

POWERS OF THE JUDGE IN COLLECTIVE REDRESS PROCEEDINGS

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INTRODUCTION

- A. OBJECTIVES
- B. STRUCTURE
- C. METHODOLOGY, SCOPE AND GENERAL REMARKS
- D. BRIEF PRESENTATION OF THE NATIONAL MECHANISMS

1. The study starts with a simple pragmatic question:

Which powers of judges in six national collective redress mechanisms¹ provide the best safeguards against possible abuses of the system?

2. In this report, cases have been selected to illustrate the issues that arise and some of the creative solutions that have been applied so far by judges at each stage of a collective redress procedure. These cases were chosen to illuminate the different approaches and what problems remain with them and then consider the options for dealing with such problems. Illustrating concrete powers of judges in collective redress proceedings and making suggestions contributing to the elaboration of an optimal balanced EU framework is the priority of the report.
3. It should be said immediately that this study is only a preliminary, and far from complete, analysis. The largest obstacle to the analysis is the underdevelopment of EU collective actions for damages, which necessarily entails a limited body of case law. Many collective redress mechanisms are relatively new and information about them is difficult to access; it is therefore too early to answer this principal pragmatic question with sufficient studies of significant cases.

¹ England & Wales, Germany, Italy, Portugal, Spain and Sweden

A. OBJECTIVES

4. In our mass production and mass consumption society, characterised by the harmonisation of standards, it is possible for business to reach a huge market (500 million consumers in the internal market). Within such a market, business non-compliance with legal rules can easily have a detrimental effect on a large number of consumers.
5. A collective redress mechanism would appear to be not only useful, but indeed an indispensable tool for European consumers. It would enable them to bring a case collectively before a court to obtain compensation for loss or damage caused by a single trader.
6. However, the discussion on the introduction of consumer collective redress proceedings at the European Union level has been clouded by fears that the European Union will open the door to a US-style class action system and the elements of this system which have possibly led to its abuse. Such elements are the discovery procedure, contingency fees, punitive damages, the lack of court supervision of out-of-court settlements, etc. It is not the purpose of this report to examine whether these features do or do not exist, but they are noted as potential features that a European Union instrument would wish to avoid.
7. A number of European Member States have introduced generalised collective mechanisms for claims for damages. The origin of the introduction of these new European collective rules has usually been one of practical expediency: judges have needed these mechanisms to be able to manage a large number of similar cases efficiently and without the judicial administrative system becoming overwhelmed². There is no uniformity or harmonisation of approach, although some similarities exist between Member States.
8. The key question facing European legislators is how to enable collective redress without producing the undesirable consequences that are associated with the US class action model. How can it avoid producing excessive litigation? Where does the balance lie between providing compensation for legitimate claims and preventing unmeritorious claims? If the system encourages the vast majority of claims to be settled, how can it avoid the “blackmail effect”, which means it will be cheaper for defendants to settle unmeritorious claims than to fight them? How can it avoid excessive transactional costs?
9. One of the important safeguards against the abuses of US class action is the active role of the judges in collective redress litigation. Research is needed to see what concrete judicial powers are the most important in that respect.

² C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 86.

10. The report aims to provide a comparative analysis of national rules and case law to identify which powers of the judges in a collective redress trial ensure fair proceedings for both parties and act as safeguards against potential abuses of the systems. The report therefore aims to take stock, gather data on claims for damages and make a comparative analysis of such data.

11. The report also aims at looking ahead to ways in which recommendations for a European instrument would be formulated. The result of the case analyses set out in this report will attempt to demonstrate whether the European Union might be able to introduce an attractive approach towards collective redress which builds on previous knowledge by fusing different national approaches and provides benefits to behaviour, consumers, competitors and the economy, without harmful risks.

B. STRUCTURE

12. It appeared necessary to start this report by formulating some **general remarks** on the **methodology** and **scope** of the study and by presenting briefly the existing **national collective mechanisms**.
13. The main report is divided into two parts.
14. **The first part** of the report consists of a **comparative presentation**, procedural step by procedural step, of the main data gathered from the national rules and the national case law of the six selected Member States. The comparative analysis is divided into four sections:
- **Section one** focuses on the powers of judges when they have to admit or reject a claim (admissibility stage).
 - **Section two** studies the powers of judges during the progress of a trial.
 - **Section three** analyses the powers of judges when they must make their final decision (judgement stage).
 - **Section four**, finally, focuses on the role of judges in the distribution of compensation among group members (execution stage).

Importantly, the type of judicial power depends on the type of abuse that is sought to guard against. Each section begins thus with an **overview of the undesirable consequences and the concerns** that the powers of judges should seek to avoid. Such an overview aims at identifying what types of problems could arise and at thinking about the powers that could deliver the best results in solving them. Each section then describes how national judges solve those various challenges, **compares the national reactions** (or more precisely, puts them in pragmatic order) and ends with **conclusions** on which of the national approaches described are the most important in preventing possible abuses of collective redress proceedings.

15. **The second part** of the report consists of **recommendations** on what other powers of judges could be relevant and finally provides recommendations for a European instrument.

C. METHODOLOGY, SCOPE AND GENERAL REMARKS

16. As a general remark, the report must begin by noting that the study took place within a short time limit and that access to supporting documentation with regard to court proceedings was somewhat complicated. Overtaken by the deadline and blocked by language, we had no choice but to revise our ambitions at times.

The research faced several obstacles; in particular, the barrier formed by the various national languages was one of the main difficulties to overcome. Imagination and networking had to join forces to allow the research to move through the four steps of establishing this report: the collection of data, the establishment of national reports, their comparison and finally the formulation of recommendations.

1. COLLECTION OF DATA

1.1. DEFINITION OF THE FIELD OF INVESTIGATION

17. ***Collective redress mechanisms in the form of representative and collective actions***

Terminology in relation to collective redress mechanisms can be confusing, as different terminology has been applied to these mechanisms in inconsistent ways.

In this report, we do not claim to provide a definition of a collective redress procedure. However, for the present study it is useful to bear in mind that the powers of judges may be exercised in two broad mechanistic models for court-based aggregated procedures: representative actions and collective actions.

(1) ***Representative actions***

Representative actions are those in which a single claim is brought by one individual or an organisation on behalf of a group of (identified) individuals (**Italy, Portugal, Spain, Sweden**). Collective redress mechanisms in the form of a *representative action* describe an action *brought by a natural or legal person on behalf of two or more individuals who are not themselves party to the action, and that is aimed at obtaining damages for the individual harm caused to the interests of all*

*those represented (and not only the representative entity)*³. The members of the group thus have a right to enforce their rights in accordance with the judge's decision.

(2) *Collective or group actions*

A second type of action is characterized by individual actions that are combined into one procedure (**England & Wales**). In *collective or group actions*, judges may frequently choose between different managerial tools for managing cases. These include selecting *test cases*, where judges must deliver a judgment on a case that forms the basis for other cases brought by persons with the same interest against the same defendant (**Germany**, in which selecting test cases is mandatory).

In this report, the generic term *collective redress proceeding* is chosen. This generic term will cover both representative and collective actions. When a part of this report wishes to focus on the particularity of a procedure, the following specific terms will be used: *representative action* or *collective action*, depending on the system at stake.

Attention should be paid to the expression *represented group members*. Even if this expression is normally exclusively relevant to representative actions, for the purposes of the comparative analysis it will also be used to designate the persons who, in collective actions, are party to the action and who will be bound by the final verdict following the collective redress procedure. Concretely, *interested summoned parties* in **Germany** and *GLO claimants* in **England & Wales** are, for the needs of this report, represented group members.

If reference is made to the US system, the term *class action* will be used.

18. *Compensatory mechanisms*

Collective redress proceedings may aim at obtaining either injunctive relief or damages for the individual harm caused to the interests of all represented. However, this report will deal exclusively with collective procedures for redress of individual damages and will therefore disregard actions seeking injunctive relief from the courts.

The report will also not focus on orders mostly for the protection of general consumer interests or other collective actions for the protection of collective consumers' interests. The traditional procedural techniques of joinder of parties to an existing suit or aggregation or consolidation by the judges of identical or similar individual actions will not be analysed further here.

Procedures for compensation where multiple claimants can suffer small levels of loss (but where infringers may escape with large illicit gains) are nevertheless envisaged in the scope of this report.

³ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p. 1126.

19. ***Consumer collective redress mechanisms***

The major areas in which policy regarding collective redress proceedings has been developing are consumer protection and competition law. This report will, however, disregard actions for infringements of competition law to focus exclusively on collective redress actions for harm to individual interests of consumers in the broad sense of the term. Different notions of *consumer* exist within the selected Member States, even within the body of EU consumer law, but all definitions refer at least to natural persons acting outside a business⁴. In this respect, under the new directive on consumer rights, *consumer* means *any natural person who, [...] is acting for purposes which are outside his trade, business, craft or profession*⁵. In this report, we will keep to this basic definition, so that non-professional persons investing on the financial market are included within it.

It should be noted that the restriction of the scope of the report to consumer collective redress proceedings limits *de facto* the results of the report. Indeed, only the relevant consumer cases have been studied. The report did not investigate collective redress cases in other fields, even though those may contain interesting practical examples of how judges exercise their powers.

20. ***Selection of the national collective redress mechanisms***

On basis of those definitions, a selection of the national collective redress mechanisms has been made. It should be noted here that the choice of the six Member States studied was imposed by the BEUC; it is not that of the reporters. The selection of the BEUC was the following: Germany, Italy, Portugal, the United Kingdom, Spain and Sweden.

This had to be restricted. Indeed, in the United Kingdom, only the jurisdiction of England & Wales has a procedure for coping with collective redress proceedings in the sense that we have defined (see *supra*). Scotland is an entirely separate and different civil jurisdiction to that of England & Wales and has not introduced a group procedure⁶. The same applies to civil litigation in the Province of Northern Ireland, which, did not adopt the civil justice reform of 1998 of England & Wales⁷.

⁴ Hans-W Micklitz, Jules Stuyck & E. Terry (ed.), *Cases, Materials and Text on Consumer Law*, Hart publishing, Oxford and Portland, Oregon, 2010, p. 29.

⁵ Article 2 (1) Directive 2011/83/eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/eec and Directive 1999/44/ec of the European Parliament and of the Council and repealing Council Directive 85/577/eec and Directive 97/7/ec of the European Parliament and of the Council.

⁶ Discussion Paper No. 98, Multi-party Actions: Court Proceedings and Funding (Scottish Law Commission, 1994).

⁷ Information supplied by Robert Turner.

1.2. COLLECTION OF NATIONAL LEGISLATION

21. It is here that the research was hampered for the first time by the language barrier. Indeed, Member States do not automatically translate each of their laws into non-national languages.

Concerning national laws specific to collective redress proceedings, the *Global Class Action Exchange* website was a very helpful tool for finding specific laws translated into English⁸. But this was not sufficient. In Germany, for instance, there will probably be some legislative changes in the next few months. We had to find a solution to translate the proposed bill in order to highlight the main changes relating to the powers of the judges.

22. While analysing rules on collective redress, we promptly realised that judicial controls are not always contained in those collective redress laws but rather in specific laws. For instance, financial controls are often found in specific rules on costs and/or funding litigation. This enlarged the amount of legislation to be studied. Contrary to specific rules on collective redress proceedings, translations of those other, specific laws were not available in English.

23. The aim of the study also entailed that we became familiar with the general rules on litigation procedure in each selected Member State. For instance, judges' evaluation of evidence could not be analysed without a global understanding of the judicial procedure in each Member State. Given the short time we had, we made recourse to general doctrinal contributions relating to litigation and dispute resolution in each Member State⁹. This research was, of course, limited to articles written in English, as we did not have enough time to find and translate articles and legal dispositions written in other national languages.

1.3. COLLECTION OF NATIONAL COLLECTIVE CASES

24. We started the collection of national collective cases with the study of the country reports relating to the *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*¹⁰. Those country reports detail, among other information, information on proceedings filed under the different collective redress mechanisms available in each Member State up to 2008. On this basis, we tried to find the texts of the relevant consumer cases in those national databases that were available on the Internet.

This research was by far the most laborious. Despite generally stating that procedures are transparent, some restrictions apparently exist in certain Member States. Although judgements of higher courts are generally available, copies of judgements of lower courts are frequently not available. However, judgements of lower courts were precisely relevant to achieving the objectives

⁸ <http://globalclassactions.stanford.edu/>.

⁹ ICLG website (<http://www.iclg.co.uk>).

¹⁰ Available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

of this report. Furthermore, where judgements are available, they are not often available in a readily accessible form (e.g. categorised in an electronic database by number, name, subject matter, etc.).¹¹

Finding practical examples on how the powers of judges were used in actual collective redress proceedings not only involves the analysis of final verdicts but also entails the analysis of decisions by which the judges manage the case. In particular, the analysis of the safeguards at the gatekeeping stage would not be relevant without studying the decisions by which the judge deny an unmeritorious application. However, in most of the jurisdictions reviewed, it is not the practice to publish such decisions.

Reaction of an English judge after we had asked him to illustrate our report with practical examples

As to illustrating your Report with practical examples of how the powers of the judges were used in individual cases where GLOs were made, I am not entirely sure how it could be achieved. It would not be possible "to read" the GLOs already made in order to analyse the use of the judges' powers. The Register of GLOs contains only a brief summary of the nature of each of the cases where GLOs have been made. Unless the ultimate judgment has been reported in one of the series of Law Reports, it could be obtained in effect only from the parties and lawyers involved in the particular case. Also, many of the cases will have been settled by agreement between the parties without any judgment or determination from the court¹².

25. Moreover, the language barrier resurfaced when we wanted to make some updates to the lists of cases contained in the country reports of 2008¹³. Indeed, none of the electronic databases were available in English (except in England & Wales, of course).

It might thus be easy to understand that it was complicated, or even impossible, to find keywords, translate them into the chosen national language, enter the translated keywords into the electronic database and then translate the results obtained (small summaries) into English. Repeating this process for each Member State selected was far too time-consuming.

26. Consequently, this report does not claim to evaluate how successful any national technique, or combination of techniques, may be in practice. Empirical evidence that would found such an evaluation is insufficient or even, for some Member States, non-existent.

¹¹ Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, "Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report", Ashurst, Brussels, 2004, (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p. 92.

¹² Email conversation with Graham Jones.

¹³ Available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

2. NATIONAL REPORTS

2.1. CONTACT WITH NATIONAL EXPERTS

27. For practical and scientific reasons, we recognized that the solution lies in the free exchange of information with the selected Member States. It was unrealistic to expect to research unfamiliar disciplines efficiently in such a short time limit. It appeared clear that we needed the collaboration of national specialists not only to access the texts of the case law but also to understand the subtleties of each collective redress mechanism and to make clear the main procedural rules of each judicial system.

We decided thus to conduct national studies on the basis of a list of exploratory questions sent to a large number of national specialists. Creating a network of contacts among six Member States was a difficult challenge. We identified experts principally in several national reports we found and tried to enter into contact with them via email. Our enquiry was often not very welcome, as the end of 2011 was very busy for everyone, and in most cases remained without reply. Fortunately, some specialists, to whom we are very grateful, agreed to help us and contributed significantly to the development of this report¹⁴. However, this kind of collaboration was not offered from each Member State.

28. We entered into contact with national lawyers to access the case law of their Member State. We provided them with lists of consumer-relevant cases and asked them to help us update the lists and find the texts of the cases. This process was not very promising. The few texts obtained were either very short and patchy or very long although absolutely not explicit on the powers of the judges.

2.2. HELP OF ERASMUS STUDENTS

29. Given our poor success with the national experts, we had to find an alternative. We decided to request the help of Erasmus students registered for the current academic year in the Law Faculty at the ULB. An Italian student, two Portuguese students, a Spanish student, and a German speaking student were thus engaged and were required to find and translate the texts of the relevant consumer collective cases.

¹⁴ We would like to thank the following for their collaboration:

- **Rebecca Money-Kyrle, Robert Turner** and **Graham Jones** (England & Wales);
- **Jana Brockfeld** (Germany);
- **Andrea Giussani** and **Silvia Pietrini** (Italy);
- **Luís Silveira Rodrigues** (Portugal);
- **Elena Martinez** and **David M. Ortega Peciña** (Spain); and
- **Laura Ervo** and **Annina H Persson** (Sweden).

2.3. CONTACT WITH NATIONAL JUDGES

30. We intended to contact directly (via face-to-face interviews, written correspondence, or telephone conferences) several judges with experience in collective redress action cases. We intended to interview them on how they see their role in the trial and on which powers they deem to be most important for preventing abuses. Although we were convinced of the merits of this approach, we managed to enter into contact with only two English judges and are still waiting for the report of a Swedish judge. The experience was very interesting but unfortunately we could not repeat it with other judges. The decision to accept this poor result was justified by concerns regarding time, based on the experiences with national experts, and by the fact that judges were very busy, as they were trying to finish all their outstanding work before the end of 2011.
31. It might be worthwhile in the future to organize meeting days between judges specialised in the field of collective redress proceedings. It is only under such conditions that their experience could usefully be collected and compared with that of their colleagues from other countries. A one-day meeting would not be sufficient; it would take at least two days for them to have the opportunity to speak to each other, to eat together, to break the ice, etc.

3. COMPARISON

3.1. CATEGORISATION

32. There are inherent limits to the amount of comparison that can be made between very different legal mechanisms, which was precisely the case with the mechanisms of the six selected Member States.

Comparing the six mechanisms on an equal footing would have resulted in denying the specific and interesting characteristics of each mechanism and so would have led to a distortion of the legal realities in the Member States being compared.

Different by their very nature, the six selected mechanisms required that we turned to the process of categorising. Different solutions for the categorisation were available:

- Comparing on the one hand the Member States which opted for an opt-in system¹⁵ and on the other, the Member States which opted for an opt-out system¹⁶. This solution appeared to be irrelevant as only **Portugal** has an opt-out system (see *infra*).

¹⁵ The approach in collective redress proceedings in which all individual potentially affected consumers have to take a positive step in order to be bound by the result of the action.

¹⁶ The approach in collective redress proceedings in which individual potentially affected consumers who fall within the definition of the group will be deemed to be bound by the result of the action without being required to take any positive step, save that any individual consumer may leave the group and not be bound if he takes a positive step to indicate this.

- Comparing on the one hand the Member States which opted for a representative procedure and on the other, the Member States which opted for a collective procedure. This solution did not give significant results.
 - Comparing on the one hand common law systems and on the other civil law systems. This solution was irrelevant as only **England & Wales** has a common law system.
33. We promptly realized that the need for categorisation appears to be relevant only at certain stages of the analysis and that the choice of categorisation depends on the stage of the collective redress proceedings studied. We thus abandoned the idea of keeping the same categorisation throughout the whole analysis and decided to pay attention to the particularities of the mechanisms by arranging the national mechanisms by categories only when necessary. This will, for instance, be the case for the analysis of judicial supervision at the execution stage, where separating opt-in systems from opt-out systems is obviously needed. Another example is the separation needed between civil law systems and common law systems when analysing the judicial supervision of out-of-court agreements¹⁷.

3.2. UNBALANCED COMPARISON

34. Attention should be paid to the concern that the data collected in each selected category are not of equal value. As stated above, the collaboration of the national experts was definitely not of similar intensity. We received doctrinal information and, sometimes, extensive reports from **English, Italian, Spanish and Swedish** experts, while the collaboration of the **Portuguese and German** experts was clearly weak. The same imbalance occurred for the case law. The majority of the texts of the relevant consumer cases were not available in **England & Wales, Portugal and Sweden**, while in **Germany, Italy and Spain**, we obtained the majority of the texts as the transparency principle is strictly respected.

Consequently, this report does not claim to provide a true comparison of the national mechanisms selected. Drawing conclusions on which of the Member States delivers the best approach to a specific issue makes no sense as we do not have sufficient evidence to support such assertions. Such a hasty process would risk distorting the legal realities.

¹⁷ Indeed, the courts in England & Wales conduct their civil litigation under the common law, an approach to the resolution of litigation that is very different to the approach of the many civil law jurisdictions selected for this report. The common law practice is to work towards a final trial of the issues which, hopefully, the interlocutory stages will have reduced to their bare essentials. In contrast, the civil law approach is to determine issues stage by stage throughout the life of the case. Each system has its good and bad points. What is certain with the common law system is that very few cases ever reach a trial as the parties at different stages of the action settle their differences as they see the evidence, etc., developing (information supplied by Robert Turner).

The comparative part of our report will only shed light on which judicial powers are created by specific national laws and on how national judges solved the various challenges in particular cases. A careful examination and use of the results of this part is absolutely essential. When reading and using the results of this part, one should keep in mind that the establishment of this part was limited by material and knowledge-related difficulties.

3.3. PRAGMATIC PRESENTATION OF THE JUDICIAL POWERS

35. For the reasons explained above, we cannot make a proper comparison. Therefore, we decided to provide a pragmatic presentation of the information we gathered.

Concretely, we will arrange the national solutions for specific identified problems by starting from the Member State which gives the fewest powers to judges to the Member State which gives the most powers to judges. When Member States are classified by alphabetical order it will mean that they give similar powers to judges.

4. RECOMMENDATIONS

36. It seems undeniable that effective safeguards to avoid abusive collective redress actions should be defined and inspired by the existing national collective redress mechanisms. What is less sure is whether the source of inspiration should be limited to the six selected Member States.

It was very difficult, and even impossible for us, to base our recommendations exclusively on the experiences of the six selected Member States. Therefore, we decided to formulate our own recommendations and will mention in footnotes whether the proposed recommendations are inspired and supported by the national rules or encouraged by national practices.

D. BRIEF PRESENTATION OF THE NATIONAL MECHANISMS

37. The Member States selected present different methods by which collective claims can be enforced, so judges do not play in the same field in each Member State. A considerable number of comparative analyses have already been made of the basic features of the selected Member States' collective redress mechanisms¹⁸. The purpose of this section is not to undertake such an analysis but rather to outline the frameworks in which national judges have to exercise their powers.
38. People familiar with these national collective redress mechanisms may skip this descriptive section.
39. The following descriptions are given in alphabetical order; no importance should be attached to the order. For each national collective redress mechanism, the following points will be examined:
- the legal basis;
 - the scope of application;
 - the type of mechanism;
 - the main steps of the procedure;
 - an overview of the case law; and
 - whether any reforms are expected.

¹⁸ We refer you to their contributions: Rapport du Sénat français, *Les actions de groupe*, 2010, n° LC 206; Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", available at: ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf, pp. 27 et seq.; Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, paras. 384 et seq.; Mulheron, "The Case for an Opt-out Action for European Member States: A Legal and Empirical Analysis", 15 CJEL (2009), 409, 415 et seq; Lindblom, "Group Litigation in Scandinavia", 13 *Zeitschrift fur Zivilprozess International* (2008), 85; S. Pietrini, "Le développement des recours collectifs en droit des pratiques anticoncurrentielles, panorama des systèmes existants en Europe", *Revue des droits de la concurrence*, n°4 2011.

1. ENGLAND & WALES: GROUP LITIGATION ORDER

40. ***Legal basis***

Rules on Group Litigation Orders (GLOs) were introduced as part of the new English civil procedural rules (the CPR) introduced in 1999.

The rules relating to GLOs are to be found in the CPR Part 19 III and in its supporting Practice Direction.

Part III is not a freestanding code, but must be read as complementary to the remainder of the CPR¹⁹. The important point about the GLO rules is that they are based on new principles that were adopted generally for all types of civil litigation claims. Principles of procedural economy, proportionality and timely justice also come into play²⁰.

41. ***Scope of application***

The GLO system is a wide-ranging procedure. There is no restriction on the subject matter of relevant claims likely to be framed as GLOs²¹.

42. ***Type of collective redress mechanism (collective action)***

The GLO procedure was introduced as a means to provide effective case management for individual claims where there were such large numbers of them that they could not be managed effectively²². Once a certain threshold of individual claims has been brought, not necessarily in the same court but with common facts and issues of law, the judge may, at his own discretion, consider whether it is useful to join the individual claims together. The GLO is merely an additional case management tool in the judge's hands which may lead to a group action in which individual actions are grouped into one procedure. The main objective is to be as informal and facilitative as possible, but operating within controls that are firmly set by the managing judge.

43. ***Main steps of the procedure***

Any party to a claim (claimant or defendant) may apply to the court for a GLO. The court may also start the procedure itself.

¹⁹ Rachel Muheron, "Some difficulties with group litigation orders – and why a class action is superior", *C.J.Q.*, 2005, p. 45.

²⁰ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis", *C.J.Q.*, Vol 27, Issue 2, 2008, p. 218.

²¹ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, 8.21.

²² Civil Justice Council, *Improving access to justice through collective actions, (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report), a series of recommendations to the Lord Chancellor*, November 2008, p. 85, n°15.

A managing judge will be appointed for the purpose of the GLO as soon as possible.

The managing judge must give a definition of the group. Claimants who wish to join the group must join a Group Register kept either by the court or by one of the lawyers acting for a claimant. All claims that fall within this definition are included and will be managed together in the same court by the same judge.

The managing judges may pick and choose, cafeteria-style, whichever methods they prefer in a given case. Options include supervising any advertising of the case, appointing lead solicitors, selecting test claims and setting cut-off dates for people to join the group, which is based on the opt-in approach.

The judge will give a formal judgement at the conclusion of the action, either making a determination as to liability or an assessment of the amount of the award or both²³. This judgement is binding on the parties and on all other claims that are on the group register at the time the judgement is given.

Any registered party who is adversely affected by a judgment may ask permission from the judge to appeal the order²⁴.

44. ***Overview of the case law***

There is an official website listing GLOs authorized by courts since 2000²⁵. They include: claims relating to personal injuries, defective products and medicines, cases of industrial disease, claims arising from accidents or disasters, cases of physical or mental abuse, shareholder claims, claims relating to the provision of financial advice and environmental claims²⁶.

GLOs are thus made in a very wide variety of situations varying completely as to facts and law²⁷, but in each situation having common or related issues of fact and/or law and a fairly small and readily identifiable group.

²³ Information supplied by Robert Turner.

²⁴ PRC Part 19, 12 (2).

²⁵ Reproduced at <http://webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm> (last visited 25/02/2012).

²⁶ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, 8.21.

²⁷ Concrete examples where GLOs have been made are:

- Claims alleging that provisions for the payment of advance corporation tax upon dividends or distributions from UK subsidiaries to parent companies resident in other States breach the EC Treaty and/or double taxation conventions entered between UK and other States.
- Issues as to the effectiveness of the termination notices served by Daimler/Chrysler UK Ltd on all members of Daimler/Chrysler UK Ltd's dealer network.
- Claims pursuant to the Consumer Protection Act 1987 in relation to removal of trilucent breast implants.
- Claims by groups of holidaymakers against travel/holiday companies.
- Escape of noxious chemicals from a factory causing death and personal injury (physical and psychological) to police and firemen attending and some local residents.

Though the procedure has now been available for some 10 years, the total number of GLOs made is quite small. The total would not exceed 100 and is probably now approximately 80 for England & Wales. Less than ten GLOs have been commenced in each of the last five years. In practice, many collective redress cases lead to settlements. So if the judges can assist in resolving one or more principal issues, then this will assist in achieving settlement²⁸.

45. ***Expected reform.***

The Civil Justice Council of England and Wales recommended a General Collective Action in a Final Report dated November 2008. Detailed Rules of Court were prepared (Draft for a Collective Proceedings Act). Although it appeared that the recommendations of the Report were to be implemented, in the event, this did not occur.

The 2008 Report recommended (i) a general collective action (ii) to be brought by a wide range of representative parties (iii) on an opt-in or opt-out basis (iv) permitted to proceed only if certified by the court as being suitable to proceed as a collective action in accordance with a strict certification procedure (v) subject to enhanced case management by specialist judges (vi) with the power of the Court to aggregate damages (vii) and any settlement between the representative claimant and the defendant(s) to be approved by the court to protect the interests of the represented class of claimants (viii) with full costs shifting and (ix) unallocated damages from an aggregate award to be subject to a *cy-près* distribution.

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- Crash landing of a charter aeroplane giving rise to claims for personal injury by some 90 passengers and crew.
 - Escape of dust and other injurious substances from a refuse disposal site causing nuisance and injury to the health to nearby residents (two such cases)
 - Neglect and abuse at a children's home giving rise to claims by former residents (information supplied by Graham Jones).

²⁸ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 57.

2. GERMANY: CAPITAL MARKET MODEL CLAIM PROCEDURE

46. *Legal basis*

The Capital Market Model Claims Act of 2005 (thereafter, the KapMuG)²⁹ came into force on 1 November 2005.

The KapMuG was introduced quickly in order to address a problem that had arisen in the famous *Deutsche Telekom* case. It was intended to be experimental and to be reviewed after five years. The trial period (so-called *sunset clause*) was initially due to expire in November 2010. The sunset clause has been prolonged for two more years to gain time for reforms and so the KapMuG will now expire on 31 October 2012. Recent declarations by the German Federal Government indicate that the KapMuG will not only be extended in time but also in scope to include other mass civil proceedings³⁰. The German Ministry of Justice has published a Draft for a reform of the KapMuG. The Draft needs approval by parliament, which is expected for early 2012.

47. *Scope of application*

The scope of the KapMuG is restricted to specific types of claims in relation to securities actions. The KapMuG provides for a test case to be brought in relation to a claim for compensation of damage suffered due to false, misleading or omitted public capital markets information or for specific performance by investors or shareholders in takeover offer situations³¹.

48. *Type of collective redress mechanism (collective action)*

The KapMuG requires individual claims to be brought at the outset. Once a certain threshold of individual claims has been brought, not necessarily in the same court but with common facts and issues of law, these can be joined together.

Moreover, the KapMuG establishes a mandatory model case procedure: the common factual and legal decisions will be decided in a collective procedure, which then has to be applied to the individual cases. This mechanism is essentially meant to offer judges a management tool for complex mass litigation.

²⁹ KapitalanlegerMusterverfahrensGesetz (Capital Investors' Model Proceedings Law)

³⁰ Axel Halfmeier, "Reform of German Model Proceedings Act planned", available at <http://globalclassactions.stanford.edu/>. The original draft (in German) is available at: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RefE_KapMuG.pdf.

³¹ Section 1 (1) KapMuG.

49. ***Main steps of the procedure***

The basic scheme imposed by the KapMuG is a three-step procedure: an application by the parties to the *court trying the matter* (the first instance judges) to use the procedure; the trial of the model case questions by the *Higher Regional Court* (the higher judge), and the application of the model case decision to the other individual cases by the first instance judges.

The procedure is thus commenced by an application to the first instance judge by the claimant or the defendant in an individual case for the *establishment of a model case*. Such application will be then considered against admissibility criteria, and the first instance judge will announce publicly in a special electronic Internet-based Complaint Registry³² that an admissible application has been made³³.

When nine further similar applications occur, whether before the same or other first instance judges, the first instance judge will order that a model case (more precisely, the *establishment objectives*) be decided by the higher judge. At this point, the first instance judges must suspend all pending proceedings for all individual lawsuits for which the outcome of the collective procedure is relevant. The individual claimants (the interested parties summoned) will then become included in the collective procedure and the model case will commence³⁴.

The purpose of the model case proceeding is to decide the common questions of similar legal actions only once by choosing a specific test case to be decided by the higher judge³⁵.

The judgment in the collective interim procedure is binding on those courts in which the original individual claims were filed and on all interested parties summoned, including those who did not intervene³⁶. The judges deciding on the individual cases will still have to judge on causation issues and on the calculation of individual damages.

The model case ruling may be appealed on a point of law³⁷ and, notably, the decision of the first instance judges on the individual claims can be appealed to the higher judge and to the Supreme Court as well so that there may be five instances before the case is finally decided.

³² The register is monitored systematically by law firms who use the register to solicit claimants.

³³ Sections 1 & 2 KapMuG.

³⁴ Section 7 KapMuG.

³⁵ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 277.

³⁶ Section 16 KapMuG.

³⁷ Section 15 KapMuG.

50. ***Overview of the case law***

Since the implementation of the KapMuG, four model case procedures have ended with a model case ruling according to Section 14 KapMuG. Currently, ten model case procedures are pending before higher regional courts and 246 applications for a model case procedure have been filed at regional courts. All matters related to the KapMuG can be found in the Complaint Registry, which is available on the Internet. Its subsections have the following headings: Expansion of the subject matter of the model case, Model case decision, Application for establishment of a model case, Model case procedure, Appeal on points of law and Summons to appear. Unfortunately, information about decisions by which the first instance judges deny an application for a model case proceeding are not contained in the Complaint Registry.

51. ***Expected reform.***

Large parts of the Draft for the reform of the KapMuG cover technical improvements that are designed to speed up the model procedure, which has been very slow in many cases, especially in the Deutsche Telekom securities case, which is now going into its tenth year before the Frankfurt courts. The main proposal in the Draft is to delete the sunset clause so that the KapMuG becomes a permanent part of German procedural law. The Ministry did not follow academic proposals to include an opt-in participation possibility for the model procedure and thus it still requires an individual suit by every claimant.

3. ITALY: AZIONE COLLETTIVA RISARCITORIA

52. *Legal basis*

Article 140-bis of the Consumer Code introduced class actions in July 2009³⁸.

The new provision came into force on 1 January 2010 and covers only infringements and violations after 15 August 2009³⁹.

53. *Scope of application*

Article 140-bis of the Consumer Code does not cover all violations that may give rise to mass torts or collective damages. The types of claims that can be brought are limited to those that involve contractual rights, product liability, anti-competitive practices and unfair commercial practices. It should be clarified that a product liability claim may be brought against a producer even when there is no direct contractual relationship between the consumer and the producer⁴⁰ and the law applies only to actions for damages brought by consumers, while excluding those brought by competent entrepreneurs⁴¹.

54. *Type of collective redress mechanism (representative action)*

Article 140-bis of the Consumer Code provides for an ordinary representative action. The particularity of the mechanism is that the affected rights must be identical for each represented group member.

55. *Main steps of the procedure*

Article 140-bis of the Consumer Code structured the action into two phases: first, an admissibility stage, and second, a liability and damages stage. Between the first and the second stage, publicity and opt-in take place.

The judges must ascertain the admissibility of the claim. The decision on admissibility may be appealed. If the claim is admitted, the judge must order that the contents of the claim and a deadline be divulged to allow the represented group members to join. Consumers or users wishing to take part in a collective redress action must join the action by giving notice to the judge.

³⁸ Law no. 99 of 23 July 2009, which amended Article 140-bis of the Consumer Code, originally introduced by Law no. 244/2007, the effectiveness of which was suspended.

³⁹ This restriction is now being challenged on constitutional grounds (Renzo Comolli et al., "Italian Class Actions Eight Months In: The Driving Forces", 16 September 2010, available at http://www.nera.com/nera-files/pub_italian_class_actions_1110_pdf.pdf).

⁴⁰ Article 140-bis of the Consumer Code, § 2.

⁴¹ Article 140-bis of the Consumer Code, § 2.

If the judges find the defendant liable, they will specify in their decision either a damages amount or a uniformly applicable criterion to be applied to all claims to calculate the damages for each individual claim⁴².

Article 140-bis of the Consumer Code provides the possibility to lodge an appeal against the final judgement of the court, which must be made within the ordinary term.

56. ***Overview of the case law***

Article 140-bis of the Consumer Code has been in effect since only January 2010; hence it is difficult to draw up statistics. At the time of writing, less than twenty class actions had been filed and no decision on their merits had been issued. Four class actions have been dismissed as non-admissible; only one has been declared admissible and will proceed to the merits stage. The reasons for such a slow start seem to be the lack of litigation-funding provisions and the ensuing potential financial burden for plaintiffs and uncertainties about judicial interpretations of the new law, which are likely to impact significantly its operation in practice⁴³. Unofficial statistics reported that most collective redress actions brought so far seem to cover mass tort claims, especially in product liability claims, contractual claims in the banking sector and actions *vis-à-vis* public bodies concerning public utilities.

⁴² Article 140-bis of the Consumer Code, § 12.

⁴³ F. Rolla, "Italy—Class Actions Shifting to High Gear?", *The International Law Quarterly*, Vol. XXIX, No. 3, Summer 2011, p. 5.

4. PORTUGAL: ACÇÃO POPULAR (POPULAR ACTION)

57. *Legal basis*

The Portuguese Constitution grants to all citizens, independently or through associations for the defence of relevant interests, the right to take a class action in cases and within the terms established by law, including the right of an injured party or parties to request compensation.

The Participation and Popular Action Law of 31 August 1995 (thereafter, Law 83/95), establishes a general set of rules in the area of class actions, which exceeds the mere consumer law.

In terms of the compensatory function, the Portuguese legislator also provides for collective protection in special legislation. With regard to consumer protection, Law 24/96 of 22 August, the Consumer Rights Law, provides that the consumer has the right to receive compensation for patrimonial damage or non-patrimonial damage caused by defective products or services⁴⁴. Where homogeneous individual interests and collective or diffuse interests are in question, it grants standing to consumers and consumers' associations, even though they have not been harmed directly, under the terms of Law 83/95, and to the Public Prosecutor and the Institute for the Consumer⁴⁵.

Also, the Securities Code, approved by Decree-Law 486/99, provides, in Articles 31 and 32, for the possibility of recourse to popular action for the protection of homogeneous individual interests or collective interests of investors in securities, giving standing to non-institutional investors, to associations for the protection of investors and to foundations whose aim is the protection of investors in securities⁴⁶.

58. *Scope of application*

The Portuguese Constitution specifies certain areas to be specially protected by popular actions, such as public health, consumer rights, quality of life and environmental protection, cultural heritage and public domain.

59. *Type of collective redress mechanism (representative action)*

Portugal permits a right of group action, exercisable by citizens and qualifying associations, which is a generally-applicable opt-out mechanism that proceeds through the usual court system.

⁴⁴ Articles 12 (4) and 12 (5) Law 24/96.

⁴⁵ Article 13 (b) and (c) Law 24/96.

⁴⁶ Henrique Sousa Antunes, Class Actions, *Global Class Actions Project Country Report: Portugal*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf, p. 8.

60. ***Main steps of the procedure***

Portugal has not created a specific new procedure concerning the popular action; rather, Portuguese rules provide for a less formal version of the general regime. Broadly speaking, individual consumers or qualifying associations will begin the process with the presentation of the initial petition to court, which should meet the general formal requirements imposed by the Civil Code.

Once the petition for the class action is received, the interested parties will be called to participate in the process or to exclude themselves from it. The writs of summons must be made public through the media or through public notice. The claimant will represent all those parties with an interest or right in the relevant class action.

In their final verdict, the judges will define the terms of payment of compensation payable by the losing party including: an indemnity fixed globally for the violation of interests of holders not individually identified and a corresponding indemnity under the general terms of liability for the holders of the identified interests⁴⁷. The final verdict has *erga omnes* effects; all members of the group will be bound and affected by it.

The process will follow the general procedure in terms of appeal.

61. ***Overview of the case law***

Although the mechanism has received positive comments, the popular action is not very common in Portugal and has been not been used very frequently in practice. The majority of popular actions brought are to protect environmental rights, public works or goods in the public domain. In particular, it appears that most consumer cases are, rather, dominated by the non-judicial and conciliatory mechanisms and are brought before the *Centros de Arbitragem*, which have occasionally referred cases to the Portuguese consumer associations to take to the courts in a popular action suit⁴⁸.

The consumer association DECO's view is that the regime has worked well although the limited number of popular actions for damages is a direct result of the limited resources which DECO has to prosecute such actions rather than due to the efficacy of the regime itself⁴⁹.

⁴⁷ Article 22 Law 83/95.

⁴⁸ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", available at http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 2.

⁴⁹ Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p. 97.

Since the inception of the Portuguese opt-out regime, DECO has (so far as we know) instituted three opt-out actions for damages: *DECO v Portugal Telecom* – the group included almost all Portuguese consumers (approx. 2 million people, 5 opted out of the action); *DECO v Academia Opening* – for language school fees (the group consisted of about 1 200-1 500 persons and no opt-out is known of); *DECO v Water provider company* - exploding water meters (the group consisted of about 1 000-2 000 persons and no opt-out is known of)⁵⁰.

⁵⁰Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p .100.

5. SPAIN: ACCIÓN COLECTIVA PARA LA DEFENSA DE DERECHOS E INTERESES DE LOS CONSUMIDORES Y USUARIOS (COLLECTIVE ACTION IN DEFENCE OF CONSUMER AND USERS' RIGHTS AND INTERESTS)

62. ***Legal basis***

The Spanish Civil Procedure Law 1/2000 of 7 January (LEC), which came into force in 2001, brought in a more extensive regime of collective redress actions in Spain. The articles concerning collective redress litigation are scarce and dispersed through the LEC. There are some sections of the LEC that are applied to collective redress proceedings specifically, and for other questions general provisions in the LEC apply.

63. ***Scope of application***

The collective redress actions are limited to proceedings for the protection of consumers, so that the LEC allows the plaintiff to obtain compensation for damage caused by the consumption or use of products, and generally to determine the contractual and non-contractual liability of a professional.

64. ***Type of collective redress mechanism (representative action)***

It must be clarified that the LEC has not developed a collective redress system, nor a specific procedure for the protection of consumers' collective interests, but it rather provides for some specific procedural rules.

An "ordinary proceeding with particularities" thus processes collective redress actions⁵¹. The Spanish legislator has offered a protection to consumers based on new ways of legitimation (standing) and special processes appropriate for the public interests of consumers.

The LEC has defined two types of interests which may be defended in collective actions:

Collective interests, when the members of the group of consumers are identified or easily identifiable; and

Diffuse interests, when the members of the group of consumers are unidentified or hard to identify.

Depending on the interests at stake, the proceedings will be adapted accordingly.

In Spain, *opt-in* and *opt-out* are not the terms used but rather *actions representing identified or*

⁵¹ Pablo Gutiérrez de Cabiedes Hidalgo, *Global Class Actions Project Country Report: Spain*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf

identifiable victims (collective interest action) and *actions brought on behalf of non-identifiable victims* (diffuse interest actions). What is key is that it is up to the judges to determine whether there are identifiable victims or not.

65. ***Main steps of the procedure***

Given there is no specific procedure for the protection of consumers' collective and diffuse interests, the judges will apply the rules for the ordinary proceeding or the oral proceeding depending on the amount claimed. The ordinary proceeding is a structured proceeding for more expensive and complex matters. If the claimed amount is higher than 3 000 Euro, the ordinary proceeding will apply⁵². The oral proceeding is a simple proceeding characterized by simplification, concentration and speed which is for small claims and less complex matters. If the claimed amount is lower than 3 000 Euro, the oral proceeding will apply⁵³.

The action begins with the filing of the complaint by the representative entitled to sue. There are no specific requirements that a collective claim must fulfil in order to be accepted.

Given the procedural complexity of this type of collective protection, a "preliminary hearing" is an essential step, especially as it introduces the possibility of considering negotiation and mediation.

The judge will summon all victims through the publication of the initial claim's admission⁵⁴. The LEC provides that the best notice and publicity be given to all those affected and their possible participation. The procedure will continue with the participation of all consumers who decided to come forward and judges will apply the rules for the ordinary and the oral proceedings. The participation of the potentially affected consumers is of crucial importance in the Spanish proceeding.

The final judgment will be binding on all consumers affected, even on consumers that have not decided to intervene in the proceedings.

It is possible to appeal the decision within a period of five days⁵⁵.

⁵² Section 249.2 LEC.

⁵³ Section 250.2 LEC.

⁵⁴ Section 15 LEC.

⁵⁵ Section 455.1 LEC.

Overview of the case law

The mechanism has been used frequently and successfully in collective interest proceedings⁵⁶. There have been, however, very few cases in Spain concerning the filing by consumer associations of legal actions to protect diffuse interests.

Collective redress actions that have already been decided by means of civil proceedings can be grouped into the following subject categories: educational services⁵⁷, gas services, financial services, travel services⁵⁸, telecommunication services and defective products (food, pharmaceutical products)⁵⁹.

⁵⁶ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, available at: ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf, p. 19.

⁵⁷ Several English schools for foreigners in Spain required payment for classes in advance and offered students the possibility to enter into financing contracts that they administered and sent to banks with which they had previously signed a cooperation agreement. When the schools closed down because of insolvency, the students found themselves tied to the credit and they had to continue the credit repayments in their entirety.

Different consumers associations and groups of consumers brought a collective redress action against the schools and the credit providers to terminate both the education contracts and the credit contracts. The court decisions upheld the claims brought by the plaintiffs, including the refund of the sums paid by the victims since the date of the schools’ closing-down. (Summary copied from Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 16).

⁵⁸ A delay in the Madrid-Egypt flight caused the loss of one day of a trip, a cruise, and a connection to Abu-Simbel as well as some of the programmed activities for several consumers. The court granted a 420.71 euro award for pain and suffering, considering that the information that the travel agency had provided to the consumers regarding the delay and the change of hotel was insufficient. Furthermore, it did not offer them the possibility to modify their contracts in order to be able to choose between their acceptance or termination. (Summary copied from Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 17)

⁵⁹ In some cases, consumers asked for compensation as a consequence of a food poisoning whereas in others they claimed compensation for the side effects caused by the consumption of A., a pharmaceutical product that alleviates the consequences of the menopause. In all cases, the courts awarded compensation to those consumers that had given evidence of the causality between the consumption of the products and the alleged injuries. (Summary copied from Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, pp. 17-18).

6. SWEDEN: GRUPPRÄTTEGÅNG

67. *Legal basis*

The Group Proceedings Act of 2002 (GrL)⁶⁰, entered into force on 1 January 2003. Unlike the other Member States reviewed, Sweden introduced its GrL spontaneously, and not in response to a need that had crystallised in special court cases.

Interestingly, in 2007 the Ministry of Justice appointed a special investigator to evaluate the GrL⁶¹ as the introduction of the initial proposal led to a period of intense opposition by industry on the basis of the risk of encouraging a significant increase in litigation⁶². The report revealed *inter alia* that no information had emerged to suggest that the fears expressed on behalf of business undertakings had been justified by events. The GrL had not been abused as a means of extorting oppressive settlements out of court, nor was there anything to suggest that the Act had impacted adversely on willingness to invest in Sweden⁶³.

68. *Scope of application*

The GrL is not confined to infringements of consumer and environmental law but potentially applies to all kinds of disputes⁶⁴. All claims in civil law can be brought in collective redress proceedings provided that the other prerequisites of the GrL are met.

69. *Type of collective redress mechanism (representative action)*

The GrL defines a collective redress action as an action that a plaintiff brings as the representative of several persons, with legal effects for them even though they are not parties to the case⁶⁵.

The GrL distinguishes three categories of collective redress actions depending on the quality of the representative claimant. Proceedings may be initiated on behalf of a group of consumers by a natural or legal person (private group action)⁶⁶, by consumer and wage earners associations (organisational action)⁶⁷ or by a designated public authority (public group action)⁶⁸.

⁶⁰ Lag 2002:599 om grupprättegång.

⁶¹ Justitiedepartementets PM 2007-06-14. Utvärdering av lagen om grupprättegång, Ju 2007/5800 /P. The investigator was Judge of Appeal Marianne Wasteson.

⁶² C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 68.

⁶³ See Ds 2008:74. See Lindblom, P H., Utvärdering av lagen om grupprättegång, SvJT 2008, p. 835.

⁶⁴ Section 1 GrL.

⁶⁵ Section 1 GrL.

⁶⁶ Section 4 GrL.

⁶⁷ Section 5 GrL.

⁶⁸ Section 6 GrL.

70. ***Main steps of the procedure***

The representative claimant must apply to the court giving specified details and, unless it is a public authority, must be represented by a lawyer. If the judge approves the group procedure, individual members of the group must then be notified of specified information. The proceeding is based on a mandatory opt-in procedure. Members of the group must affirmatively opt in via a communication to the judge that they wish to be part of the action. Otherwise, they will be left out of the action.

Represented group members are not party to the action and customarily do not appear at the trial. However, they may intervene in the proceedings and appeal the judgment, in which case they are treated as parties.

The judge may issue a judgment which for particular members of the group constitutes a final determination of the substantive matter and which for other members of the group involves the postponement of the consideration of a particular issue⁶⁹. The ruling takes legal force both for and against all who have opted in as if they had personally sued⁷⁰.

In principle, only the group may appeal against the judgement. However, a member of the group is also competent to appeal on his own behalf against a judgement that concerns his rights⁷¹.

71. ***Overview of the case law***

The total number of collective redress actions under the GrL has so far been lower than expected⁷². Since the implementation of the GrL, most cases have been private group actions (eleven cases in total). Remarkably, private group actions are being litigated by organisations formed specifically for this purpose. In such cases, one member of the board of an organisation transferred his claim to the organisation, which accordingly could bring the suit as plaintiff in a private group action. Many cases involve very large aggregate claims, with more than 200 million euros in one. During the years that the GrL has been in place, only one public group action has reached the ordinary courts and no cases of organisational group actions have been issued.

There has been, for instance, a collective redress action against a travel agency for compensation for journeys which were not delivered, against a building company to finish the building of a boat harbour, against a life insurance company for compensation for the unauthorized distribution of profits, against a security company for compensation regarding an illegal register of persons,

⁶⁹ Section 27 GrL.

⁷⁰ Section 29 GrL.

⁷¹ Section 47 GrL.

⁷² On case law, see Lindblom P. H., *Utvärdering av lagen om grupprättgång*, SvJT 2008, p. 209; Lindblom had already extensively examined the suitability of the class action system for Sweden before the system came into force. See Lindblom, P. H.: *Grupptalan. Det anglo-amerikanska*.

against an electricity company for compensation for the estopped selling of electricity and against an afternoon paper for compensation regarding a game on the Internet which did not work⁷³. The action concerned the game in the Internet was dismissed and the suit against the security company was not accepted for collective redress action. It will be tried as a normal civil case. The suit against the insurance company was cancelled because the insurance company and its parent company decided to try the issue of the distribution of profits in the arbitration court⁷⁴.

⁷³Ehdotus laiksi ryhmäkanteesta. Työryhmämietintö. Oikeusministeriö, Helsinki 2006. OMM 2006:4, p. 25.

⁷⁴OMM 2006:4, p. 25. Information supplied by Laura Ervo.

PART ONE

COMPARATIVE ANALYSIS

Section One. Powers of the judges at the admissibility stage

Section Two. Powers of the judges during the progress of the trial

Section Three. Powers of the judges at the judgement stage

Section Four. Powers of the judges at the distribution stage

SECTION ONE

POWERS OF THE JUDGES AT THE ADMISSIBILITY STAGE

A. ANTICIPATED CONCERNS

1. Concern of unmeritorious claims
2. Concern of conflicts of interest between the representative claimant and the represented group members
3. Concern of unreliability in defining the represented group members

B. COMPARATIVE ANALYSIS

1. Powers of judges when admitting (filtering) collective proceedings
 - 1.1. Specialist judges
 - 1.2. Dealing with admissibility requirements
 - 1.3. Giving a separate ruling on admissibility
2. Powers of judges when ensuring the suitability of the representative claimant
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 - 2.2. Assessing the adequacy of representation of the representative claimant and his financial capacity
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 - 3.1. Choosing between opt-in or opt-out proceedings
 - 3.2. Fixing the modalities of the exercise of the option
 - 3.3. Verifying the exercise of the option

C. CONCLUDING SUMMARY

A. ANTICIPATED CONCERNS

1. CONCERN OF UNMERITORIOUS CLAIMS

72. *Access to justice v. abusive litigation*

The introduction of a collective redress mechanism aims primarily at providing access to justice even where individual claims are numerous but the damage suffered is so small that individual actions are not individually financially realistic. Facilitating multi-party claimants' access to justice may, however, lead to some dangers. Indeed, it poses the problematic question of balancing increasing access to justice with protecting procedural and substantive fairness to defendants.

The general suspicion is that the introduction of a collective redress mechanism will encourage a significant increase in litigation of cases that will often have little merit and that will consequently waste the resources of the defendant and lead to a deleterious economic effect within the European Union. This has traditionally been supported by the US class action experience where access barriers are in practice so low that they fail to prevent frivolous, fraudulent or abusive claims.

Procedural systems which lack a strong gatekeeper procedure may in practice place defendants under intense pressure to settle, irrespective of the merits of the individual claims (so-called blackmail settlements). Basically, once a claim is admitted by the judges, the defendant may have little commercial alternative than to settle. Settlement is procured under threat of possible large scale costs that may be incurred during the proceedings combined with the prospect that such costs, from a successful defendant's perspective, would be in practice irrecoverable⁷⁵.

Opposition to the introduction of a collective redress proceeding is also encouraged by the traditionally formulated concern that such a proceeding would generate heightened publicity about claims, even those that ultimately fail or are unmeritorious, and could irreversibly damage a defendant's reputation or drive otherwise worthwhile products off the market⁷⁶ (due to publicity – see *infra*). Collective redress mechanisms could thus also be used as a device to pressure businesses to settle even if the claim has little merit or is abusive, simply to avoid bad publicity.

⁷⁵ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report): a series of recommendations to the Lord Chancellor*, November 2008, p. 156 & p. 178.

⁷⁶ Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, paras 11 and 44.

In **England & Wales**, the *Norplant* case is an example of the irreparable effect that publicity about a claim may have on a company.

The litigation concerned serious side effects allegedly caused by a slow release subdermal contraceptive implant. The case collapsed after legal aid was withdrawn but not before extensive negative publicity had led Norplant's UK distributor to withdraw the product (which had considerable therapeutic value for many people) from the UK market⁷⁷.

73. ***Relevant questions***

Undoubtedly, the risks of abuse should be avoided by procuring sufficiently strong filtering powers for judges to screen out weak or unmeritorious claims⁷⁸. Powers of judges should, at the earliest stage, have a preventive effect so that the introduction of unmeritorious, frivolous, fraudulent or abusive claims will be discouraged.

The main questions in relation to deciding what powers should be given to judges to filter claims are:

- Should the competent judges be experienced and specially trained?

- To what extent should judges decide on the admissibility of the claim? Should judges only verify formal requirements or should they need discretionary powers? Under which filtering criteria should judges assess the quality of claims?
 - To what degree of commonality should judges be attentive?
 - Should judges verify that a collective redress proceeding is a superior means of resolving the litigation?
 - Should the judges verify the preliminary merits of the case?
 - Should judges approve a collective redress proceeding only if a threshold of consumers is reached⁷⁹?

- Should judges hand down a separate formal decision on admissibility?

⁷⁷ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 213.

⁷⁸ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis", *C.J.Q.*, 2008, p. 213.

⁷⁹ Questions inspired by R. Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, (2007) *Modern Law Review* 550 at 569.

2. CONCERN OF CONFLICTS OF INTEREST BETWEEN THE REPRESENTATIVE CLAIMANT AND THE REPRESENTED GROUP MEMBERS

74. *Conflicts of interest*

The fundamental premise of a representative action is that there is a group of individuals who are not before the court other than by representation. A representative action, whether opt-in or opt-out, is one where the claim is prosecuted or defended by a single party who represents the represented group and the result of which action binds the represented group members as if they were actual parties to the action.

With representative actions, there is a risk that the representative claimant may pursue his own interest exclusively and that the represented group members lose control of litigation proceedings⁸⁰. This phenomenon may arise where represented group members cannot properly monitor their representative, leaving him free to operate opportunistically according to his own self-interest. In opt-in and in opt-out cases, loss of party autonomy is, however, an inherent and reasonable consequence of the nature of collective redress proceedings. The collective redress mechanism provides, in turn, benefits to litigants who would not otherwise be able to prosecute their claims and seek to vindicate their rights at all or in such an effective and efficient a manner as provided by the collective redress proceeding⁸¹.

If conflicts of interest are a potential danger of the representative system, this does not, however, entail that judges may not have sufficient powers to safeguard the interests of the represented group members. The lack of realistic means for the represented group members to ensure that their rights and interests are best served should rather encourage a judge to protect the interests of claimants and to ensure there is no conflict between those interests and those of the representative.

75. *Relevant questions*

The meaning of this section is not to enter into details on the issue of the quality of the person who should be granted standing to bring a collective claim. This concern is a matter for legislators and judges should only monitor the legislative choices.

Of importance is rather the ability judges should have to verify the suitability of a representative party to act on behalf of the represented group members and to represent their interests. Given that

⁸⁰ Dimitrios-Panagiotis L. Tzakas, “Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?”, *Common Market Law Review* 48, 2011, p. 1147.

⁸¹ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 150.

the represented group members are not before the court, it seems necessary that judges have this assurance.

It may also be interesting to consider whether judges should consider at the admissibility stage whether the representative has sufficient funds to pay the opponent's costs and even impose security for costs. Such powers could ensure an appropriate balance between the parties and confidence in the legal system's rules that those who put others to unjustified expense should repay such expense⁸².

The main questions in relation to deciding how judges should ensure that the representative understands his responsibility to remain free of conflicts and to pursue the litigation vigorously in the interest of the group are:

- Should judges verify whether the representative claimant represents adequately the interests of the group?
- Should judges ensure that the representative claimant is the most suitable party to act as the representative and/or even that no other person wishes to represent the group?
- Should judges verify whether the representative claimant has sufficient resources to fund and manage the collective redress proceedings, and to cover any adverse costs liability? Should the judges have the power to require security for costs from the representative claimant?
- Should judges have the power to replace a representative claimant who has engaged in conduct inconsistent with the interests of the group?

⁸² C. Hodges, "Response to Consultation *Towards a Coherent European Approach to Collective Redress*", April 2011. Available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf, p. 20.

3. CONCERN OF UNRELIABILITY IN DEFINING THE REPRESENTED GROUP MEMBERS

76. *Difficulties in establishing group definitions*

In the bulk of collective redress action contexts – mass torts, industrial diseases, product liability, securities fraud and so forth – the number of claimants may be radically uncertain. Moreover, it may continue to expand over time, especially in cases of creeping injury or illness. As group size can have major consequences in terms of the impact of the litigation on the defendant, clear and accurate group definition is crucial. The matter is of basic importance for, *inter alia*, identifying the consumers entitled to relief, entitled to notice of the action⁸³ and bound by a final judgement.

77. *Dilemma of an opt-in or opt-out approach to establishing the group membership*

The importance of the issue of reliably defining the represented group members who have sustained injury from illicit practices depends upon the form of the procedure and so inevitably raises the traditional debate on the choice between opt-in and opt-out systems. The intention of this report is not to introduce any form of presumption as to whether an EU collective redress mechanism should operate on an opt-in or opt-out basis. Sufficient studies have been delivered on the subject and studies investigating advantages and disadvantages of opt-in and opt-out actions are legion. It is, rather, of interest to consider whether judges should have the discretion to consider whether some cases, depending on the issue they raise, are better suited to resolution via an opt-in or an opt-out action.

That being said, different aspects concerning the definition of the group should be highlighted.

78. *Opt-in proceedings*

In opt-in proceedings, although it is clear that criteria have to be set in order to allow victims to assess whether their claims are eligible to be included, the extent of judges' supervision is less certain. It should be considered whether judges may have control of the criteria set by the representative claimant and whether they have to scrutinize the individual claims.

In opt-in proceedings, where access barriers are low, the danger is that people with marginal claims may “jump on board” simply in the hope of getting something out of a global settlement sum or damages award. This underscores the importance of ensuring that no group member inappropriately benefits from the initiated proceedings. The risk is that the system could be too lax and would allow parties who have absolutely no interest in the matter to benefit from a judgement.

⁸³ Concerning the importance of the matter for quantifying compensation, see *infra* – Part I, Section Three.

However, in turn, it can be very expensive and time-consuming to investigate individual claims carefully at the outset.

79. ***Uncertainty over the group membership in opt-out proceedings***

The alternative approach automatically includes all claimants who fall within the group definition unless they opt out by actively dissociating themselves from the litigation. This approach may lead, for its part, to considerable uncertainty over the membership and extent of the group. In opt-out cases, the difficulty is to provide the defendant with an unambiguous definition of the size of the group so that he can estimate the extent of his liability for damages⁸⁴. While individual group members need not be identified (and the group may include future, as yet unknown, members), there may be considerable uncertainty over the membership and extent of the group.

The problem of not being able to identify and quantify the financial consequences of such collective redress actions is a concern for defendant companies. They usually need to know the extent of the financial risk of liability that is being claimed against them in order to comply with accounting and company law requirements. They may need to set aside financial reserves and notify insurers. It may be difficult for them to confirm insurance cover or adequately manage the company unless they know how many claims are being made against them, what the sizes of those claims are and whether the claims are essentially sound or poor quality.

For not only financial reasons but also managerial reasons, judges and the parties need to know how many claims are in the group (and this is true of both the opt-in and the opt-out approaches)⁸⁵. These considerations support a managerial strategy in collective redress litigation of requiring a group to be clarified and strictly described (so far as possible) as early as possible, rather than remain shadowy⁸⁶.

Opt-out proceedings should thus require a group definition that will permit identification of individual group members. It is hence important to examine how judges should ensure that membership of a group is ascertainable.

⁸⁴ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p.1142.

⁸⁵ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 59.

⁸⁶ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 86. p. 59.

80. *Necessity of notice vs. excessive costs of notifying the group*

Necessity of publishing the action vs. damage to the defendant's reputation

Collective redress proceedings require that effective and adequate notice should be given so that represented group members can truly opt in or opt out. Although the need to publicise the pending collective redress action has been commonly accepted as necessary to inform the concerned parties, it is a very dangerous tool. Indeed, it could seriously damage the image of the defendant. Judges should take care to ensure a form of publicity that is suited to the interests of those concerned.

In opt-in proceedings, unless proper, sufficient notice of the admissibility order can be given, would-be claimants may be excluded unfairly from benefiting under the litigation. Settlement may thus be discouraged because collective redress proceedings will not necessarily embrace the whole universe of claimants and a defendant's liability may remain open-ended⁸⁷.

In opt-out proceedings, the persons comprised in the action have to be concretised effectively such that suitable notice may be directed to them. However, the risk is that the costs of such notice considerably increase given the potentially high number of group members. Depending upon the number and the location of potential claimants and the nature and extent of the issues, adequate publicity may be very expensive and time-consuming to organise. In turn, this raises the question of who should pay for it⁸⁸. Therefore, judges, in reaching a decision on notice of the action to potential claimants, should take into account the cost of such notice and its usefulness.

Judges' discretion should be allowed in giving the best notice practicable at a reasonable cost (this is true of both opt-in and opt-out approaches).

81. *Relevant questions*

The main questions in relation to deciding what safeguards aiming at the elimination of any potential abuses and uncertainty should be imposed on judges are:

- Should judges be given the power to progress collective redress proceedings on an opt-in or opt-out basis according to whichever contributes best to the effective and efficient disposition of the case?
- Should judges be given the power to determine the modalities of the exercise of the opt-in or opt-out option?

⁸⁷ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 220.

⁸⁸ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 223.

- Should judges participate in the establishment of the group membership?
 - Should judges set conditions under which the group of victims is defined (in particular, in opt-in proceedings)?
 - Should judges ensure that group members are adequately defined and at least clearly ascertained (in particular, in opt-out proceedings)?
- Should judges verify the process of notification to potential group members?
- Should judges fix a strict deadline for the exercise of the option?
- Should judges be given the power to verify the exercise of the opt-in or opt-out option?
 - In opt-in proceedings, should judges ascertain confirm that the individual claimants who opted-in meet the criteria set out in their admissibility order? Should judges have the power to strike out individual claims?
 - In opt-in and opt-out proceedings, should judges have the power to regulate the situation of claimants who fail to meet cut-off dates?

B. COMPARATIVE ANALYSIS

1. POWERS OF THE JUDGES WHEN ADMITTING (FILTERING) COLLECTIVE PROCEEDINGS

1.1. SPECIALIZED JUDGES

- Do the selected Member States provide specific rules on material and territorial competence for collective redress proceedings?
 - Do the selected Member States grant competence to experienced and specially trained judges?

ORDINARY COURTS

82. ***Spain and Portugal do not consider the need for specialist judges; proceedings are managed before the ordinary courts.***

Neither the LEC nor Law 83/95 provide specific competence rules for collective actions. In these Member States, collective claims are managed by first instance judges of the civil jurisdiction, who are in charge of dealing with all kinds of litigation arising from the application and enforcement of private law.

HIGHER COURTS

83. ***Germany gives higher judges exclusive jurisdiction for the model case procedure.***

In **Germany**, the Higher Regional Court has exclusive jurisdiction to decide a test case. However, the higher German judges are not specifically trained to deal with test case proceedings. The involvement of higher judges increases the level of confidence in the decision and avoids, in principle, the need for an appeal⁸⁹.

⁸⁹ C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 79.

84. ***England & Wales recognize the necessity for specialist judges.***

In **England & Wales**, once a GLO has been made, a managing judge will be assigned with responsibility for case management of the litigation. Although there is no requirement that this be the Central Registry of the High Court of London, this has usually been the case. The managing judge may be assisted by a Master or another judge to deal with certain procedural matters. Experience has shown that managing GLOs requires special training for and expertise of judges and that allocating competence to decide GLOs to a managing judge is beneficial to both parties and to the legal system. Few judges in England & Wales are, in practice, permitted to be involved in GLO proceedings⁹⁰.

LIMITATION OF COMPETENT COURTS

85. ***Sweden gives jurisdiction to district courts competent for real estate disputes.***

The **Swedish** Government has decided to designate the district courts that are competent to hear real estate disputes as competent to try collective redress action proceedings⁹¹. The reason for those particular courts being selected to handle collective redress actions is that they often have considerable resources for and experience of handling complex and complicated disputes with many persons involved. There is at least one such designated court in each county⁹², so they are also geographically spread across the country⁹³.

86. ***Italy chooses a special territorial criterion for allocating territorial jurisdiction among Italian courts.***

In **Italy**, collective proceedings may only be brought before one of the twelve courts that have been indicated in Article 140-bis of the Consumer Code (meaning that some Italian courts have been paired up)⁹⁴.

⁹⁰ C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 54.

⁹¹ cf. Government Regulation 2002:814.

⁹² Section 3 GrL.

⁹³ Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång (Group actions in Sweden. Background and Commentaries to the Swedish Group proceedings Act of 2002)*, Stockholm 2008, p. 300.

⁹⁴ Article 140-bis, § 4 of the Consumer Code.

