of EU administrative procedural law

Next to the various functions of general principles of EU administrative law which will be commented upon in section 2 of this note, also the nature of the general principles to be listed needs to be taken into account for drafting the recitals of a regulation on administrative procedures. Given the nature of principles, the purpose of legislation consists of explaining how their sometimes competing commands are to be balanced in a way allowing to maximise the scope of each. In this context, it is not possible to establish a hierarchy ranging from the most important to the least since such hierarchy simply does not exist.

Nonetheless, the general principles which require to be listed do differ in their scope and content. Some principles are more generally formulated than others and some offer themselves more directly to creating clearly defined rights and obligations than others. The reason for this is that some of the general principles, such as for example the 'rule of law' (Article 2 TEU), the 'right to good administration' (Article 41 Charter) and the principle of 'sincere cooperation' (Article 4(3) TEU) (which are sometimes referred to as 'umbrella'

[9] See Recital (10).

principles) contain and are defined by a series of sub-principles. Each of these sub-principles are developed and referred to in the case law as specifically identifiable principles conferring rights on individuals and/or obligations on public bodies.

The purpose of this note is therefore to propose a structured approach to listing general principles that are relevant to EU administrative procedures. The list will be structured in a way to allow for the utmost transparency as to the principles informing the drafting of the regulation and enhancing the visibility of the balancing decisions which have been undertaken in drafting the specific articles of this regulation. Overall, an EU regulation on administrative procedures is a regulation of cross-policy relevance. It is a central piece of law contributing to the 'translation' of constitutional values of the Union into the complexities of everyday decision-making in implementation of EU law. The purpose of recitals of an EU regulation on administrative procedures is therefore also to remind all addressees and other readers of the constitutional background of the detailed rules which must be interpreted 'in the light' of these principles. The recitals of the EU Regulation on administrative procedures therefore refer to rules and principles which guide any administrative activity in the scope of EU law.

Since these principles are laid down in various provisions of the EU treaties and the case law of the CJEU the purpose of the recitals is not to redefine or to limit the principles referred to. Instead, the purpose of the recitals is to enhance the visibility of their implementation through procedural rules. However, great care must be exercised in the formulation of the recitals and the principles referred to therein since the same principles might have diverse sources in the Charter and the case law establishing general principles. This is especially relevant to the right to good administration.

The method applied to identify the principles but also to draft the substantive provisions of an EU regulation on administrative procedures for implementation of EU law and policies will consist of restating principles of EU law, the case-law of the CJEU, the practice of EU institutions, bodies, offices and agencies, including, where appropriate, the European Ombudsman's Code on good administrative behaviour and the 'ombudsprudence' of the European Ombudsman. This is all the more important since the conditions of implementation might considerably differ from policy area to policy area each having a distinctive mix of institutions and bodies from various levels involved in the administration of a specific matter. More generally, an EU regulation on administrative procedures will need to be designed to equally maximise the twin objectives of public law: to ensure that the instruments in question foster the effective discharge of public duties and, at the same time, and no less importantly, that the rights of individuals are protected irrespective of the fact that any rules on EU administrative procedures must be based on constitutional principles. For that reason we propose to start the recitals dedicated to general principles with a short text recalling those twin objectives.

The general principles of administrative procedural law such as they have been developed by the CJEU are not fully coherent in their wording; nor is there a full coherence between the wording of the CJEU case-law, EU secondary law and soft law instruments. Over time, different words have been used in different CJEU rulings for the same concepts; also, the translations of the relevant principles are not always consistent even within single language versions (e.g. before the adoption of the Charter, the English version of the CJEU's case law used the words 'good', 'sound', 'proper' administration or even 'good governance' etc. whereas the French version generally used the words 'bonne administration'; other language versions also differ from the French one without any specific apparent reason).
Furthermore, there appear to be different categories of principles in view of their effect:

-some principles are quite consistently interpreted to generate enforceable rights for citizens and legal persons, such as general principles governing the investigation of a matter, which concern specifically the activity of the public administration in its relationship with the citizens, e.g. transparency, duty of care, etc.;

-some principles are often not interpreted to generate enforceable rights for citizens and legal persons, such as organisational/internal principles, that are guidelines concerning the activity of the public administration but do not directly concern the relationship to the citizens, e.g. clear allocation of responsibilities, efficiency, etc.; and

-some principles may generate enforceable rights, but not systematically, such as general principles governing administrative actions, e.g. consistency, legitimate expectations, etc.

This being said there may be differences in time and according to circumstances. The following quotation of Advocate general Kokott's opinion in Solvay[10] shows very clearly how organisational principles can be directly linked to enforceable rights:

> '[…] in accordance with the principle of good administration, the Commission has an obligation to ensure the file's proper management and safe storage. Proper management of the file includes not least the production of a meaningful index to be used for the purposes of granting access to the file at a later date'.

The lack of such an index in the case at hand, where an important part of the relevant documents appear to have been lost by the Commission resulted in a violation of the rights of defence[11].

The proposed content of the recitals reflects the differences which have just been exposed.

[10] Opinion of Advocate General Kokott in *Solvay SA v European Commission*, Case C- 109/10 P delivered on 14 April 2011, [2011] ECR I-10329 para. 194.
[11] P. 205.

2. WHY FORMULATE GENERAL PRINCIPLES OF EU ADMINISTRATIVE PROCEDURAL LAW AS RECITALS OF A REGULATION?

KEY FINDINGS

- As far as general principles of EU administrative procedural law are concerned, there are two options for 'codification' in the framework of a Regulation on EU administrative procedures: first to try and formulate all relevant principles in articles of the operative part the Regulation or, second, to use the recitals of the proposed Regulation. There are a number of legal technical and expediency reasons that lead to favour the second solution.

- Trying to exhaustively codify the fundamental principles of good administration in the operative part of a regulation would be counterproductive to the objective of Article 41 Charter on the right to good administration. The objective of adding Article 41 to the Charter was to codify some of the most important principles of good administration and to give them the status of a fundamental right. The experience of the Convention of 2000 drafting the Charter further shows how difficult it is not only to make a choice between principles in order to determine which ones are fundamental (hence the word 'includes') but also how to have a wording that reflects the variety of expressions in case-law, primary and secondary law.

- On the other hand, placing the principles in the recitals has the advantage that, while not being in themselves binding, they are a demonstration of the legislature's interpretation of principles. The recitals then may contain certain redundancies which might be necessary not least for the sake of clarity in addressing a non-expert public. Last but not least, recitals are not strictly limited by the legal basis of the relevant instrument, and they are also not limited by the legal scope of the Regulation.

- An important aspect of general principles is that they serve to guide the interpretation of legal rules of all levels of the EU's legal system and fill gaps. Taking into account the very nature of recitals our proposal is mainly grounded in the idea that the recitals not only have a legal purpose (of interpreting the norms in the regulation), but should also have a 'citizen friendly' informative purpose. The principles in the recitals therefore to be presented in a way that may prompt the non-expert to read them.

2.1. Reasons in favour of recitals as a locus for general principles

The European Parliament resolution of 15 January 2013 on a Law of Administrative Procedure of the European Union includes a recommendation on the objective and the scope of the regulation to be adopted.[12] The recommendation states that '[t]he objective of the regulation should be to guarantee the right to good administration by means of an open, efficient and independent administration based on a European Law of Administrative

[12] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)), Annex, Recommendation 1.

Procedure.[…] It should codify the fundamental principles of good administration and should regulate the procedure to be followed by the Union's administration when handling individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact with the Union's administration'.

As far as general principles of EU administrative procedural law are concerned, there are two options for 'codification' in the framework of a Regulation on EU administrative procedures: first to try and formulate all relevant principles in articles of the operative part of the Regulation or, second, to use the recitals of the proposed Regulation. There are a number of legal technical and expediency reasons that lead to favour the second solution.

At any rate, Article 41 of the Charter on the right to good administration has been conceived by the Convention of 2000 only as a first attempt to codify some of the most important principles of good administration and to give them the status of a fundamental right. This is particularly evident in the wording of paragraphs 1 and 2 first indent, '1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Paragraph 2 of Article 41 of the Charter continues with the words 'this right includes'. Those three words are intended to highlight that the listing of Article 41 is not exhaustive. The term 'includes' in legal terms has to be read as 'includes among others'. Trying to exhaustively codify the fundamental principles of good administration in the operative part of a regulation would be counterproductive to that objective. In any case, a simple legislative regulation has a lower hierarchical rank than an Article of the Charter, which has the status of primary law and the regulation itself could not impede other legislative acts of the Union to depart from the principles as codified in the regulation.

The experience of the Convention of 2000 drafting the Charter further shows how difficult it is not only to make a choice between principles in order to determine which ones are fundamental (hence the word 'includes') but also how difficult it is to have a wording that reflects the variety of expressions in case-law, primary and secondary law. The Explanations to Article 41[13] are indispensable in order to understand better what is meant in the text of Article 41 itself. Not only their style but their length would not be appropriate for an exercise of plain codification of the articles itself.

Also with regard to CJEU case law, there are inherent difficulties in the codification of CJEU case law due to the nature of case-by-case development of principles. These will have to be faced for the codification of procedural rules as the core of the operative part of the regulation. Those difficulties are increased in a very important way when it comes to general principles, because when the CJEU relates to a general principle of EU law it uses very few words, and it is not always clear whether they are interchangeable: typically many of the rulings quoted in the Explanations to Article 41 Charter refer to the 'principle of good administration' and to the 'duty of care' in the same sentence.

The lack of linguistic coherence in much of the relevant case-law is a further challenge which might slow down to a great extent the exercise of codification of general principles. The process by which Commission proposals are drafted with the involvement of jurist-linguist in order to come to have 24 linguistic versions that not only correspond to each other but also are meaningful in the context of each legal language is a time-consuming process even when it comes to technical texts. It would be even more time consuming for a

[13] Explanations Relating to the Charter Of Fundamental Rights, Doc. 2007/C 303/02, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF

codification of principles that are expressed with variations in words in the EU Courts' jurisprudence which are not always coherently used over time and not always consistently translated into all language versions. With recitals, variations between linguistic versions have a lesser impact due to the fact that they are not binding law.

On the other hand, placing the principles in the recitals has the advantage that, while not being in themselves binding, they are a demonstration of the legislature's interpretation of principles. The courts are not directly bound by the relevant wording, but they may use the recitals in order to choose a specific orientation in interpretation – as demonstrated by the case law of the EU Courts – or to identify a specific concept to be a 'general principle of EU law'.

Furthermore, there are no problems if some of the recitals are redundant in legal terms, as is often needed for the sake of clarity in addressing a non-expert public. Unlike, articles of the operative part, where redundancy usually fosters problems of interpretation as soon as the wording is only slightly different.

Las but not least, recitals are not strictly limited by the legal basis of the relevant instrument, and they are also not limited by the legal scope of the Regulation. Therefore the recitals may well serve the idea which is highlighted in letters N, O and S of the Parliaments resolution of 15 January 2013 that 'taking into account the recommendations of the Group of States against corruption (GRECO) of the Council of Europe, a clear and binding set of rules for the Union's administration would be a positive signal in the fight against corruption in public administrations', that 'a core set of principles of good administration is currently widely accepted among Member States' and 'European Law of Administrative Procedure could strengthen a spontaneous convergence of national administrative law, with regard to general principles of procedure and the fundamental rights of citizens vis-à-vis the administration, and thus strengthen the process of integration'. Indeed whereas there would be very important problems in trying to extend the scope of a Regulation on EU administrative procedures to Member State's authorities, the formulation of general principles in recitals would lend itself best to a voluntary use of their definitions by courts and legislatures of Member States.

