BEUC The European Consumer Organisation

Bridging the EU consumer enforcement pathways in mass harm situations

Prof. Dr. Stefaan Voet and Dra. Stien Dethier (KU Leuven)

January 2024
Supported by funding from Luminate Projects Limited

Disclaimer: This study has been commissioned by BEUC. The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of BEUC.

INTRODUCTION

A. Three Pillar Framework

Consumer law is a cornerstone of the EU internal market. For the past 50 years, consumer rights1 have been a key issue for the European policymakers. However, attributing European consumers (harmonized) substantive rights is one thing; giving them the possibility to effectively and efficiently enforce these rights is another. Robust consumer enforcement strengthens consumer trust and ensures a level-playing field for traders in the Single Market.

The EU policy regarding the enforcement of EU consumer law is built on three pillars. Regarding **public enforcement**, there is the **2017 CPC Regulation** (consumer protection cooperation regulation).[2] This Regulation lays down a cooperation framework to allow national authorities from all EU countries to jointly address breaches of consumer rules when the trader and the consumer are established in different countries. These national authorities form a European enforcement network, the CPC Network.[3] National enforcement authorities have strong powers to address unlawful practices and identify rogue traders. They can request information from domain registrars and banks to detect the identity of the responsible trader, carry out mystery shopping, for example, to check geographical discrimination or after-sales conditions, and to order the immediate take-down of websites hosting scams. The European Commission coordinates the cooperation between these authorities to ensure that consumer rights legislation is applied and enforced in a consistent manner across the Single Market. It can alert the CPC network and coordinate EU-wide enforcement action to tackle practices which harm a large majority of EU consumers. Authorities can accept commitments from the businesses concerned that they will correct their practices, provide remedies and compensation to the consumers affected.

---

[1] The right to health protection and safety, the right to protection of economic interests, the right to damages, the right to information and education and the right to representation. See https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/50-years-consumer-legislation_en.

[2] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27 December 2017, 1–26. See https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation_en.

[3] https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/consumer-protection-cooperation-network_en.

In the **private enforcement** arena, there is the **2020 RAD Directive** (representative actions directive).[4] This Directive aims to ensure that consumers are able to protect their collective interests in the EU via representative actions brought by qualified entities. The Directive improves consumers' access to justice while it also foresees appropriate safeguards to avoid abusive litigation. Representative actions are actions brought by qualified entities (e.g. a consumer organisation or a public body) before national courts or administrative authorities on behalf of groups of consumers to seek injunctive measures (i.e. to stop trader's unlawful practices), redress measures (such as refund, replacement, repair) or both injunctive and redress measures. Individual consumers concerned by a representative action are not claimants, but should be entitled to benefit from that action. Consumers will automatically benefit from the outcomes of actions for injunctive measures. However, they would need to take a conscious choice whether they wish to be represented and subsequently benefit from the outcome of the representative actions for redress. Member States have in principle the choice to provide for an opt-in mechanism, or an opt-out mechanism, or a combination of the two. Consumers may also benefit from collective settlements that may be reached between the qualified entity that brings the legal action and the defendant trader. The Directive aims to protect the collective interests of consumers in many areas of law and economic sectors, such as data protection, financial services, travel and tourism, energy and telecommunications. Member States may also decide to apply the mechanism of representative actions provided by the Representative Actions Directive in other or in all areas of law. The representative actions can be domestic, initiated by a qualified entity in the same Member State where it was designated or cross-border, initiated in a Member State other than the one where the qualified entity was designated. The European Commission has developed an IT tool, 'EC-REACT'[5] - an electronic collaboration tool to support the effective functioning of the representative actions as set up by the Representative Actions Directive. It is a secure and restricted electronic platform for information exchange on representative actions across the EU.

Finally, the European policy is also focused on **alternative and online dispute resolution**. The **2013 Consumer ADR Directive**[6] and **2013 Consumer ODR Regulation**[7] establish an out-of-court

[4] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4 December 2020, 1–27. See https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en.

[5] https://representative-actions-collaboration.ec.europa.eu/.

[6] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18 June 2013, 63–79.