1.2. DEALING WITH ADMISSIBILITY REQUIREMENTS

- Under which filtering criteria are the judges in the selected Member States required to assess the quality of claims? **((1) Overview of the admissibility requirements)**
- To what extent do the selected Member States allow judges to decide on the admissibility of a claim? **((2) Margin of appreciation left to judges)**
 - Do judges in the selected Member States only verify formal requirements or do they have discretionary powers?
- To what degree of commonality are judges required to be attentive in the selected Member States? **((3) The commonality requirement)**
- Are judges in the selected Member States required to ascertain that a collective redress proceeding is a superior means of resolving the litigation? **((4) The superiority requirement)**
- Are judges in the selected Member States required to permit a collective redress proceeding only if a threshold of potential claimants consumers is reached? **((5) The numerosity requirement)**
- Are judges in the selected Member States required to verify the preliminary merits of the case? **((6) The preliminary merits requirement)**

(1) OVERVIEW OF ADMISSIBILITY REQUIREMENTS

NO SPECIFIC ADMISSIBILITY REQUIREMENTS

87. ***In Spain, there is no gatekeeper procedure for collective redress actions.***

In **Spain**, the general rules only state that judges should first examine their competence in the jurisdiction and objective and, if necessary, territory. They should then make a judicial order to allow or summarily dismiss the claim⁹⁵. The LEC does not provide for decisions by judges on preliminary issues other than mere procedural objections. Judges must resolve any procedural objection *ab initio* through an *auto*, which is different from a sentence⁹⁶.

⁹⁵ Section 404 LEC; Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report: Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 38.

⁹⁶ Information supplied by Elena Martinez.

Decision of the Audiencia Provincial of Sevilla⁹⁷ - Dismissing a collective claim for procedural reasons

This case concerned a breach of educational contracts by Opening English Master Spain, S.A. because of a situation of economic insolvency and subsequent breach of financing contracts by Eurocrédito E. de F., S.A., F. Banco de Crédito, S.A., Banco S. C. H., S.A. and P. Servicios Financieros, Establecimiento Financiero de Crédito, S.A.

Students had to pay for English courses in advance so the school offered them the possibility of entering into financing contracts that they administered and that they then sent to banks with which they had previously signed a cooperation agreement. The total number of consumers that were affected by the alleged damage was estimated at approximately 10 000 persons.

The first instance judge resolved the case by means of an oral proceeding, both terminating the contracts, and ordering the banks not to continue charging the amounts provided for in the financing contracts and to refund the amounts improperly charged. But the second instance judge stated that the oral proceeding was not suitable because the case should have been resolved by means of an ordinary proceeding and so dismissed the collective claim⁹⁸.

88. ***In Portugal, Law 83/95 stipulates only one admissibility criterion that the judge has to verify for the commencement of a popular action⁹⁹.***

In **Portugal**, Law 83/95 does not contain a specific certification requirement, but the usual requirement to strike out frivolous litigation is maintained. According to Law 83/95, judges have the discretion to dismiss a claim after initial investigations and having heard the Public Prosecutor when it is *clearly improbable the application will proceed* (preliminary merits criterion).

⁹⁷ Decision of the Audiencia Provincial (Second Instance Court) of Sevilla, 22.1.2004 (Westlaw Aranzadi Reference: AC 2004\5).

⁹⁸ Summary based on the information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Spain), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 81- 84.

⁹⁹ Article 13 Law 83/95.

89. ***In Italy, Article 140-bis of the Consumer Code stipulates four criteria that a judge has to verify the commencement of a group action¹⁰⁰.***

In **Italy**, there are four admissibility requirements:

- (1) First, the represented group members' claims must be identical (strong commonality requirement).
- (2) Secondly, the claim must be manifestly founded (preliminary merits criterion).
- (3) Thirdly, the representative claimant must be able to adequately represent the interests of the class (adequacy of representation requirement).
- (4) Finally, there must be no conflict of interests.

Codacons v. Voden Medical Instruments S.p.A¹⁰¹

In *Codacons v. Voden Medical Instruments S.p.A*, it was ruled that a judge is entitled, on his own initiative, to give the proper legal assessment of the claims by reference to facts timely presented by the parties.

Although the constitutionality of this rule is disputable, judges have applied Article 140-bis, §6 of the Consumer Code straightforwardly¹⁰².

The law charges judges with making this preliminary evaluation after a special hearing¹⁰³.

90. ***In Sweden, the GrL stipulates four preconditions that the judge has to verify for the commencement of a group action.***

In **Sweden**, there are four admissibility requirements:

- (1) First, the action must be based on one or more circumstances or matters of law that are common or similar with respect to the claims of the members of the group (the commonality

¹⁰⁰ Article 140-bis, § 6 of the Consumer Code.

¹⁰¹ *Codacons v. Voden Medical Instruments S.p.A*, decisions by the court of Milan 16 December 2010 and by the Court of Appeal of Milan 3 May 2011.

¹⁰² See, e.g., the holding of the Turin court of appeals on October 27, 2010, in “*Guida al diritto*”, 2010, n. 47, p. 60 ff., with the critical comment of Andrea Giussani.

¹⁰³ Article 140-bis, § 6 of the Consumer Code.

requirement), and the group proceedings must not appear inappropriate because the grounds for some group members' claims differ materially from other claims¹⁰⁴.

- (2) Secondly, the collective redress action should be the best available procedural alternative for litigating the majority of the claims in court (the superiority test)¹⁰⁵.
- (3) Thirdly, the group must be adequately defined in terms of the value of the claims, scope, etc.¹⁰⁶.
- (4) Finally, the financial affairs of the representative claimant must be judged to be in good order and the representative claimant considered suitable to represent the group (adequacy of representation of the claimant)¹⁰⁷.

***B. et al. v A. AB*¹⁰⁸ - Dismissal of the claim by the judges because the admissibility criteria were not met**

The *B. et al. v A. AB* case concerned an online soccer game arranged by A., one of the biggest newspapers in Sweden, and in which 82 063 persons participated. Each participant paid 40 SEK (€4.40) to join the game. Mr B. claimed compensatory damages for himself and others (8 persons in total), including for the entry fee they paid to participate in the online game arranged by the newspaper, when data transmission problems on the Internet prevented them from playing the game for two days.

The district judge rejected the application for summons and dismissed the action because the application did not meet the requirements imposed by Chapter 42 of the Code of Judicial Procedure and the conditions imposed by Section 8 in the GrL. The plaintiff appealed to the court of appeal, which sent the case to the district court for retrial. The district court dismissed the case again, and the plaintiff appealed to the court of appeal again, which finally dismissed the case¹⁰⁹.

A group action is dealt with in the usual manner in relation to the judges' consideration of the general prerequisites for initiating proceedings¹¹⁰, unless otherwise provided in the GrL. In accordance with the general rules of the Code of Judicial Procedure, the special procedural conditions are peremptory and the examination is therefore conducted *ex officio* by the judges. In addition, the names and addresses of all group members must be explicitly mentioned¹¹¹ and the four preconditions for group actions should be specified by the plaintiff in his application for

¹⁰⁴ Section 8 (1) & (2) GrL.

¹⁰⁵ Section 8 (3) GrL.

¹⁰⁶ Section 8 (4) GrL.

¹⁰⁷ Section 8 (5) GrL.

¹⁰⁸ *B. et al. v A. AB*, Ö 7501-04 and Ö 810-05 Svea Hovrätt.

¹⁰⁹ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 379-380.

¹¹⁰ Section 2, § 2 GrL.

¹¹¹ Chapter 14, Section 1 Judicial Procedure Code.

summons and by the defendant in his answer. Motions to dismiss the collective redress action on the grounds that the conditions for a group action have not been met are handled the same way as other motions to dismiss an action without trying it on its merits in ordinary individual trials according to the Code of Judicial Procedure. No application is needed in order for the judges to dismiss the claim¹¹².

91. ***In England & Wales, the GLO rules stipulate five criteria that a judge has to verify for the commencement of a GLO¹¹³.***

In **England & Wales**, the case must satisfy five legal requirements stipulated in the GLO rules. These are formal requirements only.

- (1) First, there must be a *number of claims* (numerosity requirement)¹¹⁴.
- (2) Secondly, these must give rise to common or related issues of fact or law (commonality requirement)¹¹⁵.
- (3) Thirdly, the consent of the Lord Chief Justice or the Vice Chancellor is required before a GLO is possible (a kind of preliminary merits criterion)¹¹⁶.
- (4) Fourthly, a GLO will not be commenced if consolidation of the claims or a representative proceeding would be more appropriate (superiority test)¹¹⁷.
- (5) Fifthly, the class needs to be defined by the number of already issued and potential claims¹¹⁸.

In addition, judges have general powers (which, though obviously important, clearly can be exercised under limited circumstances only) under the CPR to strike out any claim where the statement of case (i) discloses no reasonable grounds for bringing or defending the claim (ii) is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings¹¹⁹, for example it is: vexatious; an attempt to re-litigate decided issues; a collateral attack upon an earlier decision; pointless and wasteful, with the benefit attainable by the claimant in the proceedings demonstrably being of such limited value as to render the proceedings not worthwhile and the litigation costs being out of all proportion to the benefit to be achieved¹²⁰. These powers can be exercised by the judges on their own initiative or on application by a party¹²¹.

¹¹² Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång (Group actions in Sweden. Background and Commentaries to the Swedish Group Proceedings Act of 2002)*, Stockholm 2008, p. 332.

¹¹³ Rachael Mulheron, "Some difficulties with group litigation orders - and why a class action is superior", *C.J.Q.* 2005, 24(Jan), p. 45.

¹¹⁴ CPR Part 19, 19.11 (1).

¹¹⁵ CPR Part 19, 19.10 and 19.11 (1).

¹¹⁶ Practice Direction 19B, para 3.5.

¹¹⁷ Practice Direction 19B, para. 1 and para. 2.3.

¹¹⁸ Practice Direction 19B, para. 3.2 (2), (3).

¹¹⁹ CPR Part 3, 3.3. and 3.4.; Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, 3.18.

¹²⁰ CPR, Part 1, 1.4 h.

¹²¹ Information supplied by Graham Jones.

Interestingly, the duties that are required of judges as set out in the CPR rules include *dealing with cases justly* (suitability requirement)¹²² and considering all options for managing litigation¹²³. This obligation to consider how they can best manage the action applies throughout the life of the claim and judges can and do intervene on their own initiative from the earliest stage¹²⁴.

*Hobson v Ashton Morton Slack Solicitors*¹²⁵ - Cost-benefit analysis

The *Hobson v Ashton Morton Slack Solicitors* case is an illustration of English judges' apparently deep-seated reluctance to make GLOs, precisely because they fear opening the floodgates to escalating costs.

Among his reasons for refusing the GLO application, the judge stressed the *obvious and grotesque imbalance* between the costs already incurred and to be incurred, and the sums to be recovered. At most, the damages recovered would have been only around 50 per cent of the costs incurred simply to date¹²⁶. On any cost-benefit analysis, he held, the GLO approach could not possibly be a 'just' means of resolution under the overriding objective¹²⁷. Consolidation of the actions or the trial of selected cases (say, 2-3 test cases) were more appropriate and cost effective means of resolving the claims¹²⁸. The *Hobson* cost-benefit dictum strongly suggests that excessive costs alone may be sufficient justification to deny a GLO, even where no other procedure is available.

Remarkably, the **Draft for a Collective Proceedings Act** endorsed this cost-benefit test. It provides that judges may *refuse to certify the claim as collective proceedings if the remedy claimed is or includes payment of money to class members (otherwise than in respect of costs), and the court concludes that it is likely that, if judgment were to be given in favour of the representative claimant, the cost to the defendant of identifying the class members and distributing to them the amounts ordered to be paid to them would be disproportionate, having regard to the likely total of those amounts*¹²⁹.

In addition, under the **Draft for a Collective Proceedings Act**, it is provided that *the court may certify a claim as collective proceedings if:*

- (1) *there is an identifiable class of 2 or more persons* (threshold requirement);
- (2) *the claims of the class members raise common issues* (commonality requirement);
- (3) *collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues* (superiority test); and

¹²² CPR Part 1, 1. 1 (1).

¹²³ CPR Part 1, 1.4.

¹²⁴ Information supplied by Robert Turner.

¹²⁵ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB), in which certification of the action as a GLO was denied.

¹²⁶ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB) at [45], [71].

¹²⁷ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB) at [71].

¹²⁸ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB) at [2].

¹²⁹ Article 19.19 (4) Draft Collective Proceedings Act.

- (4) *there is a person, or certified or authorised body suitable for appointment as representative claimant* (adequacy of representation of the claimant).
- (5) *the collective proceeding has a real prospect of success* (preliminary merits criterion)¹³⁰.

In England & Wales, public funders have sometimes helped the judges avoid unmeritorious claims so that, in certain circumstances, they also play a role of gatekeeper.

***Benzodiazepine Tranquillisers case*¹³¹ - Avoidance of unmeritorious claims**

In the *Benzodiazepine Tranquillisers* case, nearly all claimants were initially funded from state Legal Aid.

The Legal Aid Board (later known as the Legal Service Commission) suspected that many individual claims had not been sufficiently investigated, and required legal teams to audit claims, which resulted in many discontinuing and ultimately in the withdrawal of the public funding from the entire litigation. Consequently, the case collapsed.

Indeed, the defendants applied to court to strike out individual claims, which the court did on the grounds that the expert medical reports did not substantiate the injuries alleged or that the claimant had no reasonable chance of success. The remaining claims were struck out as an abuse of process, taking into account factors such as limitation defences and considerable problems in proving causation, plus the fact that delay had prejudiced the defendants' right to a fair trial¹³².

92. ***In Germany, judges must consider an application for a model case against six admissibility criteria stipulated in specific rules***¹³³.

In **Germany**, there are six admissibility requirements.

- (1) First, the application must contain questions of law or fact that are common to the proceedings (commonality requirement) and show that the questions in the proposed model *may have significance for other similar cases beyond the individual dispute concerned*¹³⁴. The application must be based on information on all factual and legal circumstances.

¹³⁰ Article 19.19 (1) Draft Collective Proceedings Act.

¹³¹ See G. Hickinbottom, "Benzodiazepine litigation" in C. Hodges, *Multi-Party Actions* (Oxford 2001); C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, pp. 61-62.

¹³² Summary based on the information contained in C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 62.

¹³³ Sections 1 (2) & 3 KapMuG.

¹³⁴ Section 1(2) KapMuG.

Under the **New Version of the KapMuG**, the admissibility of an application is given its own section and clarifies this first criterion. It lays down that *the decision on the underlying legal dispute should depend on the claimed object of establishment*¹³⁵. Remarkably, the New Version of the KapMuG uses its own specific terminology for model case proceedings and no longer makes any reference to the terminology of the German Civil Code.

- (2) Secondly, a decision on the dispute upon which the application is based must not already be forthcoming.
- (3) Thirdly, the application must not be brought for purpose of delaying proceedings.
- (4) Fourthly, the evidence the claimant intends to use to substantiate or refute factual claims must be suitable.

On this point, the terminology is also adapted in the **New Version of the KapMuG**: *the evidence offered must be suitable for proof of the claimed object of establishment*¹³⁶.

- (5) Fifthly, the claimant's reasons must justify the filing of a test case proceeding.
- (6) Finally, if an exclusively legal question has been raised, it must appear to need clarification.

The first instance judges must consider the admissibility of the claim, having granted the defendant the opportunity to submit a written pleading on the matter.

(2) MARGIN OF APPRECIATION LEFT TO THE JUDGES

NO SPECIFIC GATEKEEPER PROCEDURE

93. ***Portugal and Spain do not consider this issue as they do not provide for a specific gatekeeper procedure.***

SMALL MARGIN OF APPRECIATION

94. ***In Germany, the KapMuG grants little flexibility to judges.***

In **Germany**, generally speaking, the KapMuG contains precise guidelines for denying applications, which leaves little flexibility for the first instance judges.

¹³⁵ Section 3 (1) New Version of the KapMuG.

¹³⁶ Section 3 (1) New Version of the KapMuG.

It should be noted that in Germany, it is the responsibility of the first instance judge to admit applications for the establishment of a model case and then to order a decision of the higher judge on the establishment objective of related applications for the establishment of a model case. The *order referring the matter* of the first instance judge to the higher court is without appeal and is binding on it¹³⁷.

Judges have specified the extent of this binding effect.

4 SCH 2/06 KapMuG¹³⁸; 24 KAP 4/08¹³⁹ - A higher judge may dismiss a model case proceeding on basis that its *establishment objectives* are not admissible

In the first case, it was established that being bound by the *order referring the matter* means only that a higher judge cannot verify whether the first instance judge committed procedural errors. So, even if the higher judge cannot check whether the first instance judge was allowed to decide on an *order referring the matter*, he may however decide on the admissibility of single *establishment objectives* with regard to his interest in the legal protection of his own limited competence to investigate¹⁴⁰.

The second case interpreted the extent of the binding effect similarly. In this case, the higher judge dismissed the model case procedure by deciding that the *establishment objectives* of the *order referring the matter* were not admissible.

In this case, the plaintiffs claimed damages for prospectus liability in the broader sense on the basis of wrong, misleading and neglected information. Prospectus liability in the broader sense means (among other things) liability at the moment of conclusion of the contract (*culpa in contrahendo*).

The higher judge came to the conclusion that not all *establishment objectives* mentioned in the *order referring the matter* could be established and that he therefore had to declare the *order referring the matter* inadmissible. There was therefore no longer any need to appoint a model case plaintiff or to publish a model case procedure.

The higher judge considered that the *establishment objectives* mentioned in the *order referring the matter* aimed only at establishing claims for damages out of prospectus liability in the broader sense and that these are not within the scope of the model case proceeding Act, according to Section 1 Subsection 1 Sentence 1 of the KapMuG.

¹³⁷ Section 4 (1) KapMuG.

¹³⁸ Kammergericht 03.03.2009, 4 SCH 2/06 KapMuG.

¹³⁹ Kammergericht 18.05.2009, 24 Kap 4/08.

¹⁴⁰ Summary translated from the website: <http://zip-online.de/cf9afe3e58502559f99bac882e0d2b66>.

The Federal High Court of Justice had decided twice already ¹⁴¹ that the KapMuG only recognizes claims for damages that rely directly on wrong, misleading or neglected public capital market information. Individual duties resulting from contractual agreements and the question of whether these are violated cannot become objectives of an Application for a Model Case Procedure.

EXTENSIVE MARGIN OF APPRECIATION

95. ***In England & Wales, Italy and Sweden, the procedural prerequisites for initiating group proceedings are set out in a very flexible manner giving judges a relatively broad discretion to allow or disallow claims to be conducted in collective redress proceedings.***

In **England & Wales** and in **Sweden** the prerequisites imposed by the specific rules are deliberately simple so as to allow judges wide discretion over whether or not to admit a collective redress action. In addition, in **England & Wales**, the general approach of judges is based on the overriding objective of dealing with a case justly¹⁴².

The slow start of the new collective redress mechanism in **Italy** is, however, attributed to the uncertainties about judicial interpretations of the new Article 140-bis of the Consumer Code. This demonstrates that the absence of strictly defined criteria may lead to difficulties in predictability and interpretation. The first Italian decisions all revolved around the admissibility requirements.

¹⁴¹ XI ZB 26/07 ; III ZB 97/07.

¹⁴² CPR Part 1, 1.1 (2).

(3) THE COMMONALITY REQUIREMENT

NO EVALUATION OF THE COMMONALITY OF THE INDIVIDUAL CLAIMS

96. ***Spanish and Portuguese laws do not consider this issue, as they do not refer to commonality as a prerequisite for instance.***

It should, however, be noted that **Portuguese** scholars consider that either the parties should have been affected by the same or similar conduct or that the rights and interests harmed should be related¹⁴³.

Spanish scholars focus on the fact that defendants may be able to object the lack of commonality as a procedural motion in light of the general regulations contained in the LEC in connection with aggregation of claims. Article 72 of the LEC provides that a plaintiff can aggregate different legal actions against different defendants provided that the issues of fact that underlie each of the actions are sufficiently common. This regulation can be applied by analogy to the case of a collective redress claim¹⁴⁴.

Decision of the First Instance Court number 1 of Barcelona¹⁴⁵ – Homogeneity not required

This litigation concerned side effects caused by *Agreal*, a drug for the treatment of the consequences of the menopause, which were not mentioned in the information given to the consumers by the patient information leaflet. As a consequence, some consumers suffered physical and psychological damage. A total of 21 consumers were potentially affected by the alleged damage.

Although the judge stated that there was no homogeneity among the side effects alleged by the claimants, he admitted the collective claims. The judge decided that the drug was a defective product because the content of the patient information leaflet was not sufficient and awarded compensation for the original material damage¹⁴⁶.

¹⁴³ Tito Arantes Fontes & Joao Pimentel, “Portugal”, in *The International Comparative Legal guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 123.

¹⁴⁴ Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 139.

¹⁴⁵ *Decision of the First Instance Court num 1 of Barcelona*, num.973/2005, 27.9.2006 (Westlaw Aranzadi Reference: AC 2006\1724).

¹⁴⁶ Summary based on the information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 216-219.

97. ***England & Wales and Sweden refer to commonality as a prerequisite for instance but do not require that ascertain that the common issues that arise will predominate over the individual issues.***

In **England & Wales**, the criterion is deliberately simple, namely that the claims must *give rise to common or related issues of fact or law*¹⁴⁷. It is not required that all individual claims are necessarily the same¹⁴⁸.

***Hobson v Ashton Morton Slack Solicitors*¹⁴⁹ - Common or related issues of fact or law**

In *Hobson v Ashton Morton Slack Solicitors*, the judge refused to grant a GLO because the individual agreements between the claimants and the defendants (trade unions) were different and the assessment of liability depended on the facts of each case.

A group of miners and ex-miners brought claims regarding the enforceability of agreements made between the claimants and their trade unions under which the claimants agreed to pay the trade union a proportion of the compensation awarded to them in separate litigation. The judges ruled that no group litigation issue had been sufficiently or precisely identified: the only unifying feature in the litigation was that all of the claimants were miners or ex-miners.

Under the **Draft for a Collective Proceedings Act**, the judges have to verify that the claims of the represented group members raise common issues¹⁵⁰.

Similarly, in **Sweden**, it needs only be shown that the claims of the members of the group share one common fact or question of law, provided that the grounds for some group members' claims do not differ materially from other claims.

¹⁴⁷ CPR Part 19, 19.10.

¹⁴⁸ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 56.

¹⁴⁹ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB).

¹⁵⁰ Article 19.19 (1) Draft Collective Proceedings Act.

98. ***Germany requires that judges verify the similarity of individual cases.***

In **Germany**, a plaintiff has apply for a model case proceeding to the judge of first instance by proposing model questions and must show that they *may have significance for other similar cases beyond the individual dispute concerned*¹⁵¹. Cases are considered *similar* if they are related to the same underlying circumstances¹⁵².

99. ***Italy requires that judges verify that all individual cases are identical.***

It appears that **Italy** has adopted a strict criterion: the group members' claims must be identical (identity of individual rights requirement, which is also called the homogeneity requirement)¹⁵³. The law does not, however, clarify the concept of *identity* of the individual rights¹⁵⁴. Similarly, there are no guidelines for knowing when *individual*¹⁵⁵ rights of consumers and users may be considered *homogeneous*¹⁵⁶.

***Codacons v. British American Tobacco Italia*¹⁵⁷ - Homogeneous nature of individual rights of consumers**

In *Codacons v. British American Tobacco Italia* the judge adopted a strict interpretation of individual rights. He excluded homogeneity as the facts underlying the claim required the assessment of different individual circumstances.

In this case, the representative claimant sought compensation for nicotine addiction and psychological stress and for reimbursement of the amount spent daily on cigarettes. He argued that the tobacco manufacturer was liable for alleged tobacco manipulation and failure to warn. The representative claimant also argued that addiction, psychological stress and economic loss ensuing from the daily expenditure on cigarettes would be common to all smokers.

The judge pointed to the very diverse situations of individual smokers when ruling on the non-homogeneous nature of the individual rights of the consumers involved. Furthermore, the judge clarified that the new collective redress action law does not cover collective interests of

¹⁵¹ Section 1 (2), KapMuG.

¹⁵² Sections 2 (1), 5 KapMuG.

¹⁵³ Article 140-bis, § 6 of the Consumer Code.

¹⁵⁴ F. Rolla, "Italy: The Italian-style action and product-liability related claims", Class Actions Bulletin, July 2010 available at: <http://ehoganlovells.com/ve/v71Uf83Kt8465nF/VT=1/page=7>.

¹⁵⁵ Article 140-bis, § 1 of the Consumer Code.

¹⁵⁶ Article 140-bis, § 1 of the Consumer Code.

¹⁵⁷ Civil Court of Rome, 11 April 2011.

consumers, but rather that in product liability cases it allows collective redress claims regarding identical rights of consumers for a given product against the manufacturer; *i.e.*, rights that either arise from the same originating event or whose assessment and protection involve the same legal and factual issues.

The claim brought in this case would have required the analysis of various scenarios, such as: when each consumer started smoking and why; the brand and number of cigarettes smoked daily; the level of addiction; the individual choice to quit or continue smoking; the consequences of the above on the health of each smoker; and other typically individual matters¹⁵⁸.

***Codacons v. Voden Medical Instruments S.p.A*¹⁵⁹ – Homogeneous nature of individual rights of consumers**

In *Codacons v. Voden Medical Instruments S.p.A*, the judge also gave some guidelines on the *identity of rights* requirement.

In commenting on the requirement in general, the judge clarified that, in collective redress actions relevant to contractual rights, the identity requirement is met when, for example, consumers have entered into contracts which, even if concluded separately by each consumer, have the same content or, in any event, are aimed at governing identical rights.

In collective redress actions for liability in tort (as was the case in the *Voden Medical* litigation), the judge considered that identity exists when the rights are infringed by the same unlawful event, which shall necessarily consist of uniform conduct¹⁶⁰.

***Comitato pendolari di Nettuno v. Trenitalia S.p.A*¹⁶¹ – Homogeneous nature of individual rights of consumers**

In *Comitato pendolari di Nettuno v. Trenitalia S.p.A*, plaintiffs claimed that Trenitalia was responsible for heavy delays and inconveniences to train passengers over several days. Each consumer had bought a ticket at a different price under different terms and conditions and the delays and inconveniences suffered were different, depending on the train to be taken.

Consistently with the two above-mentioned cases, the judge dismissed the case as he considered that there was no homogeneity of situations amongst the different passengers.

¹⁵⁸ See F. Rolla, “Italy—Class Actions Shifting to High Gear?”, *The International Law Quarterly*, Vol. XXIX, No. 3, Summer 2011, pp. 5–6.

¹⁵⁹ *Codacons v. Voden Medical Instruments S.p.A*, Court of Appeal of Milan, 3 May 2011.

¹⁶⁰ F. Rolla, “Italy—Class Actions Shifting to High Gear?”, *The International Law Quarterly*, Vol. XXIX, No. 3, Summer 2011, p. 8.

¹⁶¹ *Comitato pendolari Nettuno v Trenitalia S.p.A*, Court of Rome 16 September 2011.

In *Altroconsumo vs Banca Intensa Sanpaolo*, the judge seems, however, to have adopted a more flexible interpretation of the homogeneity requirement.

The defendant claimed that the homogeneity requirement was not met as the bank account contracts at stake were in fact different from one another, which would undermine the possibility of composing a group. The defendant also underlined that in terms of damages, each consumer's position should have been evaluated via individual accounting investigations.

The judge rejected the defendant's argument and confirmed the existence of the homogeneous nature of the individual collective rights. He decided that the homogeneity criterion is not to be taken to the letter but is intended to mean *harmonised individual rights*. He specified that for homogeneity of individual consumers' rights to exist, there is no need for contracts to be identical but that there must be a correspondence between the claims, interests and rights of the consumers. This *harmony* has to be assessed with reference to 1) the *petitum* (i.e., the right which constitutes the object of the judgement for which the claimant takes action); and 2) the *causa petendi* (i.e., the legal foundation of the claim).

(4) THE SUPERIORITY REQUIREMENT

NO EVALUATION OF THE SUPERIORITY OF THE COLLECTIVE REDRESS PROCEEDING

100. ***Italy and Spain do not require judges to verify the superiority of a collective redress proceeding approach before commencing the instance.***

EVALUATION OF THE APPROPRIATENESS OF THE COLLECTIVE REDRESS PROCEEDING AND NOT OF ITS SUPERIORITY

101. ***In Germany and Portugal, judges are not required to verify that a collective redress proceeding is the best solution but instead are required to ascertain that is an appropriate form.***

¹⁶² *Altroconsumo vs Banca Intensa Sanpaolo*, Court of Appeal of Turin, 16 September 2011.

German judges must order the denying of the claim if they consider that the applicant's reasons do not justify the filing of an application for a test case.

In **Portugal**, interestingly, general rules require that judges, having heard the parties, should, *ex officio*, order types of proceedings that best suit the purpose of the case, as well as the necessary adaptations when a procedure is not appropriate to the specific characteristics of the case (common principle of appropriateness of form)¹⁶³.

EVALUATION OF THE SUPERIORITY OF THE COLLECTIVE REDRESS PROCEEDING LIMITED TO
THE EXAMINATION OF JUDICIAL ALTERNATIVES

102. ***In England & Wales and Sweden, the judges must deny a collective redress application when other judicial devices would be more appropriate.***

In **England & Wales**, judges are able to assess whether consolidation of the claims or a representative proceeding would be a more appropriate means through which the collective claim should progress¹⁶⁴. The judges must thus apply a limited superiority test. The GLO procedure must only be evaluated against consolidation and representative proceedings.

***Hobson v Ashton Morton Slack Solicitor*¹⁶⁵ - Strong superiority test**

In *Hobson v Ashton Morton Slack Solicitor*, the judge denied the application for a GLO because, *inter alia*, in his view some simpler form of dispute resolution would be far superior to a GLO in this case. Consolidation of the actions or the trial of selected cases (say, 2-3 test cases) were more appropriate and cost effective means of resolving the claims¹⁶⁶.

The judge applied a strong superiority test in this case and required that claimants for GLOs must give *serious thought* to any *alternative means of adjudication*¹⁶⁷, and then convince the court that a GLO is not only superior, but the *only satisfactory means*¹⁶⁸.

By this statement, the judge suggested that collective proceedings were the only means able to ensure effective redress.

¹⁶³ Article 265-A of the Code of Civil Procedure; for an example where the collective claim was rejected because of the unsuitability of form see Acórdão do Tribunal da Relação do Porto, 03/03/2004.

¹⁶⁴ Practice Direction 19B, para. 1 and para. 2.3.

¹⁶⁵ *Hobson v Ashton Morton Slack Solicitor* [2006] EWHC 1134 (QB).

¹⁶⁶ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB) at [2].

¹⁶⁷ *Hobson* [2006] EWHC 1134 (QB) at [71].

¹⁶⁸ *What is required before such an order is made is that there must be no other satisfactory means of resolving the dispute* *Hobson* [2006] EWHC 1134 (QB) at [72].

Likewise, **Swedish** judges must check whether a collective redress action is the best available alternative for litigating the majority of the claims in court and must take into account the effective and purposeful disposition of a case¹⁶⁹. The GrL limits the superiority test to *personal actions by the members of the group*¹⁷⁰. Hence, the procedural alternative must be judicial. This means that an out-of-court dispute resolution is not an alternative in this respect¹⁷¹.

In addition, in Sweden, judges must verify that group actions do not appear inappropriate because the grounds for some group members' claims differ materially from other claims.

According to the preparatory work for the GrL¹⁷², a public group action can only come into question when a private group action or an organisational group action is not likely to be initiated or there is otherwise a special public interest that a public group action is initiated¹⁷³. It is further stated that the public group action is expected to play an especially important part when the main purpose of the proceedings is to direct the course of action or to create a precedent and promote the development of the law. The proceeding is thus well in line with the general role of the authorities in promoting community interests and not intervening in the mutual legal relations of individuals other than in exceptional cases¹⁷⁴. The need for a public group action may be assessed case by case, but it is generally not for the competent district judge to determine whether such a need exists¹⁷⁵. As mentioned above, the Consumer Ombudsman is able to initiate public group actions¹⁷⁶. According to Section 14 b of the Swedish Consumer Agency (Standing Instructions) Ordinance (1995:868), the Consumer Ombudsman may, where justified by the public interest, file a public group action in disputes between consumers and traders over services provided mainly for private use. It is the Consumer Ombudsman that determines whether the requirements of that provision are met. The right of recourse is general in that it includes consumer disputes of every kind.

¹⁶⁹ Section 8 GrL; Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 287.

¹⁷⁰ *A group action may only be considered if (3) the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group* (Section 8 GrL).

¹⁷¹ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 287.

¹⁷² The official preparatory work to the Swedish Group Proceedings Act:

Grupprättegång. Betänkande av Grupptalanutredningen. Del A–C. SOU 1994:151, Part A–C, 1,400 pp.

¹⁷³ The final Government Bill submitted to the Riksdag: Regeringens proposition 2001/2002:107, *Lag om grupprättegång*, p. 54.

¹⁷⁴ The final Government Bill submitted to the Riksdag: Regeringens proposition 2001/2002:107 p. 37.

¹⁷⁵ Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång (Group actions in Sweden. Background and Commentaries to the Swedish Group proceedings Act of 2002)*, Stockholm 2008, p. 315.

¹⁷⁶ Section 6 GrL; The Environmental Protection Agency is also able to initiate a group action relating to compensation for certain kinds of environmental damage. See also, Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång (Group actions in Sweden. Background and Commentaries to the Swedish Group proceedings Act of 2002)*, Stockholm 2008, pp. 316, 581.

103. **The Draft for a Collective Proceedings Act in England & Wales** does not contain the same limitation as it requires that *collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues*¹⁷⁷. This provision serves wider purposes.

It will first ensure that judges, consistently with the overriding objective, are able to assess and decide on the most appropriate mechanism through which a claim should progress *i.e.*, as an opt-in collective action, opt-out collective action, traditional unitary action, or through a GLO. It is also aimed at ensuring that the use of civil process is the superior means of prosecuting any claim and achieving effective redress. It will therefore require an assessment of non-court based mechanisms (regulatory mechanisms and Ombudsman)¹⁷⁸.

(5) THE NUMEROSITY REQUIREMENT

NO EVALUATION OF NUMEROSITY

104. ***In Spain and Portugal, the number of potential claimants does not influence judges' decisions on admissibility.***

***Decision of the Audiencia Provincial of Asturias (Spain)*¹⁷⁹ - Irrelevance of the number of consumers affected**

This case concerned food poisoning caused by the consumption of olives in bad condition. The first instance judge admitted the collective claim and granted an award to consumers affected by the food poisoning even though only six consumers were affected. The second instance judge confirmed the first instance decision¹⁸⁰.

¹⁷⁷ Article 19.19 (1) Draft Collective Proceedings Act.

¹⁷⁸ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report, a series of recommendations to the Lord Chancellor*, November 2008, pp. 151-152.

¹⁷⁹ *Decision of the Audiencia Provincial (Second Instance Court) of Asturias (Section 7)*, num. 163/2005, 5.4.2005 (Westlaw Aranzadi Reference: AC 2005\841).

¹⁸⁰ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 131-134.

105. ***In Italy and Sweden, judges may take into account the number of potential claims. This is an obligation for judges in England & Wales.***

In **Italy** and **Sweden** there is no formal test of the threshold of claims required, although the judges *may* take this factor into account when deciding on admissibility of the action (*e.g.* in respect of the assessment of adequate representation of the represented group members' interests)¹⁸¹.

In **England & Wales**, judges must ascertain that there are a number of claims giving rise to GLO issues. In deciding whether to make a GLO, the judge *must* take into account the number of potential claims as well as the number of actions commenced¹⁸². This requirement is however not very burdensome as the law does not impose a minimum number of claims.

The **Draft for a Collective Proceedings Act in England & Wales** requires that judges certify a claim as collective proceedings if there is an identifiable group of 2 or more persons¹⁸³.

THRESHOLD REQUIREMENT

106. ***In Germany, a judge may not commence a model proceeding if a minimum number of claims to be managed under the procedure are not filed within a certain time limit.***

In **Germany**, the KapMuG sets a minimum threshold of consumers that shall join the action. If at least ten *related applications* have been filed before the same or other judges within the four months subsequent to the public announcement of the establishment of a model case, the first instance judge will refer the model case to the judge of appeal. The trial judge plays here a decisive role in the handling of the trial. The applications are related if they *refer to the same subject matter (related applications)*¹⁸⁴. Such is the case when, for instance, damage is suffered due to false information contained in a single prospectus.

The **New Version of the KapMuG** lays down that the ten or more applications do not each have to be filed in ten different procedures, which means that at one procedure more than one application can be filed. The New Version of the KapMuG also changes the moment at which the

¹⁸¹ Francesca Rolla & Cristina Pagni, "Italy", in *The Comparative Legal Guide to Class & Group Actions 2011: A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 101.

¹⁸² Practice Direction Part 19B, para. 3.2. (2).

¹⁸³ Article 19.19 (1) (a) Draft Collective Proceedings Act.

¹⁸⁴ Section 2 (1) KapMuG.

attainment of the quorum of ten applications is evaluated from the moment of filing the applications to the moment of announcing the applications by the first instance judges. This makes it clearer and easier for the defendant to check whether the quorum has been reached.

The Draft for a Collective Proceedings Act in England & Wales limits the threshold to *an identifiable class of 2 or more persons*¹⁸⁵.

(6) THE PRELIMINARY MERITS REQUIREMENT

NO EVALUATION OF THE PRELIMINARY MERITS

107. ***Germany, Spain and Sweden do not allow judges to verify the preliminary merits of a collective redress application.***

SUPERVISION BY A HIGHER JUDGE

108. ***In England & Wales, a particular form of preliminary merits test is provided.***

In **England & Wales**, the GLO rules require the consent of the Lord Chief Justice or the Vice Chancellor to a GLO.

However, under the **Draft for a Collective Proceedings Act**, a judge must ensure that *the collective proceeding has a real prospect of success*¹⁸⁶.

EVALUATION OF THE PRELIMINARY MERITS

109. ***In Italy and Portugal, judges have the power to verify whether the claim is manifestly unfounded.***

In **Portugal** and **Italy**, the laws require that the judge verify that the claim is manifestly founded. In practice, in **Italy**, the judge will examine the strictly legal elements of the claim, such as causation, on a *prima facie* basis in order to assess whether the action is well founded at the preliminary phase.

¹⁸⁵ Article 19.19 (1) Draft Collective Proceedings Act.

¹⁸⁶ Article 19.19 (1) Draft Collective Proceedings Act.

*Codacons v. British American Tobacco Italia*¹⁸⁷ - Prima facie assessment of the merits of the claim

In *Codacons v. British American Tobacco Italia*, the judge rejected the collective claim on the grounds that it failed the preliminary merits test.

The judge considered that the claim was *prima facie* groundless, and the defendant could not be considered liable for failure to warn and for tobacco manipulation, as alleged. Indeed, the judge held that since any smoker is aware of the health risks and addiction issues associated with smoking, and since nicotine addiction does not annihilate a smoker's free will, the smoker's voluntary conduct interrupts the direct chain of causation between cigarette manufacturing and the alleged event and damage¹⁸⁸.

Remarkably, in **Portugal**, the law gives the Public Prosecutor an important role to play at this stage of the trial. A judge may only decide to throw out unmeritorious cases or cases brought in bad faith with no chance of success when he has heard the Public Prosecutor and made the preliminary inquiries that the judge considers justified or that are requested by the claimant or the Public Prosecutor¹⁸⁹. It is, however, expected this would only happen in cases of clear abuse, and apparently it has not happened yet.

¹⁸⁷ Civil court of Rome, 11 April 2011.

¹⁸⁸ F. Rolla, "Italy—Class Actions Shifting to High Gear?", *The International Law Quarterly*, Vol. XXIX, No. 3, Summer 2011, pp. 5-6.

¹⁸⁹ Article 13 Law 83/95.

1.3. SEPARATE RULING ON ADMISSIBILITY

- Are judges in the selected Member States required to hand down a separate formal judgement on admissibility?

NO SEPARATE FORMAL JUDGEMENT REQUIRED

110. ***Portugal, Spain and Sweden, do not require judges to make a formal ruling on the admissibility of the collective redress application.***

In **Sweden**, although a formal decision on the validity of the application is not necessary, the judge must assess the claim's compliance with formal and material prerequisites¹⁹⁰ and allow the defendant the possibility to bring objections¹⁹¹.

SEPARATE FORMAL JUDGEMENT AUTHORISED

111. ***In England & Wales, formal rulings on admissibility are not made in practice, although these are authorised by the GLO rules.***

In **England & Wales**, although judges making GLOs may give their reasons for so doing, they generally will not render what we understand as a formal ruling on their admissibility¹⁹².

SEPARATE FORMAL JUDGEMENT MANDATORY

112. ***In England & Wales (under the Draft), Germany and Italy, the admissibility stage ends with a judge's order.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, judges are required to deliver a certification order¹⁹³. The Recommendations accompanying the **Draft** propose that *certification* should both be available on application by individual litigants and should be capable of being ordered by the court on its own initiative, subject to challenge by the parties¹⁹⁴.

¹⁹⁰ and decide how it will be notified (see *infra*).

¹⁹¹ Chapter 34, Code of Judicial Procedure ; Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at : ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 298.

¹⁹² Information supplied by Robert Turner.

¹⁹³ Article 19.26 Draft Collective Proceedings Act.

¹⁹⁴ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report) a series of recommendations to the Lord Chancellor*, November 2008, p. 153.

In **Germany**, denying an inadmissible application must also be done by judicial order. But contrary to **Italy** (see *infra*), Germany does not have rules concerning the (financial) consequences of the order denying the application.

The **New Version of the KapMuG** limits the time which judges have to decide on the admissibility of an application¹⁹⁵. By introducing a time limit of three months, the New Version of the KapMuG wishes to ensure that the decision on admissibility cannot be postponed excessively. Judges may take longer than three months to decide on the model case applications, but only in exceptional cases when more time is really needed.

In **Italy**, the Public Prosecutor at the court in charge may intervene in the judgment on admissibility¹⁹⁶. If the judges consider the collective redress claim non-admissible in this preliminary phase, they may order the lead plaintiff to pay attorney's fees and further damages. Article 140-bis of the Consumer Code expressly provides that such an award, in addition to being based on the principle whereby costs follow the event, can also be based on the rule whereby vexatious litigants may be ordered to pay damages¹⁹⁷. In the order declaring the non-admissibility of the claim, the judges also order *the most appropriate form of public notice by and at the expense of the unsuccessful party*¹⁹⁸.

The admissibility order is subject to appeal before the relevant court of appeal within the peremptory time limit of thirty days from either its disclosure or notification, whichever occurs first. The court of appeal decides on the claim by order in a closed session no later than forty days from the lodgement of the appeal¹⁹⁹.

¹⁹⁵ Section 3 of the New Version of the KapMuG.

¹⁹⁶ Article 140-bis, § 6 of the Consumer Code.

¹⁹⁷ Article 96 of the Code of Civil Procedure; Article 140-bis, § 8 of the Consumer Code.

¹⁹⁸ Article 140-bis, § 8 of the Consumer Code.

¹⁹⁹ Article 140-bis, § 7 of the Consumer Code.

2. POWERS OF THE JUDGES WHEN ENSURING THE SUITABILITY OF THE REPRESENTATIVE CLAIMANT

2.1. APPROVING THE STANDING OF A REPRESENTATIVE CLAIMANT

113. *Preliminary remark*

It should be noted that this section concerns *a priori* exclusively representative actions. A representative action (whether opt-in or opt-out) is one where a claim is prosecuted and defended by a single party who represents a represented group and the result of which action binds the represented group as if they were actual parties to the action even though only the representative party is before the court.

This position differs from that which arises in collective actions, where individual actions are grouped into one procedure and each individual claimant is a party on its own right. In collective actions, however, for case management reasons, judges may/must appoint a party to be the representative of other parties. We will thus focus on this point when dealing with the case management powers of judges (see *infra*- Section Two).

JUDICIAL APPROVAL LIMITED TO THE VERIFICATION OF FORMAL REQUIREMENTS

114. *In all the jurisdictions reviewed, the verification by judges of standing is strictly limited to formal requirements.*

In **Italy**, each consumer who is a member of the proposed group has the right to file a collective redress action. According to the general rules on consumer law, judges must check that the lead plaintiff is an individual consumer or user²⁰⁰ and that he has an interest in the suit²⁰¹.

²⁰⁰ *Physical person who acts for purposes other than entrepreneurial, commercial, professional or business related* (Article 3 of the Consumer Code).

²⁰¹ One can think that for the consumer to have an *interest* he must have incurred a loss caused by the defendant's conduct as alleged in the action;

In *Codacons v. Banca Intesa S.p.A.*, the court of Turin (4th June 2010) declared the case inadmissible on the grounds that the lead plaintiff lacked an interest. The Court of Appeal of Turin confirmed the decision on inadmissibility. The Turin decisions established an important general principle: the requirement for the admissibility of the collective redress action is to be assessed with regard to the lead plaintiff individually. The judge must verify the subsistence of an interest to issue the complaint on the claimant's account in the first place and only subsequently must he assess the subsistence of the same interest on the others consumers' account, thus defining the represented group.

In *Codacons v. Voden Medical Instruments S.p.A.*, the judge of appeal decided that the establishment of the qualification of the claimant as a consumer is preliminary to the assessment of whether the claim is well founded. The judge of appeal ruled furthermore that in the preliminary phase, the position of the representative claimant as a *consumer* must be evaluated on a *prima facie* basis only, and unless the defendant is able to challenge such position adequately at that point, the relevant assessment is to be made at the stage of proceedings where the merits of the case are discussed.

The lead plaintiff can also give a mandate to a consumer association to sue on his behalf, but the plaintiff remains the individual consumer giving the mandate²⁰³.

In **Spain**, there are no parties that are not in principle allowed to initiate the procedure²⁰⁴. The procedure is easily accessible to all consumers, including the most vulnerable²⁰⁵.

Depending on the specific interest at stake, the parties entitled to file a suit in defence of rights and interests of consumers are different.

Consumer and user associations may defend collective²⁰⁶ and diffuse interests²⁰⁷, but in the case of diffuse interests, the association must be a representative in accordance with the law, *i.e.* it must have been declared a public interest association and therefore the judges must control that they are members of the Spanish National Consumer Committee²⁰⁸.

Groups of consumers (*i.e.*, they need not be represented by a consumer association) and legally constituted entities created for consumers' protection have the capacity to sue on behalf of all the aggrieved consumers only when the interests are collective²⁰⁹.

With regard to groups of consumers, a group is considered to be legally constituted as the representative plaintiff when at least 50% of the affected consumers have joined it²¹⁰. In practice, Spanish consumers have already formed large groups in order to bring group actions.

²⁰² *Codacons v. Voden Medical Instruments S.p.A.*, Court of Appeal of Milan, 3 May 2011.

²⁰³ F. Rolla, "Italy: The Italian-style action and product-liability related claims", *Class Actions Bulletin*, July 2010, available at: <http://ehoganlovells.com/ve/v71Uf83Kt8465nF/VT=1/page=7>, p. 8, note 6.

²⁰⁴ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Spain), available at: http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 6.

²⁰⁵ Section 7 LEC.

²⁰⁶ Section 11, 2 LEC.

²⁰⁷ Section 11, 3 LEC.

²⁰⁸ 24 RD Legislative Decree 1/2007; Alejandro Ferreres Comella, "Spain" in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 139.

²⁰⁹ Section 11, 2 LEC.

In **Portugal**, there is a general consensus that standing for popular action should be restricted to individual holders of diffuse, collective or homogeneous individual interests which are threatened or harmed²¹¹.

Concerning associations and foundations, judges may grant them standing if they have legal personality, if the defence of the interests in question in the type of action being brought is expressly included in their powers or in the objectives set out in their statutes and if they do not exercise any type of professional activity in competition with companies or independent professionals²¹². In reality, the only organisation likely to bring such claims is DECO²¹³. Local authorities representing the interests of their residents within their respective areas may also file collective redress actions²¹⁴.

In addition, under the consumer protection laws, the Public Prosecutor and the Institute for the Consumer are also entitled to bring a popular action *when homogenous, individual, collective or diffuse interests are at issue*²¹⁵.

The early cases all included significant discussion of the standing of the consumer organisations (ACOP and DECO) to bring these actions. Defendants have traditionally tried to argue that such organisations have no right to bring popular actions as it is not explicitly mentioned as a purpose within their founding documents.

In the earlier cases, confusion about the new law meant that this argument may have won in the lower instance courts, and the matter would have been argued as a preliminary matter in the Supreme Court. In later cases, however, increased understanding among lower instance judges seems to have solved this problem somewhat²¹⁶.

²¹⁰ Section 6.7 LEC; Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 138.

²¹¹ Article 2 Law 83/95. The Portuguese Constitution (Article 52(3)(a)) states that *it is conferred on everyone, individually or through associations defending the interests at stake, the right of a collective action in the cases and terms set out in the law*.

²¹² Article 3 Law 83/95.

²¹³ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 5.

²¹⁴ Article 2, 2 Law 83/95.

²¹⁵ Article 13,c Law 24/96.

²¹⁶ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 5.

In *DECO v Portugal Telecom*, as a first matter, DECO had to prove its legitimacy because it was not clear whether it had standing to claim compensation on behalf of all consumers. The defendants argued that such organisations had no right to bring such actions as it was not explicitly mentioned as a purpose within their founding documents. The argument was made that bringing such cases was not an objective set out in the organisation's constitution. On this procedural matter, DECO lost at the first instance, won at the second instance, and also seems to have won at the third instance (although we were unable to check this). This preliminary matter is of key importance, and allowed future cases to occur.

Substantively, the case concerned the legality of the modification by Portugal Telecom of the billing dates (from 3 to 6 bills per year) and whether the company provided sufficient information to clients. DECO lost at both first and second instance on the substance of the case²¹⁸.

It is clear now that DECO (and ACOP) has standing to bring such popular actions, even though it is not directly affected by the culpable behaviour²¹⁹. This certainty is an important factor in reducing the amount of time and money spent on such cases, as it is now possible for resources to be focussed on substantive matters rather than questions of standing²²⁰. This also presents the advantage that the consumers themselves do not have to bear the litigation costs. Because of this advantage, collective redress actions initiated by groups of victims have not yet been brought in Portugal.

In **Sweden**, the requirements for standing are fine-tuned according to the three different types of collective redress actions.

²¹⁷ *DECO v Portugal Telecom*, 1a Secção, Proc. 113/95 - Tribunal da Relação de Lisboa, 2a Secção, proc. 3742/02.

²¹⁸ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Collected cases, Portugal), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 8.

²¹⁹ It should be noted that the adoption of a Consumers' Code to the law to promote collective redress actions in Portugal was envisaged. The Draft Bill of the Consumers' Code (which was under discussion in 2006) had some articles regarding collective redress actions, but was not passed.

The Draft bill for the Consumers' Code set down, for instance, that standing for the exercise of popular action, aimed at protecting homogeneous individuals or diffuse rights and interests, belongs to any individual who demonstrates an objective and serious interest in bringing the action and to associations and foundations. The standing of the aforementioned legal persons is dependent on registration with the Institute for the Consumer (Articles 552 and 553). It is also a requirement of foundations that their aim, as set out in their statutes, consists of the defence of the interests of those persons that the Consumers' Code seeks to protect. With regard to the standing of associations, the law added the following requirements: that at least 100 natural persons are included among their effective members and that they have been exercising their activity continuously for over a year.

²²⁰ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 4.

In private group actions, only a natural or legal person who has a legal claim that is subject to the action has standing to sue²²¹. The law does not grant standing on other grounds (idealist considerations or experience in group proceedings for instance) and so the judges have to verify whether the individual belongs to the group.

In organisational group actions, there are no special requirements as to the number of members and time of existence of the organisation. The judges may grant standing even to ad-hoc associations with only a few members. The judges merely have to verify whether the organisation is a non-profit association that, in accordance with its rules, protects consumer and wage-earner interests in disputes between consumers and a business operator regarding any costs, services or other utility that the business operator offers to consumers²²².

In public group actions, the judges must only grant standing to the Consumer Ombudsman. Indeed, the Government has designated the Consumer Ombudsman as the appropriate public authority for consumer disputes²²³. The first and only public action was taken to court in December 2004.

*The Consumer Ombudsman v Kraftkommission i Sverige AB*²²⁴ - Public group action

In *The Consumer Ombudsman v Kraftkommission i Sverige AB*, the Consumer Ombudsman claimed damages for about 7 000 people in compensation for the defendant's failure to supply electricity as agreed under a fixed price contract. The case concerned damages of €100 to €1000 per subscriber for additional expenses following the respondent's failure to deliver electric power in accordance with a fixed price agreement.

The defendant moved for dismissal on the grounds that the conditions provided in Section 8 of the GrL had not been met. The district judge, followed by the judge of appeal, denied the motion.

In January 2006, the defendant applied for leave to appeal the matter to the Supreme Court, which in September 2007 decided not to hear the appeal.

The proceedings were then resumed by the district court, which in January 2010 ordered the respondent to pay damages to the consumers concerned²²⁵. An appeal was lodged with the court of appeal for Upper Norrland, which concluded, like the district court, that the respondent had to pay damages for the higher price to the 2 300 consumers concerned²²⁶. About 2 000 people opted into the collective redress action.

²²¹ Section 4 GrL.

²²² Section 5 GrL.

²²³ Section 6 GrL; Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Sweden), available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf, p. 3.

²²⁴ Umeå District Court, case number T 5416, 2004.

²²⁵ Umeå District court, case number T 5416-04.

²²⁶ T 154-10, Hovrätten för Övre Norrland, 2011-11-04.

In general, the Swedish Code of Procedure does not make representation in court by an attorney mandatory. Given the complexity of collective redress proceedings, however, as a further guarantee of protection of the represented group members in private actions and organisation actions, a member of the bar must represent the representative claimant. It should be noted that the GrL allows judges to relax this requirement if there are *special reasons*,²²⁷ and in practice, the judges do not appear to be very attentive to this requirement of representation by an attorney.

***Peter Lindberg v Municipality of Järfälla et al*²²⁸ - Representation in court by attorney**

For instance, in *Peter Lindberg v Municipality of Järfälla et al*, neither the district judge, the appeal judge nor the supreme judge reacted to the fact that the plaintiff's counsel was not a member of the bar, as required in the GrL.

115. ***In England & Wales, the Draft for a Collective Proceedings Act leaves, however, more flexibility to judges.***

In **England & Wales**, the **Draft for a Collective Proceedings Act** provides for a representative action and allows a wide range of representative parties to bring collective claims. It provides that the representative party shall be either (a) (i) *a member of the class of persons who is resident in England and Wales and who would otherwise be entitled to commence proceedings on his own behalf against the defendant; or (ii) a certified or authorised body provided that—(1) the interests of the class members are linked to the objects of the certified or authorised body; and (2) in the case of a certified body, its appointment as the representative claimant is considered by the court to be in the interests of justice; (b) shall have prepared a plan for the collective proceedings that sets out a method to the satisfaction of the court for bringing the proceedings on behalf of the class and for notifying class members of the fact and progress of the proceedings; and (c) shall have provided a summary of any agreements relating to fees and disbursements*²²⁹.

²²⁷ Section 11 GrL.

²²⁸ Stockholm District Court, case number T 9893, 2006.

²²⁹ Article 19.20 (1) Draft Collective Proceedings Act.

2.2. ASSESSING THE ADEQUACY OF REPRESENTATION OF THE REPRESENTATIVE CLAIMANT AND HIS FINANCIAL CAPACITY

- Do judges in the selected Member States ensure that the representative claimant is the most suitable party to act as the representative claimant and/or even that no other person wishes to represent the group? **((1) Evaluation of the superiority of the representative claimant)**

- Do judges in the selected Member States have a later power of replacement if a representative has engaged in conduct inconsistent with the interests of the represented group? **(For this question see *infra* – Section two)**

- Do the judges in the selected Member States verify whether the representative claimant represents adequately the interests of the represented group? **((2) Verification of the suitability of the representative claimant)**

- Do the judges in the selected Member States verify whether the representative claimant has sufficient resources to fund and manage collective redress proceedings and to cover any adverse costs liability? Are the judges empowered to ask the representative for security for costs? **((3) Evaluation of the representative claimant’s financial capacity)**

(1) EVALUATION OF THE SUPERIORITY OF THE REPRESENTATIVE CLAIMANT

116. ***On the basis of the information we have, none of the Member States selected considers the first question.***

117. However, the **Draft for a Collective Proceedings Act in England & Wales** suggests an interesting solution to this issue:

If, on the application of a class member or party, it appears to the court that a representative claimant is not able adequately to represent the interests of the class members, the court may (a) substitute another class member, certified or authorised body as representative claimant; and (b) make any other order it considers appropriate²³⁰.

²³⁰ Article 19.20 (3) Draft Collective Proceedings Act.

(2) VERIFICATION OF THE SUITABILITY OF THE REPRESENTATIVE CLAIMANT

NO VERIFICATION IMPOSED

118. *In Portugal and Spain, judges are not required to ascertain the adequacy of representation of the representative claimant.*

In **Portugal**, adequate representation is not necessary at the admissibility stage; it suffices that the representative claimant has the right to act in justice.

As in Portugal, in **Spain**, adequate representation is not required at the admissibility stage. However, scholars have recognised the necessity of such a requirement and have tried to build solutions. According to the general rules, the requirement of capacity to be a party is verified by judges *ex-officio* so they would be able to terminate the proceedings because of the lack of or defect in capacity²³¹. Some scholars consider that in collective redress actions judges would be able to use this rule, according to which *the lack of capacity to be part of the proceedings and the lack of procedural capacity will be able to be noted ex-officio by the court at any moment during the proceeding*²³², in order to ascertain that adequate representation has been formed and exists²³³.

VERIFICATION IMPOSED

119. *In England & Wales, the Draft for a Collective Proceedings Act requires judges to verify that the representative claimant satisfies two prerequisites in order to declare him suitable to act as a representative claimant.*

In **England & Wales**, under the **Draft for a Collective Proceedings Act** a person or certified or authorised body will be suitable to act as a representative claimant and approved as such during the certification hearing *if that person or body— (a) would fairly and adequately represent the interests of the class or sub-class; and (b) does not have, on the common issues, an interest that is in conflict with the interests of the class members*²³⁴.

120. *Italy and Sweden* (see *infra*- Evaluation of the representative claimant's financial capacity).

²³¹ Sections 9 & 418 LEC.

²³² Section 9 LEC.

²³³ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Country Report: Spain), available at: http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 10; J. Silguero Estegan, "Las acciones colectivas di grupo", Aranzadi Civil num 22/2003, Parte Estudio, Editorial Aranzadi, SA, Pamplona, 2004, p. 7.

²³⁴ Article 19.20 (2) Draft Collective Proceedings Act.

(3) EVALUATION OF THE REPRESENTATIVE CLAIMANT'S FINANCIAL CAPACITY

EVALUATION OF THE REPRESENTATIVE CLAIMANT'S FINANCIAL RESOURCES

121. *In Italy and Sweden, specific rules oblige judges to ascertain the adequacy of representation of the representative claimant, which is directly linked to the evaluation of the representative's financial resources.*

In **Italy**, judges' holdings on a plaintiff's adequacy of representation are largely discretionary. Although no case law has emerged as yet on this point, according to scholars' prevailing opinion, review by the court of cassation is not allowed²³⁵ and judges should focus on the evaluation of plaintiff's financial resources²³⁶.

Likewise in **Sweden**, judges must take into consideration a plaintiff's interest in the substantive matter and the plaintiff's financial capacity to bring a group action and the circumstances generally²³⁷ when they verify the appropriateness of the plaintiff to represent the members of the group in the case.

In Sweden, in private group actions, the requirement of personal pecuniary interest in the outcome of the proceedings is intended to ensure that the individual will be motivated to spend time and effort in defending the interests of the group. This argument does not have much weight for situations of a high number of dispersed small claims; however, there, organisational and public group actions are expected to fill the gap²³⁸.

In order to admit a case as acceptable, judges must check whether a plaintiff is able to pay the ongoing costs of litigation in advance (e.g. for investigations and counsel, if the attorney requires a retainer). However, judges may allow the proceedings if a plaintiff is not able to prove full capacity to pay other side's costs, such as attorney's fees, if the defendant wins. It is a general rule in the Swedish law that a plaintiff cannot be required to provide surety for the opponent's litigation costs.

The preparatory work of the GrL²³⁹ presumes that it should suffice that the plaintiff's financial affairs are in *order*, which is understood to mean e.g. that the plaintiff has a reasonable annual

²³⁵ Only immediate review by the court of appeals of certifications and denials of certification is granted according to art. 140-bis, § 7 of the Consumer Code; the certification order is unreviewable on appeal against the final judgment.

²³⁶ Information supplied by Andrea Giussani.

²³⁷ Section 8 (5) GrL.

²³⁸ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Country Report: Sweden), available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf, pp. 3-4.

²³⁹ The official preparatory work to the Swedish Group Proceedings Act: *Grupprättegång. Betänkande av Grupptalanutredningen*. Del A-C. SOU 1994:151, Part A-C. (The official report in three volumes, with a summary in English in part A.)

income and access to public legal aid or private legal insurance, although both are usually limited to an amount equal to customary attorney's fees for about 100 hours of work. Naturally, an affluent person does not need to have legal insurance to be accepted as plaintiff in collective redress actions²⁴⁰.

***Grupptalan mot Skandia v Försäkringsaktiebolaget Skandia*²⁴¹ - Assessment of the representative claimant's financial capacity**

In *Grupptalan mot Skandia v Försäkringsaktiebolaget Skandia*, the judge considered that a capital of about €200 000 was more than adequate to cover running litigation expenses and to demonstrate that the organisation's finances were in order.

In this case, the *Grupptalan mot Skandia* organisation, a non-profit organisation, was founded in order to claim a right to compensation for 1.2 million policyholders. In short order, more than 15 000 people joined the *Grupptalan mot Skandia* organisation. Each paid membership dues of about €15 and the organisation rapidly amassed the capital of €200 000.

IMPOSITION OF SECURITY FOR COSTS

122. ***In England & Wales, under the Draft for a Collective Proceedings Act, the judge may consider the imposition of a security for costs.***

In **England & Wales**, one of the Recommendations accompanying the **Draft for a Collective Proceedings Act** suggests that judges, during the certification stage, consider the imposition of a security for costs against a representative party. According to this Recommendation, this will ensure that representative parties, and their funders, will have to focus their attention on the fact that not only will they face a bill for costs, if unsuccessful in the prosecution of their claim, but also that from a certification stage they will be required to provide a security for those potential costs. Still, according to this Recommendation, in those circumstances, it is however unlikely that abusive claims will be pursued as such claimants will not be permitted to prosecute their claims as a collective action absent the ability to provide a security for costs²⁴². For those reasons, it is suggested that the CPR 25.13(2)(f) rule be amended as follows: *the court may make an order for a security for costs if the claimant is acting as a representative claimant and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so*²⁴³.

²⁴⁰ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, pp. 17-18.

²⁴¹ *Grupptalan mot Skandia v Försäkringsaktiebolaget Skandia*, Stockholm District Court, case number T 97, 2004.

²⁴² Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 157.

²⁴³ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 226.

3. POWERS OF THE JUDGES WHEN VERIFYING THE WAY THE REPRESENTED GROUP IS CONSTITUTED

3.1. CHOOSING BETWEEN OPT-IN OR OPT-OUT PROCEEDINGS

- Are judges in the selected Member States empowered to progress collective redress proceedings on an opt-in or opt-out basis, whichever contributes best to the effective and efficient disposition of the case?

NO DISCRETION GIVEN TO JUDGES CONCERNING THE CHOICE BETWEEN AN OPT-IN OR AN OPT-OUT BASIS

123. *None of the selected Member States leave discretion to judges concerning the choice between opt-in or opt-out proceedings.*
124. *However, the Draft for a Collective Proceedings Act in England & Wales places the responsibility for designation between an opt-in and an opt-out basis with the judges at the admissibility stage.*

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, it is for the judges to determine the most appropriate option²⁴⁴. The Recommendation accompanying the Draft suggests that in doing so, judges should have regard to: the nature and type of action; fairness to the parties; efficiency of disposal; and the public interest²⁴⁵. A mixed-option procedure has also been made available under the Draft.

²⁴⁴ Article 19.19 (1) Draft Collective Proceedings Act.

²⁴⁵ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 146.

3.2. FIXING THE MODALITIES OF THE OPTION'S EXERCISE

- Do judges in the selected Member State which opts for an opt-out system verify that group members are adequately defined and at least clearly ascertained? **((1) Establishment of the group membership in opt-out proceedings)**
- Do judges in the selected Member States which opt for an opt-in system verify that group members are adequately defined? Are the judges given discretion as to the conditions under which the group of the victims is suitably defined? **((2) Establishment of the group membership in opt-in proceedings)**
- Do judges in the selected Member States verify the notification process to potential group members? **((3) Notification to the represented group members)**
- Do judges in the selected Member States fix a strict time limit for the exercise of the option? **((4) Cut-off dates)**

(1) ESTABLISHMENT OF THE GROUP MEMBERSHIP IN OPT-OUT PROCEEDINGS

WEAK VERIFICATION BY THE JUDGES OF THE DEFINITION OF THE GROUP

125. ***In Portugal, judges are not bound by the identification set out in the initial writ.***

In **Portugal**, the group does not have to be already constituted when the petition is lodged or even when the damages are being recovered. Those involved do not need to be identified precisely and so in the initial petition, the plaintiff does not need to name all claimants or provide an exact formal proof of monetary claims for all possible claimants.

Judges are not bound by the identification set out in the initial writ²⁴⁶ and are not required to identify the specific recipients of the (admissibility) notice.

Law 83/95 provides that those persons *may be referred to as holders of the aforementioned interests*, and that judges *shall refer to the action in question, the identity of at least the first claimant where there are several, and the identity of the defendant or defendants, as well as making sufficient reference to the claim and the reason for it*²⁴⁷.

Where it is not possible for judges to specify the respective holders individually, they shall refer to

²⁴⁶ Article 15,3 Law 83/95.

²⁴⁷ Article 15,2 Law 83/95.

the respective group, as determined by the circumstance or characteristic that is common to them, the geographical area in which they reside or the group or community constituted by them²⁴⁸.

*ACOP v Portugal Telecom*²⁴⁹; *DECO v Portugal Telecom*²⁵⁰; *DECO v M*²⁵¹; *DECO v A*²⁵²; *DECO v O*²⁵³ - Examples of the definition of a group given by judges

ACOP v Portugal Telecom concerned a situation where in October and December 1994, Portugal Telecom issued two bills each month. Both these bills included a debit corresponding to two monthly line rental fees. ACOP argued that consumers had been charged, in one month, the equivalent of two monthly fees. As a large number of consumers had paid these bills, ACOP requested a refund of one monthly line rental fee and associated costs²⁵⁴.

In this case, there is no definition of the group provided in the court documents. The case concerned the customers of Portugal Telecom. The total number of affected consumers was 3 million and the average amount of the alleged damage/loss of each individual consumer was €9.25.

In *DECO v Portugal Telecom*, the group was also not defined, although the case concerned all affected Portugal Telecom customers. As just stated, the total number of consumers affected was 3 million. The average amount of the alleged annual damage/loss of each individual consumer was between €46.98 and €62.64.