In fact, it might be argued, that the real added value of an EU regulation on administrative procedures is not the codification of general principles of EU law itself. The added value stems from establishing a body of rules which 'translates' these general principles in simply applicable rules which contain a fair balance between different competing interests each protected by general principles of law. This is the experience of the national codifications on administrative procedures (nearly all EU Member States have adopted such acts) and this is a central contribution to the clarification and simplification of EU law. For these reasons also, the Model Rules on EU Administrative Procedures established by the Research Network on EU Administrative Law (ReNEUAL)[14] follow the approach to refer to the general principles in the recitals.

2.2. Structure and wording of recitals

Which general principles of EU law need to be referred to in the recitals of an EU regulation on Administrative Procedures depends on the content of the substantive provisions of the regulation. The purpose of establishing an EU regulation on administrative procedures is to

[14] http://www.reneual.eu/

improve the quality of the EU's legal system by fostering compliance with the general principles of EU law in the reality of fragmentation between sector-specific procedures and the reality of the multi-jurisdictional nature and pluralisation of actors involved in the implementation of EU policies. Fragmentation has often resulted in a lack of transparency, predictability, intelligibility and trust in EU administrative and regulatory procedures and their outcome, especially from the point of view of citizens. A codification of administrative procedures can contribute to simplifying the legal system of the Union, enhancing legal certainty, filling gaps in the legal system and thereby ideally contributing to compliance with the rule of law. Overall, it can be expected that establishing enforceable rights of individuals in procedures that affect them, contributes to compliance with principles of due process and fosters procedural justice.

Adopting such a regulation further has the potential to contribute not only to the clarity of the legal rights and obligations of individuals and participating institutions, offices, bodies and agencies, but also to the transparency and effectiveness of the legal system as a whole. An EU Regulation on Administrative Procedures has the potential to contribute to the objectives of clarification of rights and obligations. It also contributes to simplification of EU law by ensuring that procedures can follow one single rule-book and better regulation by allowing to improve the overall legislative quality.

The recitals of an EU regulation on administrative procedures will therefore contain various principles of EU law. When identifying the principles of EU law which should be referred to in the recitals not only is it important to provide a list of principles but also to give them some order. In establishing such order, it has to be taken into account that there is neither an established 'hierarchy' of principles, nor do all general and foundational principles of EU law work in the same way. The important aspect of general principles is that they serve to guide the interpretation of legal rules of all levels of the EU's legal system and fill gaps. In that context, the reference to a general principle of EU law in the recitals serves to reiterate its importance in interpreting a legal text such as the regulation on EU administrative procedure. It also serves to clarify which principles have been balanced by the legislature in establishing specific provisions of the regulation.

However, in order to structure the approach to the reference to general principles of EU law in the recitals of the EU regulation on administrative procedure, the various principles can be grouped. Taking into account the very nature of recitals our proposal is mainly grounded in the idea that the recitals not only have a legal purpose (of interpreting the norms in the regulation), but should also have a 'citizen friendly' informative purpose. The principles in the recitals therefore need to be presented in a way that may prompt the non-expert to read them.

While the order of presentation of the general principles is not primarily grounded in legal terms, their wording on the contrary is based upon an attempt to render the essence of the content of principles visible, especially in view of the relevant jurisprudence of the CJEU.

3. PROPOSED RECITALS ON GENERAL PRINCIPLES OF EU ADMINISTRATIVE PROCEDURAL LAW

KEY FINDINGS

- The proposed recitals are not comprehensive: they are limited to the scope of clarifying the content of general principles of EU administrative procedure law, what other general principles are relevant to the implementation and interpretation of administrative procedure rules, and why those principles are important.

- Recitals (1) to (5) are intended to explain to a broader public why general principles matter. Recital (6) briefly alludes to internal principles which are very important for an open, efficient and independent administration without necessarily creating enforceable subjective rights. Recitals (7) to (22) attempt to explain what the content and meaning of those principles are. They enunciate the following principles:[15] Access to information and access to documents; Access to the file ; Duty of care; Data protection; Data quality; Effective remedy; Equal treatment and non-discrimination; Fair hearing; Fairness; Good administration; Impartiality; Legal certainty; Legality; Legitimate expectations; Participatory democracy; Proportionality; Reason giving; Rule of Law; Timeliness; Transparency.

3.1. Explanatory note

The proposed recitals are not comprehensive: they are limited to the scope of clarifying the content of general principles of EU administrative procedure law, what other general principles are relevant to the implementation and interpretation of administrative procedure rules, and why those principles are important. Other components need to be added to the recitals such as, to name one example, the legal basis of the act.

Recitals (1) to (5) are intended to explain to a broader public why those principles matter. Recitals (7) to (22) attempt to explain what the content and meaning of those principles are. Recital (6) briefly alludes to internal principles which are very important for the implementation of the principles mentioned in Article 298 (1) TFEU of an open, efficient and independent administration without necessarily creating enforceable subjective rights; contrary to the other principles those internal principles are not further developed in their enunciation in so far as they do not necessarily correspond to subjective rights. One or more specific recitals might be devoted to those principles once the articles of the operative part of the Regulation will have been drafted.

The order in which those principles are presented derives from grounds which are explained in section 1.2 of this note. The recitals include footnotes that are obviously not intended to remain in the proposal of a Regulation. Their purpose is to give the most useful references (mainly about case law) to the reader of this note.

[15] Listed in alphabetical order in the key findings, but in a different, structured order in the recitals themselves.

3.2. Proposed Recitals

Whereas:

(1) In a Union under the rule of law it is necessary to ensure that where citizens are confronted with European administration, procedural rights and obligations are always adequately defined, developed and complied with. According to the European Parliament Resolution of January 2013, an EU Regulation on Administrative Procedure should be adopted to guarantee the right to good administration by means of an open, efficient and independent European administration. Such a Regulation should define the procedures to be followed by the European administration when handling cases to which a natural or legal person is a party. This includes situations where a person has direct or personal contact with the Union's institutions, bodies, offices and agencies, as well as situations where action of Union authorities is part of a procedure which also involves Member States' authorities.

(2) A European administration which does not function properly is detrimental to the public interest. Such maladministration can be the result of an excess as well as a lack of rules and procedures. It can also result from the existence of contradictory or unclear rules and procedures.

(3) Article 298 TFEU requires a legislative regulation to establish procedures for an open, efficient and independent European administration. Properly devised administrative procedures support both an efficient administration and a proper enforcement of the right to good administration guaranteed as a general principle of EU law as well as in Article 41 of the Charter.

(4) An EU Regulation on Administrative procedures should serve to clarify rights and obligations as a default rule for all procedures under Union law. Rules and principles governing European administrative procedures which are currently established in diverse sources of law: In Treaty provisions and protocols, general principles of EU law as recognized by cases of the Court of Justice of the European Union as well as principles common to the laws of the Member States, sector-specific legislative acts of the Union, soft law (published[16] or unpublished)[17] and unilateral commitments by the Union's institutions, bodies, offices and agencies.

(5) General principles of EU law govern administrative action regardless of the possible existence of sector-specific EU law. Referring to general principles of EU law in a regulation on administrative procedures should not reformulate such principles but reaffirm the importance of those principles in interpreting the provision of this Regulation. A list of general principles highlights the fact that those principles are being

[16] The European Ombudsman has emphasized that a Regulation on the administrative procedures of the European Union would help eliminating the confusion currently arising from the parallel existence of different codes for most Union institutions and bodies, and would underline the importance of such principles both for citizens and for officials. See recital H of the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union.

[17] For example the Director-General of OLAF had issued detailed procedural instructions to his staff in the form of a Manual of Operational Procedures. In his own words: these instructions 'are not intended to have any legal force: they simply determine the practice to be followed in order to implement the applicable legal framework'. See Foreword to Manual, p.2, 1 December 2009. The manual has been replaced by 'OLAF Instructions to Staff on Investigative Procedures, which are of the same legal nature albeit they do not include the preface any more; see http://ec.europa.eu/anti_fraud/documents/about_us/instructions-to-staff-120201.pdf consulted on 10 June 2015.

implemented through the procedural rules laid down in this Regulation and illustrates which ones are balanced against each other in specific provisions of this Regulation.

(6) Although there is no established hierarchy of general principles applicable to EU administrative procedural law, not all are equal in content and scope. Some principles, such as the rule of law, good administration, or sincere cooperation are formulated in such general manner that their exact content is defined by their sub-components which, if the latter are clear, precise and unconditional also contain individual rights.

(7) The principle of the rule of law, which is part of the Union's values, as recalled in Article 2 TEU applies to administrative actions. According to that principle any action of the Union has to be based on the treaties according to the principle of conferral[18]; furthermore the rule of law requires that EU institutions, bodies, offices and agencies shall act in accordance with the law[19] and apply the rules and procedures laid down in the legislation.

(8) The principle of legality, as a corollary to the rule of law, requires that actions of European administration occur under and within the law. According to Article 52(1) sentence 1 of the Charter of Fundamental Rights 'Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms'.[20]

(9) The principle of legal certainty,[21] another corollary of the rule of law, requires EU legal rules to be clear and precise. The principle aims to ensure that situations and legal relationships governed by EU law remain foreseeable[22] in that individuals must be able to ascertain unequivocally what their rights and obligations are and be able to take steps accordingly.[23] Under the principle of legal certainty retroactive measures shall not be taken except in legally justified circumstances.[24] Further, public authorities shall act and perform their duties within a reasonable time.[25]

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[18] Case 46/87 *Hoechst v Commission* [1989] ECR 2859, summary point 3.

[19] The hierarchy of legal norms must be recognized and respected in that no act may violate higher-level Union law (Case 1/54 *France v High Authority* [1954] ECR 7, 23; Case 38/70 *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 145, para. 10.)

[20] Case C-355/10, *European Parliament v Council* [2012], ECR I- published in the electronic Reports of Cases para77: 'Second, it is important to point out that provisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required'.

[21] Case C-55/91 *Italy v Commission* [1993] ECR I-4813, para. 66; Joined Cases T-55/93 and T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos v Commission* [1996] ECR II-247, paras. 76, 116, 119; Case 43/75 *Defrenne v SABENA* [1976] ECR 455, paras. 69 ff.; Case C-143/93 *Gebroeders van Es Douane Agenten vs Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para. 27; Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others v Germany* [1983] ECR 2633.

[22] Case C-199/03 *Ireland v Commission* [2005] ECR I-8027, para. 69. See also Case C-29/08 *SKF* [2009] ECR I-10413, para. 77.

[23] See e.g. Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 25 with further references.

[24] See Case T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261, para. 98, where the Court stated that 'provisions of Community law have no retroactive effect unless, exceptionally, it clearly follows from their terms or general scheme that such was the intention of the legislature, that the purpose to be achieved so demands and that the legitimate expectations of those concerned are duly respected'.

[25] Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, para. 140.

(10) The principle of protection of legitimate expectations has been recognised since the very early case law of the CJEU as sub-principle of the rule of law.[26] Actions of public bodies shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest. Legitimate expectations shall be duly taken into account where an administrative decision is cancelled or revoked.