DECO v M concerned a large show that was advertised in Lisbon as "Operama Carmen", to include the famous singer, D., a "giratory stage", and a number of well-known performers. Some time before the date of the event, the media announced that the show would include neither D. nor the special stage. Most consumers wanted full reimbursement on that basis. DECO brought the case against the company which was referred to in the advertisements, but this company claimed it had not organised/produced the show and attempted to shift the responsibility to three foreign citizens living abroad as the producers of the event²⁵⁵.

There is no definition of the group in the court documents. The case concerned holders of tickets for the event (estimation of 92 consumers).

²⁴⁸ Article 15,3 Law 83/95.

²⁴⁹ *ACOP v P*, Proc. 781/95, Comarca de Lisboa, 5o Juízo Cível, 1a Secção.

²⁵⁰ *DECO v Portugal Telecom*, 3a Secção, Proc. 430/99 - Supreme Court of Justice.

²⁵¹ *DECO v M*, Proc. 481/99 - 1a Vara Cível de Lisboa, 1a Secção (2006).

²⁵² *DECO v A*, Proc. 127/06.5 TBTND - 1o Juízo do Tribunal Judicial de Tondela (2006).

²⁵³ *DECO v O*, Proc. 1618/03.5 TUSLB - (pending? No information available).

²⁵⁴ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 2.

²⁵⁵ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp.19-20.

DECO v O involved an in-depth procedural argument about the nature of collective actions. DECO claimed O. School students should be reimbursed for the cost of an English course which was not completed because the school closed. Students had been required to pay the annual fee in advance, and many students entered into contracts with banks by which the bank would pay the cost and students would then make monthly payments to the bank in relation to the loan. DECO's case was brought against O. and two banks (B. and F.), which were the strongest defendants as they had some of the best Portuguese law firms to represent them. DECO lost a preliminary procedural matter in the first and second instances. However, substantively, DECO won in the first instance²⁵⁶.

The case was not based on a definition of the group of consumers covered, but involved those students who had paid the annual fee for a course that was then cancelled. The case involved an in-depth discussion about *interesses individuais homogêneos*, including a legal opinion of 110 pages from an important Portuguese law teacher about these contracts, *acção popular* and whether English school students should be considered, according to Portuguese law and reality, consumers. Although there was an estimation of 1 200 consumers, only 8 presented concrete cases before the court.

DECO v A is the only case studied which contains a definition of the group. According to the court documents, the group members were the *Consumers charged for the replacement of the water meter on their property, or who could be charged* (estimation of 37 consumers). In this case, the defendant was the public water supply company. In 2004 a large number of water meters broke because of extremely cold temperatures. The company billed consumers for the cost of replacing the water meters, ignoring consumer complaints. DECO brought the case against the company, arguing that the company did not protect the metres or inform consumers about the special care that should be taken with them during cold winters²⁵⁷.

²⁵⁶ On an appeal by the banks, the decision of the second instance court is (still?) pending (no information available). Summary copied from the Portuguese case collecting sheet, p. 25 at 26.

²⁵⁷ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 31.

(2) ESTABLISHMENT OF THE GROUP MEMBERSHIP IN OPT-IN PROCEEDINGS

ESTABLISHMENT OF THE GROUP MEMBERSHIP BY THE REPRESENTATIVE CLAIMANT AND SUPERVISION OF THE JUDGES

126. ***In Spain, in collective interest actions, the constitution of the group takes place in practice prior to and outside the judicial proceeding.***

In **Spain**, if the affected people are easily determined or easy to determine, all people with an interest in the claim will have to be notified about the approaching filing of the claim by the claimant before the claim is filed²⁵⁸. The would-be plaintiff may ask the future competent judge for a preliminary proceeding to specify the members of the group²⁵⁹. In such identification, the judge may, for instance, require the collaboration of the defendant²⁶⁰. In practice, the constitution of the group takes place prior to and outside the judicial proceeding.

Decision of the Audiencia Provincial de Sevilla²⁶¹ – Individual notice required

In this case, having required the consumer association to identify the affected consumers (diffuse interests action mandatorily changed to a collective interest action), the judge charged the representative claimant to notify each potential consumer about the filing of the collective action.

127. ***In Sweden, judges must verify that the representative claimant properly defines the group (group members must be mentioned by name in the application for a summons).***

In **Sweden**, the definition of the group remains the responsibility of the representative claimant and not of the judges²⁶².

In the application, the group must be adequately defined in terms of value of the claims and delimitation²⁶³. In addition, the representative claimant must state the names and addresses of all members of the group and must provide details of circumstances that are otherwise important for notifications to the members of the group²⁶⁴. In practice, if some this information is lacking in the plaintiff's application, the judges may give him the chance to submit an additional description of

²⁵⁸ Article 15, 2 LEC.

²⁵⁹ Article 256, 1, 6 LEC.

²⁶⁰ Article 256, 1, 6 LEC.

²⁶¹ *Decision of the Audiencia Provincial de Sevilla*, 22 de enero de 2004 (AC 2004\406).

²⁶² Section 9 (1) GrL.

²⁶³ Section 8 (4) GrL.

²⁶⁴ Section 9, last sentence, GrL.

the group and a group action may sometimes be pursued, even though the names and addresses of the members are not known in advance, if such members are readily identifiable. The group may be extended during the action provided that this does not result in any additional excessive delays to the procedure (see *infra*).

***Devitor v TeliaSonera AB*²⁶⁵ - Suitable definition of the group**

In *Devitor v TeliaSonera AB*, Deviator (a limited liability company) asked the district court (Stockholms tingsrätt) to enjoin TeliaSonera AB (the largest telecoms operator in Sweden) to refund the difference between the amount billed during a particular period and the agreed rate for night time cellular phone minutes.

The district judge dismissed the case because the plaintiff failed to define the members of the group with regard to its size, scope, and otherwise. The judge instructed the plaintiff to do so, but the plaintiff did not answer this request. Because the group was not appropriately defined, the judge therefore dismissed the suit under Section 8 paragraph 4 of the GrL. The decision of the district court was appealed to the court of appeal (Svea Hovrätt), but the plaintiff later withdrew its appeal²⁶⁶.

It is suggested in legal doctrine that the (flexible) rules on notification offer the judge the power to oblige even the defendant to provide lists with names and addresses of group members when this appears appropriate. This may be important in consumer cases where a trader possesses better knowledge about his or her clients. However, pre-trial discovery does not exist in Swedish courts (see *infra* – Section Two), and so the law does not allow judges to punish a defendant who does not provide list of group members or force it to do so. Hence, it is often difficult for a representative claimant to define the members of a group²⁶⁷.

***Mattias Larsson et al. v Falck Security*²⁶⁸ - Consequences of the absence of discovery rules**

Mattias Larsson et al. v Falck Security illustrates the consequences of the inadequate Swedish rules of discovery.

In this case, the defendant refused to divulge the names of potential group members. Consequently,

²⁶⁵ *Devitor v TeliaSonera*, Stockholm District Court, case number T 5254, 2006 appealed in case Ö 6868-06, Svea Hovrätt, Stockholm.

²⁶⁶ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 343.

²⁶⁷ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 30.

²⁶⁸ Stockholm District Court, case number T 6341, 2003.

the plaintiff had to abandon the attempt to start a collective redress action and the case was litigated as an ordinary civil dispute.

ESTABLISHMENT OF GROUP MEMBERSHIP BY THE JUDGES

128. ***In England & Wales, Germany and Italy, it is not required that group members are mentioned by name in the application for a summons and so judges must actively participate in the definition of the group.***

In **England & Wales**, it is necessary for the judges to define the group so that it is clear which individual claims are, or are not, inside the coordinated arrangements²⁶⁹. On the basis of the information included in the plaintiff's application²⁷⁰, judges must specify in their GLO the GLO issues which will identify the claims to be managed as a group under the GLO²⁷¹. This will usually be a generalised description, but is important to get it right²⁷². An example might be *any claims against AB Limited in relation to [alleged effects of autism arising from] use of the drug X*²⁷³.

The judges are mandatorily required to establish a group register into which the claim managed under the GLO must be entered. However, before claimants may join a group register, they must first obtain individual claim forms and pay the requisite issue fee²⁷⁴. GLO rules state that the management judges may give *directions specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim into the group register have been met*²⁷⁵. Remarkably, no more is said in the GLO rules about when and how specific criteria should be chosen and applied to control entry into the group register. Nevertheless, this rule presupposes that judges may set entry criteria and order prospective claimants to produce a certificate or even specified evidence which demonstrates that they qualify²⁷⁶.

Under the **Draft for a Collective Proceedings Act in England and Wales**, judges may not refuse to certify a claim as collective redress proceedings on the grounds that the number of represented

²⁶⁹ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, pp.13-14.

²⁷⁰ CPR Practice Direction 19 B, para. 3.2.Article 3.2.

²⁷¹ CPR Part 19, 19.11 (2).

²⁷² C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 56.

²⁷³ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 56.

²⁷⁴ CPR Practice Direction 19 B, para. 6.1A. The current maximum fee is £1 700.

²⁷⁵ CPR Part 19, 19.13 (d).

²⁷⁶ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p. 18.

group members or the identity of each represented group member is not known²⁷⁷. That being said, it should be noted that the Draft gives judges the role of describing or otherwise identifying the represented group²⁷⁸. The judge is, however, not necessarily supposed to name or specify the number of members of the represented group²⁷⁹.

In **England & Wales**, an application for a collective action should state whether there are any matters that distinguish smaller groups of claims within the wider group²⁸⁰. On this basis, the managing judges have power to divide the group in subgroups and to order that only specific lawyers represent specific members of the group.

The **Draft for a Collective Proceedings Act in England & Wales** underlines the necessity of adequate representation of the subgroups as it states that: *if a class includes a sub-class whose members have claims that raise common issues not shared by all the class members so that the protection of the interests of the sub-class members requires that they be separately represented, the court may refuse to certify the claim as collective proceedings unless there is a person or authorised body suitable for appointment as representative claimant for the sub-class*²⁸¹.

In **Germany**, the first instance judge plays an important role in the constitution of the group.

Firstly, he must describe publicly the model questions (*establishment objective*) in his admissibility order²⁸². Under the KapMuG the *establishment objective* is the *establishment of the existence or non-existence of conditions justifying or ruling out entitlement or the clarification of legal questions*²⁸³, which may be compared to common issues²⁸⁴. On the basis of this information, which is contained in the Complaint Registry, others plaintiffs whose applications have the same establishment objectives may apply to be registered in the Complaint Registry²⁸⁵. The exact date of the public announcement must also be contained in the Complaint Registry²⁸⁶. This date is of capital importance for two reasons. Firstly, if within four months after this date the number of similar applications required for reference of the matter to the judge of appeal has not been submitted to the judge, such judge shall deny the application and resume proceedings²⁸⁷. Secondly, proceedings shall be interrupted on this date²⁸⁸.

Secondly, if at least nine other proceedings have been submitted before the same or another judge, the first judge that received such an application may decide that the procedure shall be transferred

²⁷⁷ Article 19.19 (3) (d) Draft Collective Proceedings Act.

²⁷⁸ Article 19.26 (2) (b) Draft Collective Proceedings Act.

²⁷⁹ Article 19.26 (2) (b) Draft Collective Proceedings Act.

²⁸⁰ CPR Practice Direction 19 B, para. 3.2.

²⁸¹ Article 19.19 (5) Draft Collective Proceedings Act.

²⁸² Section 2 (1) KapMuG.

²⁸³ Section 1 (1) KapMuG.

²⁸⁴ “KapMuG: Multi-party litigation in Germany”, *Class Action*, Vol. VI, No. 4, 2008, p. 425.

²⁸⁵ Section 2 (1) KapMuG.

²⁸⁶ Section 2(1) KapMuG.

²⁸⁷ Section 4 (4) KapMuG.

²⁸⁸ Section 3 KapMuG.

to the higher judge²⁸⁹. Upon receipt of the order referring the matter, the higher judge must decide what are the common points in dispute through an announcement in the Complaint Register²⁹⁰.

In **Italy**, the judge must specify the criteria a prospective group member should satisfy. Indeed, Article 140-bis of the Consumer Code requires explicitly that judges determine in their admissibility order *the characteristics of the individual rights involved in the judgement, specifying the criteria according to which individuals seeking to join are included in the class or must be regarded as excluded from the lawsuit*²⁹¹.

129. ***In Spain, in diffuse interest actions, in practice judges define the group in their final judgement.***

In **Spain**, in the case of a collective claim on behalf of undetermined aggrieved consumers, it is the task of the consumer association instituting the claim to identify the standard aggrieved consumer it represents by means of the issues of fact and law discussed in the formal complaint²⁹².

In practice, the judges will establish the group membership in their final verdict. The LEC provides mechanisms to determine the initial group of people (consumers and users), defended by a legitimate association (see *infra* – Sections Three and Four)²⁹³.

Obviously, a judge will first consider carefully whether consumers and users that are intended to be represented under the diffuse interests action are really indeterminate or are merely difficult to determine. If the judge concludes that such a determination is itself possible, he will direct the proceeding towards an effective determination of such consumers²⁹⁴.

Decision of the Audiencia Provincial de Sevilla²⁹⁵ - Identification of the group members

This case concerned a breach of educational contracts by Opening English Master Spain, S.A. because of a situation of economic insolvency. Subsequently there was a breach of financing contracts by Banco Santander Central Hispano, S.A. Students had to pay for the English courses in advance so the school offered them the possibility of entering into financing contracts that they

²⁸⁹ Section 4, (1) KapMuG.

²⁹⁰ Section 6 KapMuG.

²⁹¹ Article 140-bis, § 9 a) of the Consumer Code.

²⁹² Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 138.

²⁹³ Articles 221.1.1, al. 1 and 221.1.1, al.2 LEC.

²⁹⁴ Alejandro Ferreres Comella, “Las acciones de clase (“class actions”) en la Ley de Enjuiciamiento Civil”, *Actualidad Jurídica Uría y Menéndez* / 11-2005, p. 43.

²⁹⁵ *Decision of the Audiencia Provincial de Sevilla*, 22 de enero de 2004 (AC 2004/406).

administered and then they sent to the bank with which they had previously signed a cooperation agreement²⁹⁶.

In this case, the Seville provincial judge dismissed the action for damages filed, reasoning that the consumer association could and should have identified the students affected by the closure of the chain of schools.

The plaintiff consumer association argued in its application that it was defending diffuse interests as the group of consumers affected was not determined, nor was it readily determinable.

The judge did not share that view because the plaintiff had not made sufficient efforts to identify the group affected. According to the judge, the fact that the group of affected consumers cannot be identified in full did not relieve the plaintiff of its obligation to identify the members of the group.

The judge considered that not even having attempted to make an effort in a case where the consumer association merely had to present a dozen contracts was wholly insufficient for giving consistency to the application²⁹⁷.

(3) NOTIFICATION TO THE REPRESENTED GROUP MEMBERS

NO VERIFICATION BY JUDGES

130. ***Spain provides mechanisms to publish such cases in the media to give audience to potential claimants²⁹⁸ but is not clear what the role of the judges exactly is.***

²⁹⁶Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 87.

²⁹⁷ Alejandro Ferreres Comella, “Las acciones de clase (“class actions”) en la Ley de Enjuiciamiento Civil” *Actualidad Jurídica Uría y Menéndez* / 11-2005, p. 43; *Que estimando en parte el recurso interpuesto por el Procurador Don Francisco Franco Lama, en nombre y representación de Finanzia Banco de Crédito, S.A., y sin entrar a resolver las cuestiones planteadas por los recursos interpuestos por los Procuradores Don Augusto Atalaya Fuentes, en nombre y representación de Eurocrédito Entidad de Financiación, S.A., Don Mauricio Ferreira Iglesias, en nombre y representación de Banco Santander Central Hispano, S.A. y Don Manuel Muruve Pérez, en nombre y representación de Pastor Servicios Financieros, Establecimiento Financiero de Crédito, S.A., debemos declarar y declaramos la inadecuación del procedimiento seguido, así como la nulidad de todo lo actuado desde la providencia de 2 de diciembre de 2002, acordando en su lugar que se dé curso a la demanda presentada por Federación de Asociaciones de Consumidores y Usuarios de Andalucía (FACUA), Unión de Consumidores de Andalucía (UCA/UCE) y Federación Andaluza de Consumidores y Amas de Casa Al-Andalus por los trámites de juicio ordinario, otorgando a dicha parte la posibilidad de subsanar el defecto de no haber comunicado la demanda a los interesados, a cuyo efecto se le prestará el auxilio judicial que fuere preciso para obtener la averiguación de los integrantes del grupo, así como de subsanar el defecto de no haber acreditado los asociados suyos afectados, por el hecho dañoso, efectuando seguidamente el Juzgado un llamamiento a quienes tengan la condición de perjudicados en la forma prevista en la Ley, todo ello sin hacer especial imposición de las costas procesales de esta alzada.*

²⁹⁸ Article 15 LEC.

In **Spain**, it is not clear who, between the judge and the parties, is responsible for the notification process.

The LEC lays down only that in proceedings which intend to protect collective interests and diffuse interests, the admissibility decision of the judge must be published in media which reaches all the territorial areas where the damage of rights or interests has taken place²⁹⁹. It should be remembered here that if victims are individualized or easily individualized, the plaintiff must notify the approaching filing of the claim to the interested persons before the presentation of the initial claim³⁰⁰.

Decision of the Audiencia Provincial of Caceres³⁰¹ - Publication in the media of the filling of a claim

This litigation concerned a breach of educational contracts by Wall Street Institute Santiago, S.L. because of a situation of economic insolvency. Subsequently there was a breach of financing contracts by Citibank España, S.A., Santander Central Hispano, S.A. and Caja de Ahorros y Monte de Piedad de Madrid. Students had to pay for English courses in advance. Therefore, the schools offered them the possibility of entering into financing contracts that they administered and then sent to the banks with which they had previously signed a cooperation agreement.

The first instance judge considered that there had been a breach of Section 15 of the LEC because the filing of the claim had not been published in the media. The second instance judge confirmed the first instance judge's decision and stated that there was a breach of Section 15 of the LEC³⁰².

VERIFICATION BY JUDGES

131. ***In England & Wales, judges may give directions for publicising the GLO³⁰³.***

In **England & Wales**, the intention of the GLO rules is that judges are enabled to order the lead solicitors for the group to advertise the making of the GLO and any cut off dates for joining the group to minimise the risk of individuals trying to start their own separate proceedings at a later date (see *infra* – Cut-off dates). However, no guidance is given on the form of any publicity or on

²⁹⁹ Article 15,1 LEC.

³⁰⁰ Article 15, 2 LEC.

³⁰¹ *Decision of the Audiencia Provincial (Second Instance Court) of Caceres (Section 11)*, num. 348/2004, 15.9.2004 (Westlaw Aranzadi Reference: JUR 2004\264440).

³⁰² Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 252 - 255.

³⁰³ CPR Part 19, 19.11 (3) (c).

who might be ordered to pay the relevant costs³⁰⁴. No mention defines the term “publicizing”, so the opportunity and the modalities of the publication of the GLO are left to the discretion of the judges. The publication is commonly the parties’ responsibility and this usually takes the form of an advertisement, which will be approved by the judges if the parties are not able to agree on the wording³⁰⁵. In addition, the GLO rules require that copies of GLOs should be supplied to the Law Society and to the Senior Master³⁰⁶.

When a GLO has been made, the judge will set up a Group Register, which will be maintained in the management court,³⁰⁷ of all the parties to the group of claims being managed. This is a mandatory requirement and must introduce details as the judge *may direct of the cases which are subject to the GLO*³⁰⁸. The individual registration in this Register is an essential part of the GLO system³⁰⁹. The Register serves to promote efficient confirmation of the group’s membership at any given point.

In practice, it seems that solicitors also advertise their involvement in potential collective redress claims and seek to gather additional claimants, *e.g.* through posting on a firm’s website. Such publicity must, of course, meet certain standards laid down in the Solicitors Code of Conduct 2007 and, in particular, must not be misleading or inaccurate. Solicitors cannot make unsolicited visits or telephone calls to members of the public³¹⁰.

***Various Ledward Claimant v Kent and Medway Authority*³¹¹ - Aggressive marketing**

In *Various Ledward Claimant v Kent and Medway Authority*, the claimants alleged that they had been raped or sexually assaulted by a gynaecologist formerly employed by the defendant health authority and now deceased. The onus in this case was inevitably on the claimant lawyers to find, identify, name and particularise the various claimants as far as possible in the action³¹².

As the following comment shows, aggressive marketing can draw the disapproval of the court:

I am satisfied that this case is a classic example of litigation driven by the lawyer acting for the claimants in which there is a real risk that costs have been and will be incurred unnecessarily and unreasonably.

³⁰⁴ Information supplied by Graham Jones.

³⁰⁵ Alison Brown & Ian Dodds Smith, “England and Wales”, in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 61.

³⁰⁶ CPR Practice Direction 19B para.11.

³⁰⁷ CPR Part 19, 19.11 (2) (a).

³⁰⁸ CPR Practice Direction 19 B para. 6.1.

³⁰⁹ Before claimants may join the Group Register, they must first obtain individual claim forms and pay the requisite issue fee (CPR Practice Direction 19B para.6.1A).

³¹⁰ Alison Brown & Ian Dodds Smith, “England and Wales”, in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 61.

³¹¹ *Various Ledward Claimant v Kent and Medway Authority* [2003] EWHC 2551 (QB), para. 11.

³¹² Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p. 27.

In Germany, Italy, Portugal and Sweden, judges must give directions as to the forms of advertising.

In **Germany**, the first instance judges will announce publicly in a special electronic Internet based Complaint Registry (on this Register, see *infra* – Section Two, communication with the group members)³¹³ that an admissible application has been made³¹⁴.

In **Italy**, proper advertising is a condition for the action to continue³¹⁵. In the order declaring admissibility of the action, judges must give indications as to the forms of advertising to be given to the action so that members of the class may opt in within the time limit fixed (see *infra* - Cut-off dates). Article 140-bis of the Consumer Code does not provide for restrictions on such advertising. Thus, the admissibility order must be given publicity through the means fashioned by the judges according to their discretion³¹⁶. The order is also sent to the government for further publicity (mainly on government internet sites)³¹⁷.

In **Portugal**, judges notify identified parties individually and unidentified parties through newspapers or public notices. It is the judges' role to arrange how the opt-out notice is to be advertised.

Where it is possible to specify the respective holders individually, judges will try to send letters to personally identified victims³¹⁸. However, individual notice to represented group members is not required. Notice to such members may be given by media and press conferences and this is usually the case³¹⁹. Experience has demonstrated that such public announcement of collective redress lawsuits does not always assure opt-out rights, which can be particularly relevant when decisions are unfavourable³²⁰.

In **Sweden**, the judge must normally inform those who fit the plaintiff's description of the action by personal notice or in some other suitable way (such as leaflets, flyers or advertisement in newspapers or on the radio³²¹) and afford them the opportunity to inform him that they wish to opt

³¹³ The register is monitored systematically by law firms who use the register to solicit claimants.

³¹⁴ Sections 1 & 2 KapMuG.

³¹⁵ Article 140-bis, §9 of the Consumer Code.

³¹⁶ Article 140-bis of the Consumer Code, § 9.

³¹⁷ Article 140-bis of the Consumer Code, § 9, (b).

³¹⁸ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at : ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 297.

³¹⁹ Article 15, 2 Law 83/95; Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008).

³²⁰ Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p. 99.

³²¹ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 13; Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Sweden), available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf, p. 5.

in³²². Notices to members of the group must be given in the manner the court finds appropriate and must comply with the Code of Judicial Procedure. The judge may also order any party (even the defendant) to issue the notice if it will significantly facilitate the proceedings³²³. In such case, the party is entitled to compensation from public funds for expenses (see *infra*- Section Three).

(4) CUT-OFF DATES

CUT-OFF DATES IMPOSED BY THE LAW

133. ***In Germany and Portugal, the law, and not judges, imposes a time limit within which the option must be exercised by the individual claimants.***

In **Germany**, the KapMuG allows four months subsequent to the publicity of the admissibility order, within which the specific threshold of ten individual claims must be reached³²⁴.

In **Portugal**, according to law 83/95, it must be possible for the summoned parties to declare that they do not wish to be represented by the claimant up to the end of the evidence collection stage or equivalent stage by express declaration in the proceedings³²⁵. Summoned parties potentially affected by the infringement who remain silent are considered as being part of the group. Consequently, silence equals acceptance of being part of the group.

Within a term fixed by the judges, the summoned parties may also declare that they wish become an intervening party in their own name. They may also declare that they agree to be represented by the claimant³²⁶.

³²² Sections 13 & 49 GrL.

³²³ Section 50, § 2 GrL; Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 13.

³²⁴ Section 4 (1), 2 KapMuG.

³²⁵ Tito Arantes Fontes & Joao Pimentel, "Portugal", in *The International Comparative Legal guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 123; Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 292.

³²⁶ Article 15, 1 Law 83/95.

In Spain, the LEC, and not judges, regulates the period within which affected consumers may intervene in the proceeding.

In **Spain**, in collective interests proceedings, the public calling will not suspend the proceedings and affected consumers will be able to participate in the proceedings at any stage, but will only be able to carry out those judicial acts that are not precluded³²⁷.

In diffuse interests proceedings, the public calling will suspend the proceedings for up to a maximum of two months to enable affected consumers to join the claim. Once this period has elapsed, the proceedings will continue with the participation of consumers that have responded during that period. The judges will not permit further participation in the proceedings thereafter³²⁸.

Nevertheless, affected consumers who do not expressly opt in to the proceedings will be bound by the final judgement³²⁹, which will list not only the individual named beneficiaries but also the conditions that need to be fulfilled for any other party to benefit from the judgment. Affected parties who meet the conditions laid down in the judgment must wait until the final judgment, which will then be fully applicable to them (see *infra*- Sections Three and Four). Those individual claimants are not allowed to take individual action after the group proceedings³³⁰. The LEC thus establishes a system that enables each aggrieved consumer to join the judicial proceedings started by the consumer association or group of aggrieved consumers in order to defend his individual right or interests, but in turn the LEC does not contemplate any effective opt-out mechanism. The LEC does not introduce any mechanism that enables a consumer represented by the collective redress action brought by a consumer association to state effectively that he does not wish to be represented³³¹.

The participation of a consumer in a proceeding is therefore not meant to mark his wish to join the represented group or to be excluded from it, but is justified by his opportunity to play an active role in the trial and by his hope of directly obtaining proper compensation (see *infra*- Sections Three and Four)³³².

³²⁷ Article 15,2 LEC.

³²⁸ Article 15, 3 LEC.

³²⁹ Article 222.3 LEC.

³³⁰ “If individual proceedings are already underway when a group action based on the same damaging event is commenced, the procedures should be accumulated further”. Article 78 of the LEC.

³³¹ Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 138.

³³² Article 221.1.1, al. 1 LEC; L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12, pp. 227-228.

135. ***In England & Wales, judges may specify a date by which claimants who wish to opt in must enter their names and claims on the Group Register***³³³.

In **England & Wales**, in order to be able to make the procedure progress in an orderly fashion and to know how many claims are in the group, the judges may specify in the GLO a date by which a claimant needs to have joined the group.

In practice, judges try to avoid setting cut-off dates that give claimants too little time to investigate their claims, since this can produce a rush of bad claims that have to be weeded out later and can give a false impression of the viability of the group as a whole. There can sometimes be good reasons for not imposing a cut-off date, such as where there are difficulties in bringing the case to the attention of people who may be affected³³⁴.

CUT-OFF DATES MANDATORILY IMPOSED BY JUDGES

136. ***In England & Wales (Draft), Italy and Sweden, judges must stipulate a strict period for opting out or opting in, depending the system chosen.***

In **England and Wales**, under the **Draft for a Collective Proceedings Act**, judges are required to fix a date before which a represented group member may opt out/opt in (“the opt-out/opt-in date”)³³⁵.

In **Italy**, judges are also required to establish a deadline for a consumer to opt in. This deadline can be no later than 120 days after the deadline for public dissemination.

In **Sweden**, judges must indicate in their notice the time limit for members of the group to express consent to being part of the group³³⁶.

Konsumentombudsmannen v Stavrullen Finans AB³³⁷ - cut-off dates

In *Konsumentombudsmannen v Stavrullen Finans AB*, the Swedish Consumer Ombudsman (Konsumentombudsmannen) claimed damages for about 7 000 people in compensation for the defendants’ failure to supply electricity as agreed under a fixed price contract.

³³³ CPR Part 19, 19.13 (e); CPR Practice Direction 19B, para.13.

³³⁴ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p.19.

³³⁵ Article 19.21-22 (1) Draft Collective Proceedings Act.

³³⁶ Section 13 (4) GrL.

³³⁷ *Konsumentombudsmannen v Stavrullen Finans AB, T 5416-04, Umeå tingsrätt (Umeå District Court)*.

According to Section 13 GrL, the judge informed all known potential group members about the existence of the group action by personal notice on 12 May 2008. The judge indicated in the notice that the group members had until 1 August 2008 to express their consent to being part of the group in written form to the judge. The unknown possible group members were not neglected as the judge also decided to send a press release to the media to inform them of the action. Additionally, this information was also published through the Vasterbottens-Kuriren, the Vasterbottens Foklblad, the Norra Vasterbottent and on the website of the Swedish Consumer Ombudsman.

3.3. VERIFYING THE MODALITIES OF THE OPTION'S EXERCISE

- Do judges in the selected Member States manage the exercise of the opt-in or opt-out option?
 - In opt-in proceedings, must the judges agree that the individual claimants who opted in meet the criteria set out in the admissibility order? Do the judges have the power to strike out individual claims?
((1)) Striking out
 - In opt-in and opt-out proceedings, do the judges regulate the situation of claimants who fail to meet cut-off dates? **((2) Consequences reserved for claimants who fail to meet the cut-off dates)**

(1) STRIKING OUT

ISSUE NOT ENVISAGED

137. *On basis the information we have, none of the selected Member States provides illumination on solving this challenge.*

STRIKING-OUT POSSIBLE

138. *However, in England & Wales judges may strike out claims registered in the Register.*

In **England & Wales**, judges have the power to strike out a group or individual claims when they are not satisfied that a case can be conveniently managed with the other cases on the Group Register or if they are satisfied that the entry of the case on the Group Register would adversely affect the case management of another case³³⁸. Such may be the case when the claim is oppressive, vexatious, bound to fail, involves inordinate and inexcusable delay, or is unjust to the defendants³³⁹.

³³⁸ CPR Practice Direction 19B, para. 6.4.

³³⁹ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p.19.

(2) CONSEQUENCES RESERVED FOR CLAIMANTS WHO FAIL TO MEET CUT-OFF DATES

ISSUE NOT ENVISAGED

139. *In Portugal, Law 83/95 does not deal with this issue and does not give discretion to judges to resolve it.*

CONSEQUENCES SET OUT IN THE LAW

140. *In Germany, Italy and Sweden, judges have no other choice than to refuse the collective redress proceedings to claimants who fail to meet the cut-off dates. Those people still keep their rights to pursue individual proceedings.*

In **Germany**, if within four months the number of similar claim applications necessary to start the model proceeding has not been submitted, the first instance judge will deny the application and resume proceedings³⁴⁰.

In **Italy**, if the parties miss the deadline for providing the publicity ordered by the judge, the action is dismissed without prejudice³⁴¹.

However, according to some scholars, individual actions would be safe; only the collective redress proceedings would no longer be available³⁴².

In **Sweden**, the GrL presumes that a member who does not give any notice to the court within the fixed period shall be deemed to have withdrawn from the group³⁴³. The judges may not assess the opportunity to depart from this presumption. However, those who do not notify their willingness to join the group preserve their opportunity to pursue their individual claim in separate proceedings.

³⁴⁰ Section 4 (4) KapMuG.

³⁴¹ Article 140-bis, § 9 b) of the Consumer Code.

³⁴² Information supplied by Andrea Giussani.

³⁴³ Section 14 GrL.

141. ***In England & Wales (including under the Draft), judges may permit claimants who fail to meet the cut-off date to join the collective redress proceedings.***

In **England & Wales**, the GLO rules simply leave the situation of claimants who fail to meet cut-off dates to the judge's discretion³⁴⁴. Judges may permit claimants who fail to meet these deadlines to join group registers out of time. No guidance is given as to relevant criteria or considerations³⁴⁵.

Nash and Others v Eli Lilly & Co and Others³⁴⁶

It was found in one case that being too liberal in admitting claimants may only lead to difficulties. In *Nash and Others v Eli Lilly & Co and Others*, the judge extended the cut-off date several times, with the result that four groups of claimants were formed. Most of these claims were subsequently held to be out of time on limitation grounds. The psychological effect on the claimants was unfortunate.

The **Draft for a Collective Proceedings Act** also provides guidelines to judges as to the consequences they should reserve for represented group members who fail to meet opt-out/opt-in dates. The principle is that a represented group member who fails to opt out/opt in by the opt-out/opt-in date may not do so after that date. However, judges may grant an exception to this principle if they are satisfied that the delay was not caused by any fault of the represented group member and that the defendant would not suffer substantial prejudice if permission were granted³⁴⁷. In addition, on the application of a represented group member or party, judges may extend the period during which class members may opt out of/opt in to opt-out/opt-in proceedings³⁴⁸.

³⁴⁴ PCR Part 19, 19.13 (e).

³⁴⁵ PCR Part 19, 19.13 (e); CPR Practice Direction 19B, para.13.

³⁴⁶ *Nash and Others v Eli Lilly & Co and Others* [1991] 2 Med LR 169 and subsequent hearings.

³⁴⁷ Article 19.21-22 (4) Draft Collective Proceedings Act.

³⁴⁸ Article 19.21-22 (5) Draft Collective Proceedings Act.

C. CONCLUDING SUMMARY

1. THE FILTERING STAGE

1.1. IDENTIFIED CONCERNS AND ABUSES

142. Increase in excessive litigations and encouragement of blackmail settlements

1.2. INTERESTS AT STAKE

143. Consumer claimants: right to access to justice (even for claims for very small amounts)

Defendant: right to procedural and fair justice

General interest: ensuring the better effectiveness of a right by the deterrent effect exercised by a collective redress mechanism

1.3. POTENTIAL SOLUTIONS

144. (1) Experienced and specially trained judges
- (2) Flexible and strong filtering requirements
- (3) Separate and challengeable judgement on admissibility

1.4. APPROACH OF THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) EXPERIENCED AND SPECIALLY TRAINED JUDGES

➤ *Do the selected Member States provide specific rules on material and territorial competence for collective redress proceedings?*

➤ *Do the selected Member States grant competence to experienced and specially trained judges?*

145. **Spain** and **Portugal** do not consider this issue.

146. **England & Wales** is the only jurisdiction which recognizes the need for specialist judges.

147. **England & Wales, Germany, Italy** and **Sweden** limit the number of competent courts. This has, of course, an impact on the specialisation and on the experience of judges.

(2) FLEXIBLE AND STRONG FILTERING CRITERIA

➤ *To what extent do the selected Member States allow judges to decide on the admissibility of a claim? Do judges in the selected Member States only verify formal requirements or do they have discretionary powers?*

148. In **Portugal** and **Spain**, judges must apply the usual requirements in striking out applications for collective redress proceedings.

149. In **England & Wales, Germany, Italy** and **Sweden**, judges must consider applications for a collective redress proceeding against specific admissibility criteria. Admissibility criteria in **England & Wales, Italy** and **Sweden** do not vary significantly and are set out in a very flexible manner giving judges relatively broad discretion to allow or disallow claims to be conducted in group proceedings. In contrast, in **Germany**, judges have less flexibility to deny applications. The admissibility criteria in the KapMuG are remarkably precise.

- *According to which filtering criteria are judges in the selected Member States required to assess the quality of the claims?*

(I) COMMONALITY REQUIREMENT

- *To what degree of commonality are judges in the selected Member States required to be attentive?*

150. **Spain** and **Portugal** do not provide much illumination on solving this challenge, as they do not refer to commonality as a prerequisite for instance.
151. **England & Wales** and **Sweden** refer to *commonality* as a prerequisite for instance but do not require that judges ensure that the common issues that arise will predominate over the individual issues. It is also not required that all individual claims are necessarily the same.
152. **Germany** requires that judges verify the *similarity* of individual cases, while **Italy** goes a step further and requires that judges verify that all individual cases are *identical*.

(II) SUPERIORITY REQUIREMENT

- *Are judges in the selected Member States required to ensure that a collective redress proceeding is a superior means of resolving the litigation?*

153. **Italy** and **Spain** do not require judges to verify the superiority of the collective redress proceeding before commencing the instance.
154. In **Germany** (KapMuG requirement) and in **Portugal** (usual requirement), judges are not required to verify that a collective redress proceeding is the best solution but rather that is an appropriate form.
155. In **England & Wales** and **Sweden**, judges must deny a collective redress application when other judicial devices would be more appropriate. The superiority of the collective redress proceeding must be compared against that of consolidation and representative proceedings in **England & Wales**, while it must be compared against traditional unitary actions in **Sweden**.
156. The **Draft for a Collective Proceedings Act (England & Wales)** suggests a broad superiority test. The judges may assess the superiority of the collective redress proceeding by considering opt-in collective actions, opt-out collective actions, traditional unitary actions, GLOs and even non-court based mechanisms.

(III) NUMEROSITY REQUIREMENT

➤ *Are judges in the selected Member States required to warrant a collective redress proceeding only if a threshold of potential consumer claimants is reached?*

157. In **Spain** and **Portugal**, the number of potential claimants does not influence judges' decisions on admissibility.
158. In **Italy** and **Sweden**, judges may take into account the number of claims possible. This is an obligation for judges in **England & Wales**.
159. **Germany** and the **Draft for Collective Proceedings Act in England & Wales** require that judges verify that a threshold of individual claims is met. Under the **Draft for Collective Proceedings Act**, the threshold is reached when 2 individual claims have been submitted, while in **Germany** at least ten individual claims must be filed.

(IV) PRELIMINARY MERITS REQUIREMENT

➤ *Are judges in the selected Member States required to verify the preliminary merits of the case?*

160. **Germany, Spain** and **Sweden** do not allow judges to verify the preliminary merits of a collective redress application.
161. In **England & Wales**, judges must have the consent of the Lord Chief Justice or the Vice Chancellor before being able to start a collective redress proceeding.
162. In **Italy** and **Portugal**, judges have the power to verify that the claim is not manifestly unfounded.
163. In **England & Wales**, under the **Draft for a Collective Proceedings Act**, judges must ensure that the collective proceeding has a real prospect of success.

(V) COST-BENEFIT TEST

164. In **England & Wales**, the **Draft for a Collective Proceedings Act** allows judges to deny a collective claim if the cost of identifying the class members and distributing the amounts ordered to be paid to them would be disproportionate.

(3) SEPARATE AND CHALLENGEABLE JUDGEMENT ON ADMISSIBILITY

➤ *Do judges in the selected Member States hand down a separate formal judgement on admissibility?*

165. **Portugal, Spain and Sweden** do not require judges to make a formal ruling on the validity of the application.
166. In **England & Wales**, formal rulings on admissibility are not made in practice, although they are authorized by the GLO rules.
167. Under the **Draft for a Collective Proceedings Act (England & Wales)**, in **Germany** and in **Italy**, the admissibility stage ends with a judge's order.
Moreover, the **German** KapMuG is the only specific law which requires expressly that the first instance judge must consider the admissibility of the claim, having granted the defendant the opportunity to submit a written pleading on the matter.

2. THE JUDICIAL VERIFICATION OF THE REPRESENTATIVE CLAIMANT

2.1. IDENTIFIED CONCERNS AND ABUSES

168. Conflicts of interest between the representative claimant and the represented group members.

2.2. INTERESTS AT STAKE

169. Consumer claimants: right to be adequately represented since consumer claimants are not before the judges to defend their interests.

Defendant: right to be protected from unmeritorious claims.

2.3. POTENTIAL SOLUTIONS

170. (1) Establishment of the formal requirements concerning the standing of the representative claimant left to the legislators.

(2) Judicial evaluation of the superiority of the representative claimant.

(3) Evaluation of the suitability of a representative claimant to act on behalf of the represented group members and to represent their interests left to the discretion of the judges.

Evaluation of the financial capacity of the representative claimant.

2.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) JUDICIAL EVALUATION OF THE STANDING OF THE REPRESENTATIVE CLAIMANT LIMITED BY FORMAL REQUIREMENTS

171. **In all the jurisdictions reviewed**, the evaluation of the judge of standing is strictly limited to formal requirements.

(2) JUDICIAL EVALUATION OF THE SUPERIORITY OF THE REPRESENTATIVE CLAIMANT

- *Do judges in the selected Member States ensure that the representative claimant is the most suitable party to act as the representative and/or even that no other person wishes to represent the group?*

172. **None of the selected Member States** requires that judges take such a step.

173. However, the **Draft for a Collective Proceedings Act in England & Wales** allows judges, at the request of a represented group member or a party, to substitute another representative to the representative claimant if the existing representative appears unable to represent adequately the interests of the class members.

(3) JUDICIAL EVALUATION OF THE ADEQUACY OF REPRESENTATION BY THE REPRESENTATIVE CLAIMANT

- *Do judges in the selected Member States verify whether the representative represents adequately the interests of the group?*

174. In **Portugal** and **Spain**, the judge is not required to verify the adequacy of representation of the representative claimant.

175. In **England & Wales**, the **Draft for a Collective Proceedings Act** requires the judge to verify that the representative claimant satisfies two prerequisites in order to declare him suitable to act as a representative claimant.

➤ *Do judges in the selected Member States verify whether the representative claimant has sufficient resources to fund and manage a collective proceeding, and to cover any adverse costs liability? Are judges empowered to ask the representative for a security for costs?*

176. In **Italy** and in **Sweden**, specific rules oblige the judge to verify the adequacy of representation of the representative claimant, which evaluation is directly linked to the evaluation of the representative's financial resources.

177. In **England & Wales**, under the **Draft for a Collective Proceedings Act**, the judge may consider requiring a security for costs.

3. THE JUDICIAL VERIFICATION OF THE CONSTITUTION OF THE REPRESENTED GROUP

3.1. IDENTIFIED CONCERNS AND ABUSES

178. **Opt-in proceedings:** if the definition of the group is vague or confusing, danger that people with marginal claims “jump on board” simply in the hope of getting something out of a damages award; extensive publicity may damage the image of the defendant; very expensive and time-consuming publicity.

Opt-out proceedings: ambiguous definition of the group may lead to difficulties for defendants to identify and to quantify the financial consequences of a collective redress proceeding; extensive publicity may damage the image of the defendant; very expensive and time-consuming publicity.

3.2. INTERESTS AT STAKE

179. **Opt-in proceedings:**

Consumers: being able to assess whether their claims are eligible to be included on the basis of clear criteria; adequate notice to be able to opt in; economic proceeding.

Defendants: interest that the collective proceeding embraces the whole universe of claimants so that their liability does not remain open-ended; protection of their image; economical proceeding.

Opt-out proceedings:

Consumers: group could include future, as yet unknown, members; adequate notice; economical proceeding.

Defendants: need for a clear and ascertainable group definition to be able to estimate the extent of their liability for damages; interest that the collective proceeding embraces the whole universe of claimants so that their liability does not remain open-ended; protection of their image; economical proceeding.

3.3. POTENTIAL SOLUTIONS

180. (1) The choice between opt-in and opt-out proceedings left to the discretion of judges.
- (2) Judicial control of the modalities of the exercise of the option chosen:
- (i) verification of the definition of the group in opt-in and opt-out proceedings;
 - (ii) firm time limits for exercising the option;
 - (iii) verification of the notifying process to the represented group members.
- (3) Judicial control of the exercise of the option chosen:
- (i) striking out individual claims;
 - (ii) denying a collective proceeding to individual claimants who fail to meet time-limits for exercising the option.

3.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) JUDICIAL CHOICE BETWEEN OPT-IN OR OPT-OUT PROCEEDINGS

- *Are judges in the selected Member States empowered to progress collective redress proceedings on an opt-in or opt-out basis, whichever contributes best to the effective and efficient disposition of the case?*

181. None of the selected Member States leaves the choice between opt-in or opt-out proceedings to the discretion of the judges.
182. However, the **Draft for a Collective Proceedings Act in England & Wales** takes an approach which places the responsibility for designation of an opt-in or opt-out basis with the judge at the “certification” stage.

(2) JUDICIAL CONTROL OF THE MODALITIES OF THE EXERCISE OF THE OPTION CHOSEN

(I) ESTABLISHMENT OF THE GROUP MEMBERSHIP IN OPT-OUT PROCEEDINGS

➤ *Do judges in the selected Member State which opts for an opt-out system verify that group members are adequately defined and at least clearly ascertained?*

183. In **Portugal**, judges are not bound by the identification set out by the representative claimant in the initial writ.

(II) ESTABLISHMENT OF THE GROUP MEMBERSHIP IN OPT-IN PROCEEDINGS

➤ *Do judges in the selected Member States which opt for an opt-in system verify that group members are adequately defined? Are the judges given discretion as to the conditions under which the group of the victims is suitably defined?*

184. In **Spain**, in diffuse interest actions, in practice judges define the group in their final judgement. In collective interest actions, in practice the constitution of the group takes place prior to and outside the judicial proceeding.

185. In **Sweden**, the judges must verify that the representative claimant properly defines the group.

186. In **England & Wales, Germany and Italy**, group members are not required to be mentioned by name in the application for a summons and so judges must actively participate in the definition of the group.

(III) NOTIFICATION TO REPRESENTED GROUP MEMBERS

➤ *Do judges in the selected Member States verify the process for notification to potential group members?*

187. **Spain** provides mechanisms for publishing cases in the media to give audience but is not clear on the exact role of judges.

188. In **England & Wales**, a judge may give directions for publicising a GLO.

189. In **Germany, in Italy, in Portugal and in Sweden**, a judge must give directions as to the forms of advertising.

(IV) CUT-OFF DATES

➤ *Do judges in the selected member states fix a strict time limit for the exercise of the option?*

190. In **Germany** and **Portugal**, the law, and not judges, imposes a time limit within which the option must be exercised by the individual claimants.
191. In **Spain**, the LEC (not judges) regulates the period within which affected consumers may intervene in the proceeding.
192. In **England & Wales**, judges may specify a date by which claimants who wish to opt-in must enter their names and claims into the group register.
193. In **Italy**, in **Sweden** and under the **Draft for a Collective Proceedings Act (England and Wales)**, judges must stipulate a strict period for opting-out or opting-in, depending the system chosen.

(3) JUDICIAL MANAGEMENT OF THE EXERCISE OF THE OPTION

➤ *Do judges in the selected Member States manage the exercise of the opt-in or opt-out option?*

(1) STRIKING OUT

➤ *In opt-in proceedings, must judges establish that the individual claimants who opted in meet the criteria set out in their admissibility order? Do judges have the power to strike out individual claims?*

194. On the basis of the information we have, **none of the selected Member States** provides illumination on solving this challenge.
195. However, in **England & Wales** judges may strike out claims registered in the Group Register.

➤ *In opt-in and opt-out proceedings, do judges regulate the situation of claimants who fail to meet cut-off dates?*

196. In **Portugal**, Law 83/95 does not deal with this issue; nor does it give discretion to the judges to resolve it.
197. In **Germany, Italy and Sweden**, judges have no choice other than to refuse the collective redress proceeding to claimants who fail to meet the cut-off dates. Those people still keep their rights to pursue individual proceedings.
198. In **England & Wales** (including under the **Draft**), judges may permit claimants who fail to meet cut-off dates to join collective redress proceedings.

SECTION TWO

POWERS OF THE JUDGES DURING THE PROGRESS OF THE TRIAL

A. ANTICIPATED CONCERNS

1. Concern of arbitrariness
2. Concern of lengthy, complex, expensive and fishing-expedition processes
3. Concern of settlements conflicting with the interests of the represented group members

B. COMPARATIVE ANALYSIS

1. Framework in which judges conduct the trial - Case management powers
2. Powers of judges necessary to conduct the trial
 - 2.1. Dealing with management tools for organising the effective conduct of the trial
 - 2.2. Supervising the parties' collection and preparation of evidence
 - 2.3. Supervising the discovery process
3. Powers of judges necessary to ensure the protection of the represented group members' interests
 - 3.1. Communicating with the represented group members
 - 3.2. Considering the participation of the represented group members
 - 3.3. Keeping control on the adequacy of representation of the representative claimant
 - 3.4. Encouraging and approving settlements

C. CONCLUDING SUMMARY

A. ANTICIPATED CONCERNS

1. CONCERN OF ARBITRARINESS

199. ***Flexibility vs. predictability***

The primary objective of collective redress proceedings, i.e. providing a more speedy and efficient processing of claims than would be possible if all individual similar claims were to proceed individually, presents a significant challenge for judges. Scholars and practice have brought to light the considerable difficulties in case managing collective redress actions, which are, by their very nature, complex, lengthy and (by definition) expensive³⁴⁹.

Therefore, if the application for a collective action is admitted, judges should be given wide-ranging powers to process the procedure efficiently and to ensure that it is progressed expeditiously and economically. The judges should not only verify the conduct of the proceedings but must also make the directions necessary to enable a speedy, fair and equitable trial. The image of impartial and passive arbiters, subject to the conduct of proceedings by the parties, should give way in a collective redress proceeding to that of active instance managers. The judges should be able to transcend their role as arbitrators to become pilots of the trial, which strongly justifies managing collective claims requiring special training and expertise for judges (see *supra* – Section One).

Even if it appears clear that, to minimize time and costs, judges should be able to exercise their powers with considerable flexibility - depending on the needs of specific cases - the main risk related to this approach is that parties will not have a high degree of predictability and certainty. This broad discretion (and sometimes lack of rules) may leave parties and practitioners unable to predict how individual judges will interpret and use the powers at their disposal. The potential for arbitrariness and abuses by judges may thus be a concern.

200. ***Relevant questions.***

When viewed from the perspective of efficiency and flexibility, however, a collective redress proceeding does not mean *per se* that the judges' powers will be exercised capriciously. The main questions in deciding how judges should manage collective redress proceedings efficiently in a way which is not arbitrary are:

³⁴⁹ Concern encouraged by the potentially huge and highly complex pieces of litigations; Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p .161.

- Should the general managerial powers of judges be enhanced for collective redress proceedings?
 - To what extent should the case management powers of judges be prescribed?

2. CONCERN OF LENGTHY, COMPLEX, EXPENSIVE AND FISHING-EXPEDITION PROCESSES

201. *Need for proactive conduct of the trial*

Flexible powers only have sense when judges are inclined to exercise them creatively, actively and pragmatically. The judge must be proactive in considering how best to progress the action and by anticipating problems before they arise rather than waiting passively for lawyers to present them. In some types of case, decisions that are made on some management issues can make the difference between the success or failure of a case.

2.1. MANAGEMENT TOOLS

202. *(1) Concern of complex litigations*

The *sine qua non* of managing collective redress litigations is defining and resolving the issues in the litigation. The difficulty of the process of identifying and resolving issues may be increased in collective redress actions as materiality of facts and the scope of the trial may sometimes be difficult to determine at the outset. The parties may lack sufficient information at the outset of the case to arrive at definitions with certainty. The very complex nature of the collective redress proceedings might be a concern. A solution could be to grant judges powers to identify, define and narrow the issues, with the cooperation of the parties³⁵⁰. In the context of the management of complex litigations, the basic question is whether judges should be able to press the parties to define the amount of damages claimed and the proposed proof and manner of computation, including the evidence of causation³⁵¹ (see *infra*).

That being done, as part of their case management powers, judges should clarify and separate the issues that arise in the individual cases as well as those that are common to all or some of them. There should be various options available for progressing cases.

For instance, a judge may decide the common factual and legal question only once with a binding effect for all the affected plaintiffs by selecting a specific *test case*. The idea of test cases is to decide the common factual and legal questions of similar legal actions only once by deciding on one case which serves as an example for a multitude of identical or similar cases³⁵². Test cases may hence be satisfactory where many similar issues arise that do not depend on individual factors.

³⁵⁰ *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 42.

³⁵¹ *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 44.

³⁵² Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 262.

Test cases will have binding or persuasive effect in resolving the other individual claims in the group. However, this solution is not without tension between the position of the claimants and the defendant. Their positions will inevitably appear to become polarised over strategy: the claimants' wish to focus broadly on the common issues; the defendant's wish to identify and investigate each individual claim.

Another important aspect that should be addressed is the capacity allowed to judges to create *subgroups*. This may be indicated by the assessment that factual and/or legal issues are not common to all group members, or that next to those common issues, there are legal and/or factual issues that only concern a smaller number of group members. Subgrouping should thus represent a workable solution when, for instance, in tort cases group members may have different levels of exposure to the same allegedly toxic substance, allege different types and degrees of injury, or seek different reliefs. In securities fraud cases, group members may have received different information or communications at different times, requiring the creation of subgroups³⁵³. But the risk is that the creation of subgroups may make sometimes the case unmanageable. Conflicts and differences among group members may appear so sharp that a considerable number of small subgroups result. Collective treatment would possibly no longer be justified at all and would lead to the question of judges being able to review their admissibility order³⁵⁴.

203.

Relevant questions

- Should judges be given the power to select test cases to resolve issues?
- Should judges be given the power to divide a group in subgroups during the progress of a trial?
- Should judges be required to designate a representative claimant in each subgroup?
- Should judges be able to review their admissibility order if there are a considerable number of subgroups?

³⁵³ *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 272.

³⁵⁴ *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 272.

204. ***(2) Concern of lengthy litigations***

The very lengthy nature of the collective redress proceedings might be a concern. The judge's responsibility is hence crucial in deciding on the most efficient and prompt way to manage a litigation. In this respect, a solution should be to allow the judge, at the earliest stage possible, to be proactive in prescribing a series of procedural steps with firm dates (a litigation plan), in cooperation with the parties³⁵⁵. The judges should allow the parties to play a significant part in the development of the litigation plan.

205. ***Relevant question***

- Should judges be mandatorily required to establish a litigation plan that includes an appropriate schedule for bringing the case to resolution (prescription of procedural steps with firm dates)?
 - Should judges impose sanctions if the parties fail to respect the fixed dates?

206. ***(3) Concern of expensive litigations***

The very expensive nature of the collective redress proceedings might be a concern. A solution could be to require judges to pay attention to proportionality in relation to costs from the very beginning of the trial. It should be recognised that effective cost management has the potential to lead to the saving of costs in litigation. Judges should consider, with the help of the parties, the potential impact on costs of the directions that are contemplated and whether these are justified in relation to what is at issue at the outset. Judges should be responsible for establishing economical methods of handling a case when deciding the litigation plan. Consistent with the idea of specially trained and experienced judges, it seems that judges should receive training in costs budgeting and costs management.

207. ***Relevant questions***

- To what extent should judges be responsible for proportionality in litigation costs?
- When should a judge address the question of litigation costs?
- Should a judge inform parties periodically of the litigation costs already incurred and to be incurred in order to allow the claimants to assess their possible liability as the case develops?

³⁵⁵ On this point, see *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 13.

2.2. ACTIVE ROLE OF THE JUDGES AND EVIDENCE

208. *Concern that judges become investigating judges*

Although the presentation of evidence is generally managed by the parties, collective redress litigation presents other concerns: primarily the length of the trial. Indeed, in collective redress litigations the number of group members and the complexity of the case may increase the length of the evidence process. For instance, in the Deutsche Telekom case, the defendant denied liability and delivered eight tonnes of evidence to the court³⁵⁶.

Consistently with the idea of efficient and timely case management, this concern could lead judges in collective redress trials to take control of the parties' presentation of evidence and to press the parties to identify and narrow the issues by asking them to present additional evidence³⁵⁷. However, this approach goes against the traditional European civil procedure rules on evidence, which state that each party bears the burden of submitting and proving those facts upon which its claim or defence is based and that judges have no general power to order the parties or third parties to produce all the documents that they consider relevant to the solution of the case.

There is thus a tension between the need for an emphasis on active behaviour by judges in collective redress litigations and the risk that the judges perform an investigative role, shifting from being adjudicators to being investigating judges.

209. *Relevant questions*

The purpose of this report is not to go into details on the judicial management of evidence as this is more a matter for general civil procedure rules. Of importance is rather to consider evidence in the context of case management.

The basic point is, of course, that the parties should be in control of the collection and preparation of evidence and that the judge, when determining the victor in a factual dispute, should restrict himself to a reactive and responsive role. It is, however, relevant to consider whether judicial participation should be possible if the evidence exceeds reasonable limits and does not contribute to resolving the issues presented.

The main questions in deciding how judges should manage the evidence in potentially very long collective redress proceedings without frustrating the adversary process are:

³⁵⁶ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 78.

³⁵⁷ In this sense, see *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 42.

- Should the rules on the judicial management of evidence be adapted to collective redress proceedings?
- Should judges be able to intervene in the evidence collection and preparation to ensure that the collective redress is not unduly prolonged, unreasonably complicated, or unfairly tilted in favour of a stronger party?

210. ***Concern of wide-ranging discovery procedure for procuring evidence***

If the judicial management of evidence is more a matter for general civil procedure, it has, however, proved to be important in the US, where discovery³⁵⁸ is permitted. Discovery is traditionally justified by the need to enable each side of the contest to gain access to relevant information which might otherwise be known only to one side. This is said to achieve equality of access to information, facilitate better settlement of disputes, and avoid “trial by ambush” (where a party is unable to respond properly to a surprise revelation at a final hearing)³⁵⁹. In the US, it is common that the complexity and intractability of the intrinsic subject matter in collective litigations generate major discovery exercises to an even greater extent than in ordinary litigation³⁶⁰.

The US example has traditionally supported the general perception that discovery is inherent to an efficient collective redress mechanism and so has encouraged the fierce opposition to the introduction of a European Union collective redress proceeding. It has indeed been formulated that the use of discovery is precisely one of the fundamental causes of the high litigation costs associated with the US class action and one of the central bases for the pressure to settle that stems from unmeritorious, so-called blackmail suits.

³⁵⁸ Definition of the discovery concept: broadly described, the discovery concept means the compulsory (pre-trial) disclosure of all documents relevant to a case (this of course, without prejudice to specific exceptions to the general rule that may exist in jurisdictions having discovery or the conditions that must be fulfilled before the rule applies, for example, court authorisation). A party to a claim is thus obliged to disclose to the other party the existence of all documents which are or have been in his or her control which are material to the issues and the proceedings. In the course of the discovery procedure, parties to litigation can demand production of and inspect any information from the other side concerning the facts in the case. This may also apply to information held by third parties although usually with more conditions being imposed on granting such discovery. (Definition copied from Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, “Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report”, Ashurst, Brussels, 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, pp. 61-62).

³⁵⁹ Neil Andrews, *Three paths of justice: Court Proceedings, Arbitration and Mediation in England*, Springer (Dordrecht, Heidelberg, London, and New York, 2011), p. 26.

³⁶⁰ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, para. 8.

Discovery must be distinguished from the ability of judges to order production of specific documents.

211. ***Relevant questions***

The main questions in deciding whether and how judges should ensure equality of access to information and the avoiding of trial by ambush are:

- Is discovery inherent to collective redress proceedings? Is the general ability of judges to order production of specific documents not sufficient?
- Should the ability of judges to order production of specific documents be reinforced in collective redress proceedings?
 - In cases where production of a document may be requested by one of the parties, should approval by the judges of such a request be mandatory in collective redress proceedings?

3. CONCERN OF SETTLEMENTS CONFLICTING WITH THE INTERESTS OF THE REPRESENTED GROUP MEMBERS

212. *The need for adequate protection of the represented group members' interests*

Obviously, collective proceedings may present problems arising from the need to protect the rights of individuals who do not take part in the trial and to balance this need against the desire of the defendants for finality³⁶¹. With the introduction of a representative proceeding, there is a concern that the representative claimant will in fact pursue exclusively his own interest. Consequently, the represented group members will be bound by judgements which conflict, *in fine*, with their interests.

The ineffective voice of individual represented group members (who have limited or no actual involvement in a case) might thus be a concern.

213. *Relevant questions*

As all the parties who are interested or involved in a judicial action are not present before the court, the need for safeguards to be built to protect the interests of the represented group members is apparent. In this sense, it seems reasonable to make judges responsible for the management of the case in a way that guarantees the constitutional values of fairness and justice for both parties, including the represented group members. Judges should not only have the opportunity to intervene in the conduct of the procedure but should also have the duty to so act in order to ensure the protection of the interests of the represented group members who do not actively take part in the trial. On their side, defendants should not be neglected and should be protected by the judicial management of the proper conduct of the proceedings.

The main questions in deciding how judges should reconcile the adequate representation of the represented group members' interests and efficiency in the progress of the collective proceedings are:

- Should judges be responsible for the communication of the important orders and decisions taken during the trial to the represented group members?
- Should the participation of the represented group members in the collective proceedings be left to judges' discretion?
- Should judges keep control on the adequacy of representation of the claimant representative?

³⁶¹ Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, para. 11.

214. ***Settlements – Concern of collusion between the representative claimant and the defendant***

The general suspicion that represented group members will potentially not be adequately served by the representative claimant is supported by the experience that settlements agreed by the representative claimant and the defendant during a trial may sometimes be collusive between those two parties (this may be the case whether the claim is pursued on an opt-in or an opt-out basis).

Indeed, a private settlement, even during the trial, may often be attractive to the group representative (especially often via representative lawyers) and the defendant, who both want to agree a settlement for their own differing financial reasons³⁶². The high stakes in collective redress cases increase the incentive to avoid the risk of trial and its burgeoning cost places a premium on settling early in the litigation.

The representative's funding arrangements may essentially compromise the best interests of the represented group members³⁶³. The concern is also that the representative claimant may use the collective redress proceeding to improve his own bargaining position to settle his individual claim on terms more favourable than those for the other represented group members. Individual represented group members may have a very limited voice in this settlement process so that they could feel compelled to agree to an unfair outcome.

For their part, defendants may prefer to enter into settlements with the group representative to end long proceedings causing expensive costs then to fight on the merits of the case. So, even during the trial, the risk of a blackmail settlement does exist³⁶⁴. At this stage, media pressure may once again be sufficient to induce responsible businesses to negotiate, as businesses are vulnerable to adverse media attention caused by public and private criticism.

215. ***Relevant questions***

If there is a clear need for safeguards to be built in the area of settlements, this does not, however, mean that judges should discourage settlements. On the contrary, even if the large sums involved, the high number of parties and the complexity of issues magnify the difficulty of reaching settlement³⁶⁵, one function of the judge should be to provide powerful encouragement to settle and to approve settlements reached between parties.

³⁶² C. Hodges, "Response to Consultation *Towards a Coherent European Approach to Collective Redress*", April 2011, Available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf, p. 21.

³⁶³ See *infra* – Section Three, on the risk that the group lawyer's funding arrangements may compromise the best interests of the group members.

³⁶⁴ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p.170.

³⁶⁵ *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 167.

There should simply be an adequate form of oversight by the judges in appropriate situations to evaluate fairness of settlements before they can bind the represented group members. Judges should essentially take account of the same considerations and determine the same questions, *mutatis mutandis*, when determining collective claims by way of final judgements (e.g. determining how absent group members should opt in/opt out, how the settlement should be advertised, who should administer the execution of the settlement, etc.)³⁶⁶.

The main questions in deciding how judges should balance parties' rights and due process in settlements are:

- Should judges be required to attempt to resolve a dispute via collective consensual dispute resolution during the trial?
- Should judges approve settlements proposed by the parties so they may have a binding effect on represented group members? To what extent should this judicial supervision be carried out?
 - Should the judges verify whether the proposed settlement is fair, reasonable and appropriate for the represented group, the defendant and society at large?
- When approved, should judges state that the settlement binds every represented group member who has opted into the collective redress proceedings - or binds every represented group member who has not opted out from the collective redress proceedings, depending on the system initially chosen (first solution), or should judges require the represented group members to consent to the settlement in order to be bound by it (second solution)?
 - If the first solution is applied, should judges give a further suitable opportunity to represented group members to opt out from the settlement?

³⁶⁶ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p .170.

B. COMPARATIVE ANALYSIS

1. FRAMEWORK IN WHICH THE JUDGES CONDUCT THE TRIAL - CASE MANAGEMENT POWERS

- Are judges in the selected Member States generally empowered with case management powers? **(1.1. General judicial case management powers)**

- Do the selected Member States adapt judges' general case management powers to the collective redress proceedings? **(1.2. Judicial case management powers specifically designated for collective redress proceedings)**
 - Are judges in the selected Member States additionally empowered with specific case management powers specifically created to deal with collective redress proceedings?

 - To what extent are the case management powers described in the selected Member States?

1.1. GENERAL JUDICIAL CASE MANAGEMENT POWERS

NO GENERAL JUDICIAL MANAGEMENT POWERS

216. ***In Portugal and Spain, judges are generally not expected to monitor the trial actively. A judge must strictly respect the principle of party autonomy.***

In **Portugal** and **Spain**, the general principle is that parties have the control over the object of the procedure. A judge cannot overrule or decide out of the scope defined by the parties³⁶⁷.

217. ***No information is available for Sweden.***

³⁶⁷ Diego Saavedra & Cristina Stampa, "Spain", in *The International Comparative legal guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into litigation & dispute resolution*, published by Global Legal Group, in association with CDR, 2011, p. 257.

218. ***In Italy, judges have a general power of case management.***

In **Italy**, judges have a general power of case management, even though the main stages of proceedings are regulated in detail by law. Under article 388 of the Code of Criminal Law, failure to comply with a court's order or direction is considered a crime and this article provides specific sanctions. Law no. 69/2009 has now introduced article 614-bis CPC, which allows the judge, upon either party's request; to impose a pecuniary sanction on the other party in the case of non-compliance with a judgment ordering a party to do or abstain from doing something³⁶⁸.

219. ***In Germany, judges are generally expected to manage the trial actively.***

In **Germany**, judges in civil litigations have the general duty to conduct a case in such a manner as to reach a prompt, economical and just resolution of the dispute without frustrating the adversary process. German judges are bound to manage a case actively, although the parties, through their submissions and actions, govern the proceedings according to the principle of party autonomy. Furthermore, judges have the duty to provide indications and feedback to the parties relating to factual as well as legal issues. They may also point out possible deficiencies in the statement of claim, such as lack of jurisdiction, inconclusiveness of the pleadings, etc.³⁶⁹.

German civil judges have no power to impose coercive measures on a party that disobeys the court's orders or directions. However, if a party fails to comply with a time limit set by the judges and is not able to explain its failure sufficiently, judges are empowered in appropriate cases to reject and disregard late submissions³⁷⁰.

220. ***In England & Wales, judges have very extensive management powers.***

In **England & Wales**, judges have very extensive management powers³⁷¹ to ensure that cases are robustly and properly managed consistently with the Overriding Objective of dealing with a case justly³⁷². The parties are expressly required to help the judges³⁷³.