(11) The principle of proportionality is a criterion for the legality of any act of Union law. Next to legislative action as provided for in Protocol n° 2 on the application of the principles of subsidiarity and proportionality, the principle of proportionality is applicable as criteria of legality of acts of European administration as results from Articles 52(1) of the Charter of Fundamental Rights of the European Union and Article 5(4) TEU.[27] The Court of Justice of the European Union has interpreted the principle of proportionality to require that any measure of the European administration be based on law; to be appropriate and necessary for meeting the objectives legitimately pursued by the act in question; where there is a choice among several appropriate measures, the least onerous measure must be used; and the charges imposed must not be disproportionate to the aims pursued.[28]

(12) The right to an effective remedy[29] which is enshrined in Article 47 of the Charter,[30] in Articles 6 and 13 European Convention of Human Rights and recognised as a general principle of EU law is a key component to a legal system under the rule of law. According to this principle, neither the EU nor Member States can render virtually impossible or excessively difficult the exercise of rights[31] conferred by EU law, are obliged to guarantee real and effective judicial protection[32] and are barred from applying any rule or applying any procedure which might prevent, even temporarily, EU rules from having full force and effect.[33]

(13) The principle of good administration which is also enshrined in Article 41 of the Charter synthetizing some of the case law of the Court of Justice in this field[34] is of

[26] See Case 111/63 *Lemmerz-Werke v High Authority of the ECSC* [1965] ECR 677, where the concept of protection of legitimate expectations was first explicitly enunciated. See also Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] ECR 39, 55; Cases 42 and 49/59 *S.N.U.P.A.T. v High Authority* [1961] ECR 53; Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken v ECSC High Authority* [1962] ECR 253.

[27] Article 5(4) TEU 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties […]'.

[28] See e.g. Case C-265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR I-2237 para 21. See also e.g. Case C 343/09 *Afton Chemical v Secretary of State for Transport* [2010] ECR I 7027, para 45, and Joined Cases C 581/10 and C 629/10 *Nelson and Others v Deutsche Lufthansa AG* (C-581/10) and T*UI Travel and Others v Civil Aviation Authority* (C-629/10) [2012] published in the electronic Reports of Cases, para 71.

[29] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 9; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 19.

[30] Article 47 Charter: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

[31] See e.g. Case C 128/93 *Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I 4583, para. 37; Case C-261/95 *Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, para 27; C-453/99 *Courage and Crehan v Courage Ltd and Others* [2001] ECR I-6297, para 29; Case C 78/98 Preston and Others [2000] ECR I 3201, para. 39; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, para. 57; Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051, paras 17, 18; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, para. 95; Joined Cases C-231/06 to C-233/06 J*onkman and Others* [2007] ECR I-5149, para. 28.

[32] Case 14/83 *von Colson* [1984] ECR 1891, para 23.

[33] Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20.

[34] The CJEU has referred to good administration principles since the very early case-law: Joined Cases 7/56, 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] ECR 0039; Case 32/62 *Alvis* [1963] ECR 49, para 1A; Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Case 64/82 *Tradax v Commission* [1984] ECR 1359; see the Explanations Relating to the Charter Of Fundamental Rights, Doc. 2007/C

particular relevance to administrative procedures. According to the Charter the right to good administration requires that decisions be taken pursuant to procedures which guarantee fairness, impartiality and timeliness. Good administration includes the right to be given reasons and the possibility of claiming damages against public authorities who have caused harm in the exercise of their functions. Good administration also requires the protection of the rights of defence and of language rights.[35] In addition, good administration extends to information rights which include privacy and business secrets as well as access to information. Principles of good administration can be understood to further contain the following elements:

(14) The duty of care includes the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time[36]. It obliges the administration to carefully establish and review all the relevant factual and legal elements of a case taking into account not only the administration's interests but also all other relevant interests, prior to making decisions or taking other steps.[37] Impartiality requires the absence both of arbitrary action and of unjustified preferential treatment including personal interest.[38]

(15) Timeliness, which pertains to the principle of fairness, means that decisions have to be taken within a reasonable time[39] since slow administration is bad administration[40] and might be in violation of the concept of legal certainty.

(16) The right to a fair hearing must be observed in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person.[41] That principle (*audi alteram partem* or *audiatur altera pars*) is addressed in Article 41(2)(a) and (b) Charter;[42] it cannot be excluded or restricted by any legislative provision.[43] The right to a fair hearing requires that the party concerned must receive an exact and complete statement of the claims or objections raised and must also be given the opportunity to make its views known on the truth and relevance of the facts and on the documents used.[44]

303/02, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri =OJ:C:2007:303:0017:0035:en:PDF

[35] See Article 24 fourth subparagraph TFEU: 'Every citizen of the Union may write to any of the institutions or bodies... in one of the [official] languages... and have an answer in the same language'. Article 41 (4) Charter:'Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language'. See also EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, Official Journal 017, 06/10/1958 P. 0385 – 0386.

[36] Charter, Article 41(1).

[37] See to that respect, AG van Gerven in Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen –Freihafen* [1991] ECR I-5163; Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, para. 14.

[38] Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, para. 40; Case T-305/94 *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, paras. 317ff.

[39] Article 24 fourth subparagraph TFEU ; Article 20(2)(d) TFEU ; Article 41 (1) Charter.

[40] AG Jacobs in C-270/99 P *Z v Parliament* [2001] ECR I-9197, para. 40 with reference to Art. 41 of the Charter and claiming that this was 'a generally recognised principle.'

[41] Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para. 325.

[42] Article 41(2)(a) Charter: The right to good administration includes: 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;' ; Article 11(1) 'The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action' and (3) TEU 'The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.'

[43] Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, para. 60; case C-135/92 *Fiskano v. Commission* [1994] ECR I-2885, para. 39.

[44] See, e.g., Case 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1835, para. 10; Case 121/76 *Moli v Commission* [1977] ECR 1971, para. 19; Case 322/81 *Michelin v Commission* [1983] ECR 3461,

(17) The right of access to the file is essential in order to enjoy the right to a fair hearing. The right of access to the file is the right to get full information on matters which may affect a person's position in an administrative procedure, especially where sanctions may be involved.[45] It includes the right to get the administration's response to complaints or representations,[46] as well as to receive notice of the outcome of procedures and of decisions made,[47] including information related to the rights of appeal.[48]

(18) The duty to give reasons for decisions arises from Article 296(2) TFEU and is recognised as a right under Article 41(2)c) of the Charter of Fundamental Rights of the European Union as well as being an essential component of the right to an effective remedy recognised in Article 47 of the Charter of Fundamental Rights of the European Union. The obligation to give reasons comprises an indication of the legal basis of the act, the general situation which led to its adoption and the general objectives which it intended to achieve;[49] the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the authority which adopted the measure in such a way as enable the persons concerned to decide if they want to defend their rights by an application for judicial review.[50]

(19) The principles of transparency and of participatory democracy[51] are applicable also to situations where the proceedings lead to the adoption of an act of general application

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para. 7; Case C-328/05 *SGL Carbon v Commission* [2007] ECR I-3921, para. 71. In Joined Cases C-402/05 P and Case C-415/05 P *Kadi v Council and Commission* [2008] ECR I-6351, paras. 338-352, the Court held that overriding considerations of safety or the conduct of international relations might justify that certain matters may not be communicated to the persons concerned, but do not allow for evidence used against them to justify restrictive measures or for them not to be afforded the right to be informed of such evidence within a reasonable period after those measures were taken.

[45] Case 270/82 *Estel v Commission* [1984] ECR 1195, paras. 13ff.; Case 64/82 *Tradax v Commission* [1984] ECR 1359, paras. 21f.; Case C-34/89 *Italy v Commission* [1990] ECR I-3603, paras. 14f.; Case T-100/92 *La Pietra v Commission* [1994], ECR (civil service) I-A-83, II-275, paras. 43ff.; Case C-54/95 *Germany v Commission* [1999] ECR I-35, para. 118.

[46] Case 179/82 *Lucchini Siderurgica v Commission* [1983] ECR 3083, para. 27; Cases 96-102 and 104-106 and 110/82 *NV IAZ International Belgium v Commission* [1983] ECR 3369, paras. 12ff.

[47] Case 120/73 *Lorenz v Germany* [1973] ECR 1471, para. 5; Case 121/73 *Markmann v Germany* [1973] ECR 1495, para. 5; Case 122/73 *Nordsee v Germany* [1973] ECR 1511, para. 5; Case 141/73 *Lohrey v Germany* [1973] ECR 1527, para. 5; see also Ralf Bauer, *Das Recht auf eine gute Verwaltung im Europäischen Gemeinschaftsrecht* (Frankfurt/Main: Peter Lang, 2002) 64.

[48] Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, para. 27. See also Commission 'Code of Good administrative behaviour', Point 3, third indent: 'Where Community law so provides, measures notified to an interested party should clearly state that an appeal is possible and describe how to submit it, (the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it).Where appropriate, decisions should refer to the possibility of starting judicial proceedings and/ or of lodging a complaint with the European Ombudsman in accordance with Article 230 or 195 of the Treaty establishing the European Community.' European Ombudsman 'Code of Good administrative behaviour', Article 19 - indication of the possibilities of appeal: 'A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the European Ombudsman under the conditions specified in, respectively, Articles [263] and Articles [228 TFEU].'

[49] Case 5/67 *Beus GmbH v Hauptzollamt München* [1968] ECR 83, 95 (English Special Edition 83); See also Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para. 510; Case T-70/99 *Alpharma v Council* [2002] ECR II-3495, para. 394; Case C-304/01 *Spain v Commission* [2004] ECR I-7655, para. 51; Case C-184/02 *Spain and Finland v European Parliament and Council* [2004] ECR I-7789, para. 79; Case C-342/03 *Spain v Council* [2005] ECR 1975, para. 55.

[50] Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, paras. 14, 26.

[51] Article 10(3) TEU: 'Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.' Articles 11(1) and (3) TEU require Union institutions to hear views and opinions on EU measures and especially enter into consultation procedures.

including decisions with general applicability. In order to ensure that such hearing can effectively take place, active information of the public and structured means of feedback and response should be created.

(20) The right of access to documents[52] under Article 15 (3) TFEU[53] and Article 42 of the Charter[54] is a fundamental right of EU law and also a basic condition of an open, efficient and independent European administration. Any limitation of this principle must be narrowly construed to comply with the criteria of Article 52(1) of the Charter of Fundamental Rights of the European Union and must therefore be based on law, must respect the essence of the right and follow the criteria of proportionality.

(21) The right to protection of personal data which is embedded in Article 16(1) TEU and in Article 8 of the Charter[55] implies that beyond the need to respect all general rules on data protection,[56] special attention needs to be dedicated to data protection aspects of complex and intertwined administrative procedures involving as well EU institutions, bodies, offices and agencies as member States' authorities, which are related to inter-administrative information exchange and databases.[57] An essential point of reference is therefore the principle of transparent information management, which includes duties to record data processing activities.[58] This duty supports data protection and also fosters inter-administrative accountability and interaction with regard to collaborative information gathering. According to the principle of data quality, data used by the EU Administration shall be accurate, up-to-date and lawfully recorded. The data supplying authority shall be responsible for ensuring that the data are accurate, up-to-date and lawfully recorded.

(22) In the interpretation of this regulation, regard should be had especially to equal treatment and non-discrimination, which apply to administrative actions as a prominent corollary to the rule of law and the principles of an efficient and independent European administration.

[52] See Regulation No 1049/2001.

[53] Article 15(3) TFEU: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.... Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph....'; Charter, Article 42: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.'

[54] Article 42 Charter: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.'

[55] Article 16(1) TEU: 'Everyone has the right to the protection of personal data concerning them.' ; Charter, Article 8 *Protection of personal data*.

[56] Regulation (EC) no 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[57] Given that many administrative procedures are inextricably linked to IT systems (e.g. EU PILOT for infringements, CHAP for COM communication with complainants, ARES for COM document management, GEDA and EPADES for EP document management, etc.),

[58] See European Ombudsman 'European Code of Good administrative behaviour', Article 24 - *Keeping of adequate records:* 'The Institution's departments shall keep adequate records of their incoming and outgoing mail, of the documents they receive, and of the measures they take.'

4. TABLE OF GENERAL PRINCIPLES ENUNCIATED IN THE RECITALS

This table is intended to allow the readers to find in which of the recitals they can find an attempt to enunciate – rather than to codify (see section 2) the general principles of EU administrative law.

Principle	Recital (s)
Access to information and access to documents	20
Access to the file	17
Care (duty of)	14
Data protection	21
Data quality	21
Effective remedy	12
Equal treatment and non-discrimination	22
Fair hearing	16
Fairness	14
Good administration	13 to 18
Impartiality	14
Legal certainty	9
Legality	8
Legitimate expectations	10
Participatory democracy	19
Proportionality	11
Reason giving	18
Rule of Law	7
Timeliness	5
Transparency	19

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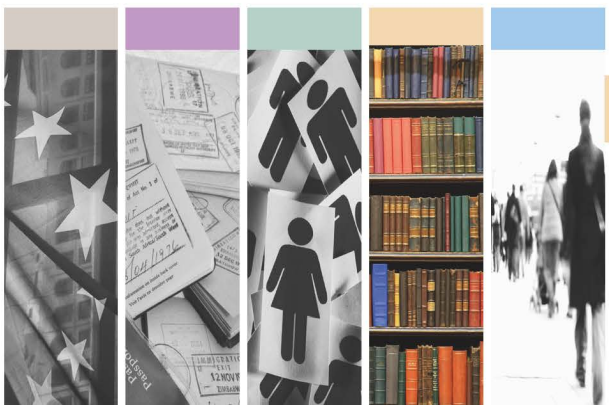

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HARMONISATION OF CRIMINAL LAW IN THE EU LEGISLATION – THE CURRENT STATUS AND THE IMPACT OF THE TREATY OF LISBON

INTRODUCTION

A significant element in the field of the European Union [EU] member states judicial cooperation constitutes the approximation (harmonisation) of their penal laws. This issue is one of the most important aspects of cooperation between the Member States. Since almost thirty years Europe has tried to improve its common activities with regard to cooperation in criminal matters by, *inter alia*, the harmonisation of penal laws.

The aim of this essay is to present the development and current state of the judicial cooperation in criminal matters within the EU. Therefore, it is necessary to present the subject in chronological order.

The essay is divided into three parts.

Part one is devoted to the short presentation of the background and history of the cooperation between the Member States in this area. As the development of the substantive European criminal law can be divided into two subsequent phases, the main content of the essay covers two parts. The first phase lasted till the entering into force of the Treaty of Lisbon and was based, generally, on the article 31 of the Treaty on the European Union [TEU]. Its procedural and material aspects are the subject of the second part of this essay. Finally, the third part presents the changes in this area and its legal consequences introduced by the Treaty of Lisbon.

I. HISTORICAL BACKGROUND

The cooperation in criminal matters between the Member States had its beginning in 1975. Then, during the meeting of European Council, an informal group – TREVI (Terrorism, Radicalism, Extremism, Violence International) was established. TREVI was the forum of the operational cooperation between ministries of justice and internal affairs of the Member States. It functioned till the entering into force of TEU. The next step to improve the cooperation has constituted the Schengen Treaty of 14 June 1985, executed through Schengen Convention of 19 June 1990. It is crucial to remember that did not only eradicate the border

control between The Member States but also provided for the deepening of the cooperation in the area of the fight against criminal behaviours as well as the broadening of the operational cooperation.

Clearly, the cooperation of European states in the area of penal law goes further than the EU; however it was the Maastricht Treaty which for the first time regulated the questions of justice system and internal affairs. Since its adoption, the Union was based on, so called, three pillars – the third one was devoted to police and judicial cooperation in criminal matters.

One of the principal goals of the EU is the creation and realization of the "space of freedom, security and justice", with the crucial role of Council and Commission (Article 3(2), Article 11 TEU). The European Judicial Area constitutes an element of the "space of freedom, security and justice" and covers the cooperation in both criminal and civil matters. The Title VI of the TEU established the cooperation in criminal matters as a subject of the intergovernmental cooperation. The common framework included the police and judicial cooperation in criminal matters and the prevention and combat against racism and xenophobia (Article 29 TEU).

The judicial cooperation intended to facilitate and accelerate the cooperation between competent ministries and judicial or equivalent authorities of the Member States with regard to judicial proceedings and the enforcement of judicial decisions. It also aimed in the facilitation of extradition between the Member States, the approximation of the criminal norms of the Member States, the prevention of the jurisdictional conflicts and, finally, the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields defined by the TEU (Article 31 TEU).

Under the Maastricht Treaty three different instruments could be adopted in the third pillar: common positions, common activities and conventions. The conventions, as treaties governed by public international law had appeared to be ineffective, as they were not ratified by all Member States. Furthermore, the ratification procedure was protracted[1]. Also, the other instruments of the third pillar appeared to be insufficient. The closer contacts between the Member States required the introduction of the more effective instruments. In the search for the adequate solutions, the Amsterdam Treaty (which entered into force on 1 May 1999) introduced a framework decision as a specific instrument of the third pillar.

Furthermore, during the European Council in Tampere in 1999 five-year program of actions was adopted. Its major aims were: to guarantee the freedom of movement of persons,

[1] K. Karsznicki, *Traktat Lizboński – nowa szansa na usprawnienie współpracy w obszarze wymiaru sprawiedliwości, „*Prokuratura i Prawo" (2009), No. 11-12.

to establish the security for the EU citizens, to facilitate the access to the justice system and the mutual recognition of judicial decisions and their effective implementation on the territory of the EU Member States. Despite these challenging goals, again it proved to be complicated to create effective framework of cooperation[2].

Subsequent five-year program of action (the Hague program) of 2005 aimed also in the strengthening of the cooperation between the Member States. The closer cooperation was considered as a device for the assurance of fundamental rights and the minimal procedural guarantees as well as the access to justice; the fight against transnational organized crime and the prevention of terrorist threats; the continuation of the mutual recognition of judicial decisions in civil and criminal matters. Unfortunately, also this initiative did not introduce any considerable institutional changes that could positively affect the effectiveness of the Member States cooperation.

Before the Lisbon reform, under Article 34 TEU, to achieve the aims of the Union, the Council could utilize certain measures. The Council could adopt common positions, framework decisions to approximate the legal regulations in the Member States, decisions to achieve the other goals and conventions recommended to be adopted by the Member States. However, also these solutions provided evidence to be inadequate for the approximation of the Member States' legal systems. Therefore, the next step has been undertaken with the adoption of the Lisbon Treaty.

II. CRIMINAL MATTERS IN THE TREATY ON THE EUROPEAN UNION

1. Legislative possibilities (concerning harmonisation of the substantial criminal law) in TEU.

Decision procedure in the EU shall be effective and simultaneously shall be subjected to a democratic control. By presenting the legal heritage and legislative possibilities of the EU in criminal matters before adopting the Treaty of Lisbon it is important to mention the division of the European law for three pillars existing since adopting the Treaty of Maastricht. What was the consequence of this division was a different legislative procedure in each of pillar. In the first pillar dominated so called community method. With deference to the principle of subsidiarity, this method were due to the logic of integration and cooperation between institutions and organs of the EU and had the following features: The European

[2] A. Grzelak, *The European Union on the way towards the Area of Freedom, Security and Justice*, Centrum Europejskie Natolin, Warszawa 2009, p. 15.

Commision had a monopoly of the right of initiative, with some exceptions the European Council voted by the qualified majority. The European Parliament had an active role and the European Court of Justice [the ECJ] was responsible for the uniformity of the interpretation of the community law. The first pillar connected the whole common policy (e. g. common agricultural policy, monetary policy, transport, common trade). Consequently, in the first pillar the institutions of the EU had the biggest possibilities. As a rule, decisions in the first pillar were undertaken by the qualified majority voting in the European Council, after the proposal of the Commission, and the acceptance of the European Parliament. As a result, legal instruments adopted in the first pillar were the effect of the activity of three actors – the Commission, the Council and the European Parliament.

The community method was different from the rules of the activity of the institution in the other two pillars, which was based on the intergovernmental cooperation. The second and the third pillar contain the matters, that were not yet "communized". The main purpose of the cooperation in the police and criminal matters were to guarantee the citizens of the EU the high level of protection, so the activity undertaken within its limits shall strengthen fast and effective cooperation of police and judicial authorities. The main role was played by the European Council conferring in these matters usually in the composition of ministers of justice and/or internal security. The justification of the intergovernmental method resulted from the fact, that the Member States were not ready for more advanced mechanisms of cooperation. It cannot be forgotten, that the area of judicial and police cooperation in criminal matters is not an exclusive EU competence.

In the intergovernmental method in the third pillar it can be observed a few characteristic elements: the European Commission has a right of initiative, which is divided with the Member States, the Council decides usually unanimously, the European Parliament has a consultative role, and a role of the ECJ is explicitly limited. Moreover, pursuant to article 42 TEU the Council could unanimously decide (after the opinion of the Commission or a member state), that activities undertaken in the judicial cooperation in criminal matters should be subjected to the Title IV of the Treaty establishing the European Community [TEC]. That meant that the rules governing the first pillar should apply to these matters. In comparison to the first pillar, article 39 TEU considerably limited the role of the European Parliament in the third pillar to the role of the opinion-giver[3]. The Council could have ignored the opinion the European Parliament, because it was not binding for the Council. As the

[3] Maria Fletcher, Robin Lööf, Bill Gilmore, William C. Gilmore *EU criminal law and justice*, p. 177, Edward Elgar Publishing, 2008, p. 235.

institutional reforms developed, the role of the unanimity decreased and the role of qualified majority voting increased, that was expected to make the common policy more effective. However, in the first pillar unanimity was still the dominating form of legislation.

Pursuant to article 34 TEU in the area of judicial and police cooperation in criminal matters the EU has following possibilities of activity: (1) common positions, (2) framework decisions for the purpose of approximation of the laws and regulations of the Member States and (3) decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. We will consider only framework decisions, introduced in the Treaty of Amsterdam, being the only instrument of approximation of the laws concerning criminal matters.

Framework decisions as a new instrument within the limits of the third pillar were introduced by the Treaty of Amsterdam. After this reform there were doubts whether framework decisions are international treaties, which would confirm the international aspect of the cooperation or they act of supranational law. There is no clear answer in TEU. On the margin of its problem we can underline, that framework decisions are destined only to the Member States, and its effectiveness is a result of the rules of international law and provisions of states' constitutions. They are similar to the directives in the first pillar but they do not have a direct effect[4]. Framework decisions are limited to the judicial and police cooperation in criminal matters. They replaced common activity in the area of judicial and police cooperation in criminal matters.

The main role in the coordination of the activity of the Member States were played by the Council. The Member States and the Commission had in the third pillar the equal right of initiative. Decisions were undertaken unanimously. Framework decisions could have been adopted in the purpose particularly indicated in the TEU: approximation of the laws and regulations of the Member States. The general legal basis for adopting framework decisions were article 34 paragraph 2 letter b) TEU. Nevertheless, it was not the sole basis, since, there was necessary to indicate – depending on the area of regulation – the particular provision of the Title VI TEU as well (other than article 34 TEU). These instruments were binding for the Member States only as to the result to be achieved, but national authorities were left to the choice of form and methods.