³⁶⁸ Francesca Rolla & Massimiliano Masnada, "Italy" in *The International Comparative Legal Guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into dispute & litigation resolution*, published by Global Legal Group in association with CDR, 2011, p. 148.

³⁶⁹ Michael Christ & Claudia Krapfl, "Germany", in *The International Comparative Legal Guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into litigation & dispute resolution*, published by Global Legal Group, in association with CDR, p.125.

³⁷⁰ Michael Christ & Claudia Krapfl, "Germany", in *The International Comparative Legal Guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into litigation & dispute resolution*, published by Global Legal Group, in association with CDR, p.125.

³⁷¹ CPR Part 3, 3.1.

³⁷² CPR Part 1, 1.1(2) specifies that:

Dealing with a case justly includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing;

Indeed, although the common law approach to civil justice is traditionally adversarial, significant reforms from 1999 (Woolf Report) have introduced far greater judicial control through case management in all civil cases³⁷⁴. In England & Wales, a judge is now obliged to manage cases actively³⁷⁵. Active judicial case management includes, *inter alia*: encouraging the parties to cooperate in the conduct of the proceedings, facilitating the settlement of the dispute in whole or in part, managing the progression of the case in a cost-conscious and efficient manner by setting procedural timetables and giving other appropriate directions, giving directions to ensure that the trial of a case proceeds quickly and efficiently and making full use of technology³⁷⁶. The effect of the CPR was to transfer control of civil litigation from the parties to the judge. The judges have powers to compel recalcitrant parties to comply with their orders and directions, the most widely used of which is the power to award cost orders.

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- (b) saving expense;
 - (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

³⁷³ Information supplied by Graham Jones.

³⁷⁴ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p. 1.

³⁷⁵ CPR Part 1, 1.4 (1).

³⁷⁶ CPR Part 1, 1.4 (2).

1.2. JUDICIAL CASE MANAGEMENT POWERS SPECIFICALLY DESIGNED FOR COLLECTIVE REDRESS PROCEEDINGS

NO SPECIFIC CASE MANAGEMENT POWERS

221. ***In Portugal and Spain, the powers of judges are not reinforced to manage collective redress proceedings.***

In **Portugal** and **Spain**, national laws do not empower judges with particular case management powers which could be used in the context of collective claims. In this respect, national laws do not authorize the judges to adopt special procedures for managing potentially difficult actions that may involve complex issues, multiple claimants or even unusual proof problems. In these two Member States, judges are not able to exercise extensive supervision and control of collective litigations.

ENUMERATED AND SPECIFIED CASE MANAGEMENT POWERS

222. ***In Germany, the whole KapMuG model proceeding is qualified as a special case management procedure.***

In **Germany**, if, for the most part, the KapMuG subjects the model case proceedings to the traditional rules under the Code of Civil Procedure³⁷⁷, it furthermore provides for a special case management procedure. The KapMuG itself is described as a management tool that aims at offering investors quicker and more efficient disposal of their cases. That being said, the KapMuG does not give higher judges flexibility in conducting the model case proceedings. Each step of the model case proceeding is well described and detailed by the KapMuG.

223. ***In Sweden, judges may choose between various enumerated management powers to conduct the trial.***

In **Sweden**, the GrL does not provide for a flexible case management framework in which judges are able to manage the pleadings, scheduling, development of evidence, etc. However, some special rules in the GrL are of interest in connection with the conduct of the trial. Some judicial management powers are enumerated in the GrL and each is limited by a specific party right that judges have to respect when exercising their powers.

³⁷⁷ The general procedural rules apply, *provided no other derogating stipulations have been agreed on* (Section 9 (1) KapMuG); Katja Langenbucher, “La procédure modèle pour investisseurs d’après la loi allemande sur “l’introduction d’une procédure modèle en faveur de l’investisseur””, *Journal des Sociétés, France*, Juillet 2011, p. 25.

For instance, judges may create subgroups provided they have given the parties (including the represented group members) an opportunity to give their view before the judges make their decision³⁷⁸. Judges may also allow a plaintiff to extend the group action to comprise new other claims on the part of the members of the group or new members of the group, provided this can be done without it causing any significant delay to the determination of the case and without other substantial inconvenience to the defendant³⁷⁹.

FLEXIBLE MANAGEMENT POWERS

224. ***In England & Wales and Italy, judges have broad leeway to structure the collective redress proceedings.***

In **England & Wales**, the GLO rules create a flexible, highly discretionary framework for managing collective claims³⁸⁰. The broad principles of case management in a GLO are that managing judges have considerable discretion and are entitled to make robust orders so as to ensure that the litigation *progresses in an orderly manner*³⁸¹.

This means that judges have to proceed in whatever way seems to them resolve the litigation as efficiently, swiftly and fairly as possible³⁸². Rather than laying down a prescriptive code, the GLO rules identify an array of possible tools and techniques. Managing judges may pick and choose, cafeteria-style, whichever methods they prefer in a given case. Options include selecting test claims, setting cut-off dates for joining group registers, appointing lead solicitors, publicising the GLO, transferring claims to a different court that will manage the litigation, specifying the details to be included in the pleadings, etc³⁸³. It has, however, been noted that such powers of the managing judges, clearly prescribed in the GLO rules, must be exercised in the interests of focus, expedition and fairness to both sides, and fairness to all members and segments of the interested group of claimants³⁸⁴.

***Taylor v. Nugent Care Society*³⁸⁵ - Necessity of very wide management powers**

In *Taylor v. Nugent Care Society*, Lord Woolf emphasised that the purpose of the GLO mechanism was to provide an effective case management system for a large number of individual claims:

³⁷⁸ Section 20 GrL.

³⁷⁹ Section 10 GrL.

³⁸⁰ CPR Part 10, 10.10.

³⁸¹ *AB v Wyeth & Brother Ltd and Another* [1991] 2 Med LR 341.

³⁸² C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 56.

³⁸³ Those options are referred as the *GLO case management methods*.

³⁸⁴ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p.132, No 8.03.

³⁸⁵ *Taylor v. Nugent Care Society* [2004] 1 WLR 1129 at [9].

The provisions which are contained in the Civil Procedure Rules dealing with group litigation were an innovation which was introduced by an amendment to the rules made in 2000. It was the experience of the courts that if litigation involving a substantial number of claimants was to be managed in the appropriate way, it was essential that there should be some procedure which provided the courts with very wide powers to manage the proceedings. It was in the court's interest for the proper dispatch of other litigation that the court should have those powers. It was also in the interest of litigants that the courts should have those powers because it would enable the court to deal with this sort of litigation in a more efficient and economic manner than would otherwise be possible. It would enable the court to provide more expeditious justice.

*Tew v. Bank of Scotland and Barclay's Bank*³⁸⁶

The following passages from Mann J's judgement demonstrate the judges' determination in England & Wales to ensure that the GLO proceeding is used speedily, effectively, with proper focus and appropriately³⁸⁷:

[36]...It seems to me that a Group Litigation Order remains an appropriate vehicle for the case management of these proceedings. It has some advantages in automatically binding all participants in relation to the genuinely common issues, and provides a useful umbrella for controlling other claims by means of stays. There may be advantages in dealing with costs, too.

[37] Subject to its proving possible to settle the terms of the Group Litigation Order issues appropriately, I shall therefore provide for a Group Litigation Order in this case. The Group Litigation Order issues will be defined in such a way as to describe claims made by borrowers under shared appreciations mortgages against the banks which involve allegations of unfairness under the relevant statutory legislation, and expressly to include the Regulation 3 point. There are certainly related issues of fact there if they are not common. The precise form of wording can be discussed and (I hope) agreed between the parties, but in the event of disagreement I will rule on it. I shall also give directions for the trial of lead cases in order to get the fairness issues decided, and possibly a direction that the Regulation 3 point be taken as a preliminary issue. Again, the parties, having reflected on this judgement, can try to reach agreement on that point, failing which I will rule on it. It is my intention to finalize these things swiftly.

³⁸⁶ *Tew v. Bank of Scotland and Barclay's Bank* [2010] EWHC 203 (Ch).

³⁸⁷ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 143.

In **Italy**, with the order whereby the collective claim is declared admissible, judges will give directions on how proceedings should be managed, thereby ensuring, in compliance with the parties' right to be heard, a fair, effective and timely management of the case³⁸⁸.

By the same order or any other order, which can be modified or revoked at any time, judges may: adopt measures to prevent undue repetitions or complications when producing evidence or bringing arguments³⁸⁹; order the parties to adequately advertise the proceedings, in the interests of members of the group who have opted in; set the most appropriate rules for the evidentiary phase; and decide all procedural issues, omitting those formalities which are not essential for the fair presentation of the case. The impact of those powers in actual practice has yet to be seen³⁹⁰.

Codacons v. Voden Medical Instruments S.p.A - Non-essential formalities

In *Codacons v. Voden Medical Instruments S.p.A*, the court of appeal balanced the aim of ensuring swift management of the proceedings and avoiding non-essential formalities against the right of the plaintiff to specify the object of the claim originally filed.

In the present case, one of the grounds of the appeal filed by Voden Medical was that the new law does not allow the filing of briefs in the admissibility phase and that, in any event, the court of Milan wrongly ruled on the admissibility of the damages claim for unfair commercial practices, which claim was not included in the writ of summons that initiated the class action.

In this regard, the court of appeal first clarified that although the new law contains provisions aimed at ensuring swift management of the proceedings and at avoiding non-essential formalities, it does not prohibit the submission of additional written briefs after the initial pleadings are filed. The court then observed that the first instance decision correctly ruled—on the basis of the allegations made in the writ of summons and better specified in the subsequent brief—on the admissibility of the claim for unfair commercial practices, in light of the general principle that the judge is entitled, on his own initiative, to give the proper legal qualification of the claims by reference to facts timely presented by the plaintiff³⁹¹.

³⁸⁸ Article 140-bis, § 11 of the Consumer Code.

³⁸⁹ Article 140-bis, § 11 of the Consumer Code.

³⁹⁰ Information supplied by Andrea Giussani.

³⁹¹ Summary of F. Rolla, F “Italy—Class Actions Shifting to High Gear?”, *The International Law Quarterly*, Vol. XXIX, No. 3, Summer 2011, p. 7

2. POWERS OF THE JUDGES NECESSARY TO CONDUCT THE TRIAL

2.1. DEALING WITH MANAGEMENT TOOLS TO ORGANISE THE EFFECTIVE CONDUCT OF THE TRIAL

- Do the selected Member States allow judges to select test cases³⁹² to resolve the issues? **((1) Considering the utility of test cases)**

- Do the selected Member States allow judges to divide the group in subgroups? **((2) Considering the utility of subgroups)**
 - Do the selected Member States require that judges appoint a representative claimant in each subgroup?

 - Do the selected Member States allow judges to review their admissibility order if there are a considerable number of subgroups?

- Do the Member States require that judges establish a litigation plan including an appropriate schedule for bringing the case to resolution with the collaboration of the parties? **((3) Establishing a litigation plan with firm dates)**
 - Which sanctions may judges in the selected Member States impose if the parties fail to respect the fixed dates?

- Do the selected Member States require that judges address the question of costs to the parties at an early stage in the proceeding? **((4) Considering the approach to costs)**

³⁹² Lead case or model case may also be used. Such terms will be used indifferently in this report.

(1) CONSIDERING THE UTILITY OF TEST CASES

NO SPECIFICATIONS ON THE POWER OF JUDGES TO SELECT A TEST CASE

225. ***In Italy, Portugal, Spain and Sweden, the rules do not set out expressly whether judges can select test cases.***

POSSIBILITY FOR JUDGES TO SELECT A TEST CASE

226. ***In England & Wales, judges may decide to proceed with test cases. Selection of those test cases to go forward is usually a matter for the parties, rather than the judges. In practice, the test case approach has been overwhelmingly used in product liability GLOs.***

In **England & Wales**, it should first be remembered that in GLO cases, the judge will decide what issues will be of greatest importance in leading to the effective early disposition of the totality of the disputes, so that these are decided as swiftly and decisively as possible³⁹³. In this respect, GLO rules allow a judge to determine which aspects of the case are to be treated as group litigation issues and which are to be left as individual matters.

That being said, the GLO regime does accommodate the possibility that an individual claim can be selected to go forward as a test case within the GLO framework. Judges may thus select one or more claims on the Group Register to proceed as a test case within the GLO framework³⁹⁴. It is even common for judges to order that lead cases should be pleaded in full. Where a claim goes forward as a test case, any determination will bind the other claims subject to the GLO and can, if the judge directs, bind any claims which are subsequently entered into the Group Register³⁹⁵.

Test claims are not defined under the GLO rules. Nor do the GLO rules offer any guidance as to how managing judges should go about identifying what are appropriate test claims. Obviously, a judge should select test claims with great care to ensure adequacy of representation. It is indeed admitted that the legitimacy of a test claim will depend upon whether the selected test claims properly and adequately reflect all relevant material issues, interests, concerns and so forth that exist within the total universe of claims in the group³⁹⁶.

³⁹³ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 57.

³⁹⁴ CPR Part 19, 19.13 (b); CPR Practice Direction 19B, para 12.3.

³⁹⁵ CPR Part 19, 19.12.

³⁹⁶ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis", *C.J.Q.*, Vol 27, Issue 2, 2008, p. 231

The *Lloyds* litigation - Selecting lead cases

The *Lloyds* litigation gives an example of what can be achieved.

At the outset of the litigation the judge held an informal meeting with the interested parties to identify the categories of cases involved and to receive information so as to be able to apply case management techniques³⁹⁷. At an early stage, the judge identified and decided a number of preliminary issues of principle common to one or more categories of cases. The judge then selected, from the cases in a particular category, lead or pilot cases for trial as to liability and principles relating to quantum in the hope that decisions in these cases would provide firm guidance in relation to other cases in the same category³⁹⁸.

The *MMR Vaccine* case³⁹⁹ - Lead cases selected by each side

In the *MRR Vaccine* case, the claimants were almost all children whose claims alleged that a vaccine given for immunisation against measles, mumps and rubella (MRR) caused autism and other disorders.

The case proceeded with eight illustrative lead cases: four chosen by the claimants and four chosen by the defendants. The trial of these lead cases was to be restricted to the issue of whether the vaccines were defective and if so whether they caused the defects complained of by the eight lead claimants.

The *Norplant* case - Lead cases selected by each side

The *Norplant* case provides a pithy object lesson in what not to do.

In this case, the judge ordered that 10 lead cases be selected from the cohort of 280 claims, five to be chosen by each side. But rather than choosing a cross section of truly representative claims, each side simply chose those five cases that it felt most confident of winning—hardly an ideal recipe for achieving effective or balanced resolution⁴⁰⁰.

³⁹⁷ Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, para. 37.

³⁹⁸ Summary copied from Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, para. 41.

³⁹⁹ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 41.

⁴⁰⁰ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis", *C.J.Q.*, Vol. 27, issue 2, p. 232.

Since the *Norplant* case, there has been a huge presumption that trying to select generic issues from individual cases will not be the most effective approach. Judges may feel that a generic approach is simply inappropriate in a given case⁴⁰¹.

The test case approach has been overwhelmingly used in product liability GLOs⁴⁰².

The *Seroxat* and *foetal anti convulsant medication* cases⁴⁰³

In the *Seroxat* and *foetal anti convulsant medication* cases, the judge ordered some individual cases to be pleaded fully so that a view could be taken of the issues that were common to most cases and these resolved, on the basis that that would be the most effective way of resolving the greatest number of individual cases in the group.

Trial of preliminary issues on hypothetical facts in a product liability case has explicitly been held to be inappropriate⁴⁰⁴.

The power of a judge to select test claimant(s) must, however, not be confounded with his ability to appoint the solicitor of one or more parties to be the lead solicitor for the claimants or defendants⁴⁰⁵.

It should be recalled that in England & Wales, GLO rules require that all claimants initiate first instance proceedings separately and apply for a collective action. Consequently, all injured individuals (via their solicitors) who have entered their claims into the Register are parties to the GLO proceedings. In trials with many parties, a judge must be able to deal comprehensively with a small number of solicitors who can speak definitively for the parties. In this sense, as part of the case management, a judge can and usually does give directions such as appointing the solicitor of one or more parties to be the lead solicitor for the claimants (or defendants)⁴⁰⁶. This power can be exercised without necessarily appointing a test claimant.

⁴⁰¹ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 56; *Hobson v. Ashton Morton Slack Solicitors* [2006] EWHC 1134.

⁴⁰² The test case approach was used in, e.g. *Pirelli Cable Holding NV v Revenue and Customs Commissioners* [2007] EWHC 583 (Ch), in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue* [2007] UKHL 34, and in *Boake Allen Ltd and others v Her Majesty's Revenue and Customs; NEC Semi-Conductors Ltd and other Test Claimants v Inland Revenue Commissioners* [2007] UKHL 25.

⁴⁰³ *Multiple claimants v Sanofi-Synthelabo Ltd* [2007] EWCA 1860 (QB).

⁴⁰⁴ Summary copied from C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 58.

⁴⁰⁵ CPR Part 19, 19.13 (c).

⁴⁰⁶ CPR Part 19, 19.13 (c).

Where a claim has the benefit of some public funding, the result in practice will be that the solicitors firm that is awarded the contract by the Legal Services Commission (formerly the Legal Aid Board) will be appointed as lead or generic firm (or sole firm)⁴⁰⁷. In straightforward cases, there may simply be a single lawyer who coordinates all the claimants. In complex cases, there may be a ‘steering group’ of lawyers, each of whom is responsible for different aspects (e.g. coordination with the court, coordination of individual claimants, liaison with the defendants, focussing on experts, or factual evidence), perhaps with a larger group of lawyers who deal locally with local clients⁴⁰⁸.

The existence of this power has meant that lawyers (and parties, but the problem rests usually with the claimants’ lawyers who compete amongst themselves) come to some agreement on who is to represent whom⁴⁰⁹. As far as we know, there has only been one public fight over who should be appointed lead firm, in the Alder Hay child organs case. A judge has to ensure that the lead solicitor’s role and relationship with other members of the Solicitors’ Group should be carefully defined in writing and may subject the lead solicitor to any directions⁴¹⁰.

OBLIGATION FOR JUDGES TO SELECT A TEST CASE

227. ***In Germany, judges are mandatorily required to resolve the collective redress action by means of a test-case process as this is the nature of the mechanism. Higher judges have exclusive jurisdiction as regards the choice of the representative test case.***

It should first be remembered that in **Germany**, all claimants initiate first instance proceedings separately and apply for a collective action. In Germany model proceedings can only be initiated by the parties, both individual and organisations⁴¹¹, and not by the courts *ex officio*⁴¹². Nonetheless, a higher judge deciding on the model questions may exercise considerable influence on how model proceedings are conducted because he selects the model claimant at his discretion⁴¹³.

In **Germany**, the KapMuG-system is based exclusively on the mandatory resolution of a single test case selected from a group of already ongoing court cases on the assumption that this will resolve all others. The test case procedure makes up the whole mechanism and a judge does not have the opportunity to assess whether this approach is appropriate or not. A judge must designate

⁴⁰⁷ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p. 14.

⁴⁰⁸ C. Hodges, *Global Class Actions Project Country Report: England & Wales*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf, p.14.

⁴⁰⁹ CPR Practice Direction Part 19 B, para .2.2.

⁴¹⁰ CPR Practice Direction Part 19 B, para .2.2.

⁴¹¹ Section 1 (1) KapMuG; Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 282.

⁴¹² Section 1 (1) KapMuG.

⁴¹³ Dietmar Baetge, *Global Class Actions Project Country Report: Germany*, (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf, p. 21.

a person to be model case plaintiff from amongst those who have obtained the model case ruling. For its part, the **New Version of the KapMuG** introduces the requirement that the model case plaintiff be chosen out of all the plaintiffs whose proceeding has been suspended⁴¹⁴ and not out of those who obtained the model case ruling as provided in the current KapMuG⁴¹⁵.

By deciding on the model questions, a judge of appeal exercises considerable influence on how model proceedings are conducted because he selects the model claimant at own discretion⁴¹⁶. Under the current KapMuG, a judge is not required to consider the financial resources of a claimant but rather the amount of the claim (if it is the subject matter of the model case). The KapMuG contains the assumption that the claimant with the highest individual claim has the strongest interest in the litigation. As a consequence, it shall be that person who may guarantee the best possible performance of the test case⁴¹⁷. Consideration shall also be given to any agreement between several plaintiffs to designate a single model case plaintiff⁴¹⁸. The designation of the model claimant is not contestable⁴¹⁹.

Deutsche Telekom litigation – Selection of the model claimant

In the *Deutsche Telekom* litigation, for example, the judge selected the model claimant based on the large size of his claim (€1.65 million) and the fact that his claim covered the majority of issues relevant to the dispute⁴²⁰.

In Germany, should the model case plaintiff withdraw his complaint in the course of the main proceedings, the judge shall designate a new model plaintiff⁴²¹. The **New Version of the KapMuG** adds that, should appropriate representation no longer be guaranteed, the appeal judge has the possibility to choose another model case plaintiff⁴²².

⁴¹⁴ New Section 2, sentence 1 New Version KapMuG.

⁴¹⁵ Section 9 KapMuG.

⁴¹⁶ Dietmar Baetge, *Global Class Actions Project Country Report: Germany*, (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf, p. 21.

⁴¹⁷ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 283.

⁴¹⁸ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report: Germany), available at: http://ec.europa.eu/consumers/redress_cons/de-country-report-final.pdf.

⁴¹⁹ Section 8, 2 KapMuG.

⁴²⁰ Dietmar Baetge, *Global Class Actions Project Country Report: Germany*, (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf, pp. 4-12.

⁴²¹ Section 11 (1) KapMuG. The law provides in this section that the same applies in the event of the death, the loss of capacity, etc. of the plaintiff.

⁴²² Section 9 of the New Version of the KapMuG.

In this case, the model plaintiff was changed by the order of 25 March 2010. The former original model plaintiff had agreed on an out-of-court settlement with the defendant. The new model plaintiff was chosen by the higher judge on the basis of suggestions from the plaintiffs' lawyers because the higher judge's view was that they were more likely to know which of their clients were still interested in the model case proceeding and definitely did not wish to agree on a settlement, as some plaintiffs had done so far. A further criterion was the amount of money claimed. Therefore the higher judge decided to take into account the special circumstances and chose a model plaintiff who was represented by the same lawyers' agency because the procedural representative was already familiar with the facts of the case.

(2) CONSIDERING THE UTILITY OF SUBGROUPS

IRRELEVANCE OF SUBGROUPS

232. ***In Germany, judges decide on only one case.***
233. ***In Italy, as the affected rights should be identical, there is no place or utility for subgroups.***

NO SPECIFICATIONS CONCERNING SUBGROUPS

234. ***In Portugal and Spain, the laws do not set out expressly whether judges can divide a group in sub-groups.***

In **Spain**, if we look at the content of final judgements, it appears that a group is frequently divided in subgroups. This is justified by the need for consumers to receive effective compensation (see *infra* - Section three, the judgement). However, in the final judgements, nothing is said about the specific representation of those subgroups during the conduct of the trial.

⁴²³ OLG München 30.12.2011, KAP 1/07.

235. ***In England & Wales, judges may divide a group in subgroups on the basis of a claimant’s application.***

In **England & Wales**, an application for a collective action may include whether there are any matters that distinguish smaller groups of claims within the wider group⁴²⁴. On this basis, managing judges have the power to divide a group in subgroups and to order that only specific lawyers are to represent specific members of the group. However, no specification is given as the possibility for judges to create *ex officio* subgroups during the progress of a trial for the purposes of the efficient management of the case.

236. ***In Sweden, judges may ex officio divide a group in subgroups during the progress of the trial.***

In **Sweden**, in order to respond to the challenges of case management, the GrL offers judges the possibility to build sub-groups and order sub-judgments, which are partial judgments on questions only on the interest of some group members (see *infra* - Section Three)⁴²⁵. If creating subgroups, judges will ascertain that a mechanism promotes appropriate processing⁴²⁶. If, and only if, this is the case, the judges will assign someone besides the representative claimant or instead of the representative claimant⁴²⁷ to conduct the action on a particular issue or a part of the substantive matter that only applies to the rights of particular members of the group. Judges must give the parties and the members of the group an opportunity to express their views before they make a decision, provided this is not manifestly unnecessary.

***Wine Import Litigation*⁴²⁸ - Subgroups**

In the Wine Import Litigation (a private group action), the representative claimant claimed damages from the Swedish State for himself and a group of other Swedes who privately imported alcoholic beverages, including wine, from other EU Member States via the Internet. “Föreningen för privatimport inom EU” [“Association for Private Imports in the EU”], an organisation created

⁴²⁴ CPR Practice Direction 19 B, para 3.2.

⁴²⁵ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 287.

⁴²⁶ Section 20 GrL.

⁴²⁷ Judges may make such an order to a member of the group or, if this is not possible, to someone else.

⁴²⁸ *Johan Torkell Jorgensen v Staten genom Justitekanslern*, T 1286-07, Nacka tingsrätt (Nacka District Court).

to litigate the claim, financed the action but did not act as plaintiff. The group consisted of roughly 400 members of this organisation. A large number of goods were confiscated by the Swedish Customs due to smuggling, i.e., the import violated Swedish alcohol and tax legislation. Some of the goods were probably destroyed due to age. The case was stayed by the district court while waiting for a ruling from the European Court of Justice concerning the right to import alcoholic beverages privately within the EU. The European Court of Justice ruled that prohibiting such imports violates EC law (but tax on the goods must probably be paid)⁴²⁹. Strangely, the district court ruled, however, in favour of the State⁴³⁰.

Interestingly, the district judge had, before taking his final ruling, divided the members of the group in three subgroups:

Subgroup 1: members who recovered alcoholic beverages that they claimed had deteriorated.

Subgroup 2: members who refused to recover the alcoholic beverages, referring to the fact that the optimal deadline for the consumption of the beverages had expired.

Subgroup 3: members who did not have the opportunity to recover their alcoholic beverages as these had been destroyed by customs.

(3) ESTABLISHING A LITIGATION PLAN WITH FIRM DATES

NO OBLIGATION TO SCHEDULE THE LITIGATION

237. ***In Germany, Portugal, Spain and Sweden, judges are not mandatorily required to establish an overall plan for the conduct of the litigation.***

OBLIGATION TO SCHEDULE THE LITIGATION

238. ***In Italy, judges must give directions on how proceedings should be managed.***

In **Italy**, judges must give directions to organise the conduct of the trial and such directions should ensure, in compliance with the parties' right to be heard, the fair, effective and timely management

⁴²⁹ 2007-06-05, case C 170/04 Rosengren vs. Sweden.

⁴³⁰ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 349-350.

of the case⁴³¹. Nothing is added in the Article 140-bis of the Consumer Code as to the sanction the judges should order should the parties fail to respect these directions.

OBLIGATION TO SCHEDULE THE LITIGATION AND TO HOLD PERIODICAL CASE MANAGEMENT CONFERENCES

239. ***In England and Wales, judges must impose a management plan and fix time limits while considering the views of the parties (via periodical case management conferences).***

In **England & Wales**, judges must hold case management conferences at periodic intervals. During these conferences, the parties may tell them what has been happening and what they propose to do next. On the basis of this information, judges must make orders on what is to happen next and set time limits. Judges must also take this opportunity to give indications, which are not binding statements, of their thoughts on subjects that are likely to be the subject matter of decisions at a further conference⁴³². This approach is seen as an early-warning system for the parties, who may nevertheless seek to persuade the judges at the next hearing that the view expressed in the indication should be altered and a different order made. Nothing is added in the GLO rules as to the sanction should the parties fail to respect these directions.

Interestingly, judges have recently begun to use GLO management methods without making formal GLOs.

Buncefield Oil Depot case – GLO-style timetable

In this case, Senior Master Turner dismissed a GLO application but nevertheless issued directions setting out a GLO-style timetable aimed at facilitating structured settlement negotiations (with the judge's incentive of making the parties negotiate – see *infra*). His directions included, *inter alia*, the use of a generic claim form and maintaining a register of claimants.

⁴³¹ Article 140-bis, § 11 of the Consumer Code.

⁴³² C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 57.

(4) DETERMINING THE APPROACH TO COSTS

NO COSTS MANAGEMENT

240. ***In none of the selected Member States are judges specifically required to determine the approach to costs at the outset of the collective redress proceedings.***

In **England & Wales**, judges have, however, general formidable case management powers by which they can control future costs⁴³³. Judges may, of course, exercise these powers in GLO proceedings even if these are not reinforced by the GLO rules. In practice, excessive costs can potentially be avoided if a GLO is made early enough and is coupled with a robust costs capping order.

*Griffiths v Solutia UK Ltd*⁴³⁴

Griffiths v Solutia UK Ltd concerned a group action brought by local residents following a chemical leak from industrial premises. The claimants recovered damages of £90 000 yet their costs alone were £210 000 as they had instructed specialist London solicitors.

The court of appeal castigated such disproportionate spending. Two judges even described it as *ludicrous*⁴³⁵. In this case, the court directed future judges to exercise their active case management powers to keep costs proportionate to damages.

There is clearly jurisdiction in England & Wales for judges to impose costs budgets or caps, but their effectiveness is limited to the control of recoverable costs, or costs shared between the parties and so they are unlikely to be fully effective against a deep pocketed defendant who is prepared to invest large sums of money defending a claim in the full knowledge that they are unlikely to recover. This has been strongly criticised as it inevitably tilts the playing field. In England & Wales, emphasis is put on the responsibility of the case managing judges to exercise their case management powers effectively⁴³⁶. Costs capping is nowadays a very useful tool in the armoury of the managing judge and there have been a number of recent examples of its use in GLOs⁴³⁷.

⁴³³ See for instance, CPR Part 3, 3.1. (2) (ll), 3.1. (6); Susan M.C. Gibbons, “Group Litigation, Class Actions and Lord Woolf’s Three Objectives – A critical Analysis”, *C.J.Q.*, 2008, p. 238.

⁴³⁴ *Griffiths v Solutia UK Ltd* [2001] EWCA civ 736 (CA).

⁴³⁵ *Griffiths v Solutia UK Ltd* [2001] EWCA civ 736 (CA) at [25], per Sir Christopher Staughton.

⁴³⁶ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 178.

⁴³⁷ Information supplied by Robert Turner.

A.B. v Leeds Teaching Hospitals NHS Trust is the first GLO case in which a costs capping order was made.

Judge Gage J capped recoverable costs on both sides, after the case had been running for some time and the claimants' costs had rapidly built up. Judge Gage J used a costs budgeting system, linked to each step in the litigation.

Tellingly, the claimants' cap amounted to just 50 per cent of what they had originally anticipated spending⁴³⁹.

In **Germany**, interestingly, costs are now advanced by the court. As a reaction to the problems encountered in the *Deutsche Telekom* case, parties are not required to pay for expert testimony in advance. Instead, the costs are advanced by the court⁴⁴⁰. In the *Deutsche Telekom* litigation, the issue of costs plays an important role because the plaintiffs had to prove that Deutsche Telekom's valuation of its more than 30 000 properties was wrong. The costs for the necessary expert testimony were estimated at €17 million. Under ordinary German costs rules, the plaintiffs would have been obliged to pay this sum in advance⁴⁴¹.

Similarly, in **Portugal**, interestingly, prepayments are not required for the exercise of the right of popular action⁴⁴².

⁴³⁸ *A.B. v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB).

⁴³⁹ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 238.

⁴⁴⁰ Dietmar Baetge, *Global Class Actions Project Country Report: Germany*, (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf, pp. 24-25.

⁴⁴¹ Dietmar Baetge, *Global Class Actions Project Country Report: Germany*, (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf, pp. 24-25.

⁴⁴² Article 20, 1 Law 83/95.

2.2. SUPERVISING THE PARTIES' COLLECTION AND PREPARATION OF EVIDENCE

- To what extent are the national rules on judicial control of evidence adapted to collective redress proceedings?
 - Do the selected Member States in which the rules on evidence are adapted allow judges to intervene in the evidence collection and preparation?

NO DIFFERENCE IN APPROACH

241. *In England & Wales, Germany, Spain and Sweden, there is no difference in approach between a normal individual proceeding and a collective proceeding as to the rules on presentation of evidence.*

In **all these Member States**, the presentation of evidence is the responsibility of the parties; whether judges may also arrange for presentation of evidence on their own initiative varies from one national general rule to another.

In **England & Wales**, there is no difference in approach between a normal unitary case and a group of cases, except that the scale of the circumstances and consequences may be larger.

In accordance with normal case management principles, judges may decide to order that certain evidence is, or is not, required, either at all or at certain stages of a case. This would apply to either factual evidence or expert evidence⁴⁴³.

Although judges have complete control of the proceedings in accordance with the CPR, which contains detailed provisions for the provision of all evidence (including documentary evidence) to the other party or parties, they do not, however, perform any investigative role. It is for the parties to prepare their respective cases, deciding what witnesses they wish to call and what evidence they should adduce before the court in order to establish the case being put forward. In the course of managing the case, judges may point out the absence of a particular piece of evidence but there is no obligation upon them to do so where the parties are represented by lawyers. Preparation of the case is for the parties not the judges. Though it is for the parties to prepare their cases as stated, the parties are not entitled to adduce whatever evidence they wish or to adduce it whenever in the course of the case they wish. If judges consider that a particular piece of evidence which a party wishes to adduce is irrelevant, merely vexatious or for some other reason will not assist the just disposal of the case, they can exclude that evidence.

⁴⁴³ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 60.

In **Germany**, the KapMuG does not contain any specific rules on the provision of evidence. As a general rule, each party bears the burden of submitting and proving those facts upon which its claim or defence is based. Everything that remains uncontested by the other party is considered as proven, and only contested facts are subject to the taking of evidence. If a fact is contested by the opponent, the other party must describe the evidence upon which it intends to rely to prove that fact. It is then up to the court to decide whether the taking of evidence is necessary and which measures to order.

In model case proceedings, the higher judge will not generally investigate the facts at issue in the proceedings. Instead, the parties determine which facts/documents should be presented to the judge to substantiate their respective cases⁴⁴⁴.

The first instance judge, for his part, can dismiss a case without appointing an expert if he finds that the claimant's submissions are unsubstantiated (e.g. because information presented is evidently not supportive of the claimant's case). Indeed, the claimant must already describe in his application the evidence *he intends to use to substantiate or refute factual claims*⁴⁴⁵.

In **Spain**, there are no special rules on the provision of evidence for collective actions.

According to the general rules, the initiative for bringing evidence to court remains with the parties and the claimant must produce any documents in support of its position together with the initial complaint. The claimant will not be able to produce further documents at a later stage (this has some exceptions). At the pre-trial hearing, judges have to accept or to reject any other means of evidence proposed by the parties. The main object of the pre-trial hearing is the determination of the evidence that will be produced at the trial or in the procedure. Judges may not request the production of any means of evidence on their own initiative and must decide on the case based solely on the evidence actually produced in the procedure by the parties⁴⁴⁶.

In **Sweden**, the GrL does not contain any specific rules on the provision of evidence.

According to Chapter 35, Section 6 of the Swedish Code of Judicial Procedure, the presentation of evidence is the responsibility of the parties. If it is found necessary, judges may also arrange for presentation of evidence on their own initiative in mandatory civil cases and in criminal cases which are under public prosecution.

⁴⁴⁴ Ina Brock & Stefan Rekkitt, "Germany", in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 95.

⁴⁴⁵ Section 1 (2) KapMuG.

⁴⁴⁶ Diego Saavedra & Cristina Stampa, "Spain", in *The International Comparative legal guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into litigation & dispute resolution*, published by Global Legal group, in association with CDR, 2011, p. 258.

242. ***Italy simplifies the presentation of evidence by the parties, including the burden of proof in collective redress proceedings. Judges may dispense with repetitive evidence.***

In **Italy**, the general rule on evidence is that each party shall substantiate his own claim or defence by providing the evidence he deems fit. The judges' role is normally limited. They cannot order the acquisition of evidence that the parties have not sought (or in respect of facts that the parties have not submitted to the judge) and cannot prevent the parties from filing documentary evidence if the submission is made within the relevant deadline⁴⁴⁷.

For its part, Article 140-bis, § 11 of the Consumer Code provides that in collective redress proceedings, the taking of evidence should be informal but respectful of the parties' rights to be heard. This article also allows judges to dispense with repetitive evidence. No case law exists as yet on the scope of this informality. However, a similar wording applies to the taking of evidence for provisional measures: according to case law, this means that there is no need for a judge's preliminary ruling on the questions the witnesses should answer⁴⁴⁸.

JUDICIAL CONDUCT OF THE PRESENTATION OF EVIDENCE

243. ***Portugal gives judges reinforced powers to collect evidence and to evaluate it freely in popular actions.***

In **Portugal**, in terms of evidence rules, judges' powers are tremendously increased in popular actions, compared to the usual process.

Under Article 17 of law 83/95, it is understood that within the scope of the fundamental issues defined by the parties, judges are responsible, on their own initiative, for collecting evidence and are not bound by the will of the parties. Judges will be entitled to collect additional evidence from the parties and other institutions on their own initiative⁴⁴⁹. This fundamentally differs from the general civil procedure regime.

It must also be noted that in popular actions, there is no need to have exact formal proof of monetary claims for all possible claimants (see *infra*- Section Three).

⁴⁴⁷ Francesca Rolla & Massimiliano Masnada, "Italy" in *The International Comparative Legal Guide to: Litigation & Dispute Resolution 2011. A practical cross-border insight into dispute & litigation resolution*, published by Legal Global Group in association with CDR, 2011, pp. 149-150.

⁴⁴⁸ Information supplied by Andrea Giussani.

⁴⁴⁹ Article 17 Law 83/95; Article 26 Law 83/95 (duty of cooperation of public bodies).

2.3. MANAGING THE DISCOVERY PROCESS

- Do the selected Member States in which the concept of discovery is unknown under the general procedural rules introduce a discovery procedure in order to progress collective redress proceedings efficiently? **((1) Discovery)**
- Do the selected Member States adapt (reinforce) the general ability of judges to order production of specific documents to collective redress proceedings? **((2) Production of specific documents)**
 - In the selected Member States where production of a document may be requested by one of the parties, is the approval by judges of such a request mandatory? Does the rule change for collective redress proceedings?
 - Do the selected Member States allow judges to request *ex officio* the production of document? Does the rule change for collective redress proceedings?

(1) DISCOVERY

NO INTRODUCTION OF DISCOVERY TO DEAL WITH COLLECTIVE REDRESS ACTIONS

244. *None of the selected Member States admits discovery in general, nor introduces discovery in order to progress collective redress proceedings in particular.*

This does not however mean that the **selected Member States** do not have other rules covering the same area and will not help in organizing the testimony and finding out the facts beforehand or during the trial, including at the pre-trial stage.

In **England & Wales**, there is a standard disclosure process, a more restrained form of discovery (see *infra* – Limited discovery).

In the **other selected Member States**, the concept of full or even limited discovery is as yet unknown. Hence, concerns of “fishing expeditions” in those Member States are somewhat exaggerated.

In all those Member States, it is for each party to detect identity and the facts on which he wishes to rely. If a party suspects that relevant facts are being withheld, he may try to induce or force the other side to disclose those facts using the production of documents method (see *infra* – Production of document).

LIMITED DISCOVERY ALLOWED UNDER THE GENERAL PROCEDURAL RULES

245. ***In England & Wales, the general procedural rules (and not the supplementary GLO rules) set out standard disclosure. Judges may dispense with disclosure or vary the extent of disclosure⁴⁵⁰.***

In **England & Wales**, judges, in the exercise of their case management powers, may give directions to support the disclosure process⁴⁵¹.

This power of judges to make various orders to support the disclosure process, either upon application of a party or on their own initiative, may be exercised in GLO proceedings. The only adaptation that the GLO rules set out is that *unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims- (a) on the group register; and (b) which are subsequently entered on the group register⁴⁵².*

Compared with the approach of the majority of the US courts, the English & Welsh approach to discovery is more restrained. England & Wales opts for a *standard disclosure* system and imposes quite strict restrictions upon the scope of the documentary disclosure to curb excessive US-style documentary disclosure. Standard disclosure⁴⁵³ concerns: documents on which part A will rely; or which adversely affect A's own case; or adversely affect party B's case; or support B's case; or any other documents which A is required to disclose by a relevant practice direction⁴⁵⁴.

According to Robert Turner, there is a tendency by some solicitors in England and Wales to produce every possible document and the proverbial kitchen sink, but this is a practice which an energetic judge will discourage or prohibit and for which a judge will penalise the offending party by an order for costs⁴⁵⁵.

The judges have a general power to make a pre-action documentary disclosure order against any type of prospective defendant⁴⁵⁶.

⁴⁵⁰ CPR Part 3, 31.5 (1), (2).

⁴⁵¹ CPR Part 3, 31.5.

⁴⁵² CPR Part 19, 19.12 (4).

⁴⁵³ CPR Part 3, 31.6.

⁴⁵⁴ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 26.

⁴⁵⁵ Information supplied by Robert Turner.

⁴⁵⁶ CPR Part 3 31.16. (3).

*Black v. Sumitomo Corporation*⁴⁵⁷ - Pre-action disclosure order

In *Black v. Sumitomo Corporation*, the court of appeal refused the countenance “deep sea fishing” expeditions, at least in commercial contexts; that is, speculative applications when the applicant has no hard evidence at all to support his allegations of civil wrongdoing⁴⁵⁸.

A pre-action disclosure (by parties and third parties) order is possible if certain cumulative conditions are satisfied, including the fact that advance disclosure is desirable to dispose of the anticipated proceedings fairly, or to prevent the need to commence proceedings, or to save costs. In granting such an order, a judge must, *inter alia*, specify the documents or the class of documents which the respondent must disclose⁴⁵⁹. Similarly, all expert evidence must be disclosed well before the trial. The result is that well before the trial begins, every party has all the evidence of all the other parties.

In the exercise of his case management powers, a judge may impose sanctions whenever there is delay or failure in complying with his directions related to the disclosure process. A judge may also impose adverse inference penalties⁴⁶⁰. This is within the discretion of the judge whose duty is to comply with and further the Overriding Objective, which is to deal with the case justly.

Opinion of English judges on the necessity of (limited) discovery

According to Senior Master Turner, disclosure is a vital tool in the armoury of all litigants and essential if the trial judge is to have a full understanding of the issues.

It is in the field of discovery that the Common Law systems differ so fundamentally from those of the Civil Law. Discovery of documents is regarded as an essential part of any Common Law civil litigation process. Senior Master Turner did not wish to give examples of the value of such discovery but simply mentioned that in a GLO relating to the misuse of a drug in medical cases, the documents relating to the testing of the drug and the knowledge that the manufacturer of the drug had of the potential dangers of the drug would be vital to the determination of liability and could only come to the attention of the claimants and the court by means of the discovery process⁴⁶¹.

⁴⁵⁷ *Black v. Sumitomo Corporation*, [2002] 1 WLR 1562, CA.

⁴⁵⁸ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 59.

⁴⁵⁹ Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, “Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report”, Ashurst, Brussels, 2004, (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p. 61.

⁴⁶⁰ Alison Brown & Ian Dodds Smith, “England & Wales” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 63.

⁴⁶¹ Information supplied by Robert Turner.

In the view of Graham Jones, it is or ought to be unthinkable that in any legal system there is no such process as disclosure of documents: there is the gravest risk, in its absence, of the failure to achieve justice. It is not infrequently the contemporaneous document which provides the evidence of what really took place. The absence of disclosure of documents, particularly those adverse to a party's own case or which support an opposing party's case, involves seeking to resolve a dispute without all the relevant and material information. Whatever may happen in the US, the apparent concern about an appropriate disclosure process is misconceived. Disclosure, as in England & Wales, can be controlled. It can be limited to only standard disclosure. A party is required to make only a reasonable search for those documents on which he does not himself rely. Even standard disclosure can be further limited by the court on the grounds of proportionality. There can be proper protection for genuinely privileged and other documents in relation to which there is good reason not to disclose⁴⁶².

The **Draft for a Collective Proceedings Act in England & Wales** allows a party to a collective redress proceedings to request disclosure of documents in the possession of class members other than the representative claimant with the permission of the judges. In deciding whether to grant a defendant permission, the Draft sets out that judges will consider in particular *the stage of the collective proceedings and the issues to be determined at that stage; the presence of sub-classes; and the approximate monetary value of individual claims, if any*⁴⁶³.

⁴⁶² Information supplied by Graham Jones.

⁴⁶³ Article 19.31 Draft Collective Proceedings Act.

(2) PRODUCTION OF SPECIFIC DOCUMENTS

NO ADAPTATION OF THE GENERAL RULE ON PRODUCTION OF SPECIFIC DOCUMENTS

246. *None of the selected Member State adapts its general rule on the production of specific documents to collective redress proceedings.*

GENERAL ABILITY OF JUDGES TO ORDER THE PRODUCTION OF SPECIFIC DOCUMENTS

247. *In Germany, Italy, Portugal, Spain and Sweden, judges are in a position to demand the production of a specific document. This power is not changed or even enhanced for collective redress proceedings.*

In **Germany, Italy, Portugal, Spain and Sweden**, there is at least limited scope for parties and third parties or even public authorities to be ordered to produce documents. Sometimes, the power of judges in this regard is more limited vis-à-vis third parties⁴⁶⁴.

In the majority of jurisdictions, a person who refuses to produce a document following an order to do so will be subject to penalties.

These are usually financial penalties in **Germany, Portugal, Spain**⁴⁶⁵ and **Sweden**.

However, sanctions can take other forms. In **Germany**, in severe cases, third parties refusing to disclose documents can be imprisoned for up to six months in the case of repeated disobedience.

Furthermore, a judge may well draw conclusions from a failure to produce documents. Exactly what conclusions are drawn appears to vary from Member State to Member State and depend on the particular context. However, in some jurisdictions such refusal can be taken to constitute proof of the relevant alleged facts.

Such is the case in **Germany** although Italy emphasises that such a refusal in itself would probably not be conclusive and other evidence would be required.⁴⁶⁶ In **Italy**, the other party's non-compliance has only a small evidentiary value, and a third party's non-compliance is

⁴⁶⁴ Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, "Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report", Ashurst, Brussels, 2004, (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p. 62.

⁴⁶⁵ It is possible for judges to impose a sanction of €60-600 and to prosecute failure to meet the obligation to obey the authority as a crime (articles 292, 298 LEC).

⁴⁶⁶ Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, "Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report", Ashurst, Brussels, 2004, (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p. 63.

penalised with a very small fine⁴⁶⁷. The other party may also be compelled to answer questions, but in such case lying is not a crime.

In **Spain**, the unjustified inability to produce the determined document allows judges to either consider as evidence a copy or indications thereof or to issue an order compelling the party to produce the required document.

JUDICIAL APPROVAL OF THE REQUEST BY ONE OF THE PARTIES

248. *In Germany, Italy, Portugal Spain and Sweden, where production of a document is requested by one of the parties, whether or not to allow such a request will generally depend on judges' discretionary evaluation of the relevance of the document⁴⁶⁸. The party requesting production must specify what document he is looking for. The level of specification required varies from one Member State to another.*

In **Germany, Italy, Portugal, Spain and Sweden**, if a party wishes to rely on a document in the possession of the other party as evidence, it must describe such document to the judges with reasonable particularity and show why it is relevant to the outcome of the dispute. Judges then have the discretion to order the production of such specified documents by the other party.

Sweden may be taken as example.

Swedish law permits the production of written evidence to a fairly large extent. Not only is a party obliged to produce written evidence in his possession, obtaining a court order against any holder of a document which may be presumed to have evidentiary value is also a solution. This obligation also applies to persons who are not parties to the dispute.

In Sweden, the difficulty is that to obtain a court order, the applicant will have to identify the document with such clarity that, if need be, the order can be enforced by a bailiff. Judges tend to uphold the identification requirement to prevent fishing expeditions. The result is that enforcing disclosure of unknown documents becomes difficult. One way in which the identification problems may be solved in Sweden is for the requesting party to ask the court for permission in the course of the pre-trial proceeding to call witnesses who may be privy to the existence and the contents of relevant documents. This approach has gained increasing popularity in recent years and tends to make the documentary discovery rules more efficient⁴⁶⁹.

⁴⁶⁷ Information supplied by Andrea Giussani.

⁴⁶⁸ Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, "Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report", Ashurst, Brussels, 2004, (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p. 62.

⁴⁶⁹ Chapter 42, Section 8, Paragraph 1 in the Code of Judicial Procedure and Lundblad, "Sweden" in *Pre-Trial and Pre-Hearing Procedures Worldwide*. Ed. by Charles Platto. Graham & Trotman and the International Bar Association 1990, pp. 151 - 152.

249. ***In Spain and Sweden, production of a document must be ordered exclusively at the request of one of parties. In Germany, in Italy and in Portugal, production of a document may be ordered in some cases by the judges ex officio.***

Opinion of a Scandinavian expert – The rules on production of documents are sufficient

Obviously, because of the lack of disclosure systems, the parties may have difficulties in estimating their possibilities of winning a case. The other problem can be that the parties will meet problems in collecting evidence and organizing the testimony. However, this “problem” has not been found to be a problem in Scandinavia and there has not been any discussion on that topic lately. In spite of the very many and very wide procedural reforms in Scandinavian countries, the rules on “disclosure” have not been amended. The obligation to produce a document or an object has been found to be sufficient and even this possibility is not used very often in practice⁴⁷⁰.

⁴⁷⁰ Information supplied by Laura Ervo.

3. POWERS OF THE JUDGES NECESSARY TO ENSURE THE PROTECTION OF THE REPRESENTED GROUP MEMBERS' INTERESTS

3.1. COMMUNICATING WITH THE MEMBERS OF THE GROUP DURING THE TRIAL

- Do the selected Members States make judges responsible for communication to the represented group members of the important decisions taken during the trial?

NO SPECIFICATION IN THE LAW

250. ***In Portugal and Spain, the laws do not set out expressly that the judges are responsible for communication with the represented group members during the trial.***

RESPONSIBILITY OF THE JUDGES

251. ***In Italy, judges must impose on the parties the form of public notification which they consider necessary to protect the group members⁴⁷¹.***

252. ***In Sweden, judges (and the representative to a certain extent) are responsible for keeping the represented group members informed about the collective proceeding.***

In Sweden, during the proceedings the plaintiff is obliged to provide information about important developments in the procedure if a group member so requests⁴⁷².

It is the judge instead of the plaintiff that will inform the group members about the case and about the group action and its features in general⁴⁷³. The reasoning here is to lower the plaintiff's costs and to ensure that all members are fully informed.

253. ***In England & Wales and Germany, relevant information about collective redress proceedings is made public by the judges via registers.***

⁴⁷¹ Article 140-bis, § 11 of the Consumer Code.

⁴⁷² Section 17 GrL.

⁴⁷³ Section 49 GrL.

In **England & Wales**, the GLO rules do not require one single central register but rather separate registers for informing potential parties and keeping them informed about the progress of the trial. Contrary to Germany, the registers are not open to everyone but only to the parties.

When a GLO has been made, the judges will set up a Group Register, which will be maintained in the management court,⁴⁷⁴ of all the parties to the group of claims being managed. This is a mandatory requirement and must introduce details as the judge *may direct of the cases which are subject to the GLO*⁴⁷⁵. The individual registration in this Register is an essential part of the GLO system (see *supra* – Section One). The Register serves to promote efficient confirmation of the group’s membership at any given point.

The **Draft for a Collective Proceedings Act in England & Wales** allows judges to order any party to give notice to the persons that the judges consider necessary in order to protect the interests of any group member or party or to ensure the fair conduct of the proceedings⁴⁷⁶.

In **Germany**, in order to enhance the information flow between the judges and between the parties (including the interested summoned parties), the KapMuG has introduced a new electronic register of lawsuits called the “Complaint Registry pursuant to the Capital Markets Model Case Act” (the Complaint Registry)⁴⁷⁷ in order to publish and exchange relevant news and information on model case proceedings.

The establishment of the Complaint Registry is legally provided and does not have to be created by the judge in each new model case proceeding. There is only one single central Complaint Registry for all the courts in Germany.

The Complaint Registry is central to the constitution of the group and is open to everyone free of charge⁴⁷⁸. All judge’s rulings must be made public via the Complaint Registry and, in particular, the admissibility order must be contained in the Complaint Registry. The Complaint Registry plays a capital role in the communication between the parties and the judges. The judges may replace summons of interested parties to court hearings with public announcement of the proceedings in the Complaint Registry⁴⁷⁹.

The **New Version of the KapMuG** provides that documents will no longer be sent via post; all the case’s statements concerning the plaintiff, the defendant and the interested summoned parties will be brought to their attention through the electronic information system.

⁴⁷⁴ CPR Part 19, 19.11 (2) (a).

⁴⁷⁵ CPR Practice Direction 19 B para. 6.1.

⁴⁷⁶ Article 9 of the Practice Direction Draft.

⁴⁷⁷ Klageregister – Klageregister nach dem Kapitalanleger-Musterverfahrensgesetz; Section 2 (1) KapMuG.

⁴⁷⁸ Section 2 (2) KapMuG.

⁴⁷⁹ Section 9 (2) KapMuG.

3.2. CONSIDERING THE PARTICIPATION OF THE REPRESENTED GROUP MEMBERS

- Do the selected Member States leave the participation of the represented group members in the proceedings to the judges' discretion?

PARTICIPATION REGULATED BY THE LAW

254. ***In Portugal and Spain, the participation of represented group members is permitted by the law and judges have very few powers, if any, to regulate this participation.***

In **Portugal**, the only discretion left to judges concerns the length of the period within which the represented group members may declare they wish to become intervening parties in the collective proceeding in their own names. Indeed, judges must fix a time limit at the outset of the trial within which the represented parties are allowed to declare they wish to become intervening parties⁴⁸⁰. Once this period has elapsed, judges may not permit further participation in the proceedings thereafter.

In **Spain**, the LEC, and not judges, regulates the period within which affected consumers may intervene in the proceeding.

In Spain, in collective interests proceedings, affected consumers will be able to participate in the proceedings at any stage, but will only be able to carry out those judicial acts that are not precluded⁴⁸¹.

In diffuse interests proceedings, the public calling will suspend the proceedings for up to a maximum of two months to enable affected consumers to join the claim. Once this period has elapsed, the proceedings will continue with the participation of consumers that have responded during that period. The judge will not permit further participation in the proceedings thereafter⁴⁸².

We will see that in Spain, intervening in the proceedings is of primordial importance for the affected consumers (see *infra*- Sections Three and Four)⁴⁸³.

⁴⁸⁰ Article 15, 1 Law 83/95.

⁴⁸¹ Article 15,2 LEC.

⁴⁸² Article 15, 3 LEC.

⁴⁸³ Article 221.1.1, al. 1 LEC; L. Frankignoul, "Un projet belge de recours collectif au regard des modèles espagnols et québécois", *Revue de la Faculté de droit de l'Université de Liège* – 2011/12, pp. 227-228.

255. ***In Sweden, the participation of the group members is the responsibility of the representative claimant.***

In **Sweden**, it is underlined in the GrL that the representative claimant protects the interests of the represented group members when conducting an action. Therefore, the representative claimant must afford members an opportunity to express their views on important issues if *this can be done without great inconvenience*⁴⁸⁴.

As stated above, for his part, the judge must only ensure that members of the group are notified of important information⁴⁸⁵.

PARTICIPATION REGULATED BY JUDGES

256. ***In England & Wales (under the Draft), Germany and Italy, during the trial, judges may regulate the participation of the represented group members.***

In **England & Wales, under the Draft for a Collective Proceedings Act**, judges may at any time in collective proceedings permit one or more represented group members to participate in the proceedings on such terms as they consider appropriate⁴⁸⁶.

In **Germany**, the higher judges bear the responsibility for the protection of the individual claimant's rights and so manage the participation of the individual claimants.

In Germany, a principal challenge for the higher judges is precisely to deal with the active role played by the summoned interested parties in the model proceedings⁴⁸⁷.

In order to preserve the claimant's rights to be heard, the KapMuG grants each claimant in the stayed actions *interested party* status, which entitles them to produce materials and make submissions at the model case trial, provided their statements and their actions are not contrary to those of the model claimant⁴⁸⁸. For example, in the *Telekom telecommunication* case, this has meant that the 17 000 claimants have the right to file written materials and make submissions at

⁴⁸⁴ Section 17 GrL.

⁴⁸⁵ Section 49 GrL.

⁴⁸⁶ Article 19.30 Draft Collective Proceedings Act.

⁴⁸⁷ "KapMuG: Multi-party litigation in Germany", *Class Action*, Volum VI, No. 4, 2008, p. 426.

⁴⁸⁸ Section 12 KapMuG.

each stage of the model trial⁴⁸⁹. That is precisely one of the several reasons why the Telekom case has needed so much time⁴⁹⁰.

In addition, the KapMuG allows the higher judge to make the *interested parties* participate in the preparation of the hearings. The judge may *instruct the interested parties summoned to the hearing to submit additions to the written pleadings provided by the model case plaintiff or the model case defendant, and may in particular set a deadline for the clarification of certain disputes which require further elucidation*⁴⁹¹.

Interested parties may also expand the subject matter of the model proceedings if the first instance judge finds that additional issues are relevant to the model questions⁴⁹².

As the previous jurisdiction of the first instance judge became unsuitable - as it partly caused considerable delays - the **New Version of the KapMuG** provides that the jurisdiction for the declaration of the expansion of a model case proceeding's subject will be shifted to the higher judge. The turning point from now on will be the announcement of the *order referring the matter*; the management of the proceedings will then go to the higher judge⁴⁹³.

In **Italy**, as judges are allowed to discipline any procedural matter (except for any formality which is not essential to the debate)⁴⁹⁴, it seems that they can permit and regulate the participation of the represented group members.

⁴⁸⁹ For an overview of the process of the Telekom litigation, see: <http://www.zeit.de/2011/20/Telekom-Prozess-Urteil/seite-1>.

⁴⁹⁰ The Higher Regional Court Frankfurt announced on its website that a decision in this case is expected on 25 April 2012.

⁴⁹¹ Section 10 KapMuG.

⁴⁹² Section 13 KapMuG.

⁴⁹³ Section 15 of the New Version of the KapMuG.

⁴⁹⁴ Article 140-bis, § 11 of the Consumer Code.

3.3. MAINTAINING SUPERVISION OF THE ADEQUACY OF REPRESENTATION OF THE REPRESENTATIVE CLAIMANT

- Do the selected Member States (where a system of representative action is established) require that the judges maintain supervision of the adequacy of representation of the representative claimant?

NO JUDICIAL SUPERVISION

257. ***In Italy and Spain, the specific laws do not provide for judicial supervision of the suitability of the representative claimant during the progress of the trial.***

JUDICIAL SUPERVISION

258. ***In Portugal, control remains with the Public Prosecutor during the progress of the trial.***

For **Portugal**, it should be remembered that the claimant in the popular action is granted standing as a representative, acting in the defence of all those interested parties who do not reject such representation. Naturally, the combination of representative standing with the opt-out system⁴⁹⁵ presupposes recognition of guarantees to the holders of the affected rights or interests. Herein, the role of the Public Prosecutor is essential⁴⁹⁶, which is atypical in civil proceedings⁴⁹⁷. It has responsibility for protecting legality, so must oversee the conduct of the representative claimant in prosecuting the case and may replace him in the case of withdrawal from the suit, or any transaction or behaviour which is harmful to the interests in question⁴⁹⁸.

Where there is collusion between the claimant and the defendant, a judge may also declare the proceedings to be terminated⁴⁹⁹ and, where the collusion in the proceedings has not been made known in a timely fashion, the holders of the harmed interests may, even after the decision has become *res judicata*, object by means of an extraordinary appeal⁵⁰⁰.

⁴⁹⁵ Article 14 Law 83/95.

⁴⁹⁶ Henrique Sousa Antunes, *Global Class Actions Project Country Report: Portugal*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, pp. 16-17.

⁴⁹⁷ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 6.

⁴⁹⁸ Article 16 (3) Law 83/95.

⁴⁹⁹ Article 665 of the Code of Civil Procedure.

⁵⁰⁰ Article 778 (1) of the Code of Civil Procedure; Henrique Sousa Antunes, *Global Class Actions Project Country Report: Portugal*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, pp. 21-22.

259. *In Sweden, throughout the progress of the trial, judges must keep supervision of the appropriateness of the plaintiff.*

In **Sweden**, if a judge considers the plaintiff is no longer appropriate, he must appoint someone else who is entitled to bring action. If no plaintiff can be appointed, the judge shall dismiss the group action⁵⁰¹.

⁵⁰¹ Section 21 GrL.

3.4. ENCOURAGING AND APPROVING SETTLEMENTS

- Do the selected Member States require that judges attempt to resolve a dispute via collective consensual resolution in the progress of the trial? **((1) Incentives provided by the judges)**

- Do the selected Member States require that judges approve settlements proposed by the parties so that they may have a binding effect on the represented group members? In the case of an affirmative answer, to what extent is such judicial supervision exercised? **((2) Judicial approval)**
 - Do judges verify whether the proposed settlement is fair, reasonable and suitable to the represented group, the defendant and society at large (settlement criteria)?

- When approved, do the selected Member States state that the settlement binds every group member who has opted into the collective redress proceedings or that it binds every group member who has not opted out of the collective redress proceedings, depending the system initially chosen (first solution), or do the selected Member States require that the represented group members consent to the settlement in order to be bound by it (second solution)? **((3) Judicial supervision of the binding effect)**
 - If the selected Member States apply the first solution, do they require that judges give a further sufficient opportunity to the represented group members to opt out from the settlement?

(1) INCENTIVES PROVIDED BY THE JUDGES

NON-MANDATORY JUDICIAL ATTEMPTS

260. *In Germany, Italy, Portugal, Spain and Sweden, specific rules on collective redress proceedings do not require judges to try to make the parties negotiate.*

In **Portugal**, although not mandatorily required to do so, judges have several times participated in the achieving of out-of-court settlements.

*DECO v Portugal Telecom*⁵⁰² - Out-of-court settlement urged by the judges

In *DECO v Portugal Telecom*, the main issue was whether it was legal for Portugal Telecom to charge a "set-up" fee as this was argued to be contrary to Portuguese law. This case was linked with another two collective redress actions of an injunctive nature, the three of which together concerned the application by Portugal Telecom of a set-up fee as well as the monthly line rental, and a schedule of prices. This collective redress proceeding included almost all Portuguese consumers (almost 2 million) and involved damages of about €120 million.

This case was appealed up to the Supreme Court of Justice. Each court (first instance, court of appeal and Supreme Court) decided that the fee was illegal. Only after the decision of the Supreme Court did DECO and Portugal Telecom reach an agreement.

The most notable litigation in Portugal was thus finalised by a court decision but the sentence of the Supreme Court of Justice enabled both parties to reach an out-of-court settlement on how to reimburse consumers for the overcharging⁵⁰³.

*DECO v A*⁵⁰⁴

In *DECO v A*, an action was intended to recover extra charges that the defendant demanded from consumers to repair malfunctioning water meters. The defendant was the public water supply company. In 2004 a large number of water meters broke because of extreme cold temperatures. The company billed consumers for the cost of replacing the water meters, ignoring consumer complaints. DECO brought the case against the company, arguing that the company did not protect the metres or inform consumers about the special care that should be taken with them during cold winters. A total of 37 consumers were probably affected by the alleged damage.

During the progress of the trial, the defendant agreed to reimburse consumers who had already paid for the replacement of their water meter. Furthermore, the company agreed not to seek the cost of the replacement of the meter from other consumers with faulty meters. All the objectives of the claimant were achieved, without needing to go to a full trial. It took only two months for the settlement to be reached⁵⁰⁵.

⁵⁰² *DECO v Portugal Telecom*, Proc. 430/99 - Supreme Court of Justice.

⁵⁰³ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Collected cases, Portugal), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 13-16.

⁵⁰⁴ *DECO v A*, Proc. 127/06.5 TBTND - 1o Juízo do Tribunal Judicial de Tondela (2006).

⁵⁰⁵ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Collected cases,

In **Sweden**, it seems that the incentives for out-of-court settlements depend more upon the litigation costs involved and the length of the collective redress procedure than on a judge's initiatives. It is often the case with collective redress actions that a consensual settlement of individual claims is not possible before the admissibility stage. However, reaching such consensual settlement remains a distinct possibility in the progress of the trial and is a likely outcome.

261. ***The New Version of the KapMuG expressly authorizes (but does not require) the higher judges to take the initiative to propose a settlement in collective proceedings***⁵⁰⁶.

MANDATORY JUDICIAL ATTEMPTS

262. ***England & Wales is the only jurisdiction which requires that judges try to make the parties negotiate.***

In **England & Wales**, the GLO rules are based on the premise that the primary objective of procedure should be to put the parties in a position where they can settle the litigation swiftly and economically by agreement. The tendency to settle is a strong element of the English & Welsh legal system, in which most GLO cases have indeed been settled.

In this context and according to their general duty to manage the case actively, judges shall encourage the parties to resort to ADR if they consider this appropriate⁵⁰⁷ and case management will determine the ability of other parties to intervene in the settlement process⁵⁰⁸.

Explanation given by Senior Master Robert Turner⁵⁰⁹

According to Senior Master Robert Turner, in practice, judges will considerably assist parties in achieving settlements. In England & Wales, as judges are required to resolve the litigation as efficiently, swiftly and fairly as possible, they will decide what issues are really important in leading to effective early disposition of the totality of the disputes, so that these are decided as swiftly and decisively as possible.

So, in practice, a judge will assist in resolving one or more principal issues which will lead to

Portugal), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 31-36.

⁵⁰⁶ Section 17 New Version of the KapMuG.

⁵⁰⁷ CPR Part1, 1.4. (2) (e).

⁵⁰⁸ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 303.

⁵⁰⁹ Information supplied by Robert Turner.

the achieving of settlements. According to Senior Master Robert Turner, this is an inherent consequence of common law practice, which works towards a final trial of the issues, which hopefully the interlocutory stages will have reduced to their bare essentials. In contrast the civil law system is to determine issues stage by stage throughout the life of the case. Senior Master Robert Turner acknowledged that each system has its good and bad points but he underlined that the advantage of the common law system is that very few cases ever reach a trial as the parties at different stages of the action settle their differences as they see the evidence, etc., developing⁵¹⁰.

Buncefield Oil Depot case – Out-of-court settlements facilitated by the judge

In this case, the judge (Senior Master Turner) dismissed a GLO application, but nevertheless issued directions setting out a GLO-style timetable aimed at facilitating structured settlement negotiations.