What is particularly important for the effective applying of framework decisions, it is their implementation. After adopting a framework decision the Member States were obliged

[4] Feliks Prusak, *Zakres związania polskiego prawa karnego konwencją Unii Europejskiej w zakresie ochrony interesów finansowych Wspólnot Europejskich,* Prokuratura i Prawo 2009, nr 6, p. 9.

to undertake particular activity in the indicated term. The result pointed out by a framework decision had to be achieved in the specified term. However, there was no the method of execute the obligation of introducing provisions of a framework decision to a state's legal system in a specified term (as e. g. in the article 226 TEC). The Member states were free how to divide competences of their institutions by implementing a framework decision, and simultaneously states had to adopt the measures, which were not peremptory norms[5]. Freedom of choice of forms and methods of implementing decisions allowed to take into account the specific of criminal regulations in the sensitive area of cooperation in criminal matters. By adopting framework decisions the Member States were obliged mainly to approximate and to implement provisions concerning definition of criminal offences and sanctions. National regulations has a purpose to assure harmonised method of combating certain phenomena. The disadvantages of the framework decisions stem out from the obligation to taking into account the legal systems of different states, hence their regulations are frequently too general. Too general wording of framework decisions limits its planned effect: the harmonisation of law. Implementation of the rules in the particular legal systems was the role of the Member States. The governments were responsible for the correct transposition. The lack of it, deficient transposition or its delay was treated as an infringement of the obligations undertaken by accessing to the Union. However, the competence of the ECJ in this matter were limited, what is considered below.

According to the TEU, the Council had to consult the European Parliament before adopting any measure concerning criminal law. The European Parliament shall deliver its opinion within a time-limit which the Council may lay down, which shall not be less than three months. In the absence of an opinion within that time-limit, the Council may act alone. As a result, that the Council was independent in the adopting of decisions. An opinion of the European Parliament was not binding, but had a political importance. Forbearance of consulting the European Parliament or adopting a decision before the European Parliament had delivered an opinion was infringement of the procedure and could have been a basis for bringing an action pursuant to article 35 paragraph 6 TUE. To avoid total independence of the Council, the office of President and the European Commission had to inform the European Parliament of the working in this matter. What is more, the European Parliament was entitled to ask the questions or to present recommendations to the Council, and once a year it was held a debate about the progress in the judicial and police cooperation in criminal matters.

[5] Anna Grzelak *Trzeci filar Unii Europejskiej*, Wydawnictwo Sejmowe, Warszawa 2008, p. 118.

It is impossible to present the former "third pillar" without mentioning the judgment of the ECJ in the case C-176/03[6], which makes apparent the division of competences in criminal matters between the first and the third pillar. Up to this judgment the ECJ stated, that criminal law is – generally speaking – the competence of the Member States under the third pillar, while the European Community [EC] does not have a competence to regulate criminal substantial law and criminal procedure[7]. In this case the Commission, supported by the European Parliament, requested to annulled Framework Decision 2003/80/JAI of the Council from 27 January 2003 on the protection of the environment through criminal law. According to the Commission, the Council had applied erroneous legal basis (article 29 TUE and following ones) for imposing the obligation of implement the rules of criminal nature on the Member States. The Commission stated that right legal basis should have been article 175 TEC, because pursuant to the article 251 TEC decisions concerning environmental policy should have been undertaken in the codecision procedure (this area was the part of the first pillar). After analysing the first 7 articles of the decision, because of its substance and aim (environmental policy), the ECJ annulled the decision. This judgment had the crucial importance for division of competences between two pillars. What results from this judgment is that the Community was competent to establish criminal rules necessary to increase the level of the effectiveness of the common policy, while the rules of criminal law prepared to strengthen cooperation in criminal matters are subjected to the Title VI of the TEU (the third pillar). The choice of the legal basis determines the form and the procedure in which the act shall be prepared and adopted[8]. We shall remember, that criminal law as such was not a part of the competences of the Community and any acts of the Community in this matter had to have a particular legal basis. The jugdment of the ECJ did not grant the Community the general competence in the area of criminal law, but stated, that approximation of states' legal systems in the area of criminal law when it concerns the crimes infringing common policies should have been subjected to the procedures proper for the particular policy[9].

Referring to the control over the framework decisions, the competence of the ECJ shall be underlined. The ECJ could control the legality and interpret framework decisions. The jurisdiction of the Tribunal was facultative, depending on the consent of the particular Member States (article 35 TEU). Pursuant to article 35 paragraph 3 letters a), b) a member

[6] Case C-176/03, *Commission v Council*, judgment of September 13, 2005.
[7] Case 203/80, *Casati* [1981] E.C.R. 2595, Case 186/87, *Cowan* [1989] E.C.R. 195, Case C-226/97 *Lemmens* [1998].
[8] Simon White *Harmonisation of criminal law under the first pillar*, European Law Review 2006, 31(1), 81-92.
[9] Anna Grzelak *Trzeci filar* .. p. 60.

state, by a declaration made at the time of signature of the Treaty of Amsterdam or at anytime thereafter, could have accepted the jurisdiction of the Court of Justice to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them. The facultative jurisdiction of the ECJ suggests an approximation of the role of the ECJ to international courts, what underlines the international character of legal instruments adopted in the third pillar.

The ECJ was also competent to control the legality of framework decisions, (article 35 paragraph 6 TEU)[10]. The subjects legitimated to brought action were the Commission or a member state. TEU did not regulated the legal effects of proclaiming decisions null and void. It shall be underlined, that article 35 paragraph 6 TEU did not obligated the ECJ to declare the act null. Moreover, the ECJ ruled on any dispute between the Member States regarding the interpretation or the application of framework decisions, unless the Council settled the dispute within six months of its being referred to the Council by one of its member.

In the latest case-law the ECJ confirmed its position in the third pillar and appliance of its heritage to some instruments of the third pillar[11] (e. g. the necessity of respecting the Community competence, which stemmed out from the abovementioned case C-176/03). Referring to the right of control pursuant to article 35 TEU, the ECJ treated this procedure as an equivalent of the procedure based on article 234 TEC (with deference to the limitations of article 35 TEU). What is more, the ECJ underlined, that European friendly interpretation of legal acts of the EC applies to framework decisions as well.

2. Current status of harmonisation

Under the TEU there were adopted a number of legal acts directed in the harmonisation of penal laws with regard to certain areas considered crucial in the fight against organized crime.

Accordingly, the main legal instruments to approximate the national substantive criminal law were framework decisions. Nonetheless, one should remember that although the Treaties of Maastricht and Amsterdam gave the impression that approximation was a new concept, the idea to approximate or harmonize the criminal legislation had already been incorporated in

[10] Jan Barcz, *Obecny reżim prawny w Tytule IV TWE. Znaczenie klauzuli kładki zawartej w art.67 ust. 2 TWE [w:] Jurysdykcja Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w dziedzinie wiz, azylu, imigracji i innych polityk związanych ze swobodnym przepływem osób (Tytuł IV TWE),* Warszawa 2007.
[11] Case C-105/03 Pupino [2005].

earlier legal instruments of the UE. Some of them – conventions, joint actions and others are mentioned below.

As has been already stated above, Article 29 TEU provided that the 'area of freedom, security and justice' shall be achieved through closer police cooperation, judicial cooperation and, where necessary, through approximation of rules on criminal matters in the Member States, the latter in accordance with Article 31 paragraph 1 letter e) TEU. According to it, approximation shall be achieved by progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking. However, despite that strict regulation contained in Article 31 paragraph 1 letter e) TUE, apart from crimes in relation to terrorism and illicit drug trafficking, a wide range of offences such as racism/xenophobia, high-tech crime, trafficking in human beings, financial crime, tax fraud, sexual exploitation of children, environmental crime and even unauthorized entry, transit and residence are the subject of the harmonisation efforts in the EU. One should note that such an activity was neither in line with TEU provisions nor with the EU policy documents. In literature it was assessed that the Justice and Home Affairs Council (JHA Council) and the Commission seemed to deliberately disregard the essentially limited mandate that the TEU had given them – that is to adopt measures establishing minimum rules relating to substantive criminal law in only a limited number of subject areas.

The scope and size of this article does not allow to describe all of the framework decisions (and other legal instruments) dealing with the approximation of substantive criminal law, even with regard to binding legal instruments. What is more, there was a great number of non-binding documents – resolutions of the EC/EU institutions, programs of action, declarations etc. One must have them in mind although they are not the subject of this article. It should be also underlined that the binding legal instruments cover, in general terms, the broad-spectrum area of fight against organized crime. Therefore, in addition to the specific regulations, some legal documents relating to this general category were adopted. It is sufficient to mention the Framework Decision of 24 October 2008 on the fight against organized crime[12] that deals with the offences relating to participation in a criminal organization and provides for minimum criminal sanctions as well as the liability of legal persons. It should be added that

[12] 2008/841/JHA, OJ L 300/42 of 11 November 2008 (it repealed previous Joint Action 98/733/JHA).

the EU has also approved the United Nations Convention against transnational organized crime (Palermo Convention)[13].

A. Crimes against financial interests of the EU

One of the first areas in which common activities with regard to approximation of penal laws were undertaken has been the combat against fraud and other illegal acts affecting the financial interests of EC. It was rather clear – the realization of the idea of common market had also their negative implication that is also the criminal behaviours "went beyond the borders".

Under Article 280 of TEC the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures which shall act as a deterrent and be such as to afford effective protection in the Member States. As the framework decision were introduced by the Amsterdam Treaty, the Member States signed the Convention of 26 July 1995 on the protection of the European Communities' financial interests[14] and two additional protocols[15] which provide for measures aimed in particular at aligning national criminal laws. More specifically, they address corruption and other financial or economic crimes as well as related conduct, insofar as the conduct involved affects the interests of the EU itself. The Convention deals with a list of conduct designated as "fraud affecting the European Communities' financial interests". The first Protocol deals with active and passive corruption (bribery and similar conduct, in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of public duty), the second with money laundering and the confiscation of the proceeds of fraud and corruption as set out in the previous instruments. Other important legal instruments adopted in this area include: Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro[16], Framework Decision of 28 May 2001 on combating fraud and

[13] See: Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organized Crime, 2004/579/EC, OJ L 261/69 of 6 August 2004.
[14] Council Act of 26 July 1995 drawing up the Convention on the protection of the financial interests of the European Communities, OJ C 316 of 27 November 1995 (entered into force on 17 October 2002).
[15] See: Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, OJ C 313 of 23 October 1996; Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19 July 1997.
[16] 2000/383/JHA, OJ L 140 of 14 June 2000. See also: Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329/3 of 14 December 2001.

counterfeiting of non-cash means of payment[17] and Convention against corruption involving officials[18]. Generally speaking, all these abovementioned legal acts define specific behaviors that shall be considered criminal offences as well as introduce minimal criminal sanctions.

The abuses against the financial interests of the Union have also been the subject of the case law of the Court of Justice. In its judgment of 8 July 1999 in the case *Criminal Proceedings against Maria Amélia Nunes and Evangelina de Matos*[19], the Court stated that Article 10 TEC requires the Member States to take all effective measures to sanction conduct which affects the financial interests of the Community. Such measures may include criminal penalties even where the Community legislation only provides for civil sanctions (as was clearly established in Article 280 TEC). The sanctions provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.