Here is what Senior Master Turner said about this case: *An example which might be of interest to illustrate the ability of a judge in the High Court to use his own initiative concerned a violent explosion at an oil terminal in North London a few days before Christmas in 2006. The damage involved over three thousand potential litigants, who ranged from householders whose homes had been damaged to international oil companies whose supply of aviation fuel to airlines at Heathrow had been seriously disrupted. Using the first writ to be issued in the High Court on which to hang my participation, I listed that case for management directions six weeks after the event. I also made it known that I would welcome any lawyers who might have clients with potential claims to attend. Forty barristers including six QCs and over a hundred solicitors attended. Having heard an outline of the whole event, I divided the potential claimants into five groups depending on the nature and size of their claims and invited the three potential defendants, I outlined the basic directions which I intended to give and invited the lawyers for the defendants to spend the rest of the day with the lawyers for the claimants devising both suitable directions for the trial of the issues and a scheme for the immediate payment of interim damages to the majority of the claimants, especially those who needed to make repairs to make their homes habitable. I rose from the Bench and left the lawyers to address the exercise that I had set them at eleven o'clock and by four o'clock I returned to court to approve five GLOs, which resulted in the settlement of the majority of the three thousand cases. This is just an example of the use of the initiative which, as judges in the High Court, we were encouraged to adopt⁵¹¹.*

⁵¹⁰ In this sense, see also C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 57.

⁵¹¹ Information supplied by Robert Turner.

Moreover, in England & Wales, incentives exist to use alternatives, such as court rules on costs, which may have a persuasive effect. Indeed, a party who commences litigation when he should reasonably have first tried an alternative pathway may not be awarded costs if he wins, or even may be ordered to pay the losing defendant's costs⁵¹².

(2) JUDICIAL APPROVAL

NO JUDICIAL APPROVAL REQUIRED

263. ***In England & Wales and Italy, there is no requirement to seek judicial approval in the settlement of the claims comprising a collective redress action.***

In **Italy**, Article 140-bis of the Consumer Code does not require any supervision by judges of the out-of-court agreement process. The only provision on out-of-court agreements contained in Article 140-bis of the Consumer Code seems to concern exclusively individual agreements. It provides that *transactions which occurred between the parties shall not affect the rights of the members who have not expressly agreed to them*⁵¹³.

It is however worth noting that in Italy a winning party who has refused a reasonable settlement proposal may be ordered to pay part of the losing party's legal expenses if the sum awarded in the judgment does not exceed the sum offered in settlement⁵¹⁴.

MANDATORY JUDICIAL APPROVAL

264. ***In Portugal and Spain, there is no special requirement to seek judicial approval. However, general provisions on judicial approval of settlement will apply to collective settlements.***

⁵¹² C. Hodges, "Response to Consultation Towards a Coherent European Approach to Collective Redress", April 2011, Available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf, p. 17.

⁵¹³ Article 140-bis, § 15 of the Consumer Code.

⁵¹⁴ Francesca Rolla & Cristina Pagni, "Italy", in *The Comparative Legal Guide to Class & Group Actions 2011: A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 105.

In **Portugal**, according to Article 300 (3) of the Code of Civil Procedure, any settlements (including those achieved in the context of popular actions) agreed between the parties are subjected to the supervision of the judges. This judicial participation is, however, limited to checking the form of the settlement. Applied to popular actions, this provision is understood as implying an assessment of the adequacy of the representation exercised by the representative claimant. Accordingly, a judge may refuse to approve the settlement if the representation has not been exercised with the aim of satisfying the interests in question⁵¹⁵.

Additionally, the Public Prosecutor also verifies settlements. If it considers that a settlement does not safeguard the interests being represented, it may replace the claimant and continue the popular action⁵¹⁶.

*DECO v Portugal Telecom*⁵¹⁷ - Out-of-court settlement

As stated above, although the most notable litigation in Portugal was finalised by a court decision, an out-of-court settlement was reached and approved by the court to organize the reimbursement of the amount overcharged. The Sentence of the Supreme Court of Justice enabled both parties to reach an out-of-court settlement on how to reimburse consumers for the overcharging. This was in response to a clear practical problem of how to identify the large number of potential consumers, and the amount owed to each.

In **Spain**, very few cases have been resolved through settlement; most of them have been resolved through full judicial trial.

In case of collective settlement, the general requirements for settlements laid down in Article 19 LEC must be observed. The settlement may only be denied by the judge if it is *forbidden by law* or *limited by public interest reasons or on a third party interest*. It has been recognised that this generic sentence requires judges to examine and ensure the fairness of negotiated outcomes⁵¹⁸. Judges must thus verify that the settlements do not affect the fundamental individual rights of any of the parties which cannot be waived, or the interests of third parties.

⁵¹⁵ Henrique Sousa Antunes, *Global Class Actions Project Country Report: Portugal*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, 24.

⁵¹⁶ Article 16, 3 Law 83/95.

⁵¹⁷ *DECO v Portugal Telecom*, Proc. 430/99 - Supreme Court of Justice.

⁵¹⁸ Pablo Gutiérrez de Cabiedes Hidalgo, *Global Class Actions Project Country Report: Spain*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf

In Sweden, there is a special requirement to seek judicial approval. In approving the settlement, a judge will take account of whether the collective settlement is non-discriminatory and fair.

In Sweden, collective settlements are subjected to the judges' approval in order to be binding on the represented group members⁵¹⁹. When receiving a request for confirmation by one of the parties, judges must first ensure that the proposed settlement is notified to members of the represented group⁵²⁰.

Judges are not permitted to approve the settlement if it can be considered *discriminatory against particular members of the group or is in another way manifestly unfair*⁵²¹. Judges are, however, not required to confirm the settlement by examining whether the settlement is good enough or whether it is more or less advantageous for some group members compared with others⁵²².

Additionally, the normal regulation on *amicable settlements* will apply⁵²³, although the judge must examine the contents of the amicable settlement more extensively than for single actions⁵²⁴. In this respect, a collective settlement can cover only some of the group members if needed. However, the representative cannot make agreements which cover only single members. Because the amicable settlement covers the members of the group, it is not possible in Sweden to confirm the settlement before the requirements for the collective redress proceeding have been examined. For the same reason, it is not possible to make an agreement before the trial in the case of collective redress actions⁵²⁵.

*Air Olympic case*⁵²⁶ – Amicable settlement approved by the judge

The *Air Olympic* case was the very first collective redress action in Sweden and was resolved in a settlement favouring the plaintiff and approved by the court.

The case involved claims for damages due to crime (gross dishonesty to creditors). The defendant was the owner of an airline which went bankrupt. Under Swedish law, victims' claims for damages may be brought in criminal proceedings. During the trial, the prosecutor moved for damages for several hundred passengers who had been left stranded in airports all over Europe and forced to make their own way home. Due to the large numbers of claims, the petitions for damages were separated from the criminal case for customary management as a civil case. One passenger,

⁵¹⁹ Section 26 GrL.

⁵²⁰ Section 49 GrL; Per Henrik Lindblom, *Grupptalan i Sverige*, Norstedts Juridik 2008, p. 128.

⁵²¹ Section 26 GrL.

⁵²² Per Henrik Lindblom, *Grupptalan i Sverige*, Norstedts Juridik 2008, pp. 127-128.

⁵²³ This regulation is in the Code for the Judicial Procedure.

⁵²⁴ Section 26 GrL.

⁵²⁵ Per Henrik Lindblom, *Grupptalan i Sverige*, Norstedts Juridik 2008, p. 127; Information supplied by Laura Ervo.

⁵²⁶ *Bo Åberg v Elfeterios Kefales*, T 1281-07, Nacka tingsrätt (district court).

B., initiated a private group action with a claim for compensation for himself and about 700 passengers. 491 of them opted into the action and the action was accepted by the district court. The defendant appealed but the court of appeal affirmed the district court ruling. The case was about to go to trial when the parties reached a settlement (4 years and 4 months after the initiation of the proceeding).

The parties reached a settlement of 810 000 Swedish Kronor (€87 527) for the passengers. The District Court confirmed the settlement by judgment on 21 June 2007. The judgment was final on 12 July 2007. The defendant was obliged to pay 810 000 SEK (€87 527) to the passengers within 18 months. If the defendant paid the passengers before 30 June 2008, he only had to pay 400 000 SEK (€43 240) to the passengers⁵²⁷.

266. ***In England & Wales (under the Draft), any settlements agreed by the representative claimant and the defendant must be approved by the judges in a “Fairness Hearing”.***

In **England & Wales**, the **Draft for a Collective Proceedings Act** remedies the lacuna of the current GLO rules.

Under the draft, any settlement agreed by the representative claimant and the defendant must be approved by the judge in a “Fairness Hearing” before it can bind the represented group of claimants. In approving a settlement, judges must essentially be satisfied that the settlement agreement is fair, just and reasonable in light of the circumstances of the case and any objections to the settlement by the represented group, which ought to be given adequate opportunity to submit its views to the judge on the settlement⁵²⁸. Note that an offer to settle that has been made shall be put to the represented group members by the representative claimant⁵²⁹.

⁵²⁷ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases, Sweden), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 355-358.

⁵²⁸ Article 19.44 Draft Collective Proceedings Act; Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report), a series of recommendations to the Lord Chancellor*, November 2008, p. 169.

⁵²⁹ Article 19.44 Draft Collective Proceedings Act.

In Germany, there is a special requirement to seek judicial approval. The settlement may only be approved by the judges when interested parties give their consent to the settlement unanimously (condition of validity of the settlement).

In **Germany**, it should first be noted that in model case proceedings the defendant frequently settles individual claims. This can be seen at any stage of the proceeding and the judge has absolutely no control over such arrangements between the parties⁵³⁰.

24 KAP 15/07, Bavaria case⁵³¹ – Numerous individual out-of-court agreements

In the *Bavaria* case, the defendants (Landesbank Berlin AG and Immobilien Beteiligungs- und Vertriebsgesellschaft der BIH Gruppe mbH) were, *inter alia*, accused of being responsible for the publication of serious mistakes (in the form of misleading, incomplete and faulty information) in the prospectus for the Immobilienfonds Bavaria Immobilien Verwaltungs GmbH & Co. Objektverwaltungs KG- LBB Fonds 6. The summoned interested parties were particularly active as they called attention to further prospectus mistakes and asked for several expansions of the matter (the subject matter was expanded three times).

In the *Bavaria* case, the judge ended the model case proceeding not because of a collective settlement but because of the number of individual out-of-court agreements. Although the higher judge did not supervise the contents of such out-of-court agreements, he urged, however, individual interested parties to negotiate with the defendant.

Initially, there were about 20 interested parties summoned in total. At the end of 2008-beginning of 2009, a significant part of the interested parties, including the model claimant, had concluded out-of-court settlements with the defendant and so withdrew their claims.

Given these circumstances, the judge was uncertain as to whether the model proceeding should continue or not. He thus decided to ask informally (via “messages”, i.e. individual letters and phone calls) the remaining parties’ representatives to state whether they planned to enter into negotiations with the defendant and, if not, whether they would agree to become the model case plaintiff. As a result, further plaintiffs withdrew their claim. In the end, only five parties were left which had not withdrawn their claim. However, nobody wished to become the model case plaintiff and in the following hearing nobody showed up. The model case defendants declared that they agreed with the decision of the Court that the model case proceeding be ended.

⁵³⁰ Similarly, the **Italian** Consumer Code allows the achievement of such settlements between parties during the collective proceedings. Settlements reached between the defendant and the representative claimant (or between the defendant and other class members) cannot affect the rights of those who joined the class action and have not expressly consented to the settlements reached. Article 140-bis of the Consumer Code does not require the judge’s approval of such settlements and provides for an opt-in mechanism (Article 140-bis, § 15 of the Consumer Code).

⁵³¹ Kammergericht 11.02.2009, 24 Kap 15/07.

The higher judge was able to end the procedure *ex officio* because the model case procedure is not initiated by a claim but by an order referring the matter. The higher judge noted that in essence a withdrawal of most of the plaintiffs does not lead to a closure of the case. But in this case, only five plaintiffs were left, none of whom wished to become the model case plaintiff and from whom no legitimate interest in the proceedings was represented in the model case proceedings.

Collective settlements are, on their part rare, even unrealistic. This is due to the importance given to the constitutionally guaranteed right to be heard in the KapMuG. In respect of this constitutional right, all plaintiffs who have enrolled in the register are generally entitled to raise their own objections and to state their own reasons. Accordingly, the KapMuG does not allow judges to approve a settlement unless all the interested parties consent to it (opt-in as a condition of validity of the settlement)⁵³². This requirement does not give any margin of appreciation to the judges. The model claimant alone does not have the power to settle a model case; for a settlement to be admissible, all of the other plaintiffs have to give their consent. It has seemed unlikely that such a consensus could be reached. In practice, settlements of model cases are, therefore, unrealistic. A court decision is the only plausible outcome.

This has been seen as the main point of weakness of the current KapMuG. Therefore, the **New Version of the KapMuG** has tried to facilitate settlements by introducing the possibility of a court-approved settlement which would then be binding on all model procedure participants unless they opt out of the settlement after notification (see *infra*). The New Version of the KapMuG gives more discretion to the judge regarding the opportunity to approve a settlement. By approving the settlement, the judge may, *inter alia*, consider: the state of affairs of the dispute so far, that the model case defendant is not forced to agree to a settlement which is not appropriate, and the consulted parties' statements (including when the judge has proposed the settlement himself). The New Version of the KapMuG regulates the necessary content of the settlement⁵³³. An agreement upon legal questions of the model case proceeding is not possible. The application of the law is not at the parties' disposal and it is the duty of the judge to apply the law on the factual situation.

Under the New Version of the KapMuG, a judge will only be able to choose between approving the whole settlement and denying approval. It will not be possible for him to review the content of the settlement or only approve parts of it⁵³⁴. If the New Version of the KapMuG does not set the absolute consent of all the interested parties as a validity condition anymore, it nevertheless requires that the judge approves the settlement only if an essential part of the interested summoned parties agree to it.

⁵³² Section 14 (3) KapMuG.

⁵³³ Subsection 2 of Article 17 of the New Version of the KapMuG.

⁵³⁴ Section 18 New Version of the KapMuG.

(3) JUDICIAL SUPERVISION OF THE BINDING EFFECT

NO SPECIFICATION

268. *In Portugal and Spain, the specific laws remain silent on the issue of the binding effect of approved settlements.*

In **Portugal**, it seems that the first solution applies and thus that the approved settlements bind every group member who has not opted out from the collective redress proceedings.

In **Spain**, the LEC does not specify what the effects of a possible settlement would be on consumers who are not intervening parties in the proceedings. Nor does the LEC give the power to judges to supervise such effects.

POSSIBILITY FOR THE REPRESENTED GROUP MEMBERS TO OPT OUT FROM THE APPROVED SETTLEMENT (FIRST SOLUTION)

269. *The New Version of the KapMuG establishes an opt-out system. No discretion is left to judges.*

In **Germany**, under the **New Version of the KapMuG**, judges are only able to approve a settlement if an essential part of the summoned interested parties agrees to it. This is meant to ensure that the model case plaintiff does not agree to a settlement which does not preserve the summoned interested parties' interests. The New Version of the KapMuG does not, however, require a certain quorum, but a certain quorum can be agreed on as a condition of validity.

When approved, to ensure that the summoned third parties know of the settlement, information on the settlement has to be sent to them by post; a public announcement alone is not a proper way of informing the summoned interested parties⁵³⁵. The New Version provides a deadline of one month for summoned interested parties to declare their wish to opt out from the settlement⁵³⁶. This is to obtain legal certainty on the number of people on whom the settlement is binding and to know which main proceedings have to be continued. As this is an opt-out system, keeping silent equals agreement to the settlement. The exercise of the opt-out right does not need a lawyer's representation.

⁵³⁵ Section 19 New Version of the KapMuG.

⁵³⁶ Section 18 subsection 2 New Version of the KapMuG.

270. ***In England & Wales (under the Draft for a Collective Proceedings Act), the possibility for the represented group members to opt out from the approved settlement is left to the judges' discretion.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, in principle the approved settlement binds every represented group member who has not opted out from the collective proceedings or binds every represented group member who has opted into the proceedings⁵³⁷.

Judges may, however, derogate this principle. Indeed, they have the power to order that that all or any group members be given a further opportunity to opt out from the approved settlement. If judges exercise this power, they must describe that entitlement to opt out and the manner in which it may be exercised⁵³⁸.

CONSENT NECESSARY TO BE BOUND BY THE APPROVED SETTLEMENT (SECOND SOLUTION)

271. ***In Sweden, once approved, the represented group members have to opt in to the settlement in order to be bound by it.***

In **Sweden**, it has been recognised that in the case that the members of the group do not accept the amicable settlement, they can continue the proceedings as parties⁵³⁹. It should be recalled that, under the amicable settlements general rules, the settlement can cover only one part of the group members if needed (see *supra*).

⁵³⁷ Article 19. 44 (6) Draft Collective Proceedings Act.

⁵³⁸ Article 19. 44 (5) Draft Collective Proceedings Act.

⁵³⁹ Per Henrik Lindblom, *Grupptalan i Sverige*, Norstedts Juridik 2008, p. 128.

C. CONCLUDING SUMMARY

1. ENHANCED AND IMPROVED MANAGEMENT OF THE CASE

1.1. IDENTIFIED CONCERNS AND ABUSES

272. (1) Concern of lengthy, complex and expensive proceedings.
- (2) Unpredictability and potential for arbitrariness concerning the use of flexible case management powers by the judges.

1.2. INTERESTS AT STAKE

273. (1) Need for wide ranging judicial powers to process the procedure efficiently and to ensure that it is expeditiously and economically progressed.
- (2) Need for flexible management judicial powers to adapt the procedure to the needs of specific cases.

1.3. POTENTIAL SOLUTIONS

274. (1) Enhanced case management powers.
- Experienced and specially trained judges (on this point, see *supra* – Section One).
- (2) Framed but flexible case management powers.

1.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) GENERAL JUDICIAL CASE MANAGEMENT POWERS

➤ *Are judges in the selected Member States generally given case management powers?*

275. No information is available for **Sweden**.

276. In **Portugal** and **Spain**, judges do not have any case management powers to monitor collective proceedings.

277. In **Italy**, judges have a general power of case management.

278. In **Germany**, judges are generally to manage the trial actively.

279. In **England & Wales**, judges have very extensive case management powers.

(2) JUDICIAL CASE MANAGEMENT POWERS SPECIFICALLY DESIGNED FOR COLLECTIVE REDRESS PROCEEDINGS

➤ *Do the selected Member States adapt judges' general case management powers to the collective redress proceedings?*

➤ *Are judges in the selected Member States additionally empowered with specific case management powers specifically created to deal with collective redress proceedings?*

➤ *To what extent are the case management powers prescribed in the selected Member States?*

280. In **Portugal** and **Spain**, judges' powers are not reinforced to manage collective redress proceedings.

281. In **Germany**, the whole KapMuG model proceeding is qualified as a special case management procedure.

282. In **Sweden**, judges may choose between some enumerated management powers for conducting a trial. The GrL describes for which rights of the parties judges have to exercise each management power so that the concern of arbitrariness may be avoided.
283. In **England & Wales** and **Italy**, judges have broad leeway to structure the collective redress proceedings. Although their powers are not precisely prescribed and enumerated, they may, however, not be exercised arbitrarily. In **England & Wales**, the powers must be exercised in the interests of focus, expedition and fairness to both side, and fairness to all members and segments of the interested group of claimants. In **Italy**, judges must manage the case in compliance with the parties' right to be heard, and to a fair, effective and timely management of the case.

2. ACTIVE CONDUCT OF THE TRIAL. A RESPONSIBILITY SHARED BY THE JUDGES AND THE PARTIES

2.1. IDENTIFIED CONCERNS AND ABUSES

284. (1) Concern of complex (i), lengthy (ii) and expensive (iii) proceedings.
- (2) Concern that judges shift from being adjudicators to investigating judges.
- (3) Concern of fishing-expedition processes; concern of high litigation costs associated with the discovery process.

2.2. INTERESTS AT STAKE

285. (1)
- (i) The claimants' wish to broadly focus on the common issues; the defendant's wish to identify and investigate each individual claim;
 - (ii) In the adversarial process, procedural equality;
 - (iii) Proportionality in relation to litigation costs.
- (2) Control of the evidence collection and preparation exercised by the parties; avoiding undue delay concerning evidences
- (3) European civil procedure rules on evidence which state that judges have no general power to order the parties or third parties to produce all documents that they consider relevant to the solution of the case; equal access to information; avoidance of "trial by ambush"

2.3. POTENTIAL SOLUTIONS

286. (1) Judicial duty of maintaining a speedy and efficient process - various management tools may be chosen for progressing cases:

- (i) Test cases, subgroups;
- (ii) Litigation plan at the earliest stage of the proceeding;
- (iii) Judicial costs management.

(2) Enhanced judicial management of the evidence to ensure focus and avoid undue delay.

(3) General judicial responsibility to ensure fair play between the parties and equal access to information (discovery is not necessary; general judicial power to order production of a document is a sufficient tool)

2.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) MANAGEMENT TOOLS

(1) TEST CASES AND SUBGROUPS

➤ *Do the selected Member States allow judges to select test cases to resolve the issues?*

287. In **Italy, Portugal, Spain** and **Sweden**, specific rules do not set out expressly whether judges can select test cases.

288. In **England & Wales**, judges may decide to proceed with test cases. Selection of those test cases that will go forward is usually a matter for the parties, rather than the judges.

289. In **Germany**, judges are mandatorily required to resolve the collective redress action by means of a test-case process as this is the nature of the mechanism. The higher judges have exclusive jurisdiction as regards the choice of the representative test case.

- *Do the selected Member States allow judges to divide the group in subgroups?*
 - *Do the selected Member States require that judges appoint a representative claimant in each subgroup?*
 - *Do the selected Member States allow judges to review their admissibility order if there are a considerable number of subgroups?*
290. In **Germany** and **Italy**, the question of subgroups is irrelevant. In **Germany**, judges only decide on one case. In **Italy**, as the affected rights should be identical, there is no place or utility for subgroups.
291. In **Portugal** and **Spain**, specific laws do not set out expressly whether judges can divide the group in sub-groups.
292. In **England & Wales** (including under the **Draft for a Collective Redress Act**) and in **Sweden**, judges may divide the group in subgroups. In **England & Wales**, judges may use this tool on application by a claimant while in **Sweden** judges may take the initiative to order the creation of subgroups. In these two Member States, judges may assign other representative claimants to represent the specified members of the subgroups. The consequences for the proceeding if there are a considerable number of subgroups are not regulated in these two Member States.

(II) LITIGATION PLAN

- *Do the Member States require that judges establish a litigation plan including an appropriate schedule for bringing the case to resolution with the collaboration of the parties?*
 - *Which sanctions may judges impose in the selected Member States if the parties fail to respect the fixed dates?*
293. In **Germany**, **Portugal**, **Spain** and **Sweden**, judges are not mandatorily required to establish an overall plan for the conduct of the litigation.
294. In **England & Wales** and **Italy**, judges must give directions on how proceedings should be managed. The specific laws do not set out expressly what sanction the judges should order if the parties fail to respect those directions. In **England & Wales**, judges must pay attention to the views of the parties via periodical case management conferences.

- *Do the selected Member States require that judges address the question of costs to the parties at an early stage in the proceeding?*

295. In **none of the selected Member States** are judges specifically required to determine the approach to costs at the outset of the collective redress proceedings.

(2) EVIDENCE MANAGEMENT

- *To what extent are the national rules on judicial management of evidence adapted to collective redress proceedings?*

- *Do the selected Member States in which the rules on evidence are adapted allow judges to intervene in the evidence collection and preparation?*

296. In **England & Wales, Germany, Spain and Sweden**, there is no difference of approach between a normal individual proceeding and a collective proceeding as to the rules on presentation of evidence.

297. **Italy** simplifies the presentation of evidence by the parties, including the burden of proof in collective redress proceedings. Judges may dispense with repetitive evidence.

298. **Portugal** gives judges reinforced powers to collect evidence and to evaluate it freely in popular actions.

(3) MANAGING ACCESS TO INFORMATION

➤ *Do the selected Member States in which the concept of discovery is unknown under the general procedural rules introduce a discovery procedure in order to progress collective redress proceedings efficiently?*

299. **None of the selected Member States** admits discovery in general; nor do they introduce discovery in order to progress collective redress proceedings in particular.

300. In **England & Wales**, the general procedural rules (and not the complementary GLO rules) set out standard disclosure (a limited form of US-style discovery). Judges may dispense with disclosure or vary the width of disclosure.

➤ *Do the selected Member States adapt (reinforce) the general ability of judges to order production of specific documents to collective redress proceedings?*

➤ *In the selected Member States where production of a document may be requested by one of the parties, is the approval of the judges of such a request mandatory? Does the rule change for collective redress proceedings?*

➤ *Do the selected Member States allow judges to request ex officio production of a document? Does the rule change for collective redress proceedings?*

301. **None of the selected Member State** adapts its general rule on production of specific documents to collective redress proceedings.

302. In **Germany, Italy, Portugal, Spain** and **Sweden**, judges are in a position to demand the production of a specific document. This power is not changed or even enhanced for collective redress proceedings.

In **Germany, Italy, Portugal, Spain** and **Sweden**, where production of a document is requested by one of the parties, whether or not to allow such a request will generally depend on judges' discretionary evaluation of the relevance of the document. The party requesting production must specify what document he is looking for. The level of specification required varies from one Member State to another.

In **Spain** and **Sweden**, production of a document must be ordered exclusively at the request of one of the parties. In **Germany, in Italy** and in **Portugal**, production of document may be ordered in some cases by judges *ex officio*.

3. A MANAGEMENT OF THE CASE SENSITIVE TO THE INTERESTS OF THE REPRESENTED GROUP MEMBERS

3.1. IDENTIFIED CONCERNS AND ABUSES

303. (1) Concern formulated by the represented group members of being irreversibly bound by a judgement which conflicts their interests.
- (2) Concern of collusion between the representative claimant and the defendant as a settlement is reached between those two parties.

3.2. INTERESTS AT STAKE

304. (1) Need to protect the rights of individuals who do not take part in the trial; desire of the defendants for finality; maintaining a speedy and efficient process.
- (2) Encouraging settlement; the large sums involved, the high number of parties and the complexity of issues magnify the difficulty of reaching settlements.

3.3. POTENTIAL SOLUTIONS

305. (1) Responsibility of judges to ensure balanced safeguards for the represented group members:
- (i) Notice to the represented group members of the relevant decisions (via a collective redress register);
 - (ii) Intervention of the represented group members in the trial left to the judges' discretion;
 - (iii) Continuous supervision of the adequacy of representation of the representative claimant
- (2) Judicial supervision of settlements:
- (i) Judicial promotion of settlement;
 - (ii) Judicial approval of settlement;
 - (iii) Judicial evaluation of the binding effect on settlement.

3.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) BALANCED SAFEGUARDS FOR THE REPRESENTED GROUP MEMBERS

(I) NOTICE OF THE RELEVANT DECISIONS

➤ *Do the selected Member States make judges responsible for the communication to the represented group members of important decisions taken during the trial?*

306. In **Portugal** and **Spain**, the laws do not set out expressly that judges are responsible for the communication with the represented group members during the trial.

307. In **Italy**, a judge must impose on the parties the form of public notification which he considers necessary to protect the group members.

308. In **Sweden**, judges (and the representative to a certain extent) are responsible for keeping the represented group members informed about the collective proceeding.

309. In **England & Wales** and **Germany**, relevant information about collective redress proceedings is made public by the judges via registers.

(II) INTERVENTION OF THE REPRESENTED GROUP MEMBERS

➤ *Do the selected Member States leave the participation of the represented group members in the proceeding to judges' discretion?*

310. In **Spain** and **Portugal**, the participation of represented group members is permitted by the law and judges have very few powers, if any, to regulate this participation.

311. In **Sweden**, the participation of the group members is the responsibility of the representative claimant.

312. In **England & Wales** (according to the **Draft**), **Germany** and **Italy**, judges may regulate the participation of the represented group members during the trial.

(III) CONTINUOUS SUPERVISION OF THE ADEQUACY OF REPRESENTATION OF THE REPRESENTATIVE CLAIMANT

➤ *Do the selected Member States (where a system of representative action is established) require that judges maintain supervision of the adequacy of representation of the representative claimant?*

313. In **Italy** and **Spain**, the specific laws do not provide for judicial control of the suitability of the representative claimant during the progress of the trial.

314. In **Portugal**, the control remains with the Public Prosecutor during the progress of the trial.

315. In **Sweden**, throughout the progress of the trial, the judges must monitor the appropriateness of the plaintiff.

(2) JUDICIAL SUPERVISION OF SETTLEMENTS

(1) JUDICIAL PROMOTION OF SETTLEMENT

➤ *Do the selected Member States require that judges attempt to resolve a dispute via collective consensual dispute resolution during the progress of the trial?*

316. In **Germany, Italy, Portugal, Spain** and **Sweden**, specific rules on collective redress proceedings do not require judges to try to make the parties negotiate.

317. In **Germany**, the **New Version of the KapMuG** expressly authorizes (but does not require) the higher judges to take the initiative to make a proposal for a settlement in collective proceedings.

318. **England & Wales** is the only jurisdiction which requires that judges try to make the parties negotiate.

➤ *Do the selected Member States require that judges approve settlements proposed by the parties in order they may have a binding effect for group members? In the case of affirmative answer, to what extent is such judicial supervision exercised?*

➤ *Do judges verify whether the proposed settlement is fair, reasonable and appropriate for the represented group, to the defendant and to society at large (settlement criteria)?*

319. In **England & Wales** and **Italy**, there is no requirement to seek judicial approval in the settlement of the claims comprising a collective redress action.

320. In **Portugal** and **Spain**, there is no special requirement to seek judicial approval. However, general provisions on the judicial approval of settlement will apply to collective settlements.

321. In **Sweden**, there is a special requirement to seek judicial approval. In approving the settlement, judges will take account whether the collective settlement is non-discriminatory and fair.

322. In **England & Wales** (under the **Draft for a Collective Proceedings Act**), any settlements agreed by the representative claimant and the defendant must be approved by the judges in a “Fairness Hearing”.

323. In **Germany**, there is a special requirement to seek judicial approval. The settlement may only be approved by the judges when the interested parties give their unanimous consent to the settlement (condition of validity of the settlement).

(III) JUDICIAL EVALUATION OF THE BINDING EFFECT OF SETTLEMENT

- *When approved, do the selected Member States state that the settlement binds every group member who has opted into the collective redress proceedings - or binds every group member who has not opted out from the collective redress proceedings, depending the system initially chosen (**first solution**), or do the selected Member States require that the represented group members consent to the settlement in order to be bound by it (**second solution**)?*
- *If the selected Member States apply the first solution, do they require that judges give a further sufficient opportunity to the represented group members to opt out from the settlement?*

324. In **Portugal** and **Spain**, the specific laws remain silent on the issue of the binding effect of approved settlements.
325. In **Germany**, the New Version of the KapMuG establishes an opt-out system. No discretion is left to the judges (first solution).
326. In **England & Wales** (under the **Draft for a Collective Proceedings Act**), the possibility for the represented group members to opt out from the approved settlement is left to the judges' discretion (first solution).
327. In **Sweden**, once approved, the represented group members have to opt in to the settlement in order to be bound by it (second solution).

SECTION THREE

POWERS OF THE JUDGES AT THE JUDGEMENT STAGE

A. ANTICIPATED CONCERNS

1. The final verdict
 - 1.1. Risk that individual interests are diluted in the interest of the group
 - 1.2. Concern of inadequate compensation to consumers
 - 1.3. Concern of extensive and abusive binding effect of the judgement

2. Financial aspects and costs assessment
 - 2.1. Concern of capture of the litigation by intermediaries
 - 2.2. Concern of excessive litigation costs

B. COMPARATIVE ANALYSIS

1. Role of the judges in deciding the terms of the final verdict
 - 1.1. Choosing between a final and/or an interim judgement
 - 1.2. Assessing the damage, calculating and choosing the form of compensation
 - 1.3. Assessing the extent of the binding effect

2. Role of the judges concerning the financial aspects of the proceedings
 - 2.1. Verifying the funding arrangements
 - 2.2. Verifying the litigation costs

C. CONCLUDING SUMMARY

A. ANTICIPATED CONCERNS

1. THE FINAL VERDICT

1.1. CONCERN THAT INDIVIDUAL RIGHTS ARE DILUTED IN THE INTEREST OF THE GROUP

328. ***Subtle balance between generic issues (such as liability) and individual issues (such as quantum of the damages)***

The essential questions in relation to a compensation claim are the assessment of whether there is liability and the assessment of the quantum of damages. Again, flexibility must evidently be a part of these decisions. It is clear that those two decisions may be more challenging in collective situations.

The collective exercise of individual actions promotes and at the same time threatens the individual interest; it promotes it because the individual consumer would not be able to initiate a suit alone in such favourable circumstances; it threatens it because the individual consumer loses his ability to personally defend his claim.

Experience has already highlighted that there could be great difficulty in coping with some types of cases, such as where individual issues (causation or damages) vary widely between group members or predominate over a general issue, for example in product liability or over quantification of small individual sums⁵⁴⁰. There is a risk that individual interests would be diluted in the collective interest of the group (or in even in the general interest of society at large) so that individuals would not be adequately compensated. By deciding by way of general issues, there is indeed the concern that certain individual rights would be overridden.

329. ***Relevant questions***

The idea of collective redress proceedings combined with the principle that the outcome is binding on all represented group members does not mean, however, that it is inconceivable that there would be different results for different represented group members; it is certainly not a prerequisite for collective redress litigations that all represented group members receive the same determination.

⁵⁴⁰ C. Hodges, "Collective redress in Europe: the new model", *C.J.Q.* 2010, 29 (3), p. 386.

Judges should be made responsible for ensuring a balance between the individual interests of the consumers and the collective interest of the group. As stated above, when conducting a trial, it should be possible for judges to divide the main group in subgroups in order to deal with more specific issues separately. However, this power is certainly not sufficient to achieve a just and effective outcome.

Where, for instance, a mass tort gives rise to a large number of claims which are factually complex and raises considerable differing issues on causation, it might be better for those claims to be examined in the first instance as a collective redress action on common issues with “decertification” and to be litigated as individual actions in a second phase. In this respect, rather than ruling approximate compensation to be awarded to the represented group members, it should be possible for judges to identify and decide common issues (such as liability) for all the represented group members and determine that individual questions (such as quantum of damages) be dealt with by other judges or by themselves in a second phase.

Furthermore, judges should also have the power to issue a final verdict for certain represented group members and an interim judgement for others (mixed judgement). A judgement could both finally determine the compensation due to certain group members and leave the assessment of the compensation of the others to other judges. In such situation, the outcome for all group members on the common issues will be the same and the ultimate resolution of the individual suits will potentially differ from one group member to another.

Granting judges flexible powers is thus key to ensuring judges’ ability to assess properly the substantive rights of the represented group members and the defendant .

The main questions in deciding which flexible powers should be given to judges at this stage in order that they deliver fair outcomes are:

- Should judges have the possibility to deliver a judgement only on the existence of the liability and/or on other common issues which will constitutes the grounds for individual actions only (interim judgement)?
 - If permitted, should judges transfer the resolution of individual issues to other judges?
- Should judges have the ability to deliver mixed judgements? In other words, should judges have the possibility to make a determination on the common issues for certain represented group members (interim judgement) and to assess the amount of the individual compensation for certain other represented group members (final judgement)?

1.2. CONCERN OF INADEQUATE COMPENSATION TO CONSUMERS

330. *Inadequate compensation to consumers*

In collective redress proceedings, the law of liability, whose initial objective is the reparation of individual loss is put to the test since it has to deal with the calculation and the reparation of mass injury. Judges are thus challenged to devise methods of calculating damage and allocating compensation that are both fair and efficient.

Many see the possibility that the final award will reach extreme limits as a reason not to introduce the concept of collective redress proceedings into European legal systems⁵⁴¹. This concern is supported by the traditional suspicion that collective redress proceedings might lead to highly undesirable adverse effects such as engendering greater payment of compensation by large companies than in individual proceedings and so imposing a high cost on the economy and risking generating unattractive changes in behaviour. Obviously, in litigations where the represented group is very large, the risk of an abusive award may rise significantly. Wide publicity of collective proceedings cases in the media may also encourage the danger of abuse as it is conceivable that judges would be tempted to allocate greater compensation to the victims to satisfy public expectations.

It is not the purpose of this report to enter into the details of the means of quantifying and proving loss in collective redress proceedings. The focus will only be, superficially, on the essential choices judges should make when calculating and allocating compensation: the basis for calculating the compensation (individual or global) and the form of the compensation.

331. *(1) The assessment of the damage*

Broadly speaking, there are three available methods that judges might use to calculate compensation in collective redress proceedings.

(i) The most traditional method requires that judges assess every individual represented group member's loss.

In certain circumstances and depending on the number of the represented group members, this first method may, however, appear impossible, impracticable or prohibitively time-consuming and expensive.

⁵⁴¹ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 308.

The division into subgroups may adequately remedy these difficulties. As stated above, judges should be allowed to categorise group members according to their damage suffered so as to facilitate a judge's determination of the amount due. In this method, judges will assess the damages by category without being required to evaluate each and every individual group member's loss. In this sense, the division of the represented group members into subgroups may lead to the award of appropriate compensation and will encourage the avoidance of time-consuming and expensive procedures.

However, subgrouping is not a satisfactory solution in all circumstances.

(ii) Consequently, judges may be tempted to order global damages sums payable to the group as a whole.

Opt-in systems (where individual claims are usually similar) typically permit global damages when the number of represented group members is known with certainty at the judgement stage. In this method, judges will calculate the damages on the basis of an estimate of the *hypothetical average* represented group member's damages and will then multiply that amount by the total number of represented group members to produce a global lump sum payable to the group. Typically, each represented group member stands to receive an equal per capita share⁵⁴².

This method has been criticised as it may potentially create an unfair windfall for represented group members with below-average claims, while being correspondingly unfair to those with above-average claims.

(iii) Opt-out systems, for their part, typically permit an aggregate assessment of the damage⁵⁴³. Within this method, judges will be able to award damages simply on the evidence of injury to the group, without precise evidence that each putative victim has suffered loss or of how much⁵⁴⁴. This is a means of quantifying and proving loss not by reference to an individual represented group member but by treating the entire represented group as an entity and assessing the global damage suffered by the entire represented group. In that respect, an aggregate assessment can practically occur by either a global or lump sum awarded against the defendant, or it may be achieved by a formula applied on a group-wide basis that determines the entitlements of individual represented group members⁵⁴⁵.

⁵⁴² Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 233.

⁵⁴³ But, *a priori*, no reason seems to justify that opt-in collective redress action could not proceed to assess damages on an aggregate basis in appropriate cases.

⁵⁴⁴ Susan M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A critical Analysis", *C.J.Q.*, 2008, p. 233.

⁵⁴⁵ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 166.

It is said that this method benefits both the defendant and the represented group members. For the defendant, damage aggregation ensures that he has certainty and finality in terms of his liability to all represented group members, especially where represented group members who have not yet joined the beneficiaries have an opportunity to opt in to the award or to a judge-approved settlement. For the represented group members, damage aggregation serves to ensure that the defendant is not left in possession of any financial gain derived from his wrongful conduct⁵⁴⁶.

However, this method has also been criticised as once the aggregate damage is made then it is for the judges to look for a further range of techniques to apportion and distribute such sums among represented group members. This step may present difficulties and be time-consuming (see *infra* – Section Four). It is conceivable that either the judges assess individual represented group members' entitlement to a share of the aggregate sum or the individual represented group members prove their entitlement to a share⁵⁴⁷.

332. ***Relevant questions***

Obviously, the assessment of the damages raises very complex issues. It is, however, not the purpose of this report to study in detail whether the substantive law on damages should be reformed. Thorough research should be conducted on this issue as it may affect both substantive and procedural law.

Of importance is rather to emphasize the need for flexibility. Judges need flexible powers to be able to award appropriate and effective compensation and avoid costly, time-consuming and inefficient individual determinations of damages. Judges should be required to demonstrate particular care when assessing damages to protect the defendant's procedural and substantive rights.

The main questions relating to the flexibility a judge should have in calculating the amount of compensation are:

- Which method of assessment of the damage and calculation of the compensation should be made available for judges?
 - Should judges be given the power to calculate the compensation on an individual, a global or an aggregate basis, whichever contributes best to the fair and the effective compensation of mass injury? In other words, should the method be left to a case-by-case assessment by judges or should a method be imposed?

⁵⁴⁶ Those two arguments may also be formulated for global damages.

⁵⁴⁷ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 166.

- If judges calculate the compensation on an individual basis, should they be allowed to use the intermediary method of subgroups to facilitate the assessment of individual damages?

333.

(2) The form of compensation

Allocating monetary damages is the classic form of compensation. Whether evaluated on an individual, global or aggregate basis, compensation traditionally takes the form of individual monetary awards. As stated above, the amount of the compensation will depend on the method of evaluation chosen.

If judges found their evaluation on an individual basis, the represented group members are, in principle, assured of receiving an award corresponding to the loss suffered. Such a compensatory award may, however, not be expected if judges use the global or the aggregate methods, both of which carry the risk of inequalities among the represented group members and the danger of an abusive award to be borne by the defendant that will affect its procedural and substantive rights.

A further typical concern expressed concerning monetary damages is that collective redress mechanisms will allow civil judges to impose a punishment on a defendant in the form of *punitive damages*. The award of *punitive damages* is the order by which a judge decides that a defendant that is malicious or has wantonly miscondacted himself must pay damages which are separate from and in excess of the compensatory damages awarded. A political consensus has formed that punitive damages (like discovery) are inherent to collective redress actions and that collective redress proceedings without the concept of punitive damages are inconceivable.

The creativity of judges may once again be challenged when it appears that monetary awards are not a fair and efficient mean of compensation. Judges could, for example, order a so-called *cy-près* distribution of damages where it is not possible to determine each and every plaintiff's actual damages. This form of compensation could also be used when the amount of damages to each represented group member is too small to warrant distribution⁵⁴⁸. This concept allows judges in US class actions to order residual damages awards to be put to the next best compensation use, for the aggregate, indirect, or prospective benefit of the represented group, such as a charitable purpose related to the underlying purpose of the litigation that created the award⁵⁴⁹.

⁵⁴⁸ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at : ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 308.

⁵⁴⁹ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at : ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 308.

Relevant questions

- Should the form of compensation be left to a case-by-case assessment by the judges?
 - Should judges be required to establish the precise amounts due in their judgements?
 - Should a *cy-près* power be granted to judges?
 - Are punitive damages inherent to collective redress proceedings?
Should judges be allowed to award punitive damages?

1.3. CONCERN OF EXTENSIVE AND ABUSIVE BINDING EFFECT OF THE JUDGEMENT

335. *Extension of the res iudicata effect of the final judgement*

Given the idea of a collective redress action, the final decision should be binding on all represented group members who have opted in or on all represented group members who have not opted out, depending on the system chosen. Delivering a final verdict thus presents a challenge for judges in collective proceedings as their verdict will impact not only two parties but rather will have irreversible consequences for a large number of persons.

In opt-in proceedings, represented group members are in principle not parties to a collective action other than by representation. Their interests are finally determined by any judgement and they will be bound by any such judgement. Even if each represented group member has actively demonstrated his will to be bound by the final judgement, it may be that the representative does not represent the group adequately. In such a situation, the represented group members could be bound by a judgement which does not adequately fit their interests.

In addition to this issue, in opt-out proceedings, it might be the case that a represented group member will be bound even if he had no knowledge of the existence of the proceedings. It could indeed occur that the means of publicity and notification of the admissibility of the collective redress proceeding were not effective.

What should be considered is whether judges, in certain circumstances, should be required to limit the binding effect of the judgement.

Notice is a critical part of the collective redress proceedings practice. It provides the structural assurance of fairness that permits judges (or representative claimants) to bind absent represented group members. Should the representative claimant win the case, the binding effect of the judgement will only have sense if suitable publicity of the judgement is served upon those who have decided to opt in or to not opt out.

To be effective, a proper notice should at least describe the represented group members with specificity (and, if appropriate, their division in subgroups) to identify those bound by the decision and, if needed, describe the steps that must be taken to establish an individual claim. Individual formal notice may sometime not be reasonably practicable because it may lead to excessive costs, which would be inconsistent with the objective of the collective redress mechanism, i.e., keeping the proceedings within proportionate costs. Other means of notification should be made available: press, leaflets, electronic registers, etc. Judges should be required to direct notice to the represented group members in a reasonable manner.

In collective redress proceedings, if wide publicity is said to benefit the represented group members, it may on the same time signify bad publicity for the defendant. This is why confidential settlements are often preferred.

The publication of the judgement may, and even must, play different roles: catching the attention of the maximum number of represented members to whom the judgement applies (which is especially important in opt-out proceedings), notifying the affected members of their rights, punishing the defendant and preventing further proceedings (the threat of publication of a court decision against a company may indeed have a preventive effect in general).

336. ***Relevant questions***

The main questions in deciding whether and to what extent judges should consider the binding effect of their judgement on the represented group members are:

- Should judges be required to ascertain the relevance of the binding effect for the represented group members and be able to limit it to the single representative claimant if needed? (In opt-in and opt-out systems)
 - If so, should judges be required to ascertain whether the representation of the represented group is adequate when considering the binding effect of the judgement?
 - Should judges have the opportunity to establish *res judicata secundum eventum litis* (or, establish that the decision is binding only if it benefits but not if it is prejudicial to those not appearing in court)?
 - In the case of a positive answer, should the decision of a judge be dependent on any additional particular circumstances?
- In opt-out systems, should a judge be allowed to enable a represented party to opt out of a judgement if, for instance, it could demonstrate that it could not reasonably have been made aware of the existence of the decision admitting the collective proceedings?
- Should judges decide or at least regulate the way the judgements are notified to the represented group members?
 - Should this regulation by judges differ in the case of opt-out proceedings?

2. THE FINANCIAL ASPECTS AND COSTS ASSESSMENT

2.1. CONCERN OF CAPTURE OF THE LITIGATION BY INTERMEDIARIES

337. ***High litigation costs: a disincentive for claimants to access justice, an incentive for defendants to settle***

The question of costs in collective redress proceedings raises crucial challenges for judges. If collective redress actions shall aim at providing cost-effective means of legal redress to represented group members, the idea that claims collectively dealt with in a single action should necessarily be cheaper than each claimant bringing his individual claim is not self-evident.

Indeed, within the collective redress litigation context, the danger of escalating, disproportionate legal costs is unusually high due to a combination of factors – including a lack of monitoring of lawyer-led collective redress actions by claimants, the extra costs of group management (the complexity of the collective litigation may, for example, generate escalating use of experts) and additional administration time required. Collective redress proceedings may involve costs which do not normally arise in individual litigation, such as co-ordinating and communicating within the group and liaising with the media in what are often high profile cases. The experience of the US supports the concern that collective redress proceedings may result in very high legal costs for the parties, irrespective of whether they were decided through court process or were settled. Experience from the US class action demonstrates that parties and judges are frequently unable to deliver a result in which costs are proportionate⁵⁵⁰.

Such procedural costs and the means of recovery thereof, can affect both the defendant and the representative group members and their representatives. To save high litigation costs, it can be cheaper for the defendant to settle cases irrespective of the merits. The pressure on defendants to settle will increase if the amounts of costs at stake are high (see *supra* –Section One, Admissibility stage). High litigation costs can also be an important disincentive for potential claimants to initiate a collective redress action. Individual resources and legal aid may have limitations in collective redress actions.

The issue of the barrier to accessing justice has traditionally been resolved for the US class action by the creation of funding mechanisms which include, *inter alia*, agreements with lawyers and third-party financiers, including hedge funds and publicly-traded litigation investment firms.

Those well-implemented mechanisms in the US cause strong concern within the European Union. The general suspicion is that they will lead to the emergence of a litigation industry in the form of

⁵⁵⁰ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p .150.

entrepreneurial claimants who will trigger and control the collective proceedings⁵⁵¹. Opportunities for self-interested behaviours are generally greater in collective redress litigation than in individual litigation. This can derive from the reasons which make collective actions attractive in the first place – the possible ignorance of potential claimants, and that they are disorganised and possibly also dispersed (absence of client control)⁵⁵². Conflicts of interest are a risk associated with increased access to justice, especially for claims which are not independently economically viable.

There are essentially two main aspects to funding: the claimant must first have sufficient resources to finance the bringing of his claim (court fees and, possibly, intermediaries' fees) and secondly the claimant must have sufficient funds to cover the risk of having to reimburse the costs of the opponent if he loses the case (*loser pays* rule. See *infra* –2.2.). Both aspects may obviously be amplified in collective redress proceedings which are, by their very nature, lengthy and complex.

It is however not the purpose of this report to assess the need for funding, nor to evaluate the most suitable method of funding. Of importance is rather to analyse how judges should supervise the role third-party funders would play in collective redress litigations, should funding by third-party investors or by lawyers be allowed.

338. ***(1) Abuses encouraged by third- party investors***

Schematically, the essential point is that third-party investors are willing to fund litigation to advance their interests in a speculative investment. Of course, their involvement will be based on an inherent need to invest only in good risks. Third-party funders will certainly undertake a reliable risk assessment before funding a claim and hence should identify good cases and filter out bad risks⁵⁵³.

Although third-party investors will promote access to justice (a “no win no fee” arrangement clearly facilitates claims) for good cases, the involvement of third-party investors will also present the disadvantage of introducing extra layers of cost. The third-party investors will seek a return on their investment in exchange for assuming the transactional funding and costs risk⁵⁵⁴. Their fees are traditionally not recoverable under civil law tariff systems, so are deducted from damages.

The risk here is that third-party investors will wish to take control of proceedings where a lot of money is at stake, and this is the outstanding issue. They will dictate outcomes based on their own

⁵⁵¹ In this sense, see Dimitrios-Panagiotis L. Tzakas, “Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?”, *Common Market Law Review* 48, 2011, p. 1147.

⁵⁵² Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, Chapter 17, paras 71-72.

⁵⁵³ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 153.

⁵⁵⁴ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 153.

commercial interests rather than promote the interest of the claimant and will demand excessive costs. There is also a risk regarding defendants. It is indeed possible that third-party investors will encourage persons to sue who would not otherwise have done so. Third-party investors may even promote unmeritorious claims with the conviction that the defendants will settle, so hoping to obtain large gains. Settlements are the best outcome for third-party investors. Often, they will be reached early in the proceedings so that third-party investors do not need to advance the litigation costs.

339. ***Relevant questions***

The third-party investors' motive of profiting from litigation by naïve claimants, the fact that third parties have sought out and encouraged ignorant persons to sue who would not otherwise have done so, the large gains hoped for by the third-party investor and the third-party's control of the litigation thus support the suspicion that such a system of funding may bring with it abuses.

Judicial controls are clearly needed so that funding would not be likely to affect the outcomes of the judgement or to raise ethical concerns. Important features that may influence large private intermediaries' costs may indeed be whether there are effective controls, such as control by judges who would impose proportionality requirements.

The main questions in deciding to what extent and how third-party funding arrangements should be regulated by judges, if permitted, are:

- Should judges be required to exercise specific control of third-party funder arrangements in collective redress proceedings?
 - At which stage of the collective redress proceeding should judges be required to exercise such a control?
 - Should judges verify whether funding arrangements are fair and comply with legal requirements?
 - Should judges be required to approve funding arrangements to make them enforceable?

(2) The danger of entrepreneurial lawyering

Lawyers funding arrangements pose the same issues as those raised by third-party investor arrangements. But unlike the use of third-party investor arrangement, these may potentially impose additional financial burdens upon opposing parties.

Funding by lawyers often – if not always - involves *contingency fees* and/or *conditional fees* agreements.

These both rely on the *no win no fee* principle. Payment to the lawyer is only due if proceedings are successful. If parties conclude a *contingency fees* agreement they may provide that fees due to the lawyer are calculated in function of the size of the award (percentage-based contingency fees). In contrast, with *conditional fees* agreements, the parties may decide that fees due to the funder are not calculated in function of the size of the award.

There is a strong cultural resistance in many European legal systems to fees in which a lawyer can be paid a percentage of the money recovered (*pacta de quota litis*). It is clear that any mechanism for rewarding lawyers through contingency fees or conditional fees will affect their financial incentives to seek work. Once again, the purpose of this report is not to resolve the question that arises for Europe out of the forgoing analyse in deciding whether or not such agreements should be allowed. What is considered is whether, to what extent and how judges should regulate them, if they are permitted.

As for private investors, the risk-shifting system puts a lawyer's capital at risk. Consequently, lawyers will likely use their superior legal knowledge to protect their economic interests by only bringing meritorious claims. A lawyer's significant legal knowledge may justify their being best suited to assess the likelihood of a particular claim prevailing.

As for third-party investors, permitting the use of liberal funding rules increases the types of litigation funding available to claimants, which should thereby increase access to justice even for very small claims. However, at the same time it increases the risk of capture by intermediaries and can lead to excesses. Lawyers' funding arrangements open access to justice not only to meritorious claims, they also open the way to potential conflicts between the interests of the lawyer and those of the represented group members.

The phenomenon of *entrepreneurial lawyering* may arise where clients cannot properly monitor their legal representatives, leaving lawyers free to operate opportunistically according to their own self-interest. The risk is indeed that lawyers will regard litigation as a business investment run solely for their own profit. If mechanisms for rewarding lawyers through *contingency fees* are allowed, it is predictable that lawyers will behave in normal ways in a capitalist economy, seeking

to maximize their income⁵⁵⁵. It is not difficult to see arguments by lawyers that they deserve significant remuneration for work on large and complex cases. Collective redress litigation may potentially be big business for them. The European concern is that this market may be in the process of significantly increasing and is insufficiently regulated⁵⁵⁶.

When their fees are directly calculated as a fraction of the final monetary outcome, it is possible that lawyers will encourage *offensive litigations* to try to get the highest amount of liquidated damages. Particular examples include bringing claims known to be unfounded for purposes of harassment and genuine but limited value claims, knowing in both cases that defendants will feel impelled to settle on terms advantageous to the lawyer though possibly of little benefit to the group members.

341. ***Relevant questions***

If, where no other form of funding is available, regulated contingency fees are permitted in order to provide access to justice, it is clear that contingency fees should be subject to proper judicial control. Indeed, if contingency fees are permitted, judges should have to exercise very close control over the arrangements for those fees and the amount of recovery.

Although it is clear that any mechanism for rewarding lawyers through conditional or contingency fees agreements will affect the financial incentive of lawyers to seek work, this does not mean, however, that judges should not have powers to regulate excessively high fees. Granting a judge power to regulate lawyers' fees may be likely to act as a strong incentive to proper and reasonable behaviour on the part of the lawyers.

The main question in relation to deciding what judicial control should be imposed on the financial incentives for the representative lawyers in order to try to create a balance between providing sufficient stimulus for bringing group proceedings, on the one hand, and eliminating or at least minimizing possible abuse of such proceedings for unfair profit purposes, on the other hand, are:

- Are collective redress proceedings viable without contingency fees agreements?
- Should judges be required to exercise specific control of lawyers' fees arrangements in collective redress proceedings?
 - How should judges control and limit to an acceptable level the risk of abusive lawyers' fees arrangements?

⁵⁵⁵ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 148.

⁵⁵⁶ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 149.

- At which stage of the collective redress proceedings should judges be required to exercise such a control?

- Should judges be required to approve lawyers' fees arrangements in order for them to be enforceable?

2.2. EXCESSIVE LITIGATION COSTS CONCERN

342. Whether funded or not, experience from US class actions demonstrates clearly that the risk of disproportionate and even abusive litigation costs is increased in collective redress proceedings which involve multiple claims (on the costs management during the proceeding, see *infra*- Section Two).

One should, however, be careful before assuming that European legal systems need to implement US-specific features in order to see an increase in the litigation costs in collective redress proceedings. The risk of excessive litigation costs is, in fact, a very complex issue which depends not only on the implementation of US features but on multiple inter-related factors. It is not the purpose of this report to analyse how combined financial incentives may affect the costs of the proceedings. What should rather be considered is the extent to which decisions that are made by judges may influence the costs of the case which are ultimately paid by the parties.

It is thus important to analyse the need for specific judicial powers concerning litigation costs of collective redress proceedings, compared to general rules of civil procedure. In collective redress proceedings, judges may face the following difficulties: the application or not of the *loser pays* principle and the consideration of costs sharing among the represented group members.

343. ***(1) Concern that absence of costs shifting encourages weak cases and so-called blackmail litigation***

There are traditionally two main justifications for a *loser pays* rule: firstly, it accords with the normal corrective justice principle (that the person who causes damage should pay for it) and secondly, it encourages proportionality between the costs and the benefits of claims and so discourages claims that have insufficient merits and ensures a sanction against non-meritorious litigations.

Remarkably, in the US a claimant has no financial outlay or risk of liability for costs if its case is lost. Indeed in the US system, contingency fees enable the lawyer to finance a claim at no cost to the claimant, and the claimant has no risk because of the absence of a *loser pays* rule⁵⁵⁷. This is a typical difference with the European systems which strongly adhere to the *loser pays* principle.

There have traditionally been strong critics of the US system that claim absence of (or very limited) costs shifting encourages weak cases and so-called blackmail settlements. On their side, supporters argue that this system places the responsibility for the clear assessment of the risks and

⁵⁵⁷ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 151.

merits of the case onto the lawyers bringing them⁵⁵⁸. Amelioration of costs shifting raises issues of unfairness to defendants and the risks of unmeritorious settlements, as one of the results of cost-shifting is weeding out unmeritorious claims. However, claimants individually may be of modest means so that costs shifting can reduce access to justice. The existence of this principle necessarily involves difficulties over funding some cases, such as those that present high costs and risks.

344. ***Relevant questions***

If the *loser pays* rule should remain the principle, it might be that judges make some adjustments and so, for example, decide which costs are to be paid by the losing party and determine the amount of those costs. Indeed, sometimes, where the successful party has conducted the proceeding negligently, incurring disproportionate costs for instance, judges should assess the costs in a less generous manner because the costs claimed must be proportionate overall. Such adjustments, however, do not seem to be required specifically by the nature of collective redress proceedings.

The main question in deciding whether judges should be able to order adjustments (or even exceptions) to the *loser pays* principle in collective redress proceedings is:

- Should judges be allowed to derogate the *loser pays* principle in collective redress proceedings?
 - If so, should the law rigorously circumscribe those exceptions or should they be left to case-by-case assessment by judges, possibly within the framework of a general provision⁵⁵⁹?

⁵⁵⁸ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 175.

⁵⁵⁹ Both questions were inspired by the Commission staff working document public consultation (*Towards a Coherent European Approach to Collective Redress*).

345. ***(2) Costs sharing among the represented group members***

Collective actions offer the considerable advantage for claimants that by joining the group they are able to share the financial costs and risks⁵⁶⁰. Forms of cost sharing may be left to private agreements between the members of the group but this may be dangerous. Financial arrangements in a group setting may be complex and can lead to significant problems. Potential problems areas include situations where the group wins but there is a shortfall of costs recovered from the losing defendants, the group loses or where group members vary in their success or failure.

Another issue may be whether the representative claimant should bear the litigation entirely in certain circumstances.

346. ***Relevant questions***

There is thus a clear need for safeguards to be built into this area.

The main questions in deciding whether and how judges should control the sharing of costs among represented group members are:

- Should judges supervise cost sharing arrangements among group members?
 - When should judges exercise this supervision?
 - Should judges have the power, in certain circumstances, to order that only the representative claimant (represented group members excluded) must bear the litigation costs?

⁵⁶⁰ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 60.

B. COMPARATIVE ANALYSIS

1. ROLE OF THE JUDGES IN DECIDING THE TERMS OF THE FINAL VERDICT

1.1. CHOOSING BETWEEN A FINAL AND/OR AN INTERIM JUDGEMENT

- Do the selected Member States allow judges to deliver a judgement on the existence of the liability and/or on other common issues which only constitute the grounds for individual actions? **((1) Interim judgement)**
 - If permitted, do judges transfer the resolution of individual issues to other judges?
- Do the selected Member States allow judges to make a determination on the common issues for certain represented group members (interim judgement) and to assess the amount of the individual compensation for certain other represented group members (final judgement)? **((2) Mixed judgement)**

(1) INTERIM JUDGEMENT

NO POSSIBILITY OF INTERIM JUDGEMENTS

347. *In Italy, Portugal and Spain, the specific rules do not set out exactly the ability of judges to deliver interim judgements.*

In **Italy**⁵⁶¹ and **Spain**, it appears, however, that this power cannot exist as the specific rules require that judges at least set down in their judgements the criteria for calculating the individual compensation and for benefiting from it.

In Italy, judges may either: quantify the damages due to each member of the represented group with an equitable decision; or establish in their decision uniform criteria based on which damages suffered by the members of the represented group shall be quantified⁵⁶². Should no agreement be

⁵⁶¹ Information supplied by professor Benacchio.

⁵⁶² Article 140-bis, § 12 of the Consumer Code.

reached between the losing defendant and single members of the represented group, it is not clear whether the latter has to bring a further, individual claim to quantify the loss, or whether the amount of loss may be directly determined in the enforcement phase, based on the abovementioned criteria⁵⁶³.

POSSIBILITY TO POSTPONE THE CONSIDERATION OF PARTICULAR ISSUES

348. ***In England & Wales (under the Draft) and Sweden, judges may hand down judgments on the common issues and postpone the consideration of particular issues.***

In **England & Wales** (under the **Draft for a Collective Proceeding Act**⁵⁶⁴) and in **Sweden**⁵⁶⁵, in determining a matter in collective redress proceedings, judges may hand down a decision on fundamental questions binding on all represented group members and adjourn the discussion on particular questions (for more details –see *infra*, (2) Mixed judgements).

POSSIBILITY TO DELIVER AN INTERIM JUDGEMENT

349. ***In England & Wales (including under the Draft), judges may deliver interim judgments on common issues. Individual issues will be dealt with by other judges.***

In **England & Wales**, judges have the possibility to give a formal judgement at the conclusion of the action, either making a determination as to liability or as to an assessment of the amount award or both⁵⁶⁶. Judges may hence give judgment at the conclusion of the action making a determination exclusively as to liability (or other common issues) and directing the individual issues to be tried at other courts whose location is convenient for the parties⁵⁶⁷.

Gerona Air Crash Group Litigation⁵⁶⁸ - Judgement on liability

The *Gerona Air Crash Group Litigation* is a GLO procedure that was pursued by passengers involved in the Gerona air crash of September 1999. The passengers were successful in establishing that a tour operator (as distinct from an air carrier) can be liable for psychiatric injuries caused to passengers involved in air accidents, thus avoiding the obstacle that is article 17 of the Warsaw Convention.

⁵⁶³ Information supplied by Andrea Giussani.

⁵⁶⁴ Article 19.34 (1) (b) Draft Collective Proceedings Act.

⁵⁶⁵ Section 27 GrL

⁵⁶⁶ CPR Practice Direction 19B, 15.1.

⁵⁶⁷ Information supplied by Robert Turner; Practice Direction 19B, 15.1.

⁵⁶⁸ *Akehurst & Others –v- Thomson Holidays Ltd and Britannia Airways Ltd*, Unreported, Cardiff County Court, 6th May 2003 and 25th November 2003, CF103949 & CF106685.

The judge thus established the liability of the tour operator for damages for psychological injuries, while the issue of quantum was subsequently mediated on a confidential basis.

The **Draft for a Collective Proceedings Act** also allows judges to deliver judgements exclusively on common issues of law or fact⁵⁶⁹. Judges are not *per se* obliged to give judgment on a specified sum payable to represented group members.

Importantly, the Draft for a Collective Proceedings Act sets out the content of a notice of determination of common issues to represented group members. If common issues are determined in the judgement, the notice should identify the common issues that have been determined and explain the determinations made. Furthermore, if common issues have been determined in favour of the represented group members, the notice should state that represented group members may be entitled to individual remedies and should describe the steps that must be taken to establish an individual claim and give an address to which represented group members may direct inquiries about the proceedings and state that failure on the part of a represented group member to take those steps will result in the member not being entitled to bring an individual claim except with the permission of the judges. Judges may, however, derogate from these requirements and also give any other information that they consider appropriate⁵⁷⁰.

OBLIGATION TO DELIVER AN INTERIM JUDGEMENT

350. ***In Germany, the nature itself of the mechanism requires that the higher judges deliver interim judgements.***

In **Germany**, the idea of model case proceedings is to decide the common factual and legal questions of similar legal actions only once by deciding on one case (the model case), which serves as a basis for the individual actions of the interested summoned parties.

In Germany, the higher judges cannot decide on compensation. This is the function of the first instance judges. The higher judges only decide upon those facts and legal questions of the model case that are relevant for all plaintiffs, i.e. mainly whether the information was wrong at all and whether it has influenced the share price⁵⁷¹. Claims for compensation may only be investigated on a case-by-case basis, but not in the model case as the causation between the wrong information

⁵⁶⁹ Article 19.34 (1) (a) Draft Collective Proceedings Act.

⁵⁷⁰ Article 19.36 Draft Collective Proceedings Act.

⁵⁷¹ E. Feess & A. Halfmeier, “The German Capital Markets Model Case Act (KapMuG) – a European role model for increasing the efficiency of capital markets? Analysis and suggestions for reform”, February 2010, available at SSRN: <http://ssrn.com/abstract=1684528>, p. 14.

and the investment decision concerns the motivation of individual plaintiffs⁵⁷². In the Telekom case, for instance, should the higher judge come to the conclusion that Telekom is responsible, each of the 17 000 procedures at the first instance courts will have to decide on the amount of the individual damages, which will again take years.

KAP 1/07 Film & Entertainment VIP Medienfonds 4 GmbH & Co. KG⁵⁷³ - Ruling on liability but not on the individual damages

In this model procedure, the higher judge of Munich established in favour of numerous investors that the prospectus for the Medienfonds VIP 4 was partly incorrect, incomplete and misleading and that the UniCreditbank as well as the initiator of the Fonds are liable for this.

On 26 March 2004, VIP Vermögensberatung München GmbH (*financial advice company Munich*) published a prospectus for an investment in the Film & Entertainment VIP Medienfonds 4 GmbH & Co. KG, which illustrated details of the capital investment for potential investors in the Funds and which was *de facto* used at the time of attracting investors. The Higher Regional Court established, after examining the evidence, that the prospectus was so incorrect, incomplete and misleading that the fiscal recognition risk, the risk of loss and the projected return were presented in a faulty manner. Moreover the Higher Regional Court decided that the Funds' initiator and the UniCredit Bank AG, which was formerly the Bayrische Hypo- und Vereinsbank AG, were responsible for having acted culpably and that the investors therefore *may* have a claim for damages.

The questions raised in this model case decision are therefore binding on all lawsuits concerning the Medienfonds VIP 4 lawsuits pending at German Courts, as long as they are based on prospectus liability.