Protection of the EU financial interest constitutes important area of cooperation between the Member States. Therefore, different proposal relating to its strengthening has appeared. Worth mentioning is the proposal of *Corpus Iuris*. It is considered as a common, unified system of criminal law rules – both material and procedural – for dealing with fraud against the EC/EU that aims in unification of certain aspects of criminal law by defining a series of specific common offences, followed by provisions determining the general principles governing them in substantive law terms and the centralisation of prosecutions by means of a European Public Prosecutor. The essence of the proposal therefore contains elements of both substantive and procedural legal unification. It provides for establishment of specifically European criminal offences – "eurocrimes" affecting the financial interests of the EU in relation to a single geographical jurisdiction comprising the territory of all EU Member States.

B. Terrorist crimes

Another crucial area of common actions within EU relates to terrorism and terrorist crimes. There were a number of legal acts dealing with them, both non-binding and binding. The most important one is the Framework Decision of 13 June 2002 on combating

[17] 2001/413/JHA, OJ L 149 of 2 June 2001.
[18] See: Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25 June 1997.
[19] C-186/98 (reference for a preliminary ruling from the Tribunal de Círculo do Porto): *criminal proceedings against Maria Amélia Nunes, Evangelina de Matos*, 1999/C 333/16.

terrorism[20]. It gives the definition of a terrorist crime, terrorist-linked offence as well as it provides for the responsibility of legal persons. One should also mention the Framework Decision of 24 February 2005 on attacks against information systems[21]. Also it does not specifically deals with terrorism it relates to the area that potentially may be utilized by terrorists. It obliges the Member States to ensure that illegal access to information systems, illegal system and data interference as well as instigation, aiding and abetting, attempt to commit them are punishable as criminal offences. Moreover, it introduces minimal criminal sanctions.

C. Trafficking in human beings and crimes against children

As an answer for the increase of crimes that infringe predominantly the rights of women and children specific legal instruments were adopted on the EU level. On 19 July 2002 Council adopted the Framework Decision on combating trafficking in human beings[22]. It lists the offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation and gives the minimal criminal sanctions. To protect the children, the Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography[23] was adopted. It requires the Member States to take the necessary measures to ensure that certain criminal behaviours involving coercing and recruiting the children into prostitution or participating in pornographic performances and engaging in sexual activities with a child as well as production, distribution and similar acts relating to child pornography shall be punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

D. Drug trafficking

Irrespective of important legal documents adopted by EU institutions, EC has joined to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988[24].

On the EU level, one should note the Joint Action of 17 December 1996 concerning the approximation of the laws and practices of the Member States of the European Union to

[20] 2002/475/JHA, OJ L 164 of 22 June 2002. See also: Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008.
[21] 2005/222/JHA, OJ L 69/67 of 16 March 2005.
[22] 2002/629/JHA, OJ L 203 of 1 August 2002.
[23] 2004/68/JHA, OJ L 13/44 of 20 January 2004.
[24] UNTS, Vol. 1582, p. 95 (entered into force on 11 November 1990).

combat drug addiction and to prevent and combat illegal drug trafficking[25]. More recently, EU-wide minimum penalties for drug production and trafficking has being introduced to enhance cooperation in this field: in November 2004, the Council adopted the Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking[26]. This decision formally commits the Member States to apply common standards and principles of law enforcement and justice in cross-border drug trafficking.

This sub-part of this article has presented main legal achievements of the EU with regard to the specific crimes that are considered as being the most problematic and requiring concerted, regular actions of the Member States. As one can note, it has been mostly devoted to certain categories of crimes. Nonetheless, it is important to remember that also other criminal behaviors are on the agenda of the EU, like environmental crimes or combating the illegal immigration[27].

III. TREATY OF LISBON

1. "Communisation" instead of intergovernmental cooperation

The Treaty of Lisbon has been adopted after long discussions and political turbulences. Finally, it is in force since 1 December 2009. Amongst many reforms provided for in the Treaty of Lisbon, reform of the judicial cooperation in criminal matters is perhaps the deepest and the most visible. The Treaty of Lisbon has abolished the abovementioned " third pillar". The former Article 31 paragraph 1 letter e) TEU has been replaced by the article 83 paragraph 1 Treaty on the Functioning of the European Union [TFEU], which provides as follows:

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money

[25] 96/750/JHA, OJ L 342 of 31 December 1996.
[26] 2004/757/JHA, OJ L 335 of 11 November 2004.
[27] See, e.g. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, 2002/90/EC, OJ L 328 of 5 December 2002;

laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

The transfer of this provision from TEU to TFEU is not only of technical nature. The regulations of TFEU adopt the so called "community method" instead of the hitherto prevailing intergovernmental method.

2. The ordinary procedure

The ordinary procedure means the procedure provided for in the article 294 TFEU. The scope of this article does not allow to completely present the ordinary legislative procedure, hence we will limit our considerations to point out the main differences between the new and the old regulations

- the European Commission has a monopoly of the right of initiative;

- the European Council decides by a qualified majority voting instead of an unanimously voted framework decision;

- the European Parliament is involved in the procedure and even has the power to bring a proposal to an end.;

- the Court of Justice ensures the uniformity in the interpretation of the Community law;

- national parliaments may be involved in the procedure[28].

This change has two main features.

First, it is limiting of the sovereign power of the Member States to regulate the criminal matters, e. g. to define types of crimes and to establish penalties. Under the new regulation a simple veto of a state is impossible. Moreover, after 1 January, 2014, it will not even be sufficient to reject a proposal for a directive. Criminal matters were always recognized as one of the most delicate issues regarding the sovereignty of the state[29]. It seems that the authors of the European Constitution and then the Treaty of Lisbon were aware thereof and it was the reason why they established paragraph 3 of the article 83, which will be discussed below.

Secondly, the power of governments was restrained and the competence of the European Parliament was extended. It is worth noting that the prerogatives of national parliaments were

[28] Daniela Pisou, *Reactive Integration: Police and Judicial Cooperation in Criminal Matters: Cooperation Or Communitisation?*, Nordestedt, 2005, p. 7-8.

[29] Christopher Harding, *Exploring The Intersection of European Law and National Criminal Law*, European Law Review 2000, 25(4), p. 380; Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 507.

also enlarged, however in a very limited scope. Under new regulations, the consent of the European Parliament (at least in a silent form) is necessary to adopt any directive concerning criminal matters.

Such a reform must be welcomed as an attempt to tackle so called "EU democracy deficit". In criminal matters this deficit is especially sensitive, since the criminal law is the deepest interference in the human freedom. The commonly recognized rule: *nullum crimen, nulla poena sine lege* (no crime, no punishment without the statute), sometimes known as *nullum crimen, nulla poena sine lege parlamentaria* (no crime, no punishment without the statute of a parliament), is at least partially fulfilled.

The next consequence of transferring criminal matters to the first pillar is a change of the form of the legal instruments. The former framework decisions were replaced by the directives. Obviously the framework decisions adopted before 1 December, 2009 are still in force. Both types of acts seems to be similar. The general rule is that each member state is obliged to adopt provisions in its own legal system to implement the matter regulated in a framework decision or a directive. The main difference is the direct effect. TEU specified that the framework decisions do not have a direct effect. There is no such provision concerning the directives. According to case law of the European Court of Justice, the directives have only a limited direct effect. An individual can only raise an argument stemming from a directive if a state did not implement it or the implementation thereof is incorrect and only provided that the individual's claim is against a state or its agency[30]. It is hardly imaginable that an argument concerning a directive on the substantial criminal law could be raised by an individual. This is because such directives are the instruments of a state or/and EU. Bearing in mind the traditional function of the penal law as a guarantee for an individual such arguments do not make any sense here, as the EU establishes only minimal rules and any member state can adopt more severe punishments or can criminalize other types of crimes than EU. As a result, the change of the form of the acts will have little impact in practice.

3. New areas of crimes

The areas of crime – in comparison to the previous regulation – have been extended. The new areas are: trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. However, as we have mentioned above, some of these areas were regulated

[30] Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt*, Judgment of the Court of 19 January 1982; Case C-91/92, *Paola Faccini Dori v Recreb Srl.*, Judgment of the Court of 14 July 1994; Andrzej Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 97-98.

by the framework decisions under TEU as well. Such an extension of the list in TFEU can be interpreted in two ways. According to the first option, this change in words does not modify the EU's competence. This provision is a mere acceptance of the hitherto prevailing practice[31]. However, this extension may be interpreted as giving the expressive competence, which is necessary to the existing acts. The harmonisation of the criminal law in certain other areas was acceptable as long as every state had an option of vetoing a proposal. Under TFUE, where a member state can be outvoted in the European Council, there is no place for the extension of that competence *per facta concludentia*. This interpretation is confirmed by the last part of paragraph 1. To extend the competence of the EU to regulate other areas of crimes, it is necessary to adopt a unanimous decision in the Council. If the enumeration in the paragraph 1 a. 2 was open, such a provision would be out of place. Therefore, we claim that enumeration in the article 83 paragraph 1 is exhaustive.

The wording of the last sentence "on basis of developments in crime" suggests that a proposal of adding new areas of crimes should be justified by the criminological research concerning the development of crime. Such a premise – posed by the German Federal Constitutional Tribunal[32] – seems too restrictive to us. It is true that every decision on penalisation should certainly be based on the rational basis. But it does not mean that extending the EU competences is possible only in case it is some new criminal phenomena. A unanimous decision in the European Council regarding the extension is in our opinion the sufficient protection for the sovereignty of the Member States.

4. Paragraph 2 – new old competence of the EU

Paragraph 2 of the Article 83 provides as follows:

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

It is a new provision, there was no such regulation in the former treaties. Nevertheless, as we have mentioned above, such a type of competence is nothing new. The provision should

[31] Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 518.
[32] Urteil des Zweiten Senats vom 30. Juni 2009, BVerfG, 2 BvE 2/08, Absatz-Nr. 364 [Judgment of the Second Senate of the German Federal Constitutional Tribunal of 30 June 2009].

be regarded as a formal sanctioning of the decisions of the ECJ in cases C-176/03[33] and C-440/05[34].

Nevertheless, this new provision has some importance for the procedure of adopting the minimum rules. Under TEC and the abovementioned decisions of the ECJ, to adopt such a measure, the procedure sufficient for harmonisation measures was also sufficient for minimum criminal rules. Under TFEU the procedure is limited also by so called "emergency brake" regulated by paragraph 3.

The interesting question is the relationship between paragraphs 1 and 2 of the article 83. Distinguishing between these two competences is necessary because of a possibly different procedure. It is argued that in the absence of any express wording to the contrary, each paragraph should be interpreted as a *lex specialis* as regards to the other paragraph[35]. This interpretation, even though logical and formally correct, does not answer the core of the question – what concerns the areas that are mentioned in paragraph 1 and are subject to harmonisation measures by the other articles of the Treaty? We foresee that, as in *Pupino* case, the competence provided in the paragraph 2 will prevail.

5. Limits of the "communisation" – emergency brake and opt-outs.

A possibility of being outvoted in the matters concerning criminal law is considered – at least by part of the countries – as a limitation of their own sovereignty. To satisfy their interests, the Treaty of Lisbon provides for two special instruments of restricting the ordinary procedure – emergency brakes and opt-outs.

Pursuant to article 83 paragraph 3, *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a

[33] *Pupino*, Judgment of the Court (Grand Chamber) of 16 June 2005.
[34] *Commission of the European Communities v Council of the European Union*, Judgment of the Court (Grand Chamber) of 23 October 2007.
[35] Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 516.

case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The emergency brake seems to be a compromise between unlimited "communisation" and a simple veto[36]. A state that is dissatisfied with a draft cannot veto it, but it can suspend the whole procedure for four months. This suspension cannot be raised on the sole basis of being against the proposal. Each suspension has to be justified by a detrimental effect of a proposed regulation on the fundamental aspects of a state's criminal justice system. The crucial problem is the meaning of this formula. Most of the authors claim that this provision should be interpreted strictly[37]. Some of them claim that it refers only to the aspects of constitutional importance and rank[38]. The other claim that strict interpretation excludes from the scope of this article certain constitutional problems and shall be referred only to the criminal justice system[39]. The latter option seems to abstract to apply. In modern constitutions there are catalogues of personal rights and freedoms – also of rights concerning criminal justice. Therefore, it is impossible to distinguish what is "constitutional" and what is "criminal" law. As examples of the areas that might affect fundamental principles of states' criminal justice, we can enumerate: the minimal penalties, the principle of fault, the sentence for life, offences concerning the question of religious freedom and freedom of speech and criminal responsibility of legal persons[40]. What is important is the wording of this provision. The word "would" instead of – for instance – "might", "may" or "could" means that a state must be sure that such a draft would affect its system. The sole possibility of such a detriment is not sufficient.

A broad interpretation of this provision may result in a risk, that calling for suspension would be used by the Member States to achieve other aims than protecting principles of their own systems. A state could suspend a procedure of adopting a directive to make pressure on the other states e. g. to change a decision concerning other matter, perhaps even not a criminal one. To protect the Union before such a practice, the Treaty provides for a "fast track"

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[36] Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 526.
[37] Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 527; Ester Herlin-Karnell, *The Lisbon Treaty and the Area of Criminal Law and Justice*, European Policy Analysis 2008, 3, p. 6-7, Marco Mansdörfer, *Das europäische Strafrecht nach dem Vertrag von Lissabon - oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung*.
[38] Marco Mansdörfer, *Das europäische Strafrecht nach dem Vertrag von Lissabon - oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung*.
[39] Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 526.
[40] Martin Heger, *Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon*, Zeitschrift für Internationale Strafrechtsdogmatik, 2009, 8, p. 414.

enhanced cooperation. Nine countries – after a disagreement on an issue of criminal matter – can establish enhanced cooperation without the whole ordinary procedure provided in such cases in the articles 326-334 TFEU.

For Denmark, Ireland and United Kingdom emergency brake has been recognised as not a sufficient protection of their sovereignty in criminal matters. These countries have opt-outs in criminal matters, which means that they are bound by the provisions concerning criminal matter only if they want to[41].

6. Proposal for a first directive

Up till now, there is no directive adopted under TFEU. However, there is a pending procedure concerning the first proposal of: Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. The proposal contains new types of crimes, for instance organisation of travel arrangements with the purpose of committing sexual abuse or offences in IT environment. The main aim of the proposal is to increase the level of criminal penalties.

IV. CONCLUSIONS

The firm and unequivocal evaluation of the changes introduced by the Lisbon Treaty with relation to harmonisation of penal law constitutes a quite difficult task.

However, in general terms it should be assessed positively. Unquestionably, it is a long-awaited answer for the inadequacies of legal instruments that could be adopted in this area. There is no doubt that both conventions and framework decisions have not been the most appropriate means of bringing in the legal framework. Conventions as international treaties governed by international law have not still been adopted by all EU Member States; the main difficulty with framework decisions has been the lack of any sanction for their non-implementation.

The changes brought about by the Lisbon treaty allows for the further unification of the system of substantive law that deals with the crimes considered to be the most challenging for the EU.

It is possible to notice to important aspects of these changes.

[41] Steeve Peers, *UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law*, University of Essex 2009.

The first one relates to the adjustments in the legislative procedures that allow for increased role of the European Parliament as well as national parliaments. This development is especially significant with regard to penal law. Among all Member States penal law is considered as belonging solely to the sovereign powers of the state. If there is more of the democratic control over the EU institution, the better chance to persuade the Member States that some modifications are vital and necessary.

Changing the procedure from the intergovernmental to the communitarian one, should be also appreciated. Procedure, provided for in the former first pillar, seems to be quicker, simpler and more democratic. Nevertheless, the Member States may be reluctant to decides over criminal matters if they know that they can be outvoted. We must remember that abovementioned Framework Decision on the protection of the environment through criminal law was earlier rejected as a proposal for a directive. It is easily imaginable that such a situation may return under new rules, especially if the majority threshold will be lower than current. The next risk is connected with the emergency brake. What is our concern is that a member state can try to apply it as a part of political bargaining.

The next advantage of the Treaty of Lisbon is changing the form of legal act concerning criminal matters. Directives have been the most popular instruments in the legal heritage of the EC and applying them to criminal matters strengthens the consistent of the common legal system. However, as we have mentioned above, it is hardly possible that these directives will have any direct effect. Hence the crucial point is possibility to force the Member States to implement the directive.

That bring us to the last point, that is the jurisdiction of the ECJ on criminal matters. In the new legal framework, the ECJ's jurisdictions on criminal matters is the same as that on any other issue regulated earlier in the first pillar. The European Commission is entitled to bring an action against a member state that do not exercise its duty to implement a directive. Even more important is unlimited competence of the ECJ to interpret the legal acts concerning criminal matters. Unified law without unified interpretation is fiction. We expect that this competence of the ECJ will have the greatest impact on the future of the European criminal law.

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Jean Monnet katedra za procesno pravo EU

Erasmus+

PRAVOS

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26 August 2016

EU Institutions

- the European Parliament,
- the European Council,
- the Council,
- the European Commission
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors

Sources of Law

(Primary Law)

(Founding Treaties – TEU, TFEU)

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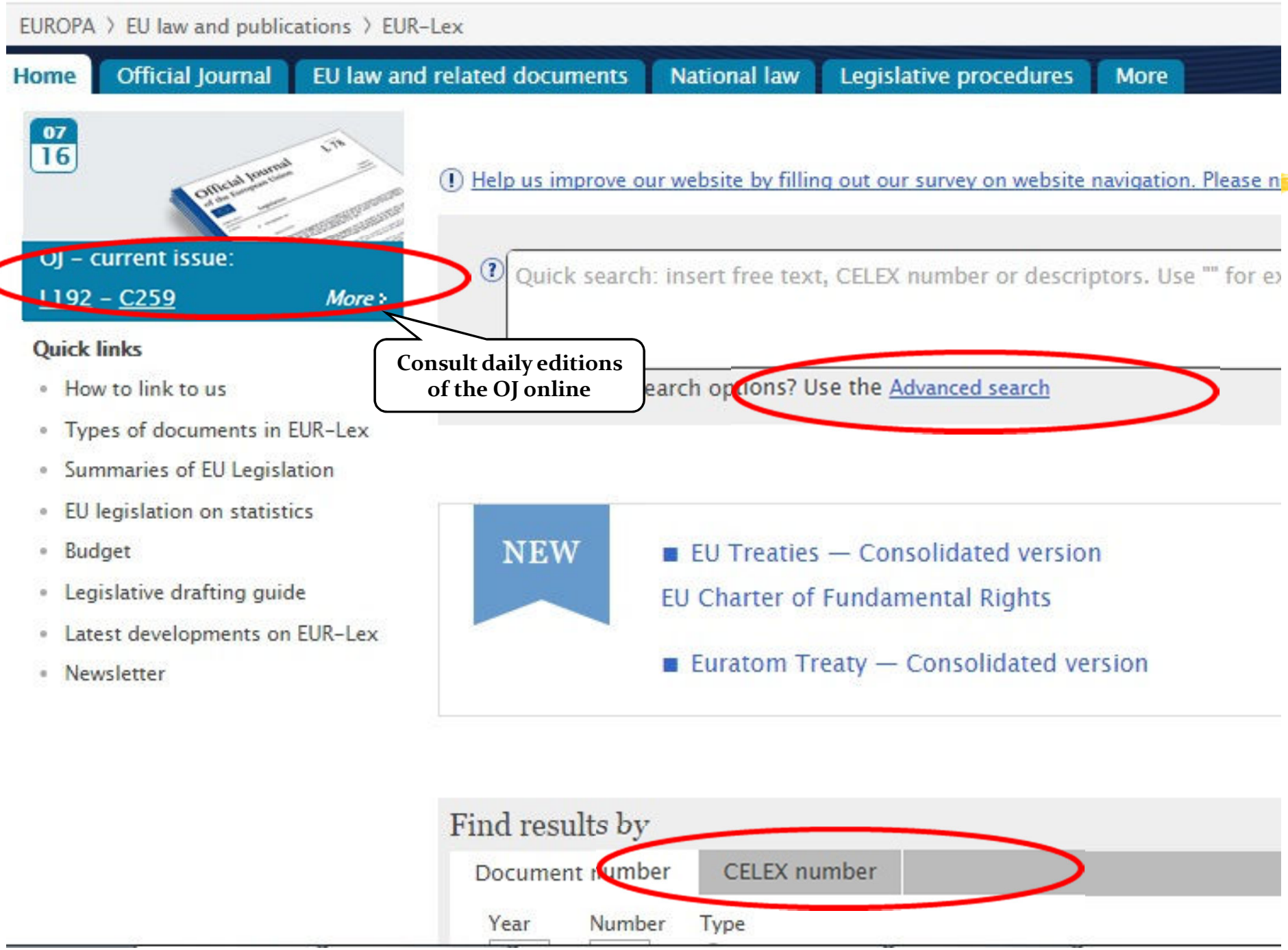
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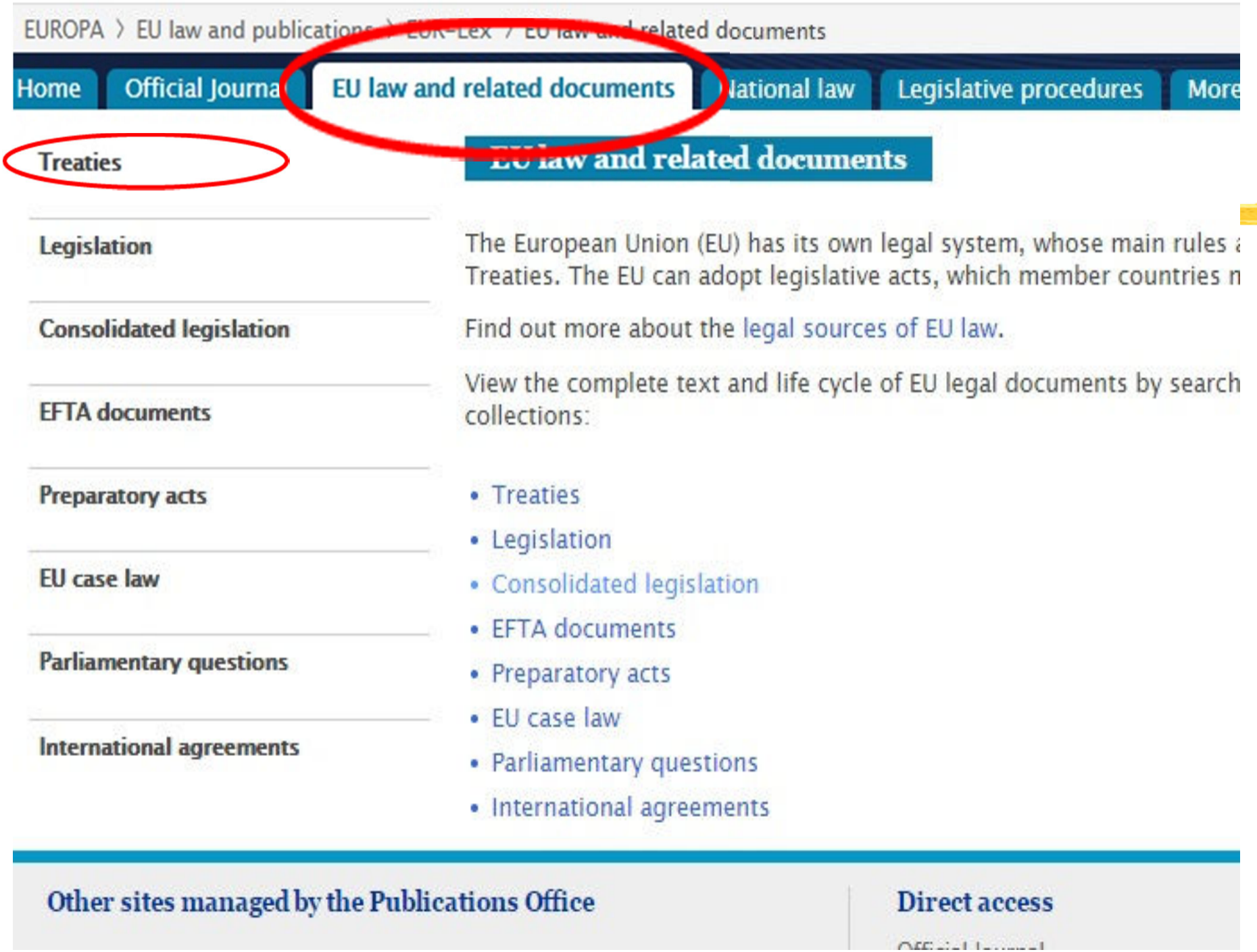
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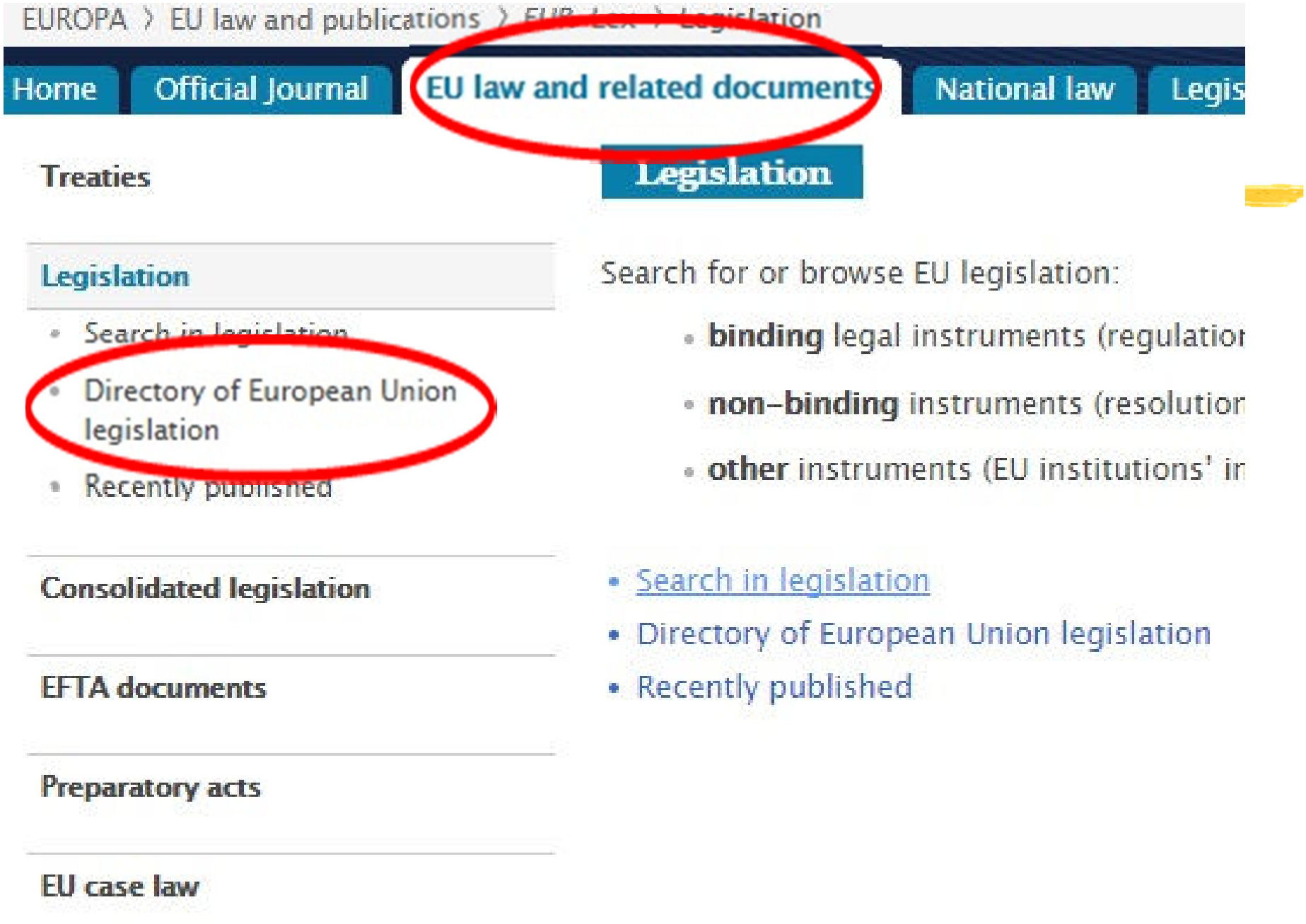
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Pravo EU-a i povezani dokumenti