⁵⁷² E. Feess & A. Halfmeier, "The German Capital Markets Model Case Act (KapMuG) – a European role model for increasing the efficiency of capital markets? Analysis and suggestions for reform", February 2010, available at SSRN: <http://ssrn.com/abstract=1684528>, p. 14.

⁵⁷³ KAP 1/07 Film & Entertainment VIP Medienfonds 4 GmbH & Co. KG, OLG München 30.12.2011, KAP 1/07; Summary translated from the website: <http://www.juris.de/jportal/portal/t/0000/page/homerl.psm1?nid=jnachr-JUNA120100055&cmsuri=%2Fjuris%2Fde%2Fnachrichten%2Fzeigenachricht.jsp>.

(2) MIXED JUDGEMENT

NO POSSIBILITY OF MIXED JUDGEMENTS

351. *In Germany, Italy and Portugal, it is not possible for judges to deliver a decision which for certain represented group members is a final decision and for other members is an interim judgement.*

In **Germany, Italy and Portugal**, all the represented group members are bound by the same judgement. The decision of the judges has the same effect for each represented group member. The judgement may not be a final decision for some group members and an interim decision for others.

POSSIBILITY OF MIXED JUDGEMENTS

352. *In Spain, judges may deliver a judgement which may have different effects on the represented group members, depending on whether they were participating parties in the proceeding or not.*

In **Spain**, the principle is that when judges order a defendant to pay compensation, they will determine who the affected consumers are who will benefit from the individual compensation payments⁵⁷⁴. If this is not possible, judges are not required to include in their judgment a specific amount that the defendant will have to pay as compensation but they must merely *specify the details, characteristics and requirements necessary to demand payment*⁵⁷⁵.

Participating in the collective redress proceedings represents several advantages for affected consumers in Spain.

The participation offers, *inter alia*, the advantage for the affected consumers that they will be designated in their own names as beneficiaries of the judgement⁵⁷⁶. Consequently, the participating parties – as the identifiable parties – will have necessary title to seek the enforcement of the judgement for their own benefit without first having to ask the enforcement court to render an order determining whether they may benefit from the award according to Article 519 of the LEC.

Another advantage is the possibility for the participating parties to benefit from a judgement which addresses their request specifically (the amount of the damages due will expressly be

⁵⁷⁴ Article 221, 1, al.1 LEC.

⁵⁷⁵ Article 221, 1, al. 2 LEC.

⁵⁷⁶ Article 221.1.1, al.1 LEC.

announced)⁵⁷⁷. This advantage is to be compared with the situation of the other represented group members.

If the arguments and evidence provided by the representative claimant allow the determination of the quantum of the damages, or at least lead to the establishment of a formula which may be used to quantify the damage, the absent represented group members will be in the same boat as the participating parties (the judgement will address their request specifically).

If, on the contrary, the amount of the compensation cannot be quantified on the basis of the elements provided by the representative claimant and the grounds of calculations cannot be established, a second trial will be necessary in order to determine the amount of compensation⁵⁷⁸. In such a case, judges may thus deliver a judgement which is definitive for the participating parties and which is a basis for a second trial for the other represented group members.

Decision of the Audiencia Provincial (Second Instance Court) of Madrid⁵⁷⁹ - Distinction between participating parties and absent affected consumers

This case concerned companies which rendered services by means of telephone lines with the code 903 or 906 provided by telephone companies. The price of the service depended on both the price of the call to these lines, which is higher than the price for ordinary lines, and the duration of the call. Part of the price belonged to the company that rendered the service and the other part belonged to the telephone company. Consumers did not have any relation with the company that rendered the service. In this case, some services were rendered by means of the 906 code, despite the fact that they referred to services that should have been rendered by means of the 903 code.

A consumer organisation and a group of consumers claimed, *inter alia*, on the grounds of the illegality of the services.

In this case, the judge ruled that the defendants are responsible for the services because they can control access to them and they enter into contracts with consumers, which creates the false belief that the company which bills the telephone invoices is the company which also renders the service. The judge stated the illegality of the services rendered by means of the 906 code and that consumers were misled at the moment of entering into the contracts⁵⁸⁰.

In this case, the judge distinguished the participating parties from the other absent affected consumers.

Concerning the intervening parties, the judge resolved their requests definitively by stating the following:

⁵⁷⁷ Article 221.1.3 LEC.

⁵⁷⁸ Article 219 LEC.

⁵⁷⁹ *Decision of the Audiencia Provincial (Second Instance Court) of Madrid (Section 19)*, num. 177/2005, 14.4.2005 (Westlaw Aranzadi Reference: AC 2005\823).

⁵⁸⁰ Summary based on the information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Spain), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 138.

€32.11 (Iván), €176.84 (José Augusto), €91.55 (Juan Ignacio), €159.80 (Gerardo), €201.70 (Octavio), €2 390.06 (Pedro Jesús), €103.28 (Emilio), €373.16 (Leonardo), €652.21 (Marisol), €35.48 (José Francisco), €796.70 (Juan Pedro), €1 533.08 (Claudio), €326.55 (Imanol), €1.42 (Gustavo), €278.32 (Regina), €47.26 (Vicente), €0.47 (Begoña), €2 931.47 (Marta), €743.61 (Carlos Miguel), €66.36 (José Antonio), €866.72 (Miguel Ángel), €244.19 (Rodrigo), €25.60 (Donato), €121.67 (Pablo), €126.43 (Luis Manuel), €737.54 (Millán), €48.41 (Luis Pablo), €397.06 (Juan Carlos), €1 337.80 (Amanda), €3 671.22 (Lucio), €329.84 (Estibaliz), €2 311.01 (Luis Enrique), €196.78 (Carlos Ramón), €262.44 (Luis Manuel).

Concerning the absent affected consumers, the judge ordered the defendants to pay them damages provided they showed that they carried out calls with the 906 code for services that should have been rendered by means of the 903 code. The judge thus postponed quantification of their damages to a second trial.

353.

In England & Wales (under the Draft) and Sweden, judges are allowed to deliver a mixed judgement.

In **England & Wales**, the Draft for a Collective Proceedings Act grants flexible powers to judges when determining a matter in collective redress proceedings⁵⁸¹. Judges may, for example, give judgment in a specified sum payable to certain represented group members⁵⁸² and by the same judgement determine that there are issues that are applicable only to certain individual group members, and order that the individual questions be determined in further hearings⁵⁸³.

As in Sweden, judges may thus postpone the consideration of certain individual claims. The organisation of those further hearings is the responsibility of the judges⁵⁸⁴. The time within which the individual represented group members may lodge claims in respect of the individual issues shall be set by the judges⁵⁸⁵.

If a member of the group does not submit such a request within the fixed time limit, the judges may not permit a later individual action, unless *the delay was not caused by any fault of that person and the defendant would not suffer substantial prejudice if permission were granted*⁵⁸⁶.

In **Sweden**, in their judgement, judges are required to specify the members of the represented group to which the judgment refers⁵⁸⁷.

The explanation for this requirement is that, as stated above, the GrL offers judges the possibility to deal with particular issues which exist among some of the group, if that is appropriate, and order

⁵⁸¹ Article 19.34 Draft Collective Proceedings Act.

⁵⁸² Article 19.34 (1) (c) Draft Collective Proceedings Act.

⁵⁸³ Article 19.37 (1) Draft Collective Proceedings Act.

⁵⁸⁴ Article 19.37 (2) Draft Collective Proceedings Act.

⁵⁸⁵ Article 19.37 (3) Draft Collective Proceedings Act.

⁵⁸⁶ Article 19.37 (4) Draft Collective Proceedings Act.

⁵⁸⁷ Section 28 GrL.

sub-judgments, which are partial judgments on questions on the interests of only some group members⁵⁸⁸. Judges may thus deliver a decision which, for certain represented group members, is a final decision on fundamental questions, and for other represented group members, signifies that discussion on a particular question has been adjourned. Judges may only use this power *if it is appropriate, taking into consideration the investigation and that can be done without significant inconvenience for the defendant*⁵⁸⁹. As under the Draft for a Collective Redress Proceedings Act, judges must order each represented group member whose case has not received a final decision to request, before a set deadline, that the pending question be examined⁵⁹⁰. If a member of the represented group does not submit such a request, the judges shall reject the individual action, *unless the defendant has consented to the request or it is manifest that the action is founded*⁵⁹¹.

⁵⁸⁸ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 287.

⁵⁸⁹ Section 27, first paragraph, GrL.

⁵⁹⁰ Section 27, second paragraph, GrL.

⁵⁹¹ Section 27, second paragraph, third sentence, GrL.

1.2. ASSESSING THE DAMAGE, CALCULATING AND CHOOSING THE FORM OF COMPENSATION⁵⁹²

- Do the specific national rules allow judges to use the global or the aggregate method to assess damages in collective redress proceedings? Do the selected Member States adapt their substantive rules on causation in tort law and calculation of damages to the assessment of mass injury? **((1) Assessment of the damage)**
 - Do the national specific rules impose an assessment method or is the issue left to a case-by-case assessment by the judges?
 - Do the selected Member States allow judges to use the method of subgroups to facilitate the assessment of individual damages?
- Do the selected Member States leave the choice of the form of compensation to a case-by-case assessment by the judges? Do the selected Member States adapt their substantive rules on the form of compensation to the reparation of mass injury? **((2) Form of compensation)**
- In cases where monetary compensation is awarded, do the selected Member States distinguish between judgments establishing the precise amounts due and judgments in which the amounts due are not established? **((2) (i) Terms of compensation)**
- Do the selected Member States reserve different effects to those two types of judgements? Could they both be used as a basis for enforcement? If not, what should be done to enforce the decision? **(On this question, see *infra*- Section Four, Execution of the judgement)**
- In the selected Member States where punitive damages are generally prohibited, are judges exceptionally allowed to award such damages in collective redress proceedings? **((2) (ii) Punitive damages)**
- Do the selected Member States grant judges a *cy-près* power in collective redress proceedings? **((2) (iii) *Cy-près* award)**

⁵⁹² Care must be taken in the use of this §. Such analysis requires more thorough research.

This § does not cover the analysis of the German mechanism as individual compensation is a matter for the first instance judges and is not regulated by the KapMuG.

(1) ASSESSMENT OF THE DAMAGE

NO ADAPTATION – INDIVIDUAL ASSESSMENT OF THE DAMAGE

354. ***In England & Wales, Spain and Sweden, judges are mandatorily required to assess the damage on an individual basis. Global or/and aggregate methods are not envisaged in the specific rules.***

In **England & Wales**⁵⁹³, **Spain**⁵⁹⁴ and **Sweden**⁵⁹⁵, it seems that judges can award only individual compensation to each represented group member, in accordance with his individual loss or damage. The general procedure envisages damages being paid to individual claimants and the rules do not introduce any other method of quantifying the compensation due. Compensation will thus be awarded on the basis of individual loss/individual claims.

Decision of the Audiencia Provincial (Second Instance Court) of Asturias⁵⁹⁶ - Individual assessment of the damage suffered

This case is an example of one in which the judge assessed separately the individual damage of each affected consumer:

€3,568.05 (Miguel), €90.06 (Carmen), €225.14 (Cristóbal), €540.28 (Diana), €135.08 (Elena), €135.08 (Luis Alberto), €112.57 (Estela), €90.06 (Lorenzo), €90.06 (Benito), €83.61 (José Ramón), €112.57 (Natalia), €135.08 (Remedios), €90.06 (Javier), €135.08 (Antonia), €67.54 (Erica), €135.08 (Inés), €135.08 (Maite), €135.08 (Sergio), €125.42 (Ramón), €192.96 (Manuel), €83.61 (María Virtudes), €135.08 (Flor).

This case concerned food poisoning suffered by 29 people at a wedding reception. The Second Instance Court confirmed the first instance decision and increased the award granted to one of the consumers (Miguel). All consumers affected by the food poisoning had attended the wedding reception and the symptoms appeared the following days. The defendant did not show that the hygiene and health conditions of the products served during the reception were appropriate. The inspection services showed that these conditions were not appropriate. Consequently, the second

⁵⁹³ Information supplied by Graham Jones.

⁵⁹⁴ L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12, p. 229.

⁵⁹⁵ Information supplied by Laura Ervo.

⁵⁹⁶ *Decision of the Audiencia Provincial (Second Instance Court) of Asturias*, num. 453/2004, 14.10.2004 (Westlaw Aranzadi Reference: AC 2004\2040).

instance court decided to award individual compensation for physical injuries⁵⁹⁷.

355. ***In England & Wales, Spain and Sweden, judges may use the technique of subgroups to facilitate the assessment of the damage.***

In **Spain**, for example, in cases where the number of affected consumers is very high, a judge may use (and has used this power frequently) the technique of subgroups to determine the amounts due to each represented group member.

Colza Oil Case⁵⁹⁸ – Subgroups

In this case, a national association of consumers appeared before the criminal court⁵⁹⁹ and stood for each and all of the more than 20 000 people who had been officially listed as affected by colza oil adulteration.

The facts were the following. The administrative authorities authorised imports into Spain of colza oil. In order to protect national production of edible oils and fat, it was stipulated that the colza oil could not be used for human nourishment, but only for industrial activities that, eventually, turned out to be almost exclusively in iron and steel works. With the objective of ensuring that the oil would not be used for human consumption once in Spain, it was ordered that the imported oil had to be denatured from its organoleptic character by being treated with certain authorised products, one of which was a potentially dangerous product, aniline. However, some of the oil was in fact used for human consumption by some importers. Consumers were poisoned (suffering what was called “toxic syndrome”), their health was seriously affected, and some died.

A Supreme Court judgement in 1992⁶⁰⁰ had carefully determined the causal relationship between the consumption of the colza oil and the reported injuries, and established the criminal liability of some of the oil distributors. In addition, the representative of the national consumer association, standing procedurally for all those who had been affected, asked for the compensation of all damage caused by the criminal action, and successfully demanded a declaration of the subsidiary civil liability of the Spanish state. The affected consumers who were represented by the

⁵⁹⁷ Summary based on the information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases, Spain), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp .106-109.

⁵⁹⁸ Supreme Court, 26 September 1997.

⁵⁹⁹ *In Spain, criminal courts are given general competence to order a person convicted of an offence to pay compensation for any personal injury, loss or damage that results from the offence. This procedure is widely used, including in situations involving loss to multiple persons* (C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 41).

⁶⁰⁰ 23 April 1992 - RJ 6783.

association had previously been officially identified and listed by the central government's forensic services.

To assess the extent of the damage and to determine the amounts of compensation due, the judge divided the group in subgroups according, *inter alia*, to the following categories: the heirs of the deceased, the affected consumers who had suffered damage for 1 to 15 days (150 000 pesetas), affected consumers who had suffered damage for 16 to 30 days (300 000 pesetas), and so on.

The criminal court awarded compensation to victims totalling €3 000 million⁶⁰¹.

LITTLE ADAPTATION – GLOBAL ASSESSMENT OF THE DAMAGE

356. ***In Italy, specific rules permit a global (equitable) assessment of damages by the judges.***

In **Italy**, according to the specific rules on collective redress proceedings, a full assessment of circumstances in each single case is not needed⁶⁰². Consequently, judges are allowed to determine damages on an equitable basis even if their determination on a strictly legal basis is not impossible or excessively burdensome: hence the burden of proof of their amount is *de facto* slightly mitigated⁶⁰³.

ADAPTATION – AGGREGATE ASSESSMENT OF THE DAMAGE – (OPT-OUT SYSTEM)

357. ***In England & Wales (under the Draft) and Portugal, specific rules permit an aggregate assessment of damages by the judges.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, judges have the power to make an aggregate assessment of the damages, provided that (i) some or all represented group members make monetary claims; and (ii) the aggregate or part of the defendant's liability to some or all represented group members can be determined by a reasonably accurate assessment and without proof by individual class members⁶⁰⁴. Judges must, however, take care in the use of such a method of damage assessment to protect the defendant's procedural and substantive rights and so must provide the defendant with an opportunity to make submissions in respect of any matter relating to a proposed aggregate award, including the following: (i) *contesting the merits or*

⁶⁰¹ Summary copied in full from C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, pp. 41-42.

⁶⁰² Article 140-bis, § 12 of the Consumer Code.

⁶⁰³ Article 140-bis, § 12 of the Consumer Code; Information supplied by Andrea Giussani.

⁶⁰⁴ Article 19.38 (1) Draft Collective Proceedings Act.

amount of an aggregate award; and (ii) that individual proof of monetary claims is required due to the individual nature of the claims⁶⁰⁵.

The Draft underlines that this rule raises matters of substantive law that should be underpinned by provisions in the enabling statute.

In **Portugal**, as there is no need to have exact formal proof of monetary claims for all possible claimants in popular actions⁶⁰⁶, judges are not required to assess each individual loss. Portugal thus follows the trend of opt-out regimes, which widely endorse aggregate assessment of damages, and so empowers judges with such powers⁶⁰⁷.

However, where the interests of the represented group members may be identified precisely, represented group members are entitled to the corresponding indemnity under the general terms of civil liability⁶⁰⁸. Consequently, judges have to assess the damages of each represented group member individually.

DECO v. M⁶⁰⁹ - Individual assessment required for holders of the identified interests

In the *DECO v. M* case, the facts were the following: a big show was advertised in Lisbon as "Operama Carmen", to include the famous singer, D., a "giratory stage", and a number of well-known performers. Some time before the date of the event, the media announced that the show would include neither D. nor the special stage. Most consumers (92) wanted full reimbursement on that basis. DECO brought the case against the company referred to in the advertisements, but the company claimed it had not organised/produced the show and attempted to shift the responsibility to three foreign citizens, who lived abroad, as the producers of the event.

Substantively, the judge found a breach of consumer law. The court determined that, since the named company had received some of the price of the tickets in its bank account, it was obliged to recompense the consumers in full and then bring a case against the other defendants to seek reimbursement of their component of the compensation.

This meant that it had to pay the total amount of the cost of the tickets and that the judge had to take into account the varying costs of the tickets to determine the damage suffered by each consumer⁶¹⁰.

⁶⁰⁵ Article 19.38 (2) Draft Collective Proceedings Act.

⁶⁰⁶ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 5.

⁶⁰⁷ Article 22, 2 Law 83/95.

⁶⁰⁸ Article 22, 3 Law 83/95.

⁶⁰⁹ *DECO v. M*, Proc. 481/99 - 1a Vara Cível de Lisboa, 1a Secção (2006).

⁶¹⁰ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Portugal), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 19-22.

(2) FORM OF COMPENSATION

(2) (1) TERMS OF COMPENSATION

JUDGEMENTS ESTABLISHING THE PRECISE INDIVIDUAL AMOUNTS DUE

358. ***In England & Wales, judges are strictly required to fix the individual amounts due in their judgements.***

In **England & Wales**, regarding the terms of compensation under a GLO, judges can award only individual compensation to each represented group member, according to its individual loss or damage⁶¹¹. No flexibility is allowed to judges.

359. ***In Italy and Sweden, judges will try to determine each individual amount due. If this is impossible, they may have recourse to other methods (opt-in systems).***

In **Italy**, even if judges may choose to quantify the damages due to each member of the represented group with an equitable decision (average, global damages – see *supra*), they will determine the compensation with respect to each group member previously identified. It seems that group members stand to receive an equal compensation and that each group member bears the burden of enforcing the judgment for the sum due to it respectively (see *infra*). This is not the only solution available to the judge.

In **Sweden**, judges will primarily seek to base their judgements on fixed amounts or at least they should respect the fixed rules on how to calculate the amount (see *infra* – formula). Most of the time, judges fix the individual amounts in the judgment and the bailiff has no power to interpret the judgment⁶¹².

360. ***In Portugal and Spain, judges may vary the rules setting out how to determine the amounts due, according to the quality of the beneficiaries.***

In **Portugal** and **Spain**, such a power is justified by the particularities of the two national mechanisms, which do not require that the quality of each represented group member is known at the outset of the collective redress proceeding.

⁶¹¹ Information supplied by Graham Jones.

⁶¹² Information supplied by Laura Ervo.

In **Portugal**, the opt-out regime is said to justify Law 83/95 making a distinction between the determination of the indemnity of the holders of an identified interest and that of the holders of non-identified interests.

In this respect, judges must specify in their judgement the terms of payment of the compensation payable by the losing party, namely global compensation for the violation of interests of holders not individually identified⁶¹³ and/or compensation calculated under the general terms of civil liability for the holders of identified interests⁶¹⁴. Where damages cannot be assessed individually, judges have indeed the power to fix an aggregate sum for class-wide damages.

***DECO v. P (Portugal Telecom Charges Litigation)*⁶¹⁵ - Compensation for the violation of interests of holders not individually identified**

As stated above, this case illustrates that in practice judges will enable both parties to reach out-of-court settlements as to the compensation of the non-identified represented group members.

In this case, the out-of-court settlement thus only concerned the reimbursement of the amount overcharged. The judge enabled both parties to reach an out-of-court settlement as to how to reimburse consumers for the overcharging. This was in response to a clear practical problem of how to identify the large number of potential consumers and the amount owed to each. The judge made a statement that collective redress actions aim to stop violations of consumer rights, and even a successful court decision has no immediate effect because of difficulties in consumers executing the decision⁶¹⁶.

The settlement allowed the consumers with bills to prove the overpayment and so appropriate refunds of the fee were possible for them. For other consumers, there were a variety of different benefits, often of a non-monetary value, in recognition that proof of actual loss and identification of possible beneficiaries was practically very difficult (on these benefits, see *infra* - *cy-près* powers).

In **Spain**, the LEC distinguishes between the group members represented by the intervening parties and the absent (un)determined represented group members⁶¹⁷. The situation will also differ if there is a collective action or a diffuse one.

⁶¹³ Article 22, 2 Law 83/95.

⁶¹⁴ Article 22, 3 Law 83/95.

⁶¹⁵ *DECO v P*, Proc. 430/99 - Supreme Court of Justice.

⁶¹⁶ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Portugal), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 16.

⁶¹⁷ Article 221 LEC.

As stated above, affected consumers who participate in the proceedings have the benefit that judges are mandatorily required to determine the specific amounts due to those consumers⁶¹⁸.

The absent but determined represented group members will be treated similarly, provided the arguments and evidence provided by the representative claimant allow judges to determine the quantum of the damages.

***Decision of the Audiencia Provincial*⁶¹⁹ - Precise amounts due to determined affected consumers**

This case is an example of a collective action where the total number of affected consumers (71) and their identity were known at the outset. In the final judgement, the judge managed to determine the precise amount due for each affected consumer:

2 consumers: €89.24; 5 consumers: €80.18; 1 consumer: €158.72; 12 consumers: €76.34; 5 consumers: €70.68; 1 consumer: €70.65; 26 consumers: €79.48; 4 consumers: €78.10; 3 consumers: €16.83; 1 consumer: €102.47; 1 consumer: €90.20; 2 consumers: €82.96; 1 consumer: €64.89; 1 consumer: €90.63; 1 consumer: €24.19; 1 consumer: €71.31; 1 consumer: €1.83; 1 consumer: €90.63; 1 consumer: €78.64; 1 consumer: €23.77.

The collective action was based on the fact that "Gas Natural Castilla y León, S.A." charged consumers for the registration, inspection and verification of their previous gas installation by means of clauses that had not been approved as standard terms in the Reglamento General del Servicio Público de Combustibles (General Regulations of the Public Combustibles Service) of 26 October 1973. Furthermore, the competent authorities had not approved the incorporation of these clauses into the service contracts.

The Second Instance Court stated that "Gas Natural Castilla y León, S.A." did not have the right to include a standard term in their contracts without the previous modification of the model approved by the Reglamento General del Servicio Público de Combustibles (General Regulations of the Public Combustibles Service) of 26 October 1973. The incorporation of new standard terms without administrative authorisation implies their nullity (art. 10 Ley 26/1984, de 19 de julio, General para., la Defensa de los Consumidores y Usuarios). The Government establishes gas prices, taking into consideration the distributors economic and financial interests, so it is unacceptable that they take those interests into account again because consumers would be paying for them twice⁶²⁰.

⁶¹⁸ Article 221.1.3. LEC.

⁶¹⁹ *Decision of the Audiencia Provincial (Second Instance Court) of Burgos*, num. 524/2002, 23.10.2002.

⁶²⁰ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (Collected cases, Spain), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 45-48.

If, on the contrary, the amount of the compensation cannot be quantified on the basis of the elements provided by the representative claimant and the bases of calculations cannot be fixed, judges will not deliver a judgement which establishes the precise amount due to the absent (un)determined represented group members. For those affected consumers, judges will at least try to establish a formula⁶²¹ which may be used to quantify the damage but a second trial will sometimes be necessary.

361. ***In England & Wales (under the Draft), great flexibility is left to judges.***

In England & Wales, under the Draft for a Collective Proceedings Act, judges may *inter alia* give a judgment in a specified sum payable to represented group members or members of subgroups in such manner as they consider appropriate and/or give judgment in an aggregate sum in respect of all or any part of a defendant's liability to class members without specifying amounts awarded in respect of individual represented group members⁶²².

Where a judgement in an aggregate sum is given, judges may order that all or a part of the aggregate award be applied so that some or all individual group or subgroup members share in the award on an average or proportional basis if: both (i) it would be impractical or inefficient for the judges to identify the group or subgroups whose members are entitled to share in the award or to determine the exact shares that should be allocated to individual group or subgroup members; and (ii) failure to make an order under this paragraph would deny recovery to a substantial number of group or subgroup members⁶²³.

JUDGEMENTS ESTABLISHING A FORMULA

362. ***In England & Wales, judges do not have the power to deliver a judgement in which precise amounts due are not established.***

363. ***In Spain and Sweden, where it is not possible to determine precise amounts due, the judge will at least fix rules on how to calculate the amounts due.***

In Spain, a distinction must be made between collective actions and diffuse actions.

In collective actions, where it is not possible to determine precise amounts due to each represented group member, the situation does not appear to be too problematic. As the represented group

⁶²¹ Article 221.1.1. LEC.

⁶²² Article 19.34 (1) (c), (d) Draft Collective Proceedings Act.

⁶²³ Article 19.39 (1) Draft Collective Proceedings Act.

members are by definition determinable, it is *a priori* conceivable that judges fix rules on how to calculate their compensation so that it can at least be concretised at the execution stage⁶²⁴.

In diffuse actions, however, as represented group members are by definition not determinable, it seems complex for judges to calculate the amount of compensation. In such situations, where it is not possible to determine which consumers may benefit from the judgement, the LEC requires at least that judges specify in their judgement the details, characteristics and requirements necessary to demand payment⁶²⁵ and a second trial will certainly be necessary to resolve the question of compensation⁶²⁶.

Decision of the Audiencia Provincial (Second Instance Court) of Burgos⁶²⁷ - Diffuse action: establishment of a Price List

This case is one of the few diffuse actions admitted in Spain. The number of the total consumers potentially affected was estimated at approximately 6 100 persons. The final judgement established both the details necessary to concretize the individual beneficiaries of the judgement (on this step, see *infra*) and the formula for calculating the compensation due.

On 27 February 2004, a snowfall caused various traffic accidents in which trucks that blocked a motorway were involved. It caused holdups that affected thousands of people and vehicles. AUSBANC claimed €300/consumer (immaterial damages), €132.84/consumer (material damages because of the holdup) and €28/vehicle (material damages because of the payment of the toll).

The second instance judge decided that the snowfall could not be considered as force majeure because snow, although being unavoidable, is predictable during the winter and the operator did not show diligent behaviour and did not adopt the necessary measures to avoid the holdups. The judge finally awarded the amount established in the Price List, according to the type of vehicle, to those who paid for the toll and €150 for consumers or cars that could show they were in the motorway on 27 February between 16.00 and 19.00⁶²⁸.

⁶²⁴ L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12, p. 230.

⁶²⁵ Article 221.1.1. LEC.

⁶²⁶ L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12, p. 230.

⁶²⁷ *Decision of the Audiencia Provincial (Second Instance Court) of Burgos (Section 3)*, num. 347/2006, 31.7.2006 (Westlaw Aranzadi Reference: AC 2007\108)

⁶²⁸ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (Collected cases, Spain), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 210 – 214.

In **Sweden**, although it is not possible to award fixed compensation, judges must at least include the fixed rules on how to calculate the amount. This is possible, for example, when interest is running. In this situation, the bailiff can calculate the fixed amount based on the rules given in the judgment⁶²⁹.

***Olivia Ozum v Sweden*⁶³⁰ - Fixed amount + interest to be calculated by the bailiff**

In the *Olivia Ozum v Sweden* case, the judges awarded €3 500 each to 43 women together with interest running until the execution of the judgment, which the bailiff had to calculate on the basis of the specific law on interest (1975: 635).

The *Olivia Ozum v Sweden* case concerned a quota rule which is applied to admissions to the veterinary medicine programme at the Swedish University of Agricultural Sciences in Uppsala that gives the underrepresented gender among applicants (currently male students) a better chance of being admitted to the programme.

In a private group action in July 2008, the plaintiff claimed damages in total of 4.6 million Swedish kronor (about €500.00) for herself and 46 other female students who were not admitted. The plaintiff was represented by the Centre for Justice Foundation (*Centrum för rättvisa*), which had undertaken to pay the plaintiff's litigation costs. Through the Office of the Chancellor of Justice, the State declared that it had no objections to trying the case as a group action. The Uppsala District Court decided in September 2008 to hear the case as a group action.

364.

In Italy, judges have the choice between establishing precise amounts due and establishing homogeneous calculation criterion.

In **Italy**, judges may establish in their decision uniform criteria on the basis of which damage suffered by the members of the represented group shall be quantified⁶³¹.

Should no agreement be reached between the losing defendant and single members of the represented group, it is not clear whether the latter has to bring a further, individual claim to quantify the loss, or whether the amount of loss may be directly determined in the enforcement phase, based on the abovementioned criteria⁶³².

⁶²⁹ Information supplied by Laura Ervo.

⁶³⁰ *Olivia Ozum v Sweden*, RH 2009:90 (see also the judgment of the district court T 3897-08, decision on 30 March 2009).

⁶³¹ Article 140-bis, § 12 of the Consumer Code.

⁶³² Information supplied by Andrea Giussani.

365. ***In England & Wales (under the draft), where a judgement in an aggregate sum is given and judges decide to divide the sum on an individual basis (and not on an average or proportional basis), judges must determine the procedure for determining the individual claims.***

In England & Wales, under the **Draft for a Collective Proceedings Act**, where a judgement in an aggregate sum is given, judges may decide to divide all or a part of the aggregate award on an average or proportional basis and/or on an individual basis. If judges order that individual claims are to be made by members of the group or subgroups in order to establish entitlement to part of the aggregate award, the judges must specify the procedures for determining the claims⁶³³.

366. ***No information is available for Portugal.***

(2)(II) PUNITIVE DAMAGES

NO PUNITIVE DAMAGES

367. ***In Italy, Spain and Sweden, judges are prohibited from awarding punitive damages in general, and are not exceptionally permitted to so act in collective redress proceedings.***

In Italy, Spain and Sweden, punitive damages essentially have no place.

PUNITIVE DAMAGES

368. ***In Portugal, punitive damages are not recoverable in general except if expressly agreed between parties. Judges are, for their part, not empowered to award punitive damages in collective redress proceedings.***

369. ***In England & Wales, judges award punitive or exemplary damages rarely, if ever. This does not change for collective redress proceedings.***

In respect of claims for breach of contract, punitive damages are not generally available⁶³⁴. Although they are available in tort claims⁶³⁵, exemplary damages will only be awarded in certain limited circumstances, including where the defendant's conduct was calculated to make a profit

⁶³³ Article 19.40 (1), (2) Draft Collective Proceedings Act.

⁶³⁴ Alison Brown & Ian Dodds Smith, "England and Wales", in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 64.

⁶³⁵ See *Kuddus (AP) v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789.

that exceeds the compensation recoverable by the claimant or where there has been oppressive, arbitrary and unconstitutional conduct by Government servants⁶³⁶. In the UK football T-shirt case, for instance, the collective claim by *Which?* included a claim for exemplary damages on the basis that the fine imposed did not cover consumer detriment. Exemplary damages are not generally recoverable in circumstances where a defendant has already been fined for his conduct⁶³⁷.

(2)(III) CY-PRÈS AWARDS

NO CY-PRÈS POWER

370. ***In England & Wales, Italy, Spain and Sweden, the specific rules do not give cy-près powers to judges. In practice, it seems that judges do not award cy-près compensation.***

CY-PRÈS POWER

371. ***In Portugal, judges have some kind of cy-près powers.***

In **Portugal**, judges have wide flexibility in the solutions which can be reached⁶³⁸. It is not inconceivable, for example, that judges award non-monetary damages when the value of the claim is too small to warrant a cash award for each class member. A telecom operator has been, for example, ordered to offer free calls to affected consumers rather than repayments.

DECO v. P (Portugal Telecom Charges Litigation)⁶³⁹

The facts were the following: DECO brought three actions in 1998 and 1999 alleging that Portugal Telecom had over-charged almost 2 million customers a total of around €120 million. Thus the average was around €60 each. The main issue was whether it was legal for Portugal Telecom to charge a "set-up" fee as this was argued to be contrary to Portuguese law.

As stated above, the procedure was finalised by a court decision and the out-of-court settlement only concerned the reimbursement of the amount overcharged. It was a written, detailed settlement with deadlines and guarantees and provided an end to two further court files: Proc. 65/98, seeking

⁶³⁶ See *Rowlands v Chief Constable of Merseyside* [2006] All ER (D) 298 (Dec).

⁶³⁷ See *Devenish Nutrition Limited v Sanofi-Aventis SA and Others* [2007] EWHC 2394 (Ch).

⁶³⁸ Section 22 Law 83/95; C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 40.

⁶³⁹ *DECO v P*, Proc. 430/99 - Supreme Court of Justice.

a declaration that the schedule of prices was void, and Proc. 70/98, seeking to prevent P. from implementing the new schedule of prices⁶⁴⁰.

The settlement agreement allowed covered various situations, including the following:

- a) Every consumer who had his telecom receipts for the relevant years could present them to Portugal Telecom and would be reimbursed the total amount overpaid.
- b) Since most of the consumers did not have their telecom receipts, they could be reimbursed by making free calls on 13 Sundays (beginning in March and ending in June) and on World Consumer Rights Day⁶⁴¹.

The settlement amounted to between 40% and 50% of the claim because 70 000 consumers asked for the total reimbursement. This amount was between €3,288,600 and €4,384,800. On the 13 free Sundays, consumers made an average of 35,000,000 to 40,000,000 calls per Sunday, which amounted to something between €68,250,000 and €78,000,000 so the settlement amounted to something between €71,538,600 and €82,384,800.00⁶⁴².

⁶⁴⁰ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (Collected cases, Portugal), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 16.

⁶⁴¹ C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 40.

⁶⁴² Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (Collected cases, Portugal), available at: europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 17.

1.3. ASSESSING THE EXTENT OF THE BINDING EFFECT

- Do the selected Member States require that judges verify the binding effect of the judgement? Are judges allowed to limit the binding effect of the judgements to the single representative claimant? **((1) Assessment of the binding effect in opt-in systems)**
 - Do judges verify the nature of the adequate representation of the represented group in order to consider the binding effect of the judgement?
 - May judges establish *res judicata secundum eventum litis* (or, establish that the decision is binding only if it benefits but not if it is prejudicial to those not appearing in court)?
 - In the case of an affirmative answer, does the judges' decision depend on any additional particular circumstance?
- In opt-out systems, in addition to the aforementioned questions, are judges allowed to enable a represented group member to opt out of a judgement if, for instance, he could demonstrate that he could not reasonably have been made aware of the existence of the decision admitting the collective redress proceeding? **((2) Assessment of the binding effect in opt-out systems)**
- Do the selected Member States leave the way of notifying the existence of the final judgement to the members of the group to the judges' discretion? **((3) Adequate notice to the represented group members)**
 - Do judges' powers differ in the case of opt-out proceedings?

(1) ASSESSMENT OF THE BINDING EFFECT IN OPT-IN SYSTEMS

MANDATORY BINDING EFFECT. NO DISCRETION ALLOWED TO JUDGES

372. ***In England & Wales (under the Draft and within certain conditions), Germany, Italy and Sweden, judgements are legally binding both for and against each and every member of the represented group without any exceptions.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, where a judgement on the common issues is given, it legally binds every represented group member who has opted into the collective proceedings and does not bind a party to the collective proceedings in any subsequent proceedings between that party and a person who opted out of, or had been excluded from, the collective proceedings⁶⁴³.

In **Germany**, the final decision rendered within the model case proceeding is not directly binding on all interested parties but rather binding upon all judges of first instance regardless of whether a particular plaintiff has actively participated in the lead case, or whether the individual case raises exactly the same issues that were dealt with in the lead case.

The binding effect concerns all the questions of law and fact that were raised in the model case proceeding. This means that even if an individual based his claim only on a mistake in a prospectus that could not be proven in the model case, he can be successful with the lawsuit if others based their claims on a different mistake in the same prospectus that has indeed been proved in the model case. Thus, scholars have argued that the KapMuG invokes an extension of the liability of the defendant towards the investors⁶⁴⁴.

In **Italy**, the Consumer Code requires that judges establish in their final judgement that the trial is binding upon all represented group members⁶⁴⁵. Judges are not allowed to make an exception to this overall binding effect but this is made without any prejudice to the single action of those individuals who do not join the collective redress proceeding⁶⁴⁶.

In **Sweden**, during the preparatory work for the GrL other alternatives were discussed: giving the decision only evidentiary value and no *res judicata*; and extending the decision's *res judicata* to

⁶⁴³ Article 19.35 (2) Draft Collective Proceedings Act.

⁶⁴⁴ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Germany), available at: http://ec.europa.eu/consumers/redress_cons/de-country-report-final.pdf, p. 10.

⁶⁴⁵ Article 140-bis §14, first sentence of the Consumer Code.

⁶⁴⁶ Article 140-bis §14, second sentence of the Consumer Code.

the defendant, but to the passive members of the group only if the decision is in the group's favour and not if it is against the group.

The lawmaker finally opted for fully-fledged *res judicata*, both for the defendant and for all members of the group⁶⁴⁷. For Swedish scholars, this solution appears justified on the grounds of fairness⁶⁴⁸. In their judgment, judges must specify the members of the group to which the judgment refers⁶⁴⁹. This requirement is important as judges may deal with particular issues between some of the group if that is appropriate and order sub-judgments, which are partial judgments on questions only on the interest of some group members⁶⁵⁰.

373. ***In Spain, judges are not allowed to limit the binding effect of the judgement but are rather required to establish that res iudicata effects of the judgement also affect the non-litigants.***

In **Spain**, a notably broad solution to the issue of who is bound by a final judgement is adopted. Article 222.1.3 of the LEC establishes an exception to the rule *res iudicata inter partes* because the *res iudicata* effects of the decisions affect not only the parties to the proceedings but all affected consumers (even if not determined at the outset of the proceedings). This provision is presumed to bind non-litigants, and it is interesting that the law provides no opt-out mechanism.

Indeed, in both proceedings, in collective and in diffuse actions, the decision that is rendered causes *res judicata* effects on the members of the represented group or undetermined consumers that are represented in the legal action, regardless of their participation or not in the procedure⁶⁵¹ (see *supra*).

Decision of the First Instance Court num. 61 of Madrid⁶⁵² - Extension of the binding effect to non-litigants

In this case, the judges decided, *inter alia*, that the order to the defendants to re-establish telephone services in cases where they were cut off or, if this was not possible, to pay an amount of €90 has a binding effect for not only the intervening parties whose service was cut off by T., S.A. (Miguel, Francisco, Joaquín, Amaya, María José and Agustín) but also for any other consumers that show that their telephone service was cut off.

⁶⁴⁷ Section 29 GrL.

⁶⁴⁸ Information supplied by Laura Ervo.

⁶⁴⁹ Section 28 GrL.

⁶⁵⁰ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 287.

⁶⁵¹ Article 223.2. LEC; L. Frankignoul, "Un projet belge de recours collectif au regard des modèles espagnols et québécois", *Revue de la Faculté de droit de l'Université de Liège* – 2011/12, pp. 226- 227.

⁶⁵² *Decision of the First Instance Court num. 61 of Madrid*, 20.7.2004 (Westlaw Aranzadi Reference: AC 2004\1144).

This case concerned two telephone companies, “T. S.A.” and “L. S.A.”, which granted lines with the code 903 or 906 to other companies to render their services. The price of the services depended on both the price of the call in these lines, which was higher than the price in ordinary lines, and the duration of the call. Part of the price belonged to the company that rendered the service and the other part to the telephone company. Consumers did not have a relationship with the company that rendered the service. In the analysed cases, some services were rendered by means of the 906 code despite the fact that they were referred to as services that should have been rendered by means of the 903 code. Consumer organisations and groups of consumers claimed for the illegality of the services, the refund of certain amounts and, in some cases, the reestablishment of the telephone service.

The judge considered that the telephone companies were responsible for the rendered services because they could control access to them and they had entered into contracts with consumers, creating the false belief that the company that billed the telephone invoices was the company that also rendered the service.

The judge stated the illegality of the services rendered by means of the 906 code and that consumers concluded the contracts by mistake⁶⁵³.

The LEC does not introduce a mechanism that enables a consumer represented by a collective action brought by a consumer association to state effectively that he does not wish to be represented⁶⁵⁴. In other words, parties not intervening in the proceedings will nevertheless be bound by the final judgment that will list not only the individual named beneficiaries but also the conditions that need to be fulfilled for any other party to benefit from the judgment (see *infra* – Section Four). Affected parties who meet the conditions laid down in the judgment must wait until the final judgment, which will then be fully applicable to them. Those individual claimants are not allowed to initiate individual action after the group proceedings⁶⁵⁵. The absence of such mechanism put into question the constitutionality of the LEC as regards the legal actions brought on behalf of undetermined consumers.

Although the meaning is not fully clear, the LEC does not seem to allow judges to determine whether a judgement shall affect non-litigants or not.

⁶⁵³ Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union”, (Country Report: Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 17.

⁶⁵⁴ Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 138.

⁶⁵⁵ If individual proceedings are already underway when a group action based on the same damaging event is commenced, the procedures should be accumulated further under article 78 of the LEC.

374. ***In England & Wales, judgements are in principle legally binding on all members of a represented group, but judges may order otherwise.***

In **England & Wales**, any judgement or order given on a GLO issue is in principle binding upon other parties that are on the group register at the time the judgment is given or the order made, provided the judges do not order otherwise⁶⁵⁶.

Judges may also evaluate the extent to which a judgement will bind parties to claims which are subsequently entered into the register⁶⁵⁷. A party to a claim which was entered into the group register after a judgment or order which is binding on him was given or made may not apply for the judgment or order to be set aside varied or stayed or appeal the judgment or order but may apply to the judges for an order that the judgment or order is not binding on him⁶⁵⁸.

Under the **Draft for a Collective Proceedings Act**, where a judgement in an aggregate sum is given and the sum is divided on a proportional or an average basis, a represented group member may apply to the judges to be excluded from the proposed distribution and be given the opportunity to prove his claim on an individual basis⁶⁵⁹.

The judges, in deciding whether to exclude a represented group member from an average or proportional distribution, must consider (i) the extent to which the represented group member's individual claim varies from the average for the represented group; (ii) the number of the represented group members seeking to be excluded from the average distribution; and (iii) whether excluding the represented group member(s) would unreasonably deplete the amount to be distributed on the average basis⁶⁶⁰.

⁶⁵⁶ CPR Part 19, 19.12 (1) (a).

⁶⁵⁷ CPR Part 19, 19.12 (1) (b).

⁶⁵⁸ Information supplied by Graham Jones.

⁶⁵⁹ Article 19.39 (2) Draft Collective Proceedings Act.

⁶⁶⁰ Article 19.39 (3) Draft Collective Proceedings Act.

(2) ASSESSMENT OF THE BINDING EFFECT IN OPT-OUT SYSTEMS

PRINCIPLE OF BINDING EFFECT. DISCRETION ALLOWED TO JUDGES

375. *In Portugal, judges may restrict the extent of the binding effect in certain specified circumstances.*

In **Portugal**, the final judgement binds, in principle, all claimants indiscriminately, except those who have expressly opted out⁶⁶¹.

Judges are, however, required to depart from this principle when they turn down a claim for lack of proof⁶⁶². Additionally, although the meaning is not fully clear, Law 83/95 allows judges to limit the extension of the binding effect when they reject a claim for incorrect representation or pronounce a judgment based on circumstances specific to one case⁶⁶³. It has been said that the possibility for judges to limit the *res judicata* effect is a useful instrument in repressing abuse of popular action for personal gain.

376. *In England & Wales (under the Draft), judges may allow a represented group member to opt out of the judgement provided certain conditions are satisfied.*

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, a judgement on common issues binds every represented group member who has not opted out of, or been excluded from, the collective proceedings⁶⁶⁴. However, judges may permit a represented group member who fails to opt out by the opt-out date to do so after that date if they are satisfied that (i) the delay was not caused by any fault of the represented group member; and (ii) the defendant would not suffer substantial prejudice if permission were granted⁶⁶⁵.

⁶⁶¹ Article 19,1 Law 83/95.

⁶⁶² Article 19,1 Law 83/95.

⁶⁶³ Article 19,1 Law 83/95 uses the following expression: *when the judge should decide alternatively*.

⁶⁶⁴ Article 19.35 (2) (a) Draft Collective Proceedings Act.

⁶⁶⁵ Article 19.21 (3) Draft Collective Proceedings Act.

(3) ADEQUATE NOTICE TO THE REPRESENTED GROUP MEMBERS

NO SPECIFICATION

377. *In Italy and Spain, specific laws do not consider the issue of appropriate and reasonable notification to the represented group members and so do not specifically require that judges regulate the way the represented group members are notified about the case.*

In **Italy** and **Spain**, the general rules on individual formal notice probably apply (no information available).

Decision of the Audiencia Provincial (Second Instance Court) of Madrid⁶⁶⁶ – Publication in the media

This case illustrates that notifying represented group members may also have a preventive and a punitive effect on defendants.

In this case, the judge ordered that the Spanish Commercial Register Official Bulletin (Boletín Oficial del Registro Mercantil) and a newspaper with a national circulation publish both the decision and the abusive clause, and that the Standard Terms Register (Registro de las Condiciones Generales de la Contratación) publish the decision.

A rounding-up clause was included by Banco E. S.A. in variable rate mortgages. AUSBANC claimed that the clause was found void because it was abusive, and demanded that Banco E. S.A. eliminate the standard term and refrain from using it in the future and that the judgement be published in a newspaper with national circulation.

The judge stated that the rounding-up clause was a standard term because the bank imposed it without it being negotiated by the parties. It was not part of the price but an unjustified increase, which was applied in all cases. Finally, it was an abusive clause because it was not necessary to impose an increase of 0.25% in all cases in order to simplify the calculation of the interest rate. It benefited exclusively the bank at the expense of consumers⁶⁶⁷.

⁶⁶⁶ *Decision of the Audiencia Provincial (Second Instance Court) of Madrid*, num. 71/2006, 21 February 2006 (Westlaw Aranzadi Reference: AC 2006\833).

⁶⁶⁷ Summary based on the information contained in Civic Consulting (Lead) and Oxford Economics, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union” (collected cases, Spain), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 174-177.

378. ***In England & Wales, Germany and Portugal, specific laws impose the means of notification to the represented group members.***

In **England & Wales**, represented group members will be aware of the judgement via the group register. Judges may in principle order additional publication of their decision in the media but the position as to costs is not clear. There would seem to be no reason in principle that would prevent the judge ordering the costs to fall on the losing party⁶⁶⁸. In practice the number of high profile cases with significant media coverage remains, however, limited. It is thus suggested that the GLO mechanism has a limited deterrent effect, which is supported even further by the fact that the amount of damages awarded is not made publicly available⁶⁶⁹.

In **Germany**, the decision of the judge is served by post upon the executive parties in the form of an official notification; the other parties receive a single notice (informal notification). However, the higher judges may also order that the decision be published in the register instead of serving it by post⁶⁷⁰.

In **Portugal**, the represented group members are notified via newspapers. Should the represented group members win the case, the judges must order that the defendant - at his own cost - publish the judgement in two newspapers that they select and which it is presumed are read by the represented group members. Judges may also determine that such publication be by means of extracting the essential aspects of a judgement when publication of the entire judgement is not advisable due to its length⁶⁷¹.

379. ***In England & Wales (under the Draft) and Sweden, judges may choose the means of notification they consider appropriate. Specific laws specify to a certain extent to the content of such notice.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, judges may choose between the following means of notice or any combination of the following means: (a) *personal delivery*; (b) *post*; (c) *publishing or leafleting*; (d) *press advertisement, radio or television broadcast*; (e) *individually notifying a sample group within the class*; or (f) *any other means the*

⁶⁶⁸ Information supplied by Graham Jones.

⁶⁶⁹ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: United Kingdom), available at: http://ec.europa.eu/consumers/redress_cons/uk-country-report-final.pdf, p. 32.

⁶⁷⁰ Section 14 KapMuG.

⁶⁷¹ Article 19, 2 Law 83/95.

*judges consider appropriate*⁶⁷². The representative claimant is responsible for giving the notice chosen by the judges.

The Draft for a Collective Proceedings Act includes rules as to the minimum content of such notices. It varies from one type of judgement to another.

In **Sweden**, judges must notify their judgement to the group members in a manner they consider appropriate, observing the provisions contained in Chapter 33, Section 2, first paragraph of the Code of Judicial Procedure⁶⁷³. In Sweden, judges are mandatorily required at least to identify in the judgement the members of the group to which the judgement refers (on this requirement, see *supra* – binding effect).

Interestingly, in Sweden, the notifications to members of the group are paid for by the public and not by the parties. The court both issues and pays for notice to group actions. If a judge orders the parties to attend to a notification, the party in such a case is entitled to compensation from public funds for expenses⁶⁷⁴.

⁶⁷² Article 12 of the Practices Directions accompanying the Draft for a Collective Proceedings Act.

⁶⁷³ Section 50 GrL.

⁶⁷⁴ Section 50, second sentence, GrL.

2.ROLE OF THE JUDGES CONCERNING THE FINANCIAL ASPECTS OF THE PROCEEDINGS

2.1.VERIFYING THE FUNDING ARRANGEMENTS⁶⁷⁵

- Do the selected Member States specifically regulate third-party funding of collective redress proceedings? **((1) Regulation of third-party investors arrangements)**
 - If so, do the selected Member States require that judges exercise specific verification of third party funding arrangements in collective redress proceedings?
 - When are judges required to exercise such verification?
 - Are judges required to verify that funding arrangements are fair and comply with legal requirements?
 - Are judges required to approve funding arrangements to make them enforceable?
- Do the selected Member States allow contingency fees agreements in general? If not, do they allow contingency fees agreements specifically to fund collective redress proceedings? **((2) Regulation of lawyers' funding arrangements)**
 - If contingency fees agreements are permitted, do the selected Member States require that judges exercise a specific supervision of lawyers' funding arrangements in collective redress proceedings?
 - When are the judges required to exercise such supervision?
 - Are judges required to approve lawyers' fees arrangements to make them enforceable?

⁶⁷⁵ (i) As financial controls are often found in general rules on litigation procedures, or in specific rules on costs and/or funding, it might be that certain aspects are not covered by the report.

(ii) Focus is only put on the funding issues raised by collective redress proceedings. In this sense, the report will, for example, not cover legal aid systems as such a system does not present any difference with general proceedings. Legal costs insurance will also not be examined because it is a too complex a subject to deal with in such a report (it should be noted that in Sweden, insurance companies in their litigation insurance are inclined to exclude or limit their litigation insurance in respect of group proceedings. This has been considered to be an impediment to the use of the scheme. Similarly, in Germany, legal protection insurance does not apply to model proceedings actions). Besides the classical aid and litigation funding through legal protection insurance, it appears to be more useful to consider third-party funding and lawyers arrangements.

(1) REGULATION OF THIRD-PARTY INVESTOR ARRANGEMENTS

ISSUE NOT REGULATED BY SPECIFIC RULES

380. *In Germany, Portugal, Spain and Sweden, judges are not required to exercise specific supervision of third-party funding arrangements in collective redress proceedings. No interesting case law has emerged yet on this issue in these Member States.*

381. *In Portugal, the collective redress mechanisms are little used precisely because of the problem of the lack of funding.*

In **Portugal**, the relatively small number of actions commenced for damages on the basis of Law 83/95 is largely due to the fact that DECO has finite resources with which to prosecute collective redress proceedings, rather than due to the lack of efficacy of the system⁶⁷⁶.

In Portugal, consumers and consumer associations are exempt from payment of the costs of preliminary preparations in bringing a case to court that concerns rights arising from the provision of goods and services if the value of the action does not exceed the monetary competence of the first instance court⁶⁷⁷. Consumer associations are also expected to receive support from the State, via the central, regional and local administration, as part of its activity within the areas of training, provision of information and representation of consumers, and under the right to tax benefits identical to those which the law provides either now or in the future to private social welfare institutions⁶⁷⁸.

382. *In Italy and Spain, funding through third-party investors has not yet appeared necessary. This is justified because consumer associations may be representative claimants in collective redress proceedings.*

In **Italy**, in collective redress proceedings, litigation funding by consumer associations is allowed under Article 140-bis of the Consumer Code.

Judges must verify that such funding agreement does not raise a conflict of interests. Indeed, a third-party funding agreement may be relevant only insofar as a conflict of interest may ensue⁶⁷⁹, but according to the general opinion, third persons funding is physiological in collective redress

⁶⁷⁶ Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p. 100.

⁶⁷⁷ Article 14,2 Law 24/96 of 31 July – Consumer Rights Law.

⁶⁷⁸ Articles 18, o and p Law 24/96 of 31 July – Consumer Rights Law.

⁶⁷⁹ Article 140-bis, § 6 Consumer Code.

litigation, and problems of conflict of interest would arise only in very special cases (e.g., funding from a business competitor of the defendant)⁶⁸⁰.

In **Spain**, when a representative claimant is held liable to pay the defendant party's costs, it does not, however, mean that he actually pays in practice.

In Spain, authorized consumer associations enjoy the benefit of free justice⁶⁸¹. That means that their costs are borne by the State should they lose⁶⁸². This free justice for consumer organisations⁶⁸³ does not, however, cover all costs. The payment for advertisements in the mass media during the proceedings is one of the main problems that consumer associations have to face because this expense is not provided free of charge⁶⁸⁴.

383. ***In Germany and Sweden, the issue of funding the collective redress proceedings has been resolved by practice. Models of funding have been developed in order to deal with collective redress proceedings.***

In **Germany**, private companies have recently expressed interest in funding collective redress litigation.

An increasing number of private companies offer third-party funding in exchange for up to 50% of the award received in a successful claim⁶⁸⁵. The purpose of such funding is to remove any risks for the funded party and so, typically, the funder will bear these costs, though of course this depends on the individual terms of the funding agreement. By providing financing, the funder does not become a party to the litigation, and so is not liable for costs vis-à-vis the court or the opponent. No data is available on the existence of judicial supervision on such a mechanism.

Moreover, a new model of funding has entered the scene recently: the acquisition of potential claims for damages by a (foreign) company founded solely for the purpose of acquiring claims and

⁶⁸⁰ Information supplied by Andrea Giussani.

⁶⁸¹ Section 22.2 c) of Law 38/2003, of 17 November, General of Subsidies BOE num. 276, of 18 November 2003.

⁶⁸² Information supplied by Elena Martinez.

⁶⁸³ Law 1/1996, of 10 January on Legal Aid.

⁶⁸⁴ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Spain), available at: http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 40.

⁶⁸⁵ Ina Brock & Stefan Rekitt, "Germany", in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 97.

enforcing them in court proceedings⁶⁸⁶. In 2009, the Federal Court of Justice confirmed the permissibility of this kind of grouping of claims⁶⁸⁷.

In **Sweden**, an interesting funding mechanism that developed precisely to deal with collective redress proceedings must be highlighted.

False organisation actions have appeared in practice. Such was the case in the *Skandia*⁶⁸⁸, *Wine import*⁶⁸⁹ and *Arlanda*⁶⁹⁰ cases.

The explanation is that in *true* organisation actions, the organisation cannot also be a group member; if the organisation is a group member, the lawsuit is treated as a private group action⁶⁹¹. Legal persons, such as non-profit organisations, may initiate private group actions⁶⁹². A group of people who wish to initiate a group action may form an organisation or foundation solely for this purpose. By transferring one of the members' claim for damages, or only part of it, to the legal person (the organisation), it becomes a member of the group. By this means, the organisation gains standing to initiate a private group action (but not an organisation action) on behalf of everyone who opts in, whether or not they are members of the organisation.

While the organisation's finances must be *in order*⁶⁹³ for the organisation to be accepted as a representative claimant, this can be arranged by collecting dues or other funding from the association's members (such as a limited guaranty). By this means, the members can limit their financial risk. Nor do members run any risk of being required to pay the opponent's costs as the named plaintiff – the organisation – bears the entire risk.

This transfer method is also open to already existing organisations, foundations, and other legal persons not formed solely for the purpose of litigating a claim⁶⁹⁴.

⁶⁸⁶ Freshfields Bruckhaus Deringer, "Class Actions and Third Party Funding of Litigation: An analysis across Europe", June 2007, Freshfields Derlinger, available at <http://www.freshfields.com/publications.pdfs/2007/jun18/18825.pdf>, p. 32

⁶⁸⁷ S. Pietrini, "Le développement des recours collectifs en droit des pratiques anticoncurrentielles, panorama des systèmes existants en Europe", *Revue des droits de la concurrence*, n°4 2011, pp. 2-3.

⁶⁸⁸ *Grupptalan mot Skandia v Försäkringsaktiebolaget Skandia*, Stockholm District Court, case number T 97, 2004.

⁶⁸⁹ *Pär Wihlborg v The Swedish State through the Chancellor of Justice*, Nacka District Court, case number T 1286, 2007.

⁶⁹⁰ *Carl de Geer et al v The Swedish Airports and Air Navigation Service*, Nacka District Court, Environmental Court, case number M 1931, 2007.

⁶⁹¹ Section 5 GrL.

⁶⁹² Section 4 GrL.

⁶⁹³ Section 8 (5) GrL.

⁶⁹⁴ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 19.

*Scandia case*⁶⁹⁵ – Transfer method

In the *Scandia* case, a non-profit organisation was founded solely for the purpose of claiming a right to compensation for 1.2 million policyholders. In short order, more than 15 000 people joined the organisation. Each member paid dues of about €15 and the organisation rapidly amassed a capital of €200 000. One board member transferred his claim for compensation to the organisation, which thus became a group member and thus gained standing to initiate the action for the entire group affected (that is, not only the members of the organisation). Consequently, the action was brought as a private group action and as an organisation action.

JUDICIAL SUPERVISION

384. ***In England & Wales, third party funding is likely to develop in collective redress proceedings and judges must manage it.***

In **England & Wales**, the combined issues of funding and the prospective liability for the other side's costs should a claim fail were estimated to be the principal reason why over 80% of potential collective consumer actions brought to lawyers did not proceed to a claim in 2006⁶⁹⁶.

That being said, litigation funding claims for a share of the recoveries has recently increased in England & Wales as a reaction to the judges' approach of favouring access to justice⁶⁹⁷. Professional funding firms are becoming increasingly prevalent and hedge funds and other private investors are also reportedly becoming involved in this market.

Judges must look at the proposed private funding arrangement in light of the totality of the settlement to determine its validity, considering whether an agreement poses a risk of corrupting public justice in terms of trafficking in litigation or an officious interference in the disputes of others⁶⁹⁸. Such professional funders are not excused from liability for costs in the event of an unsuccessful outcome, as judges have the power to order a third party to pay the costs where appropriate.

⁶⁹⁵ Stockholm District Court, case number T 97, 2004.

⁶⁹⁶ As stated at the CJC first Collective Consumer Redress Event, October 2006; Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report), a series of recommendations to the Lord Chancellor*, November 2008, p. 173.

⁶⁹⁷ Freshfields Bruckhaus Deringer, "Class Actions and Third Party Funding of Litigation: An analysis across Europe", June 2007, Freshfields Derlinger, available at <http://www.freshfields.com/publications.pdfs/2007/jun18/18825.pdf>, p. 19.

⁶⁹⁸ Freshfields Bruckhaus Deringer, "Class Actions and Third Party Funding of Litigation: An analysis across Europe", June 2007, Freshfields Derlinger, available at <http://www.freshfields.com/publications.pdfs/2007/jun18/18825.pdf>, p. 17.

In *Arkin v Borchard Lines*, the court of appeal limited the liability for costs of the private funder to the extent of the funding provided.

The court of appeal recognised thus that the public benefit of access to justice must be balanced against the general rule that a successful party to litigation should recover its costs.

The court also emphasised that private funding ensures that private funders consider with even greater care than parties to the litigation whether the prospects of litigation are sufficiently good to justify the support they intend to provide, which would also be in the public interest.

However, this case did not rule out that there will be circumstances in which funding arrangements will fall foul of the policy considerations rendering a funding agreement unenforceable. This is always a matter of the judges' discretion⁷⁰⁰.

A Code for third-party investor funders has even been agreed and recourse to the judges is available if appropriate⁷⁰¹.

Jackson LJ⁷⁰² has indeed recommended that third-party funding be made available to claimants in personal injury actions, including collective redress actions, and that the regulation of funders proceed by way of a voluntary Code rather than external regulation, provided that the Code adequately addresses issues such as the degree of control funders may exert over litigation. Jackson LJ has also recommended that the current law be changed to allow a funder's cost liability to the extent of the full amount of a defeated claimant's costs rather than being capped at the amount of funding provided⁷⁰³.

⁶⁹⁹ *Arkin v Borchard Lines* [2005] EWCA Civ 655.

⁷⁰⁰ Freshfields Bruckhaus Deringer: "Class Actions and Third Party Funding of Litigation: An analysis across Europe", June 2007, Freshfields Derlinger, available at <http://www.freshfields.com/publications.pdfs/2007/jun18/18825.pdf>, p. 15.

⁷⁰¹ Information supplied by Graham Jones.

⁷⁰² Jackson LJ delivered a final report on litigation costs in England & Wales on 14 January 2010. His goal was to reduce costs whilst encouraging access to justice. If adopted, Jackson LJ's costs recommendations would have the greatest impact on collective redress claims (personal injury actions such as those involving product liability or environmental claims). These claims would be subject to a unique costs regime that would likely result in an increase in this type of litigation.

⁷⁰³ Hogan Lovells, "England & Wales: Lord Justice Jackson's Final Report: overhaul of costs regime for collective actions for personal injury claims", *Hogan Lovells Class Actions Bulletin*, available at: <http://ehoganlovells.com/rv/ff0001fb7f7f6014139862a7cb46baef74d7f39c/p=3>.

(2) REGULATION OF LAWYERS' FUNDING ARRANGEMENTS

385. ***Contingency fees are not an essential feature of any collective redress mechanism of the selected Member States.***

Experience from **the selected Member States** demonstrates that the risk of abuses by intermediaries such as lawyers seems to be very low.

PROHIBITION OF CONTINGENCY FEE AGREEMENTS

386. ***Portugal and Sweden are the two only Member States studied where lawyers' funding arrangements are in principle prohibited under general law.***

In **Portugal**, they are not exceptionally allowed for collective redress proceedings.

In **Sweden**, contingency fees are generally banned but permitted in certain special circumstances such as collective redress proceedings (see *infra*).

387. ***In England & Wales, contingency fees are not permitted but conditional fee agreements are allowed and supervised by judges (general rules).***

In **England & Wales**, contingency fees are currently disallowed. There is a long line of judicial precedents showing that judges have traditionally been opposed to lawyers having a financial stake in the outcome of their clients' litigation⁷⁰⁴.

Jackson LJ, on his side, recommended that lawyers be permitted to enter into contingency fee arrangements, subject to proper regulation, which would include a requirement that a claimant receive independent advice. Additionally, he recommended that contingency fees in personal injury cases be capped at 25% of the damage award.

According to the current general rules, claimants who cannot afford to pay legal fees can enter into a Conditional Fee Arrangement (CFA) with their lawyers whereby they do not pay legal fees if their claim fails. Claimants are allowed to enter into a CFA but have to comply with the relevant statutory provisions. A party can apply to the judges to determine whether there has been compliance with the statutory requirements. A judge, on becoming aware of a clear breach, would of course take appropriate action⁷⁰⁵.

⁷⁰⁴ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 104.

⁷⁰⁵ Information supplied by Graham Jones.

In England & Wales, under a CFA, a lawyer may receive a success fee as well as his ordinary fee⁷⁰⁶. The success element is a percentage increase. This bonus may not exceed 100% of the normal fee⁷⁰⁷. If a claimant wins under a conditional fee agreement funded action, the defendant will be liable for the claimant's ordinary costs and the claimant's lawyer's success fee⁷⁰⁸. In practice, judges have allowed successful claimants to recover from the defendant their lawyers' fees, including the increase, in addition to the damages award itself. Jackson LJ recommended that the CFA system be adjusted so that the success fee component is always payable by the claimants, effectively out of the damages award. Following the Report of Jackson LJ, to ensure that personal injury claimants are not deprived of fair compensation, success fees should be capped in such situations to an amount equal to 25% of the damages award (excluding damages payable for future care or loss), and the level of general damages for pain, suffering and loss of amenity increased by 10%⁷⁰⁹.

CONTINGENCY FEES ALLOWED BY GENERAL RULES

388. ***In Germany, Italy and Spain, funding by lawyers is allowed under the general rules. Specific rules on collective redress proceedings do not require the approval of the judges of such agreements.***

In **Germany**, as of 1 July 2008, lawyers' funding arrangements are, in certain circumstances, permitted under German general law⁷¹⁰.

The recent changes in legislation follow a decision by the Federal Constitutional court that the long-standing prohibition of such arrangements was not in line with the German Constitution and holding that contingency fees need to be admitted if the individual circumstances of the client so require to enable claimants to enforce their rights⁷¹¹. Such agreements must be in writing.

The new legislation permits both conditional fee arrangements as well as contingency fee arrangements. According to the new legislation, fee arrangements can be made conditional upon the success of a claim if the specific circumstances of the case justify such an arrangement. The legislation specifically provides that such a situation may arise where the client, due to his

⁷⁰⁶ CPR Part 48, 48.9 (2).

⁷⁰⁷ Conditional Fee Agreements Order 1998 (SI 1998, No 1860) Article 4.

⁷⁰⁸ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, pp. 104-105.

⁷⁰⁹ Hogan Lovells, "England & Wales: Lord Justice Jackson's Final Report: overhaul of costs regime for collective actions for personal injury claims", *Hogan Lovells Class Actions Bulletin*, available at: <http://hoganlovells.com/rv/ff0001fb7f7f6014139862a7cb46baef74d7f39c/p=3>.

⁷¹⁰ Ina Brock & Stefan Rekkitt, "Germany", in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 97.

⁷¹¹ BVerfG, 12 December 2006, case no. 1 BvR 2576/04; Freshfields Bruckhaus Deringer, "Class Actions and Third Party Funding of Litigation: An analysis across Europe", June 2007, Freshfields Derlinger, available at <http://www.freshfields.com/publications.pdfs/2007/jun18/18825.pdf>, p. 31; "KapMuG: Multi-party litigation in Germany", *Class Action*, Volum VI, No. 4, 2008, p. 426.

financial situation, would otherwise be prevented from pursuing his claim. However, the new legislation does not allow legal practitioners to bear the other side's costs and/or court fees in the event that their client loses⁷¹².

In **Italy**, Article 93 of the Code of Civil Procedure allows lawyers to sponsor their clients by anticipating all costs of the proceedings until its final outcome. If they win the case, they are personally entitled to obtain reimbursement from the losing party⁷¹³.

Moreover, the prohibition of contingency and conditional fee arrangements was abrogated in 2006⁷¹⁴. They are allowed, provided that any arrangement between lawyer and client is made in writing⁷¹⁵. However, the Italian Lawyer's Code of Conduct contains the principle that *fees have to be proportionate to the activity carried out*. As far as we know, Italian case law has not yet defined the concept of proportionality in terms of what percentage of recoveries may be paid to lawyers.

In **Spain**, Bar Associations establish indicative scales regarding lawyers' fees, but lawyers and their clients agree them freely⁷¹⁶. On 4 November 2008, the Spanish Supreme Court issued a decision declaring that contingency fees are fully valid in Spain. A judge does not have responsibility for determining fees in these cases. The judge may review lawyers' fees only on the objection of the paying counter-party: i.e. if lawyers' fees are objected to as being unlawful, improper or excessive⁷¹⁷.

⁷¹² Ina Brock & Stefan Rekitt, "Germany", in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 97.

⁷¹³ Francesca Rolla & Cristina Pagni, "Italy", in *The Comparative Legal Guide to Class & Group Actions 2011: A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 105.

⁷¹⁴ Law Decree of 4 July 2006, no 223.

⁷¹⁵ Francesca Rolla & Cristina Pagni, "Italy", in *The Comparative Legal Guide to Class & Group Actions 2011: A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 105;

⁷¹⁶ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Spain), available at: http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, 39.

⁷¹⁷ Pablo Gutiérrez de Cabiedes Hidalgo, *Global Class Actions Project Country Report: Spain*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf.

389. ***In England & Wales (under the Draft) and Sweden, judges must approve lawyers' fees agreement to make them enforceable in England & Wales, and to make them binding on the represented group members in Sweden.***

In **England & Wales**, under **the Draft for a Collective Proceedings Act**, an agreement in respect of fees and disbursements payable by the representative claimant is not enforceable unless approved by the judges⁷¹⁸.

To be approved by the judges, the agreement must (i) be in writing, (ii) state the terms under which fees and disbursements are to be paid, (iii) give an estimate of the expected fee and state whether or not that fee is conditional on success in the collective proceedings and (iv) state the method by which payment is to be made, whether by lump sum or otherwise⁷¹⁹.

If an agreement is not approved by the judges or if the amount due under an approved agreement is in dispute, the judges may determine the amount in respect of fees and disbursements; or make any other or further order they consider appropriate⁷²⁰.

In **Sweden**, contingency fees are generally banned but permitted in certain special circumstances such as collective redress proceedings.

Indeed, the GrL allows the representative claimant and his lawyer to reach fee agreements, meaning that lawyers' fees are based on the extent to which the group members' claims are satisfied. Under these *risk agreements*, fees are conditional on liability but are not primarily contingent fees. For example, a lawyer will be paid double or triple the rate if the action is successful and half the rate - or nothing - if the group action fails. In practice, it seems that a risk agreement provides no excessive incentives for conducting group proceedings but may overcome the reluctance of some attorneys to engage in this complicated procedure.

Represented group members are bound by a risk agreement only if the judges approve it⁷²¹. The issues of the approval must be considered by the judges in pending group proceedings on request of the representative claimant.

There are several mechanisms by which the members of the represented group and the judges can control the fairness of such agreements. The judges may only approve them if they *are reasonable*

⁷¹⁸ Article 19.48 (2) Draft Collective Proceedings Act.

⁷¹⁹ Article 19.48 (1) Draft Collective Proceedings Act.

⁷²⁰ Article 19.48 (3) Draft Collective Proceedings Act.

⁷²¹ Section 38 GrL.

*having regard to the nature of the substantive matter*⁷²². The GrL requires that the agreements must be made in writing and specify how fees will depart from normal fees if the claims of the members of the group are granted or dismissed completely⁷²³. As noted above, judges are not authorized to approve risk agreements *if fees are based solely on the value of the subject of dispute*⁷²⁴. In addition, the GrL offers the possibility for group members to notify their dissatisfaction and to appeal the judge's decision to approve a risk agreement⁷²⁵.

In Sweden, the risk agreements allowed in collective redress proceedings are not binding on the defendant.

The judge is not allowed to order the losing defendant to pay fees for the representative claimant's lawyer that are higher than the customary rate, possibly adjusted on the basis of the lawyer's special qualifications, the scope of the action, or the difficulty of the case⁷²⁶.

⁷²² Section 39 GrL.

⁷²³ Section 39, second and third sentences, GrL.

⁷²⁴ Section 39, last sentence, GrL; for an example of risk agreement approved by the judge, see the *Bo Åberg v Elfeterios Kefales* case, Stockholm District Court, case number T 3515, 2003; the case has now been transferred to the Nacka District Court, case number T 1281, 2004.

⁷²⁵ Section 45 GrL.

⁷²⁶ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 17.

2.2. VERIFYING THE LITIGATION COSTS

- Do the selected Member States allow judges to derogate from the *loser pays* principle in collective redress proceedings? Is the *loser pays* principle adapted to collective redress proceedings? **((1) Costs shifting)**
 - If so, do the national laws rigorously circumscribe those exceptions or are they left to case-by-case assessment by judges, possibly within the framework of a general provision?
- Are judges in the selected Member States required to supervise cost sharing arrangements among represented group members? **((2) Supervision of cost sharing arrangements)**
 - If so, when must judges exercise this control?
 - Do judges have the power in certain circumstances to order that the representative claimant only (represented group members excluded) must bear the litigation costs?

(1) COSTS SHIFTING⁷²⁷

THE *LOSER PAYS* RULE AS A PRINCIPLE

390. ***All selected Member States discourage unmeritorious claims through the application of the loser pays principle.***

In **most of the selected Member States**, the *loser pays* principle seems to constitute a strong disincentive against unmeritorious claims.

Where costs shifting applies, the following costs are shifted: court costs, witness and expert expenses (sometimes subject to court approval), and lawyers' fees and expenses (usually subject to reduction)⁷²⁸.

⁷²⁷ Germany will not be covered by this section as litigation costs are not a matter for the higher judges but rather for each first instance judge.

⁷²⁸ C. Hodges, S. Vogenauer and M. Tulibacka, *Costs and Funding of Civil Litigation: A comparative study*, December 2009, Legal Research Paper Series, University of Oxford, p. 19.

391. ***In England & Wales, Italy and Spain, general rules allow judges to reconsider the losing party pays principle in certain circumstances.***

In **England & Wales**, the general rule is that the unsuccessful party will be ordered to pay the standard basic costs of the successful party⁷²⁹, although a judge has a wide discretion to award full reasonable costs, limited costs, or no costs at all⁷³⁰. Judges may thus adjust the *loser pays* rule and so can decide whether to order one party to pay the other's costs. In acting so, judges can determine the amount of those costs and can decide for which stages of the litigation costs are to be paid (discretionary costs decisions⁷³¹).

In all cases, except for very limited special exceptions, a judge thus has general discretion as to full or partial shifting of costs. In deciding what order to make about costs, a judge must have regard to all the circumstances, including matters which are set out in the PCR⁷³².

Through the trial, judges have general powers to refuse, limit or cap recoverable costs (see *supra* – Section Two, Costs management). Such orders place a ceiling on parties' recoverable costs. In proceedings where there is real risk of costs getting out of hand, judges increasingly have begun to make such orders in recent years.

Concretely, judges impose an *ex-ante* cap on a party's capacity to recover costs from the losing party⁷³³. The cap is, however, limited to recoverable costs; it does not prohibit the capped party from incurring costs above the cap, but in the latter situation, such excess costs will not be recoverable, because they will be above the cap⁷³⁴.

Jackson LJ recommended that for personal injury claims, whether part of a collective redress action or brought individually, full costs shifting should be replaced by *qualified one-way costs shifting*. Under this regime, injured claimants would be able to recover their costs from the defendant following a win, but generally would not have to pay the defendant's costs following a loss. However, the judges would be able to order otherwise based on parties' financial circumstances or their unreasonable conduct during the litigation.

⁷²⁹ CPR Part 44, 44.3.2 (a).

⁷³⁰ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 174.

⁷³¹ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 102.

⁷³² Information supplied by Graham Jones.

⁷³³ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 101.

⁷³⁴ Neil Andrews, *The three paths of justice: court proceedings, arbitration, and mediation in England*, published by Springer (Dordrecht, Heidelberg, London and New York), 2011, p. 102.

Jackson LJ's reason for this *qualified one-way costs shifting* is that it would prohibitively expensive for the vast majority of personal injury claimants to meet an adverse costs order in fully contested litigation. Conversely, defendants in such actions are almost invariably insured or self-insured⁷³⁵.

In **Italy**, some new rules on fee-shifting were recently adopted to foster settlements: they establish the liability of a winning party that rejected an offer of settlement not lower than the subsequent judicial award⁷³⁶.

Judges may also limit or exclude recovery of legal expenses when none of the parties is entirely successful in his case or when exceptional circumstances occur which have to be specified in the judgment⁷³⁷. In practice, where the claimant has not acted unreasonably and the defendant has deep pockets, Italian judges sometimes do not apply the *loser pays* principle⁷³⁸.

It is the judges' task to determine the amount of the winning party's lawyers' fees that the losing party must pay. However, the fees the lawyer may directly charge to the client are almost always much higher because that determination is not a cap; hence the winning client must pay the difference⁷³⁹. If the client complains of the excessiveness of fees, a special fast-track procedure may apply to determine their amount with respect to any kind of litigation.

At the judges' discretion, the losing party may be exempt from his duty to pay the winning party's lawyers' fees⁷⁴⁰, and usually consumers and consumer associations are exempt, as well as parties that did not actively participate in the litigation.

Hence, *de facto*, in practice a representative claimant would be liable for the winning defendant's lawyers' fees only in rare circumstances, and the class members only in absolutely extreme cases⁷⁴¹.

In contrast to lawyers' fees, court fees are directly determined by law and not by the judge. When judges decide a case, they must award legal costs to the winning party to the extent provided by the Legal Tariffs (agreements contracting the amount of legal fees beyond the Legal Tariffs are not taken into account), excluding unnecessary expenses or expenses incurred due to the winning party's unfair conduct in the trial.

⁷³⁵ Hogan Lovells, "England & Wales: Lord Justice Jackson's Final Report: overhaul of costs regime for collective actions for personal injury claims", *Hogan Lovells Class Actions Bulletin*, available at: <http://ehoganlovells.com/rv/ff0001fb7f7f6014139862a7cb46baef74d7f39c/p=3>.

⁷³⁶ Information supplied by Andrea Giussani.

⁷³⁷ Francesca Rolla & Cristina Pagni, "Italy", in *The Comparative Legal Guide to Class & Group Actions 2011: A practical cross-border insight into class and group actions work*, published by Global Legal Group, in association with CDR, 2011, p. 105.

⁷³⁸ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Main Report), available at: http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf, p. 67.

⁷³⁹ Information supplied by Andrea Giussani.

⁷⁴⁰ Article 91 of the Italian Code of Civil Procedure.

⁷⁴¹ Information supplied by Andrea Giussani.

Article 140-bis of the Consumer Code does not set statutory limitation to legal costs to be borne by the plaintiff.

In **Spain**, the *loser pays* principle will be excepted when neither party completely wins: in this case the judge may decide the percentage of litigation costs payable by each party⁷⁴².

In Spain, judges do not manage the costs incurred by the parties.

The lawyers, by means of the procedure called *tasacion de costas*, will claim the payment of the fees against the losing party⁷⁴³. The losing party can argue that the costs are excessive or improper. The Court's Legal Secretary will verify that the legal fees claimed by the winning party are reasonable and will reduce legal fees that exceed the established limits, i.e. one-third of the amount claimed in the proceedings⁷⁴⁴.

Spain protects the losing party insofar as under the *loser pays* principle the losing claimant will not be liable for excessive legal fees charged by the defendant's lawyer. In Spain, a judge does not have responsibility for determining fees. The judge may review lawyers' fees only on the objection of the paying counter-party: i.e. if lawyers' fees are objected to as being unlawful, improper or excessive⁷⁴⁵.

NO EXCEPTIONS ADAPTED TO COLLECTIVE REDRESS PROCEEDINGS

392. ***In England & Wales, Italy, Spain and Sweden, specific rules do not empower judges to reconsider traditional costs shifting rules in collective redress proceedings.***

In these Member States, when a representative claimant is held liable to pay the defendant party's costs it does not, however, mean that he actually pays in practice. Mechanisms, including public funding, can notably reduce certain costs and expenses in the absence of adaption of the *loser pays* principle in collective redress proceedings.

In **Spain**, for example, if a group is represented by an authorized consumer association and it then loses the case, no person will have to pay any amount because the very nature of such associations entails - as a fundamental aim - the litigation and the assumption of these risks. In Spain, these

⁷⁴² Article 394 LEC.

⁷⁴³ Articles 241-246 LEC.

⁷⁴⁴ Article 394.3 LEC establishes that the amount that the losing party has to pay regarding legal fees cannot exceed one-third of the amount claimed in the proceedings.

⁷⁴⁵ Pablo Gutiérrez de Cabiedes Hidalgo, *Global Class Actions Project Country Report: Spain*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf.

entities enjoy the benefit of free justice⁷⁴⁶. This means that their costs are assumed by the State should they lose⁷⁴⁷.

In **Sweden**, in a private action, the group representative is in most cases expected to receive financial support from outside sources, including under the Legal Aid Act and from the legal expenses insurance of the group members. In a public action, the State bears most of the legal costs for actions brought by the Ombudsman.

PARTIAL SHIFTING OF COSTS ALLOWED BY SPECIFIC RULES

393. ***In Portugal, law 83/95 adapts the loser pays principle to collective redress proceedings and so exempts the representative claimants from court fees except if they fully lose the claim. In this case, judges can order them to pay between half and 1/10 of the regular fees.***

In **Portugal**, according to Law 83/95, the representative claimant, in the event that a claim only partially proceeds, is exempt from the payment of costs (although the *loser pays* rule does apply)⁷⁴⁸.

In the case of the total failure of a claim, the representative claimant is only responsible for an amount to be determined by the judges at their own discretion and which is somewhere between 10% and 50% of the costs that would normally be due, depending on his financial situation and the substantive or procedural reason for the dismissal of the action⁷⁴⁹.

ACOP v Portugal Telecom⁷⁵⁰

In *ACOP v. Portugal Telecom*, the judge held that ACOP's case was baseless, and Portugal Telecom had proven that the billing was not illegal.

The judge ordered ACOP to pay 10% of the court costs⁷⁵¹. The total costs of the representative claimant related to the case were finally: Court fees: €157.06 (which equated to 10% of the usual cost, as ordered by the judge); lawyers' fees: €0.

⁷⁴⁶ Section 22.2 c) of the Law 38/2003, of 17 November, General of Subsidies BOE num. 276, of 18 November 2003.

⁷⁴⁷ Information supplied by Elena Martinez.

⁷⁴⁸ Article 20,2 Law 83/95.

⁷⁴⁹ Article 20,3 Law 83/95.

⁷⁵⁰ *ACOP v P*, Proc. 781/95; Comarca de Lisboa, 5o Juízo Cível, 1a Secção.

⁷⁵¹ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Portugal), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, p. 5.

The defendant, for his part, is obliged to pay court fees regardless of whether or not it wins⁷⁵².

Law 83/95 also requires that the judges, at the end of the proceedings, rule on the award for the successful parties' lawyers' fees, taking into account the complexity of the case and the amount in question⁷⁵³. Concretely, judges will make the decision as to the percentage to be paid on the basis of the representative claimant's financial situation and the formal and substantive reasons for having decided the case substantively in the defendant's favour⁷⁵⁴.

Except for lawyers' fees that will be allocated by the judge at the end of the proceedings, judges do not regulate court fees in collective redress proceedings. So, as regards court fees and other incidental expenses and the legal costs for bringing the action, the successful party may recover the amounts paid within the proceedings.

It should, however, be recalled that Law 83/95 provides for a special procedure which reduces the amount payable for court costs. It is a much less formal system, and is used to avoid the difficult technical proof of each element of individual consumer cases within a large mass action.

(2) SUPERVISION OF COSTS SHARING ARRANGEMENTS

NO ISSUE OF COSTS SHARING

394. ***In Italy and Spain, the litigation costs are in principle borne entirely by the representative claimant. This results from the practice.***

In **Italy**, Article 140-bis of the Consumer Code does not provide for a costs sharing mechanism among members of a class.

According to scholars' prevailing opinion, the litigation costs are borne entirely by the representative claimant. There is no statutory limitation to legal costs to be borne by the plaintiff. Only the representative claimant must pay the group lawyers' fees: opting-in is free of charge

⁷⁵² Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Portugal), available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf, p. 6.

⁷⁵³ Article 21 Law 83/95.

⁷⁵⁴ Tito Arantes Fontes & Joao Pimentel, "Portugal", in *The International Comparative Legal guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 126.

because a lawyer's representation is not mandatory⁷⁵⁵ (it is an exception to the general rule; obviously a lawyer may charge fees to the represented group members for specific help, e.g. in preparing the opt-in application)⁷⁵⁶.

Hence, in principle, the representative claimant is responsible to the court and the defendant for all costs, while members of the represented group who wish to join in do not have to bear any further costs, besides the costs related to filing their request before the court.

In **Spain**, the LEC does not regulate distribution or allocation of costs amongst members of the group or undetermined consumers represented in the action. In practice, consumers only seem to have to pay the membership fee to be represented by the consumer organisation in a collective redress claim.

ISSUE REGULATED BY SPECIFIC RULES

395. ***In Germany, Portugal and Sweden, specific rules expressly regulate liability for costs of a member of the group. The judges' supervision is limited to the correct application of those rules.***

In **Germany**, the decision on costs of the model case proceedings is a matter for the first instance judges⁷⁵⁷. The share of the costs common to all represented group members involved in the proceedings before the judge of appeal are divided up among the separate proceedings brought by each represented group member according to the ratio of the amount of the claim made by a respective group member to the total amount of the claims made⁷⁵⁸. These costs are part of the costs order of the separate first instance proceedings.

In **Portugal**, law 83/95 regulates the liability for costs only of participating represented group members⁷⁵⁹. For them, the liability for costs is joint and several in nature⁷⁶⁰. In practice, it is usually the representative claimant that bears the litigation costs⁷⁶¹.

⁷⁵⁵ Article 140-bis, § 3 of the Consumer Code.

⁷⁵⁶ Information supplied by Andrea Giussani.

⁷⁵⁷ Section 17 KapMuG.

⁷⁵⁸ Sections 8,3 & 14,2 KapMuG; Section 17, third sentence KapMuG.

⁷⁵⁹ Article 20,5 Law 83/95.

⁷⁶⁰ Tito Arantes Fontes & Joao Pimentel, "Portugal", in *The International Comparative Legal guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, published by Global Legal Group in association with CDR, 2011, p. 126.

⁷⁶¹ In DECO's cases for instance; information supplied by Luis Rodrigues.

In *ACOP v Portugal Telecom*, there were no lawyers' costs for individual represented consumers (around 3 million), and it appears that legal services were provided to ACOP free of charge. The consumer organisation was eligible for reduced court costs.

In **Sweden**, the main rule is that the representative claimant in principle bears alone the risk of being ordered to pay the opponent's costs if the group loses the case.

The GrL regulates, however, the liability for litigation costs of a member of the represented group in certain circumstances: (i) if the defendant has been ordered to pay and cannot pay; (ii) if they have incurred additional litigation costs by their conduct⁷⁶³. The same applies to additional costs in connection with risk agreements that the defendant has not been ordered to pay, in accordance with Section 41 GrL,⁷⁶⁴.

In any case, represented group members can be held liable to bear only part of the litigation costs corresponding to their benefit from the proceedings⁷⁶⁵ but cannot be liable to pay more than they have gained through the proceedings⁷⁶⁶.

JUDGES' DISCRETION

396. ***In England & Wales, the GLO rules expressly regulate liability for costs of a member of the group and create space for a margin of appreciation by the judges.***

In **England & Wales**, judges must decide which procedural costs are individual costs and which are common costs under the GLO⁷⁶⁷. The former relate to any aspects that relate only to each claimant's individual case and the latter are any aspects that relate to all claims generically⁷⁶⁸.

Unless judges order otherwise, any order for common costs against represented group members imposes on each group litigant several (not joint and several) liability for an equal portion of those common costs⁷⁶⁹.

⁷⁶² *ACOP v P*, Proc. 781/95; Comarca de Lisboa, 5o Juizo Cível, 1a Secção.

⁷⁶³ Sections 33-36 GrL.

⁷⁶⁴ Section 34 GrL.

⁷⁶⁵ Section 34 GrL.

⁷⁶⁶ Per Henrik Lindblom, *Global Class Actions Project Country Report: Sweden*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 17.

⁷⁶⁷ CPR Part 48, 48.6A (5).

⁷⁶⁸ CPR Part 48, 48.6A (2).

⁷⁶⁹ CPR Part 48, 48.6A (3).

Where judges make an order on costs in relation to any application or hearing which involved both GLO issues and issues relevant only to individual claims, the judges will direct as to which proportion of the costs is to relate to the common issues and which proportion is to relate to the individual costs⁷⁷⁰.

Case law has provided that judges are entitled to devise new procedures adapted to the circumstances of particular collective redress litigations.

Furthermore, there can be agreements about the apportionment of costs of proceedings amongst represented group members. The arrangements usually provide that people who join the group late accept liability for the common costs that have been incurred before they join, but that people who leave the group have their liability for costs frozen or limited or continued. The existence of the agreement does not exclude the statutory discretion of judges to make their own orders. However, where there are contractual rights and obligations, judges' discretion should ordinarily be exercised so as to reflect those contractual rights and obligations⁷⁷¹.

Judges usually order that the costs of a test or lead case shall be treated as common costs, since they are for the purpose of advancing the whole group's cases⁷⁷².

⁷⁷⁰ CPR Part 48, 48.6A (5).

⁷⁷¹ Information supplied by Graham Jones.

⁷⁷² CPR Part 48, 48.6A (2).

C. CONCLUDING SUMMARY

1. THE FINAL VERDICT

1.1. IDENTIFIED CONCERNS AND ABUSES

397. (1) Concern that individual interests are diluted in the interest of the group.
- (2) Concern that the final award reaches extreme limits (disadvantage for the defendant) or gives compensation that is inappropriate for the consumers.
- (3)
- (i) & (ii) Concern that *res judicata* covers abusively absent represented group members (opt-in proceedings).
 - (iii) Concern that individual notices of the judgement cause disproportionate costs.

1.2. INTERESTS AT STAKE

398. (1) Objectives (essence) of the collective redress mechanism: collective resolution of individual and similar issues; Interest of individual consumers balanced against the interest of the group; Achieving just and effective outcome for represented group members.
- (2) Balance between avoiding costly, time-consuming and inefficient individual damages determinations and awarding appropriate and not excessive compensation.
- (3)
- (i) & (ii) Objectives (essence) of the collective redress mechanism: binding all the consumers who have opted in or who have not opted out.
 - (iii) Individual notice = assurance of fairness for represented group members.

1.3. POTENTIAL SOLUTIONS

399. (1) Judges should have flexible powers to decide the type and the terms of the judgement.
- (i) Interim judgement on common issues.
 - (ii) Mixed judgement.
- (2) Judges should have flexible powers to assess the damage and to decide the terms and form of compensation:
- (i) Judges should be given the power to calculate the compensation on an individual or a global or an aggregate basis, whichever contributes best to the fair and the effective compensation of mass injury (but accuracy of decision making);
 - (ii) Form of compensation should be chosen on a case-by-case basis.
- (3) Binding effect of the judgement
- (i) Judicial regulation of the binding effect not necessary in opt-in proceedings.
 - (ii) Judicial limitation should be allowed in opt-out proceedings where a represented group member could demonstrate that he could not reasonably have been made aware of the existence of the decision admitting the collective proceedings.
 - (iii) Reasonable publicity should be ordered by the judges on a case-by-case basis.

1.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) TYPE OF JUDGEMENT

(I) INTERIM JUDGEMENT

➤ *Do the selected Member States allow judges to deliver a judgement on the existence of liability and/or on other common issues which constitute the grounds for individual actions only?*

➤ *If permitted, do judges transfer the resolution of individual issues to other judges?*

400. In **Italy**, **Portugal** and **Spain**, the specific rules do not set out expressly the ability of judges to deliver interim judgements.

401. In **England & Wales** (under the **Draft**) and **Sweden**, judges may deliver judgements on the common issues and postpone the consideration of particular issues.

402. In **England & Wales** (including under the **Draft**), judges may deliver interim judgements on common issues. Individual issues will be dealt with by other judges.

403. In **Germany**, the nature itself of the mechanism requires that the higher judges deliver interim judgements.

(II) MIXED JUDGEMENT

➤ *Do the selected Member States allow judges to make a determination on the common issues for certain represented group members (interim judgement) and to assess the amount of the individual compensation for certain other represented group members (final judgement)?*

404. In **Germany**, **Italy** and **Portugal**, it is not possible for judges to deliver a decision which for certain represented group members is a final decision and for other members is an interim judgement.

405. In **Spain**, judges may deliver a judgement which may have different effects on the represented group members, depending on whether they were participating parties in the proceedings or not.

406. In **England & Wales** (under the **Draft**) and **Sweden**, judges are allowed to deliver a mixed judgement.

(2) COMPENSATION

(1) ASSESSMENT OF DAMAGES

- *Do the specific national rules allow judges to use the global or the aggregate method to assess the damages in collective redress proceedings? Do the selected Member States adapt their substantive rules on causation in tort law and calculation of damages to the assessment of mass injury?*

- *Do the national specific rules impose an assessment method or is the issue left to a case-by-case assessment by the judges?*

407. In **England & Wales**, **Spain** and **Sweden**, judges are mandatorily required to assess damages on an individual basis. Global or/and aggregate methods are not envisaged by the specific rules.

408. In **Italy**, specific rules permit a global (equitable) assessment of damages by judges.

409. In **England & Wales** (under the **Draft**) and **Portugal**, specific rules permit an aggregate assessment of damages by judges (opt-out systems)

- *Do the selected Member States allow judges to use the method of subgroups to facilitate the assessment of individual damages?*

410. In **England & Wales**, **Spain** and **Sweden**, judges may use the technique of subgroups to facilitate the assessment of damages.

- *Do the selected Member States leave the choice of the form of compensation to a case-by-case assessment by the judges? Do the selected Member States adapt their substantive rules on the form of compensation to the reparation of mass injury?*
 - *In cases where monetary compensation is awarded, do the selected Member States distinguish between judgments establishing the precise amounts due and judgments in which the amounts due are not established?*

JUDGEMENTS ESTABLISHING THE PRECISE INDIVIDUAL AMOUNTS DUE

- 411. In **England & Wales**, judges are strictly required to fix the individual amounts due in their judgements.
- 412. In **Italy** and **Sweden**, judges will try to determine each individual amount due. If it is impossible, they may have recourse to other methods (opt-in systems).
- 413. In **Portugal** and **Spain**, judges may vary the specification of the determination of the amounts due according to the quality of the beneficiaries.
- 414. In **England & Wales** (under the **Draft**), great flexibility is left to the judges.

JUDGEMENTS ESTABLISHING A FORMULA

- 415. No information is available for **Portugal**.
- 416. In **England & Wales**, judges do not have the power to deliver a judgement in which precise amounts due are not established.
- 417. In **Spain** and **Sweden**, where it is not possible to determine precise amounts due, the judge will at least fix rules on how to calculate the amounts due.
- 418. In **Italy**, judges have the choice between establishing precise amounts due and establishing homogeneous calculation criterion.

419. In **England & Wales** (under the **Draft**), where a judgement in an aggregate sum is given and the judges decide to divide up the sum on an individual basis (and not on an average or proportional basis), the judges must determine the procedure for determining the individual claims.

➤ *In the selected Member States where punitive damages are generally prohibited, are judges exceptionally allowed to award such damages in collective redress proceedings?*

420. In **Italy, Spain and Sweden**, judges are prohibited from awarding punitive damages in general; neither are they exceptionally permitted to do so in collective redress proceedings.

421. In **Portugal**, punitive damages are not recoverable in general except if expressly agreed between parties. Judges are, for their part, not empowered to award punitive damages in collective redress proceedings.

422. In **England & Wales**, judges award punitive or exemplary damages rarely, if ever. This does not change for collective redress proceedings.

➤ *Do the selected Member States grant judges a *cy-près* power in collective redress proceedings?*

423. In **England & Wales, Italy and Spain and Sweden**, the specific rules do not give judges *cy-près* powers. In practice, it seems that judges do not award *cy-près* compensation.

424. In **Portugal**, judges have some kind of *cy-près* powers.

(3) BINDING EFFECT OF THE JUDGEMENT

(I) BINDING EFFECT IN OPT-IN SYSTEMS

- *Do the selected Member States require that judges verify the binding effect of the judgement? Are judges allowed to limit the binding effect of the judgements to the single representative claimant?*
 - *Do judges verify the adequacy of the representation of the represented group in considering the binding effect of the judgement?*
 - *May judges establish res judicata secundum eventum litis (or, establish that the decision is binding only if it benefits but not if it is prejudicial to those not appearing in court)?*
 - *In the case of an affirmative answer, does the judges' decision depend on any additional particular circumstance?*

425. In **England & Wales** (under the **Draft** and within certain conditions), **Germany**, **Italy** and **Sweden**, judgements are legally binding both for and against every member of the represented group without any exceptions.

426. In **Spain**, judges are not allowed to limit the binding effect of the judgement but are rather required to establish that the *res iudicata* effects of the judgement also affect the non-litigants.

427. In **England & Wales**, judgements are in principle legally binding on all members of the represented group, but judges may order otherwise.

(II) BINDING EFFECT IN OPT-OUT SYSTEMS

- *In opt-out systems, in addition to the aforementioned questions, are judges allowed to enable a represented group member to opt out of a judgement if, for instance, he could demonstrate that he could not reasonably have been made aware of the existence of the decision admitting the collective redress proceeding?*

428. In **Portugal**, judges may restrict the extent of the binding effect in certain specified circumstances.

429. In **England & Wales** (under the **Draft**), judges may allow a represented group member to opt out of the judgement provided certain conditions are satisfied.

(III) NOTICE TO THE REPRESENTED GROUP MEMBERS

➤ *Do the selected Member States leave the means of notifying the existence of the final judgement to the members of the group to the judges' discretion?*

➤ *Do the powers of judges differ in the case of opt-out proceedings?*

430. In **Italy** and **Spain**, specific laws do not consider the issue of the suitable and reasonable notification to the represented group members and so do not specifically require that judges manage the way the represented group members are notified about the case.

431. In **England & Wales**, **Germany** and **Portugal**, specific laws impose the means of notification to the represented group members.

432. In **England & Wales** (under the **Draft**) and **Sweden**, judges may choose the means of notification they consider appropriate. Specific laws set out to a certain extent the content of such notice.

2. THE FINANCIAL ASPECTS

2.1. IDENTIFIED CONCERNS AND ABUSES

433. (1) Concern of capture of the collective redress proceeding by funders.
- (i) Capture of the litigation by third-party funders; absence of client control; extra costs; blackmail settlements.
 - (ii) Entrepreneurial lawyering; conflicts of interests; maximisation of lawyers' incomes through contingency and conditional fees agreements; offensive litigations.
- (2) Concern of excessive litigation costs.
- (i) Concern that the US non-existence of costs shifting encourages weak cases and so-called blackmail litigation.
 - (ii) Concern that private arrangements among the represented group members as to the sharing of costs lead to significant problems.

2.2. INTERESTS AT STAKE

434. (1) Potential need for (private) funding mechanisms
- (i) Additional means of funding litigation and, for some consumers, the only means of funding litigation (access to justice promoted to consumers); the use of a third party does not impose additional financial burdens upon the losing party; third party funding tends to filter out unmeritorious cases.
 - (ii) Effective access to justice; contingency fees exclude the unmeritorious claims: lawyers will agree to such agreement only if they are reasonably assured of the eventual success of the collective action.
- (2)
- (i) No costs shifting encourages access to justice but costs shifting opens the door only to meritorious claims.

2.3. POTENTIAL SOLUTIONS

435. (1) If, and only if, third-party investor and lawyers' funding arrangements should be permitted to provide access to justice:

- (i) Judge-supervised third-party investor agreements (judges' approval necessary at the earliest stage of the proceedings);
- (ii) Judge-supervised contingency fees agreements (judges' approval necessary at the earliest stage of the proceedings).

(2) No specific adaptation to the collective redress proceedings. Application of the general rules concerning the powers of the judges when they settle the litigation costs:

- (i) Maintenance of the *loser pays* principle to help deter unmeritorious litigation⁷⁷³;
- (ii) Judicial regulation of the sharing of costs among represented group members.

⁷⁷³ The losing party in the proceedings, if ordered to pay the successful party's costs, must only be required to pay an amount for costs reflecting what would be conventional amount, with any difference to be borne by the successful party.

2.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) PRIVATE FUNDING

(I) THIRD-PARTY INVESTOR AGREEMENTS

- *Do the selected Member States regulate specifically third-party funding of collective redress proceedings?*
 - *If so, do the selected Member States require that judges exercise specific verification of third party funding arrangements in collective redress proceedings?*
 - *When are judges required to exercise such verification?*
 - *Are judges required to verify that funding arrangements are fair and comply with legal requirements?*
 - *Are judges required to approve funding arrangements to make them enforceable?*

- 436. In **Germany, Portugal, Spain** and **Sweden**, judges are not required to exercise specific supervision of third-party funding arrangements in collective redress proceedings. No interesting case law has yet emerged on this issue in these Member States.

- 437. In **Portugal**, the collective redress mechanisms are little used precisely because of the problem of lack of funding.

- 438. In **Italy** and **Spain**, funding through third-party investors has not yet appeared necessary. This is justified because consumer associations may be the representative claimant in collective redress proceedings.

- 439. In **Germany** and **Sweden**, the issue of funding the collective redress proceedings has been resolved by the practice. Models of funding have been developed in order to deal with collective redress proceedings.

- 440. In **England & Wales**, third-party funding is likely to develop in collective redress proceedings. Judges must review third-party agreements to assess their validity (Code for third-party investors).

➤ *Do the selected Member States allow contingency fees agreements in general? If not, do they allow contingency fees agreements specifically to fund collective redress proceedings?*

441. Contingency fees are not an essential feature of any collective redress mechanism of the **selected Member States**. Experience from **the selected Member States** demonstrates that the risk of abuses by intermediaries such as lawyers seems to be very low.

442. **Portugal** and **Sweden** are the two only studied Member States where lawyers' funding arrangements are in principle prohibited under general law.

443. In **England & Wales**, contingency fees are not permitted but conditional fees agreements are allowed and regulated by judges (general rules).

444. In **Germany**, **Italy** and **Spain**, funding by lawyers is allowed by general rules. Specific rules on collective redress proceedings do not set out requirements for the approval by the judges of such agreements.

➤ *If contingency fees agreements are permitted, do the selected Member States require that judges exercise specific supervision of lawyers' funding arrangements in collective redress proceedings?*

➤ *When are judges required to exercise such supervision?*

➤ *Are judges required to approve lawyers' fees arrangements to make them enforceable?*

445. In **England & Wales** (under the Draft) and **Sweden**, judges must approve lawyers' fees agreements to render them enforceable in **England & Wales**, and to make them binding on the represented group members in **Sweden**.

(2) LITIGATION COSTS

(1) COSTS SHIFTING

- *Do the selected Member States allow judges to derogate from the loser pays principle in collective redress proceedings? Is the loser pays principle adapted to collective redress proceedings?*
 - *If so, do the national laws rigorously circumscribe those exceptions or are they left to case-by-case assessment by the judges, possibly within the framework of a general provision?*

446. **All selected Member States** discourage unmeritorious claims through the application of the *loser pays* principle. In most of the selected Member States, the *loser pays* principle seems to constitute a strong disincentive for unmeritorious claims. Where costs shifting applies, the following costs are shifted: court costs, witness and expert expenses (sometimes subject to court approval), lawyers' fees and expenses (usually subject to reduction).
447. In **England & Wales, Italy** and **Spain**, general rules allow judges to reconsider the losing party pays principle in certain circumstances.
448. In **England & Wales, Italy, Spain** and **Sweden**, specific rules do not give judges the ability to reconsider traditional costs shifting rules in collective redress proceedings. In Spain and in Sweden, when a representative claimant is held liable to pay the defending party's costs it does not, however, mean that he actually pays in practice. Mechanisms, including public funding, can notably reduce certain costs and expenses in the absence of adaption of the *loser pays* principle in collective redress proceedings.
449. In **Portugal**, law 83/95 adapts the *loser pays* principle to collective redress proceedings and so exempts the representative claimants from court fees except if they completely lose the claim. In this case, judges can order them to pay between half and 1/10 of the regular fees.

➤ *Are judges in the selected Member States required to supervise costs sharing arrangements among represented group members?*

➤ *If so, when must judges exercise this control?*

➤ *Do judges have the power, in certain circumstances, to order that only the representative claimant (represented group members excluded) must bear the litigation costs?*

450. In **Italy** and **Spain**, the litigation costs are in principle borne entirely by the representative claimant. This results from the practice.

451. In **Germany**, **Portugal** and **Sweden**, specific rules regulate expressly liability for costs of a member of the group. The judges' supervision is limited to the correct application of those rules.

452. In **England & Wales**, the GLO rules expressly regulate liability for costs of a member of the group and create space for a margin of appreciation by the judges.

SECTION FOUR

POWERS OF THE JUDGES AT THE DISTRIBUTION STAGE

A. ANTICIPATED CONCERNS

1. Concern of ineffective compensation
2. Concerns around unclaimed damages

B. COMPARATIVE ANALYSIS

1. Role of the judges in the execution of the decision and in the distribution of damages
 - 1.1. Imposing reasonable steps on represented group members for them to obtain compensation (opt-out proceedings)
 - 1.2. Appointing a liquidator to supervise the distribution
2. Role of the judges concerning unclaimed damages

C. CONCLUDING SUMMARY

A. ANTICIPATED CONCERNS

1. CONCERN OF INEFFECTIVE COMPENSATION

1.1. SUPPLEMENTARY STEPS

453. ***Concern that additional steps represent an extra obstacle to obtaining compensation (opt-out proceedings)***

If, at the outcome of a collective redress procedure, a judgement may be declared binding on a large group of consumers, it does not mean that they will all automatically obtain compensation⁷⁷⁴.

An effective distribution of the obtained funds to individuals is mostly linked to the accuracy of the decision making. This will depend on the terms of compensation decided by the judges and on how accurately the modalities of distribution of the compensation have been described.

Judgements in which the precise amounts due are not established do not have the same effects as judgements establishing the precise amounts due to individual represented group members. It is indeed not self-evident that they could both be used as a basis for enforcement. Similarly, judgements which do not identify precisely the beneficiaries of the compensation awarded – which is potentially possible in opt-out proceedings – do not raise the same issues as judgements establishing the beneficiaries precisely.

In opt-out proceedings, it may happen that represented group members have to undertake some further steps before obtaining compensation. It has been formulated that additional steps for obtaining compensation may represent an extra obstacle for consumers before they can be compensated. This is essentially because the victims may not be able to prove or assess the amount of damage they suffered (especially in situations where the violation relates to mass consumer goods).

454. ***Relevant questions***

In opt-out proceedings, when it is necessary to identify individually the affected consumers, it appears important that judges describe clearly the steps that must be taken in order to obtain compensation. When specifying this procedure, judges should also set a time within which

⁷⁷⁴ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report”, available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 309.

represented group members must take these steps and after which they will no longer be entitled to claim compensation.

Another concern in performing an effective distribution of the obtained funds to individuals which have suffered low-value damages derives from the costs needed for handing out such sums individually. This concern may be resolved by granting judges *cy-près* powers (see *supra* – Section Three, *cy-près* power)⁷⁷⁵.

The main question in deciding how judges should strike the balance between ensuring that supplementary steps do not constitute an extra obstacle to compensation for affected consumers and assuring the defendant that no consumer will benefit from the judgement abusively is:

- Should judges be entitled to ask the represented group members to undertake supplementary steps to obtain compensation?
 - If permitted, to what extent should this power be exercised?
 - Should judges be able to require that individuals take these steps within a certain timeline?
 - Should judges have jurisdiction to supervise the execution of these steps?

⁷⁷⁵ L. Tzakas, “Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?”, *Common Market Law Review* 48, 2011, p. 1150.

1.2. SUPERVISION OF THE DISTRIBUTION

455. ***Concern that the defendant will fail to execute the judgement***

Once individual awards are ordered, it has been suspected that defendants will fail to execute judgements in collective redress proceedings as they would not be threatened with a collective enforcement of the judgements.

Once an aggregate award is made in the final judgement – which would be typically possible in opt-out proceedings – it is necessary to seek a further range of techniques to apportion and distribute such sums among represented group members. Judges could, for example, order that the defendant pays into court the total amount of his liability to the represented group members and then appoint a liquidator (a third party or the representative claimant) to administer the judgement award. In such situation, aggregate damages awards will generate a central fund from which individual claimants must be paid. In practice, it may be far from easy for the designated liquidator to devise a fairly-balanced mechanism for apportioning damages and such solution may lead to difficulties and tend to a conflict of interests. Indeed, it may be feared that such distribution process would be a field ripe for acute conflicts of interest between represented group members.

456. ***Relevant questions***

The purpose of this report is not to analyse whether a special group enforcement should be possible (e.g. by the representative claimant) or whether a collective redress judgment should rather be enforceable by all represented group members. What should, however, be considered is whether judges may make a decision which could ensure that the defendant will execute the judgement and so facilitate the distribution of the award among the represented group members and ensure their effective compensation.

In the case where individual awards are ordered, one solution could be to allow judges to decide, on a case-by-case basis, between ordering the defendant to distribute the amount to which each represented group members is entitled directly to them and ordering the defendant to pay the total amount of his liability to the court. In the latter case, judges should have to decide whether they should supervise the individual payments or whether the distribution of the total amount among the represented group members must be left to a liquidator (the representative claimant or another third party).

Similarly, and furthermore, once an aggregate damages order is made, it should also be possible for judges to appoint a liquidator responsible for the distribution of the aggregate award among the represented group members. It seems, however, preferable that judges and not the appointed liquidators should determine in their final judgement the modalities of such distribution, including the steps that must be taken to establish individual compensation amounts (see *supra*).

The main questions are:

- Should judges be entitled to order that the defendant pays into court the total amount of his liability to the represented group members?
 - If permitted, should judges be entitled to appoint a liquidator to distribute the awarded compensation among the represented group members?
 - If so, should judges remain competent to rule over any dispute that may arise regarding the execution of the decision on its merits?

2. CONCERNS AROUND UNCLAIMED DAMAGES

457. *Unclaimed damages*

Where damage aggregation occurs, experience shows that there is the likelihood that there will remain an unclaimed residue of the awarded damages, especially where collective actions are pursued on an opt-out basis.

The problems of the use of unclaimed funds will rarely be encountered in opt-in proceedings. In contrast, the opt-out system entails the risk of acquiring damages funds which cannot be paid to consumers injured by an infringement, essentially because their identity is unknown or even because the victims cannot prove or assess the amount of damage they suffered.

It might be envisaged that unclaimed damages are given one of the three following treatments.

Firstly, judges could decide to return the award back to the defendant. This solution, however, goes against the need to ensure that collective redress proceedings have a preventive effect. Such a mechanism would not deter potential offenders

Secondly, judges could order that the unclaimed residue should be distributed to a Foundation aimed at the financing of further collective redress proceedings.

Strong opposition is mounted against this solution on the basic point that such a solution will equal ordering the defendant to pay punitive damages as they will not compensate the affected consumers, nor benefit them.

Finally, judges could also order the residual funds to be put to the next best compensatory use and so order that such a residue can be distributed either for a purpose that will benefit the group generally or benefit, for instance, a charity related to the underlying purpose of litigation that created the award⁷⁷⁶.

This last solution falls under the *cy-près* doctrine. As stated above, judges may also use this doctrine in situations where the group recovery cannot be economically distributed to group members or where it is not possible to determine each plaintiff's actual damages.

In this context, a *cy-près* power may, however, lead to the risk that that judges would be placed in a difficult position as interested groups would seek to lobby them in order to secure an award in

⁷⁷⁶ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 308.

their favour⁷⁷⁷. Giving a judge the power to exercise that possibility may thus lead to difficulties and tend to undermine the judge's independence⁷⁷⁸.

458. ***Relevant questions***

Even if the utility of any unclaimed fund being applied consistently with the proper use of a *cy-près* power should be recognized, it seems that the risk of difficulties for judges in exercising this power is too high.

What might be the best solution is to allow judges, after a period of time which is properly assessed and with proper notice given to the represented group members, to order that the unclaimed residue is distributed to a Foundation. In the meantime, and consistently with what is stated above, judges should have the power to appoint a liquidator, or alternatively the representative party, to administer any judgement award.

The main questions relating to how judges should deal with residual damages when plaintiffs fail to collect their portions of the award are:

- Should judges be required to put into their final judgements certain deadlines within which the represented group members have to claim their individual share from the aggregate award?
- Which treatment should judges reserve for unclaimed damages?
 - Should judges have the possibility to choose between the three solutions on a case-by-case basis or should the solution be imposed by law?

⁷⁷⁷ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 181.

⁷⁷⁸ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 181.

1. ROLE OF THE JUDGES IN THE EXECUTION OF THE DECISION AND IN THE DISTRIBUTION OF DAMAGES

1.1. IMPOSING REASONABLE STEPS ON REPRESENTED GROUP MEMBERS FOR THEM TO OBTAIN COMPENSATION (OPT-OUT PROCEEDINGS)

- Do the selected Member States (where an opt-out system is chosen) allow judges to ask represented group members to take supplementary steps to obtain compensation?
 - If permitted, to what extent is this power exercised?
 - Are the supplementary steps limited by deadlines fixed by the judges?
 - Are judges competent to supervise the execution of those steps?

IRRELEVANCY OF SUPPLEMENTARY STEPS (OPT-IN PROCEEDINGS)

459. *In England & Wales, Italy and Sweden, the systems are entirely based on opt-in system. Supplementary steps are unnecessary as judgements are always based on fixed amounts and the identity of the represented group members is known.*

SUPPLEMENTARY STEPS IMPOSED BY JUDGES

460. *In Portugal, Law 83/95 does not deal with this issue. However, in practice, it appears that judges require (or the parties agree) that the affected consumers take some steps before obtaining payment.*

⁷⁷⁹ *Remarks:*

This section does not cover the **German** system as the KapMuG exclusively provides for an interim judgement.

In **Italy**, the provisions concerning the enforcement of collective actions have not yet faced this problem as no case has yet reached this final stage.

Information about the practice is not clear. However, it seems that judges usually require (or the parties agree) that the claimants demonstrate the value of their loss in order to receive the compensation.

Portugal Telecom Charges case – Supplementary steps

In the *Telecom* case, the settlement agreement reached required that every consumer present his telecom bills for the relevant years to Portugal Telecom to be reimbursed for the total amount overpaid.

461. ***In England & Wales (under the Draft) and Spain, judges may order affected consumers to undertake minor steps to obtain compensation⁷⁸⁰. In England & Wales (under the Draft), judges must impose a time-frame for those steps and supervise the procedure themselves. In Spain, no deadlines are imposed and the enforcement judges supervise the procedure.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, judges may determine that individual claims are to be made by represented group members to establish entitlement to part of the aggregate award. When specifying this procedure, judges will set a deadline within which the represented group members may lodge individual claims. A represented group member who fails to lodge a claim within the fixed time may not later lodge a claim under this rule, except with the permission of the judge. Judges may grant permission if they are satisfied that (i) *the delay was not caused by any fault of that person* and (ii) *the defendant would not suffer substantial prejudice if permission were granted⁷⁸¹.*

Similarly, we have seen that judges may deliver a judgement on common issues and state in the same judgement that represented group members may be entitled to individual remedies (see *supra*, Section Three). In such situation, the judges will describe the steps that must be taken to establish an individual claim and state that failure on the part of a represented group member to take those steps will result in the member not being entitled to bring an individual claim except with the judges' permission⁷⁸².

⁷⁸⁰ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 309.

⁷⁸¹ Article 19.40 (3)-(5) Draft Collective Proceedings Act.

⁷⁸² Article 19.36 (2) (c) Draft Collective Proceedings Act.

In **Spain**, the final decision affects not only the parties to the proceedings but all the affected consumers (see *supra* – Section Three)⁷⁸³. Spain has a system that is neither an opt-in nor an opt-out system.

When a defendant is ordered to pay compensation, judges will determine the affected consumers individually. If this is not possible, it will be necessary for judges to identify each affected person specifically and their amount of compensation in supplementary proceedings (*procedimiento de ejecución de sentencia*)⁷⁸⁴.

Concretely, judges will specify in their final decision the details, characteristics and requirements necessary for demanding payment⁷⁸⁵. If the affected consumer meets these conditions and criteria it may request the enforcement judges to render a decision on its membership of the group. The LEC does not provide any time limit for the introduction of such a request to the execution judge. It is then necessary for the enforcement judges to decide whether or not the affected consumer belongs to the group, upon hearing the defendant⁷⁸⁶.

*Telecommunication service case*⁷⁸⁷ - Supplementary steps

The facts of the case were the following:

Two telephone companies granted lines with the code 903 or 906 to other companies in order for them to render their services. The price of the service depended on both the price of the call in these lines, which was higher than the price in ordinary lines, and the duration of the call. Part of the price belonged to the company that rendered the service and the other part to the telephone company. Consumers did not have a relationship with the company that rendered the service. In the analysed cases, some services were rendered by means of the 906 code despite the fact that they were referred to services that should have been rendered by means of the 903 code. Consumer organisations and groups of consumers claimed, on the grounds of the illegality of the services, for the refund of certain amounts and, in some cases, the reestablishment of the telephone service.

The judges considered that the telephone companies were responsible for the rendered services because they could control access to them and had entered into contracts with consumers, creating the false belief that the company which billed the telephone invoices was the company which also

⁷⁸³ Section 222.3 LEC establishes an exception to the rule *res iudicata inter partes* because the *res iudicata* effects of the decisions affect not only the parties to the proceedings but all the affected consumers.

⁷⁸⁴ Regulated by Section 519 LEC.

⁷⁸⁵ Article 221.1.1 LEC.

⁷⁸⁶ Article 519 LEC.

⁷⁸⁷ Juzgado de Primera Instancia núm. 61.Sentencia de 20 julio 2004 AC\2004\1144.

rendered the service. The judges stated the illegality of the services rendered by means of the 906 code and that consumers had concluded the contracts by mistake⁷⁸⁸.

In this case, the judges ordered the defendants to pay damages to some identified consumers and to those who showed they had carried out calls using the 906 code for services that should have been rendered by means of the 903 code. Concretely, to obtain compensation, the affected consumers had to present their bills to demonstrate they made calls with the prefix 906 on the precise date.

Those conditions also applied to those who used these numbers through the Internet. Affected consumers also had to present their bills in order to obtain the reestablishment of the services in those cases in which they had been cut off or, if this was not possible, the payment of €90.

Decision of the Audiencia Provincial (Second Instance Court) of Burgos⁷⁸⁹ - Supplementary steps

This case concerned a snowfall on 27 February 2004 which caused various traffic accidents where trucks which blocked a motorway were involved. It caused holdups that affected thousands of people and vehicles. "Ausbanc Consumo" claimed €300/consumer (immaterial damages), €132.84/consumer (material damages because of the holdup) and €28/vehicle (material damages because of the payment of the toll). The total number of potentially affected consumers was approximately 6 100 (action for the protection of diffuse interests).

In this case, the judge awarded the amount established in the Price List, according to the type of vehicle, to those who paid the toll and €150 for consumers or cars which could show they were in the motorway on 27 February between 16.00 and 19.00 via relevant documents (pay toll tickets, bus tickets, etc.)⁷⁹⁰.

⁷⁸⁸ Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", (Country Report: Spain), http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf, p. 17.

⁷⁸⁹ *Decision of the Audiencia Provincial (Second Instance Court) of Burgos (Section 3)*, num. 347/2006, 31 July 2006 (Westlaw Aranzadi Reference: AC 2007\108).

⁷⁹⁰ Summary based on information contained in Civic Consulting (Lead) and Oxford Economics, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" (collected cases, Spain), available at: http://ec.europa.eu/consumers/redress_cons/docs/final_reportEvaluationPart3por-uk.pdf, pp. 210-213.

1.2. APPOINTING A LIQUIDATOR TO SUPERVISE THE DISTRIBUTION

- Do the selected Member States empower judges to order that the defendant pays into court the total amount of his liability to the represented group members?
 - If permitted, are judges entitled to appoint a liquidator to distribute the awarded compensation among the represented group members?
 - If so, do judges remain competent to rule over any dispute that may arise regarding the execution of the decision on its merits?

NO SPECIFIC RULES ON THE POSSIBILITY TO ORDER THAT THE DEFENDANT PAYS THE TOTAL AMOUNT OF HIS LIABILITY AT ONCE

462. *In England & Wales, Italy, Portugal, Spain and Sweden, no specific rules set out exactly whether judges can order the defendant to pay the total amount of his liability at once to the court or even to the representative claimant or another third party.*

In **England & Wales, Spain and Italy** and **Sweden**, judges traditionally order the defendant to pay the amounts due directly to each represented group member.

463. *In England & Wales, Italy, Portugal and Sweden, should the defendant fail to hand over the compensation, each group member has the right to request that the judgement be enforced. There are no special rules for collective redress judgment enforcement but the usual enforcement system applies. In other words, no special collective enforcement is possible but the collective redress judgments are enforceable by all members of the group.*

In **England & Wales**, the management judges cease their involvement once they have established the amount of the compensation to be paid to each individual represented group member. It is then for the defendant to make the individual payments⁷⁹¹. If the defendant fails to do so, the CPR rules have specific provisions for enforcement of judges' rulings in all civil litigations⁷⁹². Hence, if the losing party fails to pay the damages, the onus is on the successful party to apply to the court for some form of execution. According to Senior Master Robert Turner, the enforcement of the judgement is a subject of considerable complexity in England & Wales. As the judge previously responsible for enforcement in his role as Registrar of Judgments, he has, however, confirmed that most successful litigants using the very considerable powers of the High Courts and the powers of

⁷⁹¹ Information supplied by Graham Jones.

⁷⁹² See CPR Parts 70-74 for the rules relating to enforcement.

the High Court Enforcement Officers (who are answerable to the Senior Master) can obtain their damages if the losing party has the means to pay⁷⁹³.

In practice, execution of judgements is in most cases achieved by negotiation between the respective lawyers and any insurance companies representing the losing party without any further resort to the courts⁷⁹⁴.

In **Italy**, no collective redress action is allowed at the enforcement stage. Every represented group member is responsible for enforcing the judgment for the sum respectively due.

As stated above, the judgment may also be limited to a determination of criteria for calculating the sum respectively due to every represented group member⁷⁹⁵. It is, however, unsettled whether, in this latter case, a further individual judgment for the precise determination of the amount due is needed to promote the enforcement proceedings. Departing from the general rule, article 140-bis, § 13 of the Consumer Code also grants the defendant special means of obtaining a stay of the enforcement proceedings. No fluid group recovery is contemplated, nor is any kind of injunctive remedy in which the court could be continuously involved⁷⁹⁶.

In **Portugal**, it is difficult to deal with the question of distribution as information is not clear. It seems that consumers must present their quantified loss to the execution court to be paid. The execution of the decision is made in another court and before another judge⁷⁹⁷. Where damages cannot be individually assessed, we have seen that judges have the power to fix an aggregate sum for group-wide damages (see *supra*, Section Three). However, Law 83/95 does not include any provision for damages distribution between represented group members or any partial distribution for the plaintiff consumer association⁷⁹⁸. It is suggested that parties should resort exclusively to arbitration, setting up a highly specialized court or arbitration committee alongside the court in question, which processes the payment of all indemnities⁷⁹⁹.

It has been reported that there have been problems with the distribution of proceeds associated with the practicalities of the type of case and claim. The judicial decisions given in the earliest collective cases noted likely practical problems with distributing proceeds in such cases.

⁷⁹³ Information supplied by Robert Turner.

⁷⁹⁴ Information supplied by Robert Turner.

⁷⁹⁵ Article 140-bis, § 12 of the Consumer Code.

⁷⁹⁶ Information supplied by Andrea Giussani.

⁷⁹⁷ Information supplied by Luis Rodrigues.

⁷⁹⁸ Rachael Mulheron, *Reform of Collective Redress in England and Wales – A Perspective on Need*, Research Paper for Civil Justice Council (2008), p. 99.

⁷⁹⁹ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p. 1152; Henrique Sousa Antunes, *Global Class Actions Project Country Report: Portugal*, (2007), available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf, p. 27.

In **Sweden**, execution is a separate stage after the proceedings and belongs to the execution authorities, the bailiffs⁸⁰⁰.

The parties to the enforcement are always the represented group members who have opted in to the collective redress proceedings. The representative claimant cannot be a party at the enforcement level but the enforcement happens in the name of each member. The reason is that in the judgment the representative claimant cannot be a subject of - for example - a damages award, but that the judgment always has to be given in the name of the group members directly and separately. Therefore, in the enforcement, the represented group members have the role of a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only a restricted role⁸⁰¹. According to Laura Ervo, this can be criticised from an access to justice point of view. This kind of individual enforcement system is also very bureaucratic⁸⁰². It has been suggested that the system should be changed in the future to make collective redress proceedings more powerful. In the preparatory work⁸⁰³, group enforcement in the name of the representative of a group was suggested but this proposal did not go through⁸⁰⁴.

464. ***In Spain, the representative claimant may apply for the execution of the judgement.***

In **Spain**, the LEC does not permit judges to appoint the consumer association or the group of affected consumers as the direct beneficiaries of the award. Only the consumers may be the beneficiaries of the fixed compensation. A decision awarding individual compensation to an identified consumer (party involved in the trial) constitutes a writ of execution. The execution of the judgement is subjected to the supervision of another judge competent for the execution.

The association that had legitimate authority to litigate can, however, apply for the execution even though the money is owed to the people affected⁸⁰⁵.

The affected consumers consequently have the choice between joining the execution expedited by the representative association or seeking the execution of the said judgment individually⁸⁰⁶. In the latter situation, it might be that the defendant will be exposed to an undetermined number of judgment enforcement petitions from each of the consumers⁸⁰⁷.

⁸⁰⁰ Information supplied by Laura Ervo.

⁸⁰¹ Sections 15 and 29 GrL.

⁸⁰² Information supplied by Laura Ervo.

⁸⁰³ SOU 1994:151, pp. 459 – 462.

⁸⁰⁴ For this discussion, see, for example, Lindblom 2008, pp. 103–104.

⁸⁰⁵ Articles 548 and 549 LEC; www.ocu.org.

⁸⁰⁶ L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12, p. 227.

⁸⁰⁷ L. Frankignoul, “Un projet belge de recours collectif au regard des modèles espagnols et québécois”, *Revue de la Faculté de droit de l’Université de Liège* – 2011/12; Alejandro Ferreres Comella, “Spain” in *The International Comparative Legal Guide to: Class & Group Actions 2011. A practical cross-border insight into class and group actions work*, Published by Global Legal Group in association with CDR, 2011, p. 141.

465. *In England & Wales (under the Draft), judges have wide discretion so that they may consider any means of distribution they consider appropriate, including appointing a liquidator.*

In **England & Wales**, the **Draft for a Collective Proceedings Act** allows judges to direct any means of distribution of any sum awarded that they considers appropriate, including any one or more of the following decisions: (i) that the defendant distribute directly to the represented group members the amount to which each class or sub-class member is entitled by any means authorised by the court; or (ii) that the defendant pay into court the total amount of the defendant's liability to the represented group members until further order of the judges⁸⁰⁸. Such further order may be the appointment of a person to administer the distribution. Judges may order that the costs of distributing sums under this rule, including the costs of any notice associated with the distribution and the fees payable to any person administering the distribution, be paid out of the proceeds of the judgment and make any further or other order they consider appropriate⁸⁰⁹.

⁸⁰⁸ Article 19.41 (1) Draft Collective Proceedings Act.

⁸⁰⁹ Article 19.41 (2) Draft Collective Proceedings Act.

2. THE TREATMENT OF UNCLAIMED DAMAGES

- Do the selected Member States require that judges put in their final judgements certain deadlines by which the represented group members have to claim their individual share from the aggregate award?

- Which treatment do judges in the selected Member States reserve for unclaimed damages?
 - Do judges have the possibility to choose between the three solutions on a case-by-case basis or is the solution imposed by law?

NO SPECIFICATION

466. *England & Wales, Italy, Spain and Sweden do not regulate this issue. The questions under this section are essentially directed at the situation where there is an award of aggregate damages, which is not possible in those Member States.*

DEADLINES AND SOLUTION DETERMINED BY SPECIFIC RULES

467. *In Portugal, three years after the date of the final treatment, unclaimed funds may be used to finance access to law and to the legal system in other collective redress actions (the Justice Department fund).*

In **Portugal**, Law 83/95 regulates the treatment of unclaimed damages. No flexibility is left to the judges.

The specific law fixes the period which the individual represented group members have to claim their compensation at three years⁸¹⁰.

Once these rights have lapsed, undistributed residue shall be given to the Ministry of Justice, which shall register them in a special account. The amounts shall be applied to the payment of compensation of the successful parties' attorney fees and support for access to the law and to the courts by holders of the right of collective redress proceedings who justifiably so request⁸¹¹.

⁸¹⁰ Article 22, 4 Law 83/95.

⁸¹¹ Article 22, 5 Law 83/95.

468. ***In England & Wales (under the Draft), judges may fix the deadline for individual claims and may decide the treatment of undistributed awards on a case-by-case basis.***

In **England & Wales**, under the **Draft for a Collective Proceedings Act**, a high level of flexibility is left to the judges. In all cases, judges shall set a deadline within which the individuals must claim their share of the award.

The judges may order that all or any part of an award of any sum that is due to the represented group members and that has not been distributed within the fixed time be paid to a Trustee to be applied in any manner that may reasonably be expected to benefit the represented group members (*cy-près* power)⁸¹². In deciding whether to use such a *cy-près* power, judges may consider whether the distribution of the undistributed residue would result in unreasonable benefits to persons who are not members of the represented group but may also consider any other matter they consider relevant⁸¹³. Judges may so act even if the order would benefit persons who are not represented group members or persons who may otherwise receive any judgment sum as a result of the collective proceedings⁸¹⁴.

If any part of any judgment sum which is to be divided among individual represented group members remains unclaimed or otherwise undistributed after a time set by the judges, the judges may order that that part of the award *(i) be applied against the cost of the collective proceedings (ii) be forfeited to the Crown; or (iii) be returned to the defendant*⁸¹⁵.

⁸¹² Article 19.42 (1) Draft Collective Proceedings Act.

⁸¹³ Article 19.42 (2) Draft Collective Proceedings Act.

⁸¹⁴ Article 19.42 (3) Draft Collective Proceedings Act.

⁸¹⁵ Article 19.42 (4) Draft Collective Proceedings Act.

C. CONCLUDING SUMMARY

1. DISTRIBUTION OF COMPENSATION

1.1. IDENTIFIED CONCERNS AND ABUSES

469. (1) Concern of ineffective compensation; individual steps (in opt-out proceedings) = extra obstacle to obtain compensation.

(2) Concern that the defendant does not execute the judgement.

1.2. INTERESTS AT STAKE

470. (1) Assuring the defendant that no consumer will benefit abusively from compensation awarded.

(2) Individual enforcement v. collective enforcement.

1.3. POTENTIAL SOLUTIONS

471. (1) Judges should be entitled to impose reasonable steps on represented group members for them to obtain compensation.

(2) Whether in opt-in or opt-out proceedings, supervision of the distribution by a liquidator should be possible (remaining competence of the judges).

1.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) SUPPLEMENTARY STEPS

- *Do the selected Member States (where an opt-out system is chosen) allow judges to ask the represented group members to take supplementary steps to obtain compensation?*
 - *If permitted, to what extent is this power exercised?*
 - *Are the supplementary steps limited by deadlines fixed by the judges?*
 - *Are judges competent to supervise the execution of those steps?*

472. In **England & Wales, Italy** and **Sweden**, the systems are entirely based on an opt-in system. Supplementary steps are unnecessary as the judgements are always based on fixed amounts and the identity of the represented group members is known.

473. In **Portugal**, Law 83/95 does not deal with this issue. However, in practice, it appears that judges require (or parties agree) that the affected consumers take some steps before obtaining payment.

474. In **England & Wales** (under the **Draft**) and **Spain**, judges may order affected consumers to undertake minor steps to obtain compensation. In **England & Wales** (under the **Draft**), judges must impose a time-frame for taking these steps and supervise the procedure themselves. In **Spain**, no deadlines are imposed and the enforcement judges supervise the procedure.

(2) SUPERVISION OF THE DISTRIBUTION

➤ *Do the selected Member States give judges the possibility to order that the defendant pays into court the total amount of his liability to the represented group members?*

➤ *If permitted, are judges entitled to appoint a liquidator to distribute the awarded compensation among the represented group members?*

➤ *If so, do judges remain competent to rule over any dispute that may arise regarding the execution of the decision on its merits?*

475. In **England & Wales, Italy, Portugal, Spain** and **Sweden**, no specific rules set out exactly the ability of judges to order the defendant to pay at once the total amount of his liability to the court or even to the representative claimant or another third party.

476. In **England & Wales, Italy, Portugal** and **Sweden**, should the defendant fail to hand over the compensation, each group member has the right to request the enforcement of the judgement. There are no special rules for collective redress judgment enforcement but the usual enforcement system applies. In other words, no special collective enforcement is possible but the collective redress judgments are enforceable by all members of the group.

477. In **Spain**, the representative claimant may apply for execution of the judgement.

478. In **England & Wales** (under the **Draft**), judges have wide discretion and so may consider any means of distribution they consider appropriate, including appointing a liquidator.