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- Pročišćeno zakonodavstvo
- Dokumenti EFTA-e
- Pripremni akti
- Sudska praksa EU-a

Court of Justice of the European Union (CJEU)

- Court of Justice: 1 judge from each EU country, plus 11 Advocates General
- General Court: 1 judge from each EU country
- Civil Service Tribunal: 7 judges

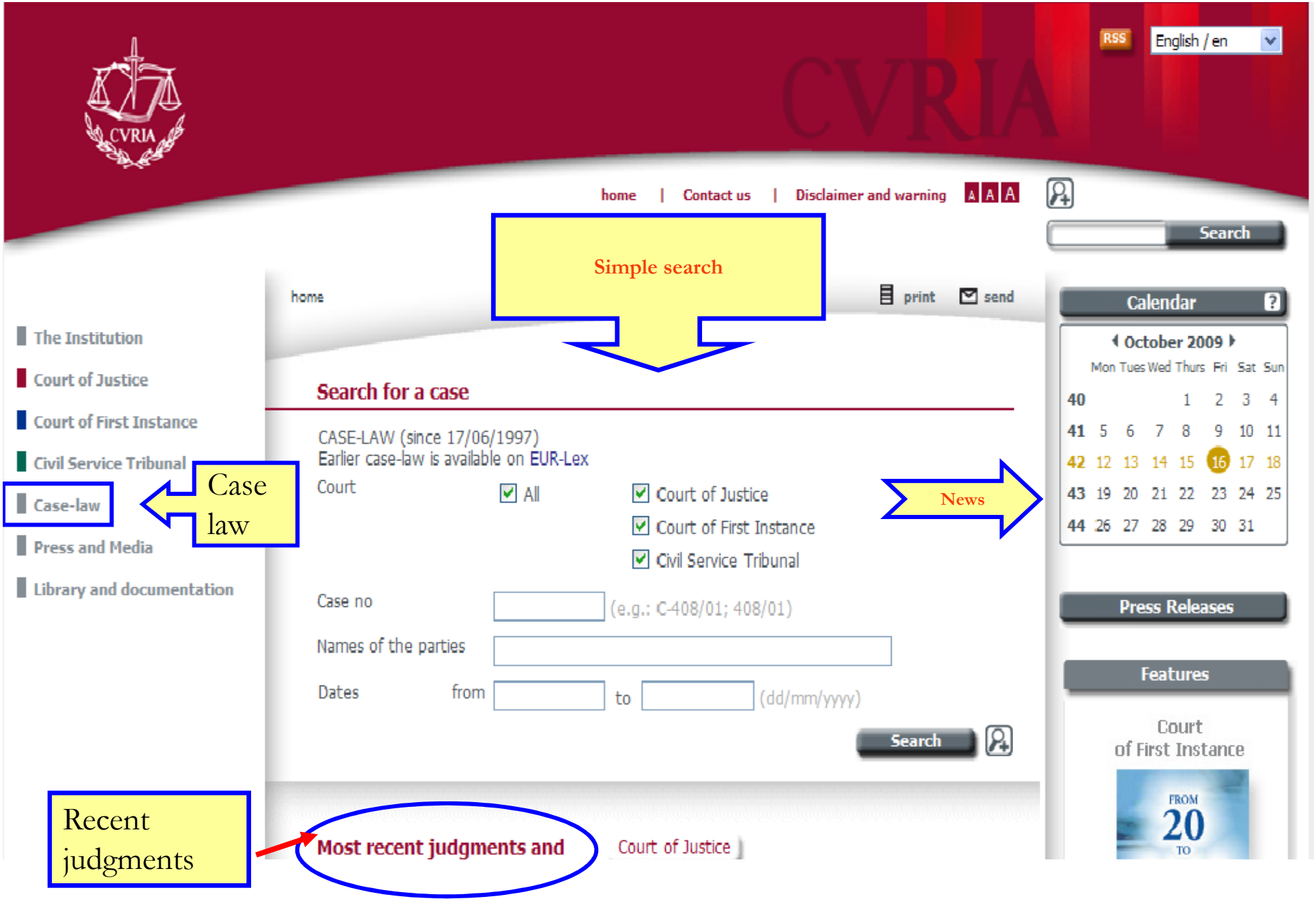
C - 173/99 (2001) ECR I - 4881

Case number 173 from 1999 , published 2001 in European court records , volume I , page 4881.

T – 63/01 (2002) II – 05225

Case number 63 from 2001 , published 2002 in European Court Records , volume II , page 5225.

F - 12/05 Tas v. Commission (2006)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Case	Document	Date	Name of the parties	Subject-matter	Curia	EUR-Lex
C-547/15	Opinion ECLI:EU:C:2016:565	14/07/2016	Interservice	Free movement of goods - Customs union		
C-335/15	Judgment ECLI:EU:C:2016:564	14/07/2016	Ornano	Social policy		
C-290/15	Opinion ECLI:EU:C:2016:561	14/07/2016	D'Oultremont and Others	Environment		
C-271/15 P	Judgment ECLI:EU:C:2016:557	14/07/2016	Sea Handling v Commission	Provisions governing the institutions - Access to documents		
C-230/15	Judgment ECLI:EU:C:2016:560	14/07/2016	Brite Strike Technologies	area of freedom, security and justice - Judicial cooperation in civil matters		
C-196/15	Judgment ECLI:EU:C:2016:559	14/07/2016	Granarolo	area of freedom, security and justice - Judicial cooperation in civil matters		
C-97/15	Judgment ECLI:EU:C:2016:556	14/07/2016	Sprengen v Pakweg Douane	Free movement of goods - Customs union - Common Customs Tariff		
C-19/15	Judgment ECLI:EU:C:2016:563	14/07/2016	Verband Sozialer Wettbewerb	Approximation of laws		
C-6/15	Judgment	14/07/2016	TNC Dimarso	Freedom of establishment		

Non-official EU current awareness

- EurActiv
- EUobserver
- PoliticoEU

Web JM chair : http://jeanmonnet-eupl.pravos.hr/pages/clanovi-katedre-members.php

ANY QUESTIONS