2. UNCLAIMED DAMAGES

2.1. IDENTIFIED CONCERNS AND ABUSES

479. (1) Concern that compensatory damages turn into punitive damages if a Foundation is constituted; concern that judges' perceived independence would be undermined if *cy-près* powers are allowed.

2.2. INTERESTS AT STAKE

480. (1) Necessity of the distribution of unallocated damages to ensure the preventive effect of collective redress proceedings.

2.3. POTENTIAL SOLUTIONS

481. (1) Deadline fixed by the judges to claim an individual share from an aggregate compensation award; distribution of the unclaimed residue to a Foundation aimed at the financing of further collective redress proceedings.

2.4. APPROACH BY THE SELECTED MEMBER STATES TO THE PROPOSED SOLUTIONS

(1) UNCLAIMED DAMAGES

- *Do the selected Member States require that judges put in their final judgements certain deadlines by which the represented group members have to claim their individual share from the aggregate award?*
 - *Which treatment do judges in the selected Member States reserve for unclaimed damages?*
 - *Do judges have the possibility to choose between the three solutions on a case-by-case basis or is the solution imposed by law?*

482. **England & Wales, Italy, Spain and Sweden** do not regulate this issue. The questions under this section are essentially directed at the situation where there is an award of aggregate damages, which is not possible in those Member States.

483. In **Portugal**, funds which are unclaimed three years after the date of the final sentence may be used to finance access to the law and the legal system in other collective redress actions (Justice Department fund).

484. In **England & Wales** (under the **Draft**), judges may fix a deadline for individual claims and may decide the treatment of undistributed award on a case-by-case basis.

PART TWO

RECOMMENDATIONS

A. GENERAL PRELIMINARY REMARKS

485. ***Sources of inspiration***

The European instrument should recognise and use the existing patchwork of procedures which currently exists in the Member States – not only the six selected Member States - and outside the European Union.

Particular attention should, for example, be given to the Dutch law, which is entirely based on the negotiation of an agreement and to the Quebec law, which has very interesting experience of more than 30 years. The procedures in force in these two countries present the advantage of being based on a balance that eliminates the need for punitive damages and the funding of the proceedings by the lawyers themselves (*quota litis pactum*).

The Belgian Draft Law on collective redress procedures should, of course, also be taken into consideration⁸¹⁶.

486. ***A representative action***

The European instrument should establish a mechanism that allows a claimant to file a lawsuit on behalf of a group of people without previous mandate of the latter, and confers the decision following this decision *res judicata* on all represented group members.

487. ***Main objectives and guidelines***

The European instrument should promote access to justice and full compensation in the case of mass injury and act as an economic regulation tool (preventive effect).

Respect of the rights of the parties, efficacy and speed, and a fair and effective outcome should be the guiding principles of the European instrument.

488. ***Object***

The European instrument should provide for a mechanism that confers to a representative claimant the right to represent a group of affected consumers whose injury is of common origin and affects a large scale of people so as to achieve either the conviction of the responsible party or an agreement. The outcome of the judgement or the agreement should be binding for all represented group members.

⁸¹⁶ Available at: http://www.droit-eco-ulb.be/fileadmin/fichiers/Class_actions_-_Loi_avec_appel.pdf. See also: http://www.droit-eco-ulb.be/fileadmin/fichiers/Class_actions__Loi_modifiant_le_Code_judiciaire_avec_appel.pdf.

Importantly, the European instrument should be available only as a last resort where other alternatives could not be reasonably used, but the existence of such an option should encourage swift and voluntary negotiation between parties⁸¹⁷.

Functions of the European instrument should be, for example, to provide a powerful incentive to encouraging settlement, to approve settlements reached between the parties, to balance the rights of parties and to guarantee due process.

The European instrument should thus establish a suitable combination of amicable settlement and litigation. It should lead to a trial with the permanent possibility of switching to an out-of-court settlement. To be binding for all the group members, this agreement should, however, need the approval of the judges. Post-confirmation by the judges should not imply an admission of liability.

489. ***Scope of application***

The European instrument should not be restricted to consumer law.

490. ***Prominent role of the judges***

The effectiveness of the collective redress proceeding should be guaranteed by its legal framework and by its judicial supervision. The European instrument should establish a series of issues that must be considered either in the amicable settlements or in the judgements after litigations. The judges should, in each case, verify that an adequate answer has been given to each issue.

The European instrument should provide for a prominent role of the judges in the process and it is key that powers should be flexible.

- At the admissibility stage, the European instrument should require that the judges act as gatekeepers and as case-managers.

As gatekeepers, the judges should play an important role by deciding whether a collective claim is unmeritorious or admissible, by approving the suitability of the representative claimant and by supervising the way the group of affected persons is constituted.

⁸¹⁷ Even if the following recommendation may appear in practice unworkable, this may have the merit of being mentioned. In the European instrument, the central importance of ADR should be particularly emphasised. Therefore, the European instrument could provide that judges should, as part of their active case management powers, ensure that the parties to a collective redress action have actively taken steps to engage in ADR. There must be evidence of need for a collective redress action and it should follow an assessment of economic and other impacts and consideration of alternative approaches. The judges should grant a right of action only where ADR options have been considered. A court-based procedure should not be the primary model for delivering collective redress. This viewpoint is entirely consistent with the justice policy in several Member States that mediation and other approaches should be tried before resorting to the courts.

As case managers, the judges should outline the guidelines of the trial: description of the common issues, definition of the group, fixing a time limit to opt in/opt out, etc.

- At the trial on the merits stage, the European instrument should require that judges act as case managers and costs managers and grant judges permanent seizing so that a careful handling of all collective redress proceedings be ensured.

As case managers, judges should ensure the fairness, the speediness and the efficiency of the process. Judges should also be required to pay particular attention to the interests of the absent represented group members.

As costs managers, judges should ensure that the litigation costs are kept proportionate.

- At the judgement stage, the European instrument should require that judges deliver a just and effective outcome.
- At the distribution stage, the European instrument should invite judges to demonstrate audacity and creativity in assuring the rights of group members to obtain effective compensation.

491. ***Centralisation of the collective proceedings to a single first instance court and to a single appeals court***

The European instrument should grant competence of dealing with collective redress proceedings to one single court exclusively (one in first instance and one in appeal).

By their nature, collective injuries rarely fall within the judicial scope of one court. The conduct of the trial before one single court will also facilitate public information and the handling of a collective redress Register (on the Register – see *infra*).

Moreover, centralisation will essentially lead to specialisation and experience, and is beneficial to both parties (defendant and represented group members) and to the legal system. Justice security and economy of the collective redress proceedings are also at stake. On the one hand, it will encourage the case law to become uniform in one specific area, and therefore predictable and so legally secure (and at the same time avoid the risk of *forum shopping*). On the other hand, specialised and experienced judges will rule a judgement in a more economical way, without being faced with time-consuming material and territorial jurisdiction conflicts.

Specially trained judges

The European collective redress mechanism will only work efficiently with experienced and specially trained national judges.

Judges clearly need sufficient knowledge and sufficient understanding about how collective redress proceedings work. Having specialist judges will encourage the effective exercise of case management powers by the judges and will ensure that collective cases are managed equally, effectively and efficiently. This constitutes a strong safeguard for the parties against arbitrariness. Collective claims should be subject to a form of case management by specialist judges (on case management powers – see *infra*)⁸¹⁸. Therefore, the European instrument should require that only national judges who have followed specialized training should be entitled to deal with collective redress proceedings. Essentially, the judges should receive training in case management, costs budgeting and costs management. An important role should be reserved for the European Judicial Training Network.

⁸¹⁸ England & Wales.

B. POWERS OF THE JUDGES AT THE ADMISSIBILITY STAGE

1. FILTERING POWERS

- *Should the European instrument provide that judges verify only formal requirements or should the European instrument give judges discretionary powers as to the admissibility of the collective claims?*

493. ***Flexible admissibility requirements***

The European instrument should empower judges, playing the role of gatekeepers, to exercise their powers with considerable flexibility, depending on the needs of the specific cases⁸¹⁹. This is a necessary safeguard against potential abuse of collective redress proceedings.

Flexibility should not equal broad discretionary powers. The European instrument should contain guidelines to help the judges construe their filtering powers. Such guidelines could include that the admissibility criteria should be interpreted efficiently, especially in the light of the objectives of a collective redress proceeding (*inter alia*, effective, efficient, economical means of increasing access to justice and delivery of effective redress in the optimal number of cases, with lowest risk of abuses).

- *Which filtering requirements should be provided in the European instrument?*

494. ***Verifying filtering requirements***

The European instrument should provide that judges are satisfied that a collective application meets the following requirements before handing down an admissibility order.

⁸¹⁹ England & Wales, Italy and Sweden.

- *To what degree of commonality should the European instrument require judges to be attentive?*

(1) Existence of common issues of law or/and of fact

The European instrument should provide that the judges verify that the application of the would-be representative claimant presents common questions of law or/and fact⁸²⁰.

The European instrument should not, however, imitate national systems which require that those issues arise from the same or similar circumstances or even that they predominate over individual issues. Accordingly, judges could not, for instance, refuse an application for collective redress proceedings on the grounds that the claimed remedy includes a claim for damages that would require individual assessment after determination of the common issues or that the remedy claimed relates to separate contracts involving different represented group members or even that different remedies are sought for different represented group members⁸²¹.

The commonality requirement should be concise and generally described. If further necessary, it should be for the judges to define, refine and specify the commonality requirement. Judges could, for example, consider that questions of law and/or facts are common if solving them represents a step forward⁸²² in the resolution of the general dispute (i.e. the totality of all the individual cases).

- *Should the European instrument require judges to verify a superiority requirement?*

(2) The most appropriate means for the fair and efficient resolution of the common issues

The European instrument should require that judges verify that the collective redress proceedings are a superior means of resolving consumer issues⁸²³. The superiority test should be wide-ranging so as to allow the judges to assess and decide on the most appropriate mechanism through which a collective claim should progress.

⁸²⁰ England & Wales and Sweden.

⁸²¹ Draft for a Collective Proceedings Act in England & Wales

⁸²² Quebec.

⁸²³ England & Wales and Sweden.

Accordingly, the European instrument should empower judges to weigh the collective redress mechanism against all other available and viable judicial (and out-of-court) instruments. In this sense, judges could consider that collective redress proceedings are a superior redress mechanism to, for example, either pursuing the claim on a traditional unitary basis through civil courts or alternatively through pursuit of a compensatory remedy via regulatory action where that is available and where it is able to deliver effective access to justice.

(3) Suitability of the claimant for appointment as representative claimant (has the standing and the ability to represent the interests of the group members both adequately and properly)

See *infra*.

(4) The definition of the group

See *infra*.

- *Should the European instrument require that judges verify the preliminary merits of the case?*

No judicial review of the preliminary merits of the case⁸²⁴

Since one of the main objectives of an anti-abuse measure will be to prevent cases that have insufficient merits, it may be that the European instrument should include the requirement that the judge reviews the merits of the case. However, an initial review of merits by judges could turn out to be a significant investigation involving costs and delay. Consequently, the European instrument should not require that judges verify that the collective redress offers a real prospect of success.

- *Should the European instrument provide that a judge will warrant collective redress proceedings only if a threshold of potential claimants consumers is reached?*

No numerosity requirement needed⁸²⁵

⁸²⁴ Germany, Spain and Sweden.

⁸²⁵ England & Wales, Italy, Portugal, Spain and Sweden.

- *Should the European instrument provide that the judge rules a separate formal judgement on admissibility?*

495. ***Delivering a formal separate judgement on the admissibility***

The European instrument should provide that no collective redress proceedings should be permitted to proceed unless judges admit it in a separate formal judgement⁸²⁶.

After having granted the parties (the representative claimant and the defendant) the possibility to lead an adversarial debate on the admissibility requirements⁸²⁷, judges should be required to hand down a decision on the admissibility, and this within a certain time limit.

If judges consider the collective redress claim non-admissible, the European instrument should allow them to order the lead plaintiff to pay attorney's fees and further damage⁸²⁸.

Appeals from either a positive admissibility judgement or a refusal should be subject to the current general national rules which govern appeal⁸²⁹. However, the European instrument should not make a second appeal to the Supreme Court possible.

The (non-)admissibility judgement should be subject to challenge by both defendants and claimants, including the group members which are represented by the representative claimant.

Should the judges admit the collective redress, the European instrument should provide that they justify the reasons why they consider the required admissibility requirements to be satisfied.

In addition, the European instrument should provide that judges establish certain elements in their admissibility judgement (to be published to inform the public – see *infra*)⁸³⁰. They should be required to:

- (1) specify the common issues of law and/or facts;
- (2) describe or otherwise identify the group. If appropriate the judge should also describe subgroups (see *infra*);
- (3) specify whether the collective proceeding is an opt-in or opt-out proceeding and the time limit for exercising the option chosen;
- (4) state the opt-in/opt-out date and the manner and the time within which any group member may opt in/opt out of the collective proceedings (see *infra*);

⁸²⁶ Germany and Italy.

⁸²⁷ Draft for a Collective Proceedings Act in England & Wales, Germany and Sweden.

⁸²⁸ Italy.

⁸²⁹ Draft for a Collective Proceedings Act in England & Wales and Italy.

⁸³⁰ Draft for a Collective Proceedings Act in England & Wales.

- (5) state the name of the representative claimant(s) appointed by him (see *infra*);
- (6) order the publication of a notice to the group members (see *infra*);
- (7) enact a calendar for the written and oral pleadings on the merits; and
- (8) include any other provisions they consider appropriate.

If, at any time after an admissibility judgement is made, the admissibility requirements are no longer satisfied with respect to the collective proceedings, the European instrument should require that the judges reject the claim.

2. STANDING AND SUITABILITY OF THE REPRESENTATIVE CLAIMANT

496. ***Approving the standing of the representative claimant.***

The European instrument should contain provisions which establish the specific formal requirements that the representative claimant should satisfy in order to be approved for such quality by the judges (especially for opt-out proceedings⁸³¹).

- *Should the European instrument require that judges verify whether the representative claimant represents adequately the interests of the group?*

497. ***Ensuring the suitability of the representative claimant.***

In addition to legal requirements concerning the quality of the representative claimant, the European instrument should require that judges ensure that the representative claimant bringing the collective redress is able to adequately represent and defend the interests of the represented group members⁸³².

The European instrument should leave the assessment of the ability of the would-be representative claimant to carry out adequately the procedure within the judges' discretion. The European instrument should only require that judges at least make sure that the representative claimant would fairly and adequately represent the interests of the represented group and subgroup members and that he does not have, on the common issues, an interest that is in conflict with the interests of the represented group members⁸³³.

- *Should the European instrument require that judges ensure that the representative claimant is the most suitable party to act as the representative and/or even that no other person wishes to represent the group?*

498. ***Granting the opportunity to other potential representatives to become the representative claimant***

The European instrument should require that judges allow other potential suitable persons claiming within a certain time limit to be appointed as representative for the purpose of the collective redress proceedings.

Additionally, the European instrument should permit potential represented group members or parties to challenge the decision of the judges on the adequacy of representation of the

⁸³¹ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, , p. 1147.

⁸³² Draft for a Collective Proceedings Act in England & Wales, Italy and Sweden.

⁸³³ Draft for a Collective Proceedings Act in England & Wales

representative claimant. If, on the application of a potential represented group member or party, it appears to the judges that a representative claimant is not able to represent the interests of the represented group members adequately, the judges should be able to substitute another represented group member or another person as representative claimant⁸³⁴.

- *Should the European instrument require judges to verify whether the representative claimant has sufficient resource to fund and manage the collective proceedings, and to cover any adverse costs liability? Should judges have the power to require a security for costs from the representative?*

499. ***Ensuring the ability of the representative claimant to pay the opponent's costs***

The European instrument should allow judges to require claimants to show that they have sufficient funds to pay winner's costs⁸³⁵, provided they are satisfied by the defendant that there is a risk that the claimants will be unable to do so.

Consistently with this requirement, the European instrument should allow judges to consider imposing a security for costs against the representative claimant⁸³⁶. This will ensure that representative claimants (and their funders) focus their attention on the fact that not only will they, if unsuccessful in the prosecution of their claim, face a costs bill but also that from the admissibility stage they will be required to provide a security for those potential costs.

The European instrument should also provide that judges must verify the fairness of any funding arrangement (if it should be allowed) between the parties (on the funding arrangements - see *infra*).

- *Should the European instrument give judges a later power of replacement should a representative engage in conduct inconsistent with the interests of the group?*

500. ***Verifying the continued eligibility of the representative claimant***

The European instrument should provide that the effective monitoring of the continued eligibility of the designated representatives must be assured by the judges (see *infra*)⁸³⁷.

⁸³⁴ Draft for a Collective Proceedings Act in England & Wales.

⁸³⁵ Italy and Sweden.

⁸³⁶ Draft for a Collective Proceedings Act in England & Wales.

⁸³⁷ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p. 1149.

3. ACCURATE AND APPROPRIATE DEFINITION OF THE GROUP

- *Should the European instrument empower judges to progress collective redress proceedings on either an opt-in or opt-out basis, whichever contributes best to the effective and efficient disposition of the case?*

501. ***Choosing between an opt-in and an opt-out mechanism***

The European instrument should not contain a presumption as to whether collective claims should be brought on an opt-in or on an opt-out basis. The European instrument should rather leave the judges to decide, according to guidelines, which mechanism is the most appropriate for any particular claim, taking into account all the relevant circumstances⁸³⁸.

It should be underlined in the European instrument that in assessing whether an opt-in or opt-out procedure is most appropriate, judges should be particularly mindful of the need to ensure that neither claimants' nor defendants' substantive legal rights should be subverted by the choice of procedure⁸³⁹.

Importantly, the European instrument should provide guidance to judges and should clearly detail prerequisites for opt-in or opt-out proceedings. An effective criterion relating to the operability and efficiency of one of these two proceedings could be, for example, the introduction of a superiority requirement, i.e. opt-out proceedings should be allowed when they are superior to opt-in model proceedings. Additionally, the European instrument could provide that judges, when making their decision, need to conclude that the opt-in model would not represent a beneficial way of handling the claims⁸⁴⁰.

In any case, for claimants who are not EU Member State residents, the European instrument should require judges to apply the opt-in system.

⁸³⁸ Draft for a Collective Proceedings Act in England & Wales.

⁸³⁹ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 18.

⁸⁴⁰ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, pp. 1139- 1141.

- *Should the European instrument require that judges participate in the establishment of the group membership?*

502. ***Defining the group membership***

The European instrument should empower national judges with a certain margin of appreciation as to the criteria by which the group of the victims is suitably defined. The European instrument should not allow judges to refuse to admit a collective claim as collective redress proceedings because the number of represented group members or the identity of each represented group member is not known.

The European instrument should make judges responsible for the specification of the claims included in collective redress action⁸⁴¹. However, in describing or otherwise identifying represented group members, judges should not necessarily be required to name or specify the number of the represented group members⁸⁴². Depending on the circumstances at stake, alternative means for defining the group of victims should be made available: strictly (e.g. by naming the represented group members and strictly identifying the harm) or more loosely (specifying the similarity of the harm as a criterion)⁸⁴³. Obviously, the level of accuracy required in defining the group could also depend on the mechanism chosen. Opt-in and opt-out proceedings do not raise the same issues.

- *Should the European instrument require that judges set criteria by which the group of the victims is defined (in particular, in opt-in proceedings)?*

In opt-in proceedings, judges should be required to make sure that concrete criteria are set by the representative to allow victims to assess whether their claims are eligible to be included.

- *Should the European instrument require that judges verify that group members are adequately defined and at least clearly ascertained (in particular, in opt-out proceedings)?*

In opt-out proceedings, judges should be required to ensure that appropriate criteria are implemented so that the group members or the claims represented can be adequately defined and clearly ascertained. Persons comprised in the action have to be identified concretely such that adequate notice may be directed to them and that the defendant may unambiguously estimate the size of the group.

⁸⁴¹ England & Wales, Germany and Italy.

⁸⁴² Draft for a Collective Proceedings Act in England & Wales.

⁸⁴³ Draft for a Collective Proceedings Act in England & Wales, Portugal.

503. ***Dividing the group into subgroups, if necessary***

If appropriate and necessary (e.g., different remedies are sought for different represented group members), the European instrument should allow judges to define subgroups whose members have claims that raise common issues not shared by all represented group members⁸⁴⁴.

However, if the represented group includes a subgroup whose members have claims that raise common issues not shared by all the represented group members so that the protection of the interests of the subgroup members requires that they be represented separately, judges should be required to refuse to admit the claim as a collective redress proceeding.

The European instrument should provide that the description of the subgroups is not definitive at this stage of the proceedings; elements requiring further categorization may occur during the procedure.

- *Should the European instrument require that judges supervise the process of notification to the potential represented group members?*

504. ***Publicising the action***

The European instrument should strictly prescribe that the judges take care to ensure a suitable form of publicity according to the interests concerned and order the division of costs for such publicity⁸⁴⁵.

Concretely, in any case – in both opt-in and opt-out proceedings - potential represented group members and the media should be notified through a Register in which the judgement instituting the procedure is filed⁸⁴⁶.

The European instrument should indeed introduce a Register especially created for the purpose of collective redress proceedings in order to enhance the information flow between the judges and the parties, and between the representative claimant and the represented group members. Such a Register should be made available online⁸⁴⁷. Indeed, effective management of collective redress proceedings will require constant attention to developments in the litigation (see *infra*). Establishing an online mechanism for ongoing communication among the parties and the judges and among the represented group members and the judges during the course of the collective redress litigation is essential.

⁸⁴⁴ England & Wales (including the Draft) and Sweden.

⁸⁴⁵ England & Wales, Germany, Italy, Portugal and Sweden.

⁸⁴⁶ England & Wales and Germany.

⁸⁴⁷ Germany.

However, a mere presumption of awareness arising after notifications have been lodged in such a Register may be not sufficient.

Consequently, the European instrument should require the judges' approval of additional means by which the representative claimant makes the collective redress action known. Such approval should be given only if the judges are satisfied that the means of publicity are suited to the particular circumstances of the case and provide those concerned with a reasonable opportunity to learn of the existence of the representative action. If approval is not possible, the judges should, however, be able to request appropriate amendments⁸⁴⁸. Should the notification by use of official documents appear costly and time-consuming, modern forms of communication, such as the Internet, could serve as a solution for an effective and efficient way of informing all the potentially represented group members.

Relating to the need for a *notification standard*, a certain differentiation has to be made between opt-in and opt-out collective redress proceedings.

In opt-in proceedings, it could be presumed that the representative claimant has a significant interest in making the action known so that the widest possible number of potentially involved persons opt-in and the claimed damages reach an amount rendering the litigation feasible and realistic. Therefore, it seems unnecessary that the European instrument impose a particular standard for the means to be used⁸⁴⁹.

In contrast, risks underlying the opt-out system if consumers are to be bound by a judge's ruling without their knowledge mean that the European instrument should require the adoption of a *notification standard* for opt-out proceedings.

Arguably, the European instrument could provide that personal notice by post should be the primary means of directing notice to the represented group members. Such could be the case as long as the names and addresses of the potential claimants are known or can be found through reasonable efforts.

The European instrument should, however, allow exceptions from this standard. In the case of low-value claims, a certain margin of appreciation should be given to judges. This seems indeed an arguable means of handling such collective proceedings since the costs for directing individual notification could manifestly render the collective redress litigation unfeasible⁸⁵⁰.

⁸⁴⁸ In this sense, see Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p. 1145.

⁸⁴⁹ Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, p. 1145.

⁸⁵⁰ In this sense, see Dimitrios-Panagiotis L. Tzakas, "Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?", *Common Market Law Review* 48, 2011, pp. 1146-1147.

- *Should the European instrument provide that judges fix a strict time limit for the exercise of the option?*

505. ***Setting cut-off dates***

The European instrument should leave the modalities of the exercise of the option to the judges' discretion.

The European instrument should only provide that judges state the opt-in/opt-out date⁸⁵¹, the manner of exercise (*e.g.* in filling in an online form, sending a letter to the representative claimant, etc.) and the deadline within which represented group members may voluntarily opt out of the collective redress proceeding/may opt in to the collective redress proceeding.

- *Should the European instrument leave the consequences for claimants who fail to meet cut-off dates to the judges' discretion?*

The European instrument should not allow judges to permit claimants who fail to meet the opt-in date to exercise further their option⁸⁵². In contrast, in opt-out proceedings, judges should be allowed to permit a represented group member who fails to opt out by the opt-out date to do so if they are satisfied that the delay was not caused by any fault of the represented group member and that the defendant would not suffer substantial prejudice if permission were granted⁸⁵³.

- *In opt-in proceedings, should judges confirm that the individual claimants who opted-in meet the criteria set out in their admissibility order? Should judges have the power to strike out individual claims?*

506. ***Striking out***

The European instrument should allow judges to supervise to a certain degree the inclusion of personal claims in opt-in collective proceedings⁸⁵⁴.

⁸⁵¹ England & Wales (including the Draft), Italy and Sweden.

⁸⁵² Germany, Italy, Sweden.

⁸⁵³ Draft for a Collective Proceedings Act in England & Wales.

⁸⁵⁴ England & Wales.

C. POWERS OF THE JUDGES DURING THE PROGRESS OF THE TRIAL

1. AN ENHANCED AND IMPROVED MANAGEMENT OF THE CASE

- *Should the European instrument provide specific judicial managerial powers for progressing collective redress proceedings?*

507. ***Enhanced form of case management and costs management by specialized judges***

The European instrument should emphasise the importance of a proper judicial management of the case and costs. This supports the need for specialist judges (see *supra*).

- *To what extent should the judicial case management powers be prescribed?*

Flexible management powers

The European instrument should provide that judges become case managers and settlement facilitators, in addition to adjudicators.

Therefore, the European instrument should grant judges flexible powers which allow them to approach the collective redress proceedings with pragmatism and creativity⁸⁵⁵.

Judges should be entitled to tailor case-management procedures to the needs of a particular litigation and to the available resources of the parties and the judicial system⁸⁵⁶. It could be dangerous to attempt to codify in the European instrument a single managerial approach to all cases⁸⁵⁷. This could squeeze all types of cases into the same procedural straightjacket, and would potentially lead to some difficulties⁸⁵⁸.

⁸⁵⁵ England & Wales and Italy.

⁸⁵⁶ England & Wales and Italy.

⁸⁵⁷ In this sense, see C. Hodges, *The Reform of Class and Representative Actions in the European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 58.

⁸⁵⁸ A significant example of such difficulties is Germany. We have seen that the KapMuG provides very detailed procedural steps and does not leave any flexibility to the judge. As a result, proceedings are very long (Telekom case).

The European instrument should, rather, fight against unpredictability and arbitrariness by offering judges written guidelines⁸⁵⁹. This could also be helpful for lawyers unfamiliar with collective redress proceedings.

For example, it could be set out in guidelines that in planning case management, judges should keep in mind the goal of bringing about resolution as speedily, inexpensively and fairly as possible consistently with the respect of the parties' rights in the adversarial process⁸⁶⁰. Indeed, judges should not be able to impose directions and controls without considering the views of the parties.

⁸⁵⁹ Such as the practice directions in England & Wales.

⁸⁶⁰ England & Wales and Italy.

2. ACTIVE CONDUCT OF THE TRIAL. A RESPONSIBILITY SHARED BY THE JUDGES AND THE PARTIES

- *Should the European instrument empower judges to divide the group into subgroups during the progress of the trial?*

508. ***Management of issues - dividing the group in subgroups***

Identifying the issues is critical to developing a plan for efficiently resolving complex collective redress litigations. The European instrument should encourage judges to identify and resolve problems promptly by offering them management tools. One of these tools should be the power to divide the group in subgroups⁸⁶¹, provided it promotes an appropriate processing⁸⁶².

- *Should judges be required to appoint a representative claimant in each subgroup?*

The European instrument should not require judges to appoint persons, besides the main representative claimant, to represent the different subgroups⁸⁶³.

- *Should judges be able to review their admissibility order if there are a considerable number of subgroups?*

If collective treatment no longer appears to be justified, the European instrument should allow judges to review their admissibility order. Moreover, if a represented group includes subgroups whose members have claims that raise common issues not shared by all the class members so that it appears in the progress of the trial that the protection of the interests of the subgroup members requires them to be represented separately, judges should be required to withdraw the collective claim as collective proceedings.

⁸⁶¹ England & Wales and Sweden.

⁸⁶² Sweden.

⁸⁶³ Contrary to England & Wales and Sweden.

- *Should the European instrument require judges to establish a litigation plan that includes an appropriate schedule for bringing the case to resolution (prescription of procedural steps with firm dates)?*

509. ***Management of time - establishing a litigation plan***

The European instrument should remedy lengthy proceedings by requiring judges to establish a litigation plan at the earliest stage of the proceedings. Such a litigation plan could save costs and time.

Judges should promptly develop litigation plans and orders, update them and modify them as the litigation unfolds.

In the litigation plan, judges should decide the order in which issues are taken at trial to be able to take certain issues to the point of decision before moving on to other issues. Judges should also be responsible for establishing economical methods of handling the case when deciding on the litigation plan. They should also be required to consider, with the help of the parties, the potential impact on costs of the directions that are contemplated and whether these are justified in relation to what is at issue at the outset.

The European instrument should require judges to monitor the progress of the litigation periodically to verify that schedules are being followed and judges should be able to consider necessary modifications to the litigation plan. Judges should also be able to order interim reports from the parties as effective management requires constant attention to developments in the litigation⁸⁶⁴. Soliciting frequent feedback on the operation of the litigation plan usually yields the information necessary for adjusting procedures. This essentially encourages the establishment of a Register for on-going communication between the parties and the judges during the course of the collective redress litigation (see *supra*).

The European instrument should put in place arrangements to enable the parties to contact the judges informally (i.e. by telephone or email, via the clerk), so as to deal with urgent matters or to seek guidance on procedural points (permanent seizing of the judge).

The litigation plan should be organised around fixed dates carefully estimated for each piece of work with the help of both parties⁸⁶⁵. Firm deadlines should be set for every component of the trial. The judges should not, however, be able to impose deadlines or other controls and requirements without considering the views of the parties and judges should be able to revise these when warranted.

⁸⁶⁴ Periodical conferences in England & Wales; on this point, see *Manual for Complex Litigation. Fourth*, Federal Judicial Center, 2004, p. 12.

⁸⁶⁵ See periodical conferences in England & Wales.

- *Should the European instrument allow judges to impose sanctions if the parties fail to respect the fixed dates?*

Once established, the European instrument should allow judges to order, when necessary, appropriate sanctions for derelictions and dilatory tactics⁸⁶⁶.

- *Should the European instrument make judges responsible for the proportionality of costs to the litigation?*

510. ***Costs management***

As stated above, the European instrument should require that the competent judges are trained in costs budgeting and costs management.

Additionally, and as part of the litigation plan process, the European instrument could set out a standard costs management procedure which judges would adopt at their discretion if the use of costs management would appear to be beneficial in any particular case.

Such a procedure could, for example, include a requirement that judges, with input from the parties, actively attempt to control the costs of cases. Costs capping orders could help to promote equality of arms and encourage access to justice where large resource disparities exist between claimants and defendants. Considerable care is needed, though, to ensure that caps are fair, reasonable and proportionate to the value of the litigation and the complexity of the issues⁸⁶⁷. In this sense, the parties should provide budgets of their own costs and submit them for approval to judges.

- *When should judges address the questions of litigation costs?*

The European instrument should require that judges pay attention to proportionality in relation to costs at the very beginning of the trial (see *supra*, litigation plan). A clear recommendation is that recoverable costs should be as fixed and predictable as possible, from as early as possible. This would provide transparency and predictability for all parties, and support equality of arms.

⁸⁶⁶ In this sense, see *Manual for Complex Litigation, Fourth*, Federal Judicial Center, 2004, p. 13.

⁸⁶⁷ England & Wales.

- *Should judges inform parties periodically on the litigation costs already incurred and to be incurred in order to allow the claimants to assess their possible liability as the case develops?*

See *supra*, litigation plan and interim reports.

- *Should the European instrument adapt the traditional rules on the judicial management of evidence to the collective redress proceedings?*

511. ***Management of evidence***

The European instrument should not allow judges to attempt generally to control the presentation of evidence at trial⁸⁶⁸. Judges should supervise the courtroom and proceedings without frustrating the adversarial process.

- *Should the European instrument allow judges to intervene in the evidence collection and preparation to ensure that the collective redress is not unduly prolonged, unreasonably complicated, or unfairly tilted in favour of a stronger party?*

The European instrument should provide that the parties supervise evidence collection and preparation and that they are only subject to judicial case management directions.

For their part, judges should be required to keep the trial moving in an orderly and expeditious fashion and therefore should bar cumulative and unnecessary events.

Judicial intervention could be necessary and should so be allowed if evidence exceeds reasonable bounds and does not contribute to resolving the issues presented. Such management should provide the parties and lawyers with a prompt, firm and fair ruling.

⁸⁶⁸ England & Wales, Germany, Spain and Sweden.

Automatic discovery or disclosure should not take place in the European instrument⁸⁶⁹.

- *Should the European instrument reinforce the ability of judges to order production of specific documents?*

The European instrument should not; traditional national laws are sufficient.

- *In cases where production of a document may be requested by one of the parties, should judge's approval of such a request be mandatory in collective redress proceedings?*

The question is not specifically apposite to collective redress proceedings. The European instrument should not cover this issue.

⁸⁶⁹ Germany, Italy, Portugal, Spain and Sweden.

3. A MANAGEMENT OF THE CASE THAT IS SENSITIVE TO THE INTERESTS OF THE REPRESENTED GROUP MEMBERS

513. ***Protecting the interests of absent represented group members***

The European instrument should make judges, in addition to the representative claimant, responsible for protecting the interests of the absent represented group members⁸⁷⁰.

- *Should the European instrument make judges responsible for the communication of the important orders and decisions taken during the trial to the represented group members?*

514. ***Notifying the represented group members about relevant decisions***

The European instrument should require that judges supervise the communication to represented group members of information which they will consider important for the rights of the represented group members⁸⁷¹.

Judges should be allowed to order, at any time during the process of the trial, any party to give notice to persons that the judges consider necessary, to protect the interests of any represented group member or party or to ensure the fair conduct of the proceedings⁸⁷².

Such notice would, for example, be necessary when the representative claimant has been substituted by a new representative, when a settlement is subject to a request for approval or when a decision has been appealed against.

Judges should order that such notice will be given at least through the Register⁸⁷³ but also by any other means or combination of means that they consider appropriate⁸⁷⁴.

⁸⁷⁰ Draft for a Collective Proceedings Act in England & Wales and Sweden.

⁸⁷¹ Draft for a Collective Proceedings Act in England & Wales, Italy and Sweden.

⁸⁷² Draft for a Collective Proceedings Act in England & Wales.

⁸⁷³ England & Wales and Germany.

⁸⁷⁴ Draft for a Collective Proceedings Act in England & Wales.

- *Should the European instrument leave the participation of the represented group members in the trial to the judges' discretion?*

515. ***Dealing with the participation of the represented group members***

The European instrument should permit judges to allow, at any time in the proceedings, one or more represented group members to participate in the proceedings on such terms as they consider appropriate⁸⁷⁵.

The European instrument should acknowledge that where individual rights are diminished, there is a need that judges ensure that those rights are protected and safeguarded. Consistently, judges should be required to coordinate compromises of absolute interests to ensure the balance between core aspects of the adversarial principle - notably, the right to be heard and the opportunity to participate - and the inevitable need that collective redress proceedings be workable and efficient. Opportunities for individual participation, combined with appropriate notice, could greatly reduce the risk of some represented group members securing additional recompense at the expense of other represented group members⁸⁷⁶.

- *Should the European instrument require that judges keep supervision of the adequacy of representation of the representative claimant?*

516. ***Supervising continuously (i.e. even after the admissibility stage) the suitability of the representative claimant***

The European instrument should empower judges to continuously supervise the adequacy of representation of the representative claimant. Judges should be able to appoint someone instead of the representative claimant if the representative claimant is no longer considered appropriate to represent the group members⁸⁷⁷.

If no new representative claimant can be appointed, judges should be required to dismiss the collective redress action⁸⁷⁸.

⁸⁷⁵ England & Wales (including under the Draft), Germany and Italy.

⁸⁷⁶ Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report", available at: ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf, p. 302.

⁸⁷⁷ Portugal and Sweden.

⁸⁷⁸ Sweden.

- *Should the European instrument require that judges attempt to resolve a dispute via collective consensual dispute resolution during the progress of the trial?*

517. ***Promoting and facilitating settlement***

As stated above, the European instrument should allow for a settlement to be reached after initiating the collective redress procedure (trial with permanent possibility to switch to an out-of-court agreement with post-confirmation by the judge) and moreover, the attempt to obtain an out-of-court settlement should be an explicit part of the procedure.

Parties should be able to reach an out-of-court agreement by either settling among themselves or using an ADR mechanism. The central importance of ADR in its many forms should be particularly emphasised.

One function for judges should precisely be to provide powerful and adequate incentives for parties to settle whilst balancing the rights and guarantees of due process. The European instrument should provide that judges, as part of their active case management, ensure that the parties to a collective redress action have actively taken steps to engage in ADR and that the litigation should be a course of last resort.

The European instrument should provide effective facilities to assist negotiation and settlement. To promote the negotiation of such agreement, judges should be permitted to stay the collective redress proceedings upon request of any interested person. The stay should be scheduled for an initial period (of maximum six months), set by the judges. This stay period should be renewable for a period fixed by the judges, (up to six months). Judges should be required to hear the representative claimant and the defendant before delivering a ruling on the stay but in principle, judges should not reject the stay.

The stay could indeed be desirable in most cases because it could give the parties a *cooling off period* that could help calm their disputes. However, judges could refuse the stay in exceptional cases. Such should be the case when, for example, they are satisfied that there are legitimate concerns that the debtor is organising its insolvency.

The European instrument should also use financial incentives to promote out-of-court settlement⁸⁷⁹.

⁸⁷⁹ England & Wales and Italy.

- *Should the European instrument require that judges approve settlements proposed by the parties for them to be valid and have a binding effect on group members?*

518. ***Approving settlement***

It is important that a European instrument provides for a mechanism for preventing abuses and conflicts of interests in settlements.

The only efficient and democratic way of replacing the ineffective *voice* of individual represented group members is by substituting the judges for them in assessing whether or not to accept a settlement. Consequently, the European instrument should provide that any settlement agreed by the representative claimant and the defendant must be approved by the judges to be valid before it can potentially bind the represented group members⁸⁸⁰.

Judicial approval forms part of a judges' protective jurisdiction; not just for the represented group members but also for defendants as it protects their rights to effective access to justice, especially to procedural justice. Moreover, judicial approval provides binding resolution, enabling all parties to move onward with financial certainty.

The European instrument should require that judges give adequate opportunity to represented group members to submit their views on the proposed settlement⁸⁸¹. Judges should indeed ensure that notice that an offer to settle has been made is given to the represented group members. Such notice should be made through the Register and, if necessary, by any other means the judges consider appropriate (see *supra*, notifying represented group members).

- *Should the European instrument require that judges verify whether the proposed settlement is fair, reasonable and suitable for the represented group, the defendant and society at large?*

Judges should be able to refuse the settlement if it does not offer effective compensation to the group members or when there is no consistency between the benefits granted to all represented group members⁸⁸².

Essentially, a judge should be satisfied that the settlement agreement is fair, just and reasonable in light of the circumstances of the case (settlement criteria).

⁸⁸⁰ Where a settlement is proposed by the parties and achieved, Germany, England & Wales (Draft), Portugal and Sweden strongly support the recommended conclusion that such a settlement should not be valid and binding unless it is approved by the judge.

⁸⁸¹ Draft for a Collective Proceedings Act in England & Wales and Sweden.

⁸⁸² Draft for a Collective Proceedings Act in England & Wales and Sweden.

Judges should not only be required simply to review the terms of settlement for fairness but also to determine how and within what timeline represented group members should opt in to/opt out of the settlement (see *infra*), what reasonable steps should be taken to advertise the settlement to represented group members, what evidence is required to claim a share of the settlement fund, what limitation period should be set for claiming a share and who should administer the settlement fund (and at what cost).

In approving a settlement for a collective claim, judges should thus consider a number of issues to ensure that the represented group members are given adequate opportunity to claim their share of the settlement⁸⁸³. Essentially, the European instrument should require that judges consider the same considerations and determine the same questions, *mutatis mutandis*, as when determining a collective redress claim by way of final judgement (see *infra*).

- *When approved, should the European instrument state that the settlement binds every represented group member who has opted into the collective redress proceedings or binds every represented group member who has not opted out from the collective redress proceedings, depending on the system initially chosen (first solution), or should judges be required to require the represented group members to consent to the settlement in order to be bound by it (second solution)?*

519. ***Controlling the binding effect of a settlement***

The European instrument should not contain a provision which sets out that, when approved, the settlement binds every represented group member who has not opted out of or been excluded from the collective proceedings or binds every represented group member who has opted into the proceedings, depending the system chosen at the outset. The European instrument should rather require the mandatory exercise of a second option⁸⁸⁴.

The European instrument should allow judges to decide which mechanism (opt-in or opt-out) is the most appropriate, taking into account all the relevant circumstances.

So, if appropriate, judges should be able to order that all represented group members will be given a further opportunity to opt out and that the notice given in accordance with what is stated above

⁸⁸³ Civil Justice Council, “*Improving access to justice through collective actions* (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report), *a series of recommendations to the Lord Chancellor*”, November 2008, p. 169.

⁸⁸⁴ Draft for a Collective Proceedings Act in England & Wales – opt-out; Germany (New Version of the KapMuG – opt-out and Sweden – opt-in.

describes that entitlement and the manner in which it may be exercised⁸⁸⁵. Opt-out of the settlement may be justified if, for example, the circumstances of individuals are sufficiently different that the settlement is materially unfair to them.

The opt-in or the opt-out process necessary for being a member of the represented group in collective redress proceedings is thus independent of the opt-in or the opt-out process necessary to be bound by the approved settlement.

Under this regime, an affected person could be required to *opt* twice. The represented group member who has *opted* for the collective redress action but does not *opt* to benefit from the approved settlement should not be bound by the collective redress proceedings and should be able to initiate an individual action.

⁸⁸⁵ Draft for a Collective Proceedings Act in England & Wales and Germany (New Version of the KapMuG).

D. POWERS OF THE JUDGES AT THE JUDGMENT STAGE

1. THE JUDGEMENT

- *Should the European instrument entitle judges to deliver a judgement only on the existence of liability and/or on other common issues which will only constitutes the basis for individual actions (interim judgement)?*

520. ***Flexible powers to choose an appropriate type of judgement***

The European instrument should allow judges to determine the most appropriate type of judgement in any particular proceedings. Flexibility should be the key.

Consistently, judges should have the possibility to give a formal judgement at the conclusion of the collective redress action either by making a determination as to liability or as to an assessment of the amount award or both⁸⁸⁶.

A judgement exclusively on the determination as to liability should, for example, be delivered when it appears during the course of the trial that the individual claims are factually complex and raise considerable issues differing from issues of causation, even where there are substantial common issues or interests. In such situation, it should be better for judges to group the claims in light of their similarities, resolve the common issues in the first instance with *decertification* to follow and order the claims to be proceeded as individual actions⁸⁸⁷. In doing so, judges should be required to have regard notably to: the nature and type of action, fairness to the parties and efficiency of disposal⁸⁸⁸.

- *Should the European instrument require that judges transfer the resolution of individual issues to other judges?*

The European instrument should require that judges describe the steps that must be taken within a particular period to establish an individual

⁸⁸⁶ England & Wales.

⁸⁸⁷ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 146.

⁸⁸⁸ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 146.

claim and give an address to which represented group members may direct inquiries about the proceedings⁸⁸⁹.

The European instrument should state that failure on the part of a represented group member to take these steps will result in the member not being entitled to bring an individual claim, except with the permission of the judges⁸⁹⁰.

- *Should the European instrument permit judges to make a determination on the common issues for certain represented group members (interim judgement) and to assess the amount of the individual compensation for certain other represented group members (final judgement)?*

521. ***Postponing the consideration of particular issues***

Judges should have the possibility to give judgement in respect of the common issues and separate judgments in respect of any other issues⁸⁹¹.

Accordingly, the European instrument should provide that when judges determine common issues in favour of the represented group or represented subgroup, they may also determine that there are issues that are applicable only to certain individual members of the represented group or represented subgroup and order that the individual questions will be determined in further proceedings⁸⁹².

The European instrument should allow judges to deal with particular issues among some of the represented group if that is appropriate and to order sub-judgments, which are partial judgments on questions only on the interests of some represented group members. Judges should thus be entitled to deliver a decision which for certain represented group members is a final decision on fundamental questions and for other represented group members signifies that discussion on a particular question has been adjourned.

Judges should only use this power if it is appropriate, taking into consideration the investigation and whether it can be done without significant inconvenience to the defendant⁸⁹³.

The time within which the individual represented group members for whom the case has not finally been determined may request that the remaining issues be addressed should be set by the judges⁸⁹⁴. If a member of the group does not submit such a request within the fixed time limit,

⁸⁸⁹ Draft for a Collective Proceedings Act in England & Wales.

⁸⁹⁰ Draft for a Collective Proceedings Act in England & Wales.

⁸⁹¹ Draft for a Collective Proceedings Act in England & Wales.

⁸⁹² Draft for a Collective Proceedings Act in England & Wales and Sweden.

⁸⁹³ Sweden

⁸⁹⁴ Draft for a Collective Proceedings Act in England & Wales and Sweden.

judges should refuse a later individual action unless the delay was not caused by any fault of that person and the defendant would not suffer substantial prejudice if permission were granted⁸⁹⁵.

- *Should the European instrument empower judges with the possibility to calculate the compensation on an individual or a global or an aggregate basis, whichever contributes best to the fair and effective compensation of mass injury?*

522. ***Assessing the damage***

This issue raises matters of substantive law that should be underpinned by provisions in the enabling statute. The aim of this report is not to study in detail whether the introduction of a collective redress mechanism would affect the substantive law on torts. More thorough recommendations should be made further on this point.

Where monetary claims are made, the European instrument should leave the method of assessment of the damages to a case-by-case assessment by the judges⁸⁹⁶. If judges choose compensation by equivalent, the amount of damages could be calculated on an individual basis, globally or aggregately⁸⁹⁷ for all or certain categories (subgroups) of the represented group.

The harm suffered should, in principle, be evaluated individually⁸⁹⁸.

Whether in opt-in or opt-out proceedings, the global method⁸⁹⁹ should also be available⁹⁰⁰. Consequently, judges should be allowed to determine the damages on an average basis, even if their determination on a strictly legal basis is not impossible or excessively burdensome⁹⁰¹.

Whether in opt-in or in opt-out proceedings, the European instrument should grant judges the power to aggregate damages in appropriate cases. This power should be seen as a means of avoiding costly, time-consuming and inefficient individual damages determinations and as benefiting both the defendant and the represented group members⁹⁰².

Should some or all of the represented group members make monetary claims, judges should be permitted to use this method if the aggregate or a part of the defendant's liability to some or all represented group members can be determined by a reasonably accurate assessment and without proof by individual represented group members⁹⁰³. Before making such an order, judges should be required to provide the defendant with an opportunity to make submissions to the judges in respect

⁸⁹⁵ Draft for a Collective Proceedings Act in England & Wales.

⁸⁹⁶ Draft for a Collective Proceedings Act in England & Wales.

⁸⁹⁷ Those methods were defined in the First Part of the Report, Section Three.

⁸⁹⁸ General law.

⁸⁹⁹ In the sense we defined it in the First Part of the Report, Section Three.

⁹⁰⁰ Italy.

⁹⁰¹ Italy.

⁹⁰² Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 166.

⁹⁰³ Draft for a Collective Proceedings Act in England & Wales.

of any matter relating to a proposed aggregate award⁹⁰⁴. Accordingly, the defendant could challenge the merits or the amount of an aggregate award or argue that individual evidence of monetary claims is required due to the individual nature of the claims⁹⁰⁵.

- *Should the European instrument allow judges to divide the group in subgroups to facilitate the assessment of individual damages?*

The European instrument should provide that when different remedies are sought for different represented group members, judges can divide them into several categories for the determination of compensation. The division of the represented group members into categories (subgroups) would permit judges to calculate damage suffered appropriately and efficiently⁹⁰⁶.

We could consider the following example: a defendant company has polluted a river. Different types of damage may be distinguished: that of horticulturists whose produce has become unmarketable and whose land has been polluted (subgroup A); that of private residents whose land has been polluted (subgroup B); and that of tourists on holiday in the region (subgroup C).

For subgroup A, it could be justified that the judges assess the damage of each horticulturist individually, while for subgroup B and subgroup C, a global assessment could appear sufficient. If the number of affected tourists is evaluated to be 100 persons, it indeed seems conceivable that the judges calculate the damages on the basis of an estimate of the *hypothetical average* damage of each represented tourist (e.g. €100) and then multiply that amount by the total number of represented group members to produce a global lump sum payable to the group (e.g. €100,000).

⁹⁰⁴ Draft for a Collective Proceedings Act in England & Wales.

⁹⁰⁵ Draft for a Collective Proceedings Act in England & Wales.

⁹⁰⁶ England & Wales (including under the Draft), Spain and Sweden.

- *Should the European instrument leave the choice of the form of compensation to a case-by-case assessment by the judges?*

523. ***Choosing the form of compensation and fixing the modalities for calculating the compensation***

The European instrument should empower judges with the greatest flexibility at this stage. The European instrument should allow judges to pick and choose, cafeteria-style, whichever form of compensation they prefer in a given case. Judges should be able to choose between specific performance and monetary compensation. Options include, notably, fixing precise individual monetary amounts due, establishing a formula to calculate the damages⁹⁰⁷ and ordering *cy-près* compensation⁹⁰⁸. Judges could, for example, order so-called *cy-près*⁹⁰⁹ compensation where it is not possible to determine each plaintiff's actual damage or when an effective distribution to represented group members having suffered low-value damages induces excessive costs.

If judges have made an aggregate assessment of damages, the European instrument should allow them to order that all or a part of the aggregate award will be divided among group or sub-group members on an individual basis or on a proportional basis⁹¹⁰. Judges could, for example, order that all or a part of the aggregate award be divided up so that some or all of the individual represented group or subgroup members share in the award on a proportional basis if it would be impractical or inefficient to identify the group or sub-group members entitled to share in the award or to determine the exact shares that should be allocated to individual group or sub-group members⁹¹¹.

This recommendation applied to our aforementioned example could give the following results:

For subgroup A, the judges could use the method of a formula to determine the individual claims of the subgroup members. Accordingly, the judgement could provide that horticulturists will be entitled to monetary compensation amounting to €2 500 per tonne of cherries and €2 000 per tonne of apricots, plus an amount of €100 per square metre of land to decontaminate it. For subgroup B, the judges could combine specific performance with the method of precise amounts due. Accordingly, the judgement could provide that residents are entitled to specific performance consisting of cleaning the land, plus an indemnity of €50 per person. For subgroup C, the judgement could provide that each tourist stands to receive an equal per capita share of the global lump sum awarded.

⁹⁰⁷ Draft for a Collective Proceedings Act in England & Wales, Italy, Spain and Sweden.

⁹⁰⁸ Portugal.

⁹⁰⁹ In the sense we defined it in the First Part of the Report, Section Three.

⁹¹⁰ Draft for a Collective Proceedings Act in England & Wales.

⁹¹¹ Draft for a Collective Proceedings Act in England & Wales.

- *Should the European instrument grant judges cy-près power?*

The European instrument should empower judges with the greatest flexibility. If judges consider that *cy-près* compensation would be suitable in a particular case, they should be allowed to deliver such an order⁹¹².

- *Should the European instrument allow judges to award punitive damages?*

Punitive damages should not be provided under the European instrument⁹¹³.

- *Should the European instrument require that judges verify the relevance of the binding effect of the judgement to the represented group members and allow judges to limit the binding effect of the judgement to the single representative claimant? If so, should judges be required to verify the nature of the adequate representation of the represented group in order to consider the binding effect of the judgement?*
- *Should the European instrument give the opportunity to judges to establish res judicata secundum eventum litis (or, establish that the decision is binding only if it benefits but not if it is prejudicial to those not appearing in court)? In the case of an affirmative answer, should this decision be dependent on any additional particular circumstance?*

524. ***Binding effect of the judgements***

The European instrument should not consider the aforementioned questions.

The European instrument should only provide that a judgement either binds every member of the group or subgroup who has not opted out of the collective redress proceedings or binds every class member who has opted into the collective proceedings, depending the system initially chosen⁹¹⁴.

- *Should the European instrument allow judges to enable a represented party to opt out of a judgement if, for example, it could demonstrate that it could not reasonably have been made aware of the existence of the decision admitting the collective proceeding?*

The European instrument should provide that in opt-out proceedings, judges could allow a represented group member to opt out of a

⁹¹² Portugal.

⁹¹³ Italy, Spain and Sweden.

⁹¹⁴ Germany, Italy and Sweden.

judgement if it could demonstrate that it could not reasonably have been made aware of the existence of the decision admitting the collective redress proceeding. The judges should, in addition, be satisfied that the defendant would not suffer substantial prejudice if permission was granted⁹¹⁵.

In order to preserve the balance reached by the parties, this rule should not, however, allow a person who has not opted in to the collective redress proceedings to benefit from the judgement. In the latter case, the rights of defence of such a person are not affected and that person remains entitled to bring an individual action.

- *Should the European instrument leave the means of notifying the existence of the final judgement to the represented group members within the judges' discretion?*

525. ***Notifying the represented group members about the judgement***

The European instrument should allow judges to order any means of notification they consider appropriate⁹¹⁶ and so should only require that the publicity is useful and proportionate to the intended aim.

Of course, the judgement should at least be published in the Register. In addition to that, the judges could, for example, choose between the following means of notice or any combination of the following means: personal delivery, post, publishing or leafleting, press advertisement, or radio or television broadcast.

Judges should have the possibility to order the defendant to attend to such notification and even to satisfy other disclosure obligations, at its own cost, provided this has significant advantages for the processing of the litigation⁹¹⁷. We will add that judges should be able to impose a fine if the defendant does not make the disclosures incumbent on him.

⁹¹⁵ Draft for a Collective Proceedings Act in England & Wales.

⁹¹⁶ Draft for a Collective Proceedings Act in England & Wales and Sweden.

⁹¹⁷ Sweden.

2. THE FINANCIAL ASPECTS

526. *Supervising third-party funding arrangements*

The European instrument should not make third party funding arrangements enforceable. A collective redress mechanism should indeed not need access to third-party funding in order to be effective.

As to the issues of funding, the European instrument should underline that tight control by the judges of the management of the case should reduce costs and make them more predictable. The European instrument could also promote access to justice at proportionate costs by creating a public fund maintained by unclaimed damages (see *infra*).

If properly regulated third party funding arrangements as a mainstream funding option are one day accepted, one function of the European instrument should be to empower judges with a powerful responsibility to monitor such funding arrangements. It seems clear that the European instrument should require that judges approve such arrangements at the earliest stage of the proceedings to make them enforceable. Judges should be required to have regard to, and balance, a number of factors, all of which may be relevant, but none of which should solely be determinative. The factors that could indicate that a third-party funding arrangement is lawful should include:

- the funded representative claimant should have demonstrated an interest in suing on its own initiative;
- the third-party funder should not have the capacity to improperly monopolise the litigation;
- there should be no conflict of interest between the third-party funder, the representative claimant and the represented group;
- the third-party funder should have fully informed the representative claimant about the effects of the third-party funding arrangement;
- the third-party funder should be willing and able to meet any adverse costs order that may be rendered against the funded representative claimant, should the action fail;
- the third-party funder should not have negotiated an inordinately high fee; and
- the third-party funding arrangement should not otherwise have any tendency to corrupt the legal process⁹¹⁸.

The regulation of third party litigation should be a responsibility shared by legislation and the judges⁹¹⁹.

⁹¹⁸ Factors and circumstances recommended by R. Mulheron and P. Cashman, "Third party funding: a changing landscape", *C.J.Q.*, 2008, pp. 339-340.

⁹¹⁹ C. Hodges, "Response to Consultation Towards a Coherent European Approach to Collective Redress", April 2011, Available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf, p .11.

These recommendations do not address further the issue of the increase of access to justice for claimants through the general availability of third-party arrangements.

527. ***Supervising lawyers' fees arrangements***

The European instrument should not make contingency fees as conditional fees arrangements enforceable. A collective redress mechanism should not need access to lawyers' funding in order to be effective. The spread of contingency fees should indeed be scrutinized very carefully.

If such lawyers' arrangements are one day admitted, the European instrument should require that an agreement in relation to the lawyers' fees payable by the representative claimant must be in writing, must state the terms under which fees are to be paid and must give an estimate of the expected fee⁹²⁰. Judges should be required to approve such arrangements to make them enforceable and binding on the represented group members⁹²¹. Judges should also be allowed to impose a cap on those fees.

- *Should the European instrument allow judges to derogate from the losing party pays principle in collective redress proceedings? If so, should the European instrument rigorously circumscribe those exceptions or should they be left to case-by-case assessment by the judges, possibly within the framework of a general provision?*

528. ***Applying the loser pays principle***

No particularities of the collective redress proceedings seem to require that the European instrument should allow judges to derogate from the *loser pays* principle, which principle strongly supports the avoidance of unmeritorious litigation.

While judges should be required to utilise in appropriate cases the full range of costs measures, such as security for costs or cost capping orders, the traditional national rules as to costs shifting⁹²² should be maintained in collective redress proceedings, without any exception⁹²³.

The European instrument should only require that judges cap the parties' liability for each other's costs at an early stage of the proceedings (see *supra*)⁹²⁴, and so judges could cap the potential costs liability of claimants of limited financial means to facilitate their access to justice.

⁹²⁰ Draft for a Collective Proceedings Act in England & Wales.

⁹²¹ Draft for a Collective Proceedings Act in England & Wales and Sweden.

⁹²² The losing party in the proceedings, if ordered to pay the successful party's costs, must only be required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party.

⁹²³ England & Wales (including under the Draft), Italy, Spain and Sweden.

⁹²⁴ England & Wales.

The *loser pays* principle is also a deterrent against speculative or so-called blackmail litigation, unless the representative claimant is impecunious. In the latter case, judges should be required to use their powers to award a security for cost. In acting so, judges could provide protection for defendants against such blackmail claims. Should full costs shifting be provided, judges should therefore make sure that parties are solvent (or are adequately insured)⁹²⁵.

- *Should the European instrument require that judges supervise cost sharing arrangements among represented group members? When should judges exercise this control? Should judges have the power, in certain circumstances, to order that the representative claimant only (represented group members excluded) must bear the litigation costs?*

529. ***Supervising costs sharing arrangements among the represented group members***

The main rule under the European instrument should be that, in principle, the representative claimant assumes alone the risk of being ordered to pay the opponent's costs, if the group loses the case⁹²⁶. Judges should not be given any particular discretionary power on this issue.

The European instrument should, however, provide for the liability of represented group members for litigation costs in certain circumstances: (i) if the defendant has been ordered to pay and cannot pay; (ii) if they have incurred additional litigation costs with their conduct⁹²⁷. In any case, represented group members can be held liable to bear only that part of the litigation costs corresponding to their benefit from the proceedings but cannot be liable to pay more than they have gained through the proceedings⁹²⁸.

⁹²⁵ Civil Justice Council, *Improving access to justice through collective actions (Developing a More Efficient and Effective Procedure for Collective Actions. Final Report)*, a series of recommendations to the Lord Chancellor, November 2008, p. 179.

⁹²⁶ Draft for a Collective Proceedings Act in England & Wales, Germany, Italy, Portugal, Spain and Sweden.

⁹²⁷ Sweden.

⁹²⁸ England & Wales, Germany and Sweden.

E. POWERS OF THE JUDGES AT THE DISTRIBUTION STAGE

1. DISTRIBUTION OF THE DAMAGES

- *Should the European instrument allow judges to ask the represented group members to undertake some supplementary steps to obtain compensation?*

530. ***Determining the supplementary individual steps necessary to obtain compensation***

Whether for opt-in or opt-out proceedings, the European instrument should allow judges to require that represented group members have to undertake some steps before obtaining compensation⁹²⁹. Judges could, for example, require that the represented group members prove and even assess the amount of damage they suffered.

The European instrument should provide that judges clearly describe in their final judgement the steps that must be taken and should specify that failure on the part of a represented group member to take those steps will result in the member not being entitled to bring an individual claim except with the permission of the judges⁹³⁰.

- *Should the European instrument require judges to fix firm dates by when individuals should take these steps?*

The European instrument should require judges, when specifying this procedure, to set a deadline by which the represented group members have to undertake those steps and after which the awards paid by the defendant will have the status of unclaimed damages. The judges should not be able to allow compensation to a represented group member who fails to make a claim within the fixed time, unless they are satisfied that the delay was not caused by any fault of that represented group member and the defendant would not suffer substantial prejudice if permission were granted⁹³¹.

⁹²⁹ Draft for a Collective Proceedings Act in England & Wales, Portugal and Spain.

⁹³⁰ Draft for a Collective Proceedings Act in England & Wales.

⁹³¹ Draft for a Collective Proceedings Act in England & Wales.

- *Should the European instrument give competence to judges to supervise the execution of these steps?*

See *infra* (possibility to appoint a liquidator but remaining competence of the judges).

- *Should the European instrument entitle judges to order that the defendant pays into court the total amount of his liability to the represented group members?*

531. ***Ordering the constitution and administration of a fund to manage and distribute compensation***

In the case that precise amounts due are ordered to identified and specified consumers – which would usually be the case in opt-in proceedings – the European instrument should allow judges to decide, on a case-by-case basis, between ordering the defendant to distribute the amount to which each member is entitled directly to represented group members and ordering the defendant to pay the total amount of his liability to a fund⁹³². If a fund is established, judges should give directions on how individual represented group members could be paid out of the fund.

In the case that aggregate awards are ordered, the European instrument should allow judges to make an order for the creation of a fund to manage and distribute individual compensation, provided a reasonably accurate assessment can be made of the total amount that the represented group would be entitled to under the judgement (see *supra*). This solution has a twin-pronged benefit to both represented group members and the defendant. It serves to ensure that the represented group members are properly compensated and that the defendant is not left in possession of any financial benefit derived from their unjust conduct; it also serves to ensure that the defendant has certainty and finality in terms of their liability to all affected represented group members.

- *If permitted, should the European instrument entitle judges to appoint a liquidator to distribute the awarded compensation among the represented group members?*

The judge should be able to appoint a liquidator to share out the damages paid by the defendant amongst the represented group members.

⁹³² The Draft for a Collective Proceedings Act in England & Wales provides this power to judges but does not consider the creation of a fund. The Draft envisages that the defendant pay the total amount of his liability to the court.

The European instrument should leave the choice between ordering the representative claimant or a third-party liquidator to administer the distribution to the judges' discretion.

In any case, the European instrument should provide that judges make directions as to how represented group members are to be able to make a claim for payment from the fund in their final judgement (see *supra*) and the liquidator or the representative claimant should only apply them.

This recommendation, applied to our aforementioned example, could give the following results:

For subgroup A, the judges could order that the defendant pays the aggregate sum to a determined agricultural company (*i.e.*, the liquidator). Consequently, the judges should have determined in the final judgement that individual claims are to be made by horticulturists within a period of X months in order to establish entitlement to part of the aggregate award. The determined agricultural company should then apply the procedure for determining the claims specified by the judges in the final judgement (formula) and pay the compensation to the individual horticulturist within X months of the presentation of evidence by the individual of the amount of the damage suffered.

For subgroup C, the final judgement could order that the defendant pays the global sum of €100 000 to the representative claimant and that this latter has to pay €100 to the represented group members who appear before him within X months.

- *If so, should judges remain competent to rule over any dispute that may arise regarding the execution of the decision on the merits?*

The European instrument should require that judges remain competent to rule over any dispute that may arise regarding the execution of the decision on the merits. Judges should remain competent until the awards have been paid or until the repairs have been paid for, up to which time the referral continues, or until the right to compensation has been time-barred or no longer exists.

Summary

In summary, the final judgement should at least rule on the following points:

- the composition of the group and, if appropriate, the categorisation of its members (subgroups);
- the form of compensation;
- the modalities for calculating the compensation;
- the modalities of distribution, including the person liable for this task;
- the supplementary steps that must be taken to obtain compensation and the procedure for determining individual claims;
- the time-limits within which the payments should be claimed and should be made, and after which the awards will have the status of unclaimed damages; and
- the means and costs of publicity.

2. UNCLAIMED DAMAGES

- *Should the European instrument require that judges put in their final judgements certain deadlines within which the represented group members have to claim their individual shares of award and after which the award will have the status of unclaimed damages?*

See *supra*.

- *Should the European instrument require that judges decide the treatment of unclaimed damages or should the European instrument impose a solution?*

533. ***Deciding the treatment of the unclaimed damages***

The European instrument should stipulate some governing rules for when consumers do not claim their compensatory damages, creating a Foundation with goals aligned with collective redress proceedings.

However, ordering the attribution of the unclaimed damages to a Foundation should not be the only solution⁹³³; the European instrument should give flexibility to the judges on this point. They should be required to make the use that they consider the most appropriate of the unclaimed damages, depending on the needs of the case.

The primacy of the compensatory function of the awarded funds should nonetheless be highlighted in the European instrument. In all cases, judges should be required to make sure that all means of directly compensating the represented group members have been exhausted. Consistently, judges could consider whether all or any part of an award of any sum that is due to the represented group members and that has not been distributed within the fixed time could be dedicated in any manner that could reasonably be expected to benefit represented group members (*cy-près* power)⁹³⁴. The European instrument should, on this point, challenge the creativity of the judges. In deciding whether to use such a *cy-près* power, judges should consider any matter they consider relevant, including whether the distribution of the undistributed residue would result in unreasonable benefits to persons who are not members of the represented group⁹³⁵, and should make sure that the unclaimed damages are allocated to a specific purpose that is consistent with the interests of the represented group members.

⁹³³ Draft for a Collective Proceedings Act in England & Wales.

⁹³⁴ Draft for a Collective Proceedings Act in England & Wales.

⁹³⁵ Draft for a Collective Proceedings Act in England & Wales.

Where, after a proper period of time fixed in the judgement (see *supra*) with proper and proportionate notice given to the represented group, an unclaimed residue remains and may not be allocated in a manner consistent with a *cy-près* distribution, judges could also have the possibility to order that unclaimed residue be distributed to a Foundation aimed at the financing of further collective redress proceedings⁹³⁶ or be set against the costs of the collective redress proceedings⁹³⁷.

⁹³⁶ Portugal.

⁹³⁷ Draft for a Collective Proceedings Act in England & Wales and Portugal.

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PART ONE - COMPARATIVE ANALYSIS

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