[7] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18 June 2013, 1–12.

framework for the resolution of consumer disputes.[8] The Regulation establishes a free and interactive pan-European ODR platform[9] through which consumers and traders can initiate ADR in relation to disputes concerning online transactions (offline transactions are excluded). National ADR entities receive the complaint electronically and seek to resolve the dispute through ADR (mediation, conciliation, ombudsmen, arbitration or complaints boards). The Consumer ADR Directive promotes ADR by encouraging the use of approved ADR entities that ensure the following minimum quality standards: the entities should be impartial and provide transparent information, offer their services at no or nominal cost, and hear and determine complaints within 90 days of referral. The Directive applies to domestic and cross-border disputes concerning complaints by a consumer resident in the EU against a trader established in the EU.

On 18 October 2022, the European Commission adopted its 2023 Commission Work Programme (A Union standing firm and united).[10] The Commission intends to:

- propose amendments to the rules governing cooperation between consumer protection authorities to help deter unfair business practices and to support more effective investigations into breaches of consumer law;
- modernise the ADR framework in view of the rapid development of online markets and advertising and the need to ensure that consumers have access to fair, neutral and efficient dispute resolution systems.

The Commission is planning to adopt a **Consumer Enforcement Package** under the aforementioned Work Programme 2023 to modernise the 2017 CPC Regulation, the 2013 Consumer ADR Directive and 2013 Consumer ODR Regulation through targeted amendments to make them fit for the digital age.[11] In 2022, the Commission launched a public consultation with the aim to gather views from the general public and relevant stakeholders.[12]

On 17 October 2023, the Commission adopted a proposal to review the ADR framework.[13] Two legislative proposals were published: one amending the ADR Directive and one to repeal the ODR

[8] See https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en.
[9] https://ec.europa.eu/consumers/odr/main/?event=main.home2.show.
[10] COM(2022) 548 final. See https://commission.europa.eu/system/files/2022-10/com_2022_548_3_en.pdf.
[11] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.
[12] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13535-Consumer-protection-strengthened-enforcement-cooperation_en.
[13] https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en.

Regulation. Moreover, a recommendation addressed to online marketplaces and EU trade associations having a dispute resolution mechanism and to Member States was also published.

The objectives of the review are to:

- make the ADR framework fit to the digital markets by covering all categories of disputes concerning EU consumer rights;
- improve the access to ADR in cross-border disputes through the use of digital tools, assistance to consumers and traders;
- simplify ADR procedures to all actors; including reducing reporting obligations of ADR entities and information obligations of traders whilst encouraging traders to increase their engagement in ADR claims through the duty to reply;
- discontinue the ODR platform and replace it by user-friendly digital tools to assist consumers in finding a redress tool to resolve their dispute;
- incentivise online marketplaces and EU trade associations having a dispute resolution mechanism to get aligned with the quality criteria in the ADR Directive.

B. Objective and Research Questions

To date, these three enforcement pathways have been operating mainly on their own. When analyzing the various policy strategies, one must conclude that an overall, connected and integrated collective redress framework is missing on the EU level. In that sense, the European policymaker is culpable of a **"silo mentality"**. In corporate business, this is described as a situation where departments or sectors of the same company do not share information with others in the same company. This type of mentality reduces efficiency in the overall operation, reduces morale, and may help destroy a productive company culture.[14]

This silo mentality strongly reduces the potential of the three pillar model. When operated together, the three forms of enforcement can strengthen and complement each other.[15] This multiplicity of (mass) dispute resolution mechanisms has strengthened deterrence.[16] For example, the use of ADR can be incentivized through the existence and use of both public enforcement and

[14] B. Gleeson, "The Silo Mentality: How To Break Down The Barriers", Forbes, 2 October 2013, available at https://www.forbes.com/sites/brentgleeson/2013/10/02/the-silo-mentality-how-to-break-down-the-barriers/#5656c75f8c7e (referring to the Business Dictionary).
[15] H. De Coninck, "Buitengerechtelijke regeling van consumentengeschillen" (2014) 105 DCCR 23; C. Hodges, "Current discussions on consumer redress: collective redress and ADR" (2012), 13 ERA Forum 19.
[16] H. Micklitz and A. Wechsler, "What is Collective in EU Collective Redress?", in X. Kramer, S. Voet, L. Ködderitzsch, M. Tulibacka and B. Hess, *Delivering Justice. A Holistic and Multidisciplinary Approach*, Oxford, Hart Publishing, 2022, 76.

representative actions.[17] These enforcement methods, especially representative actions, are considered to be 'sticks' that encourage traders to participate in and comply with ADR procedures.[18]

Biard, however, notes a new tendency of the Commission to consider all enforcement pillars together. He notes that this is indeed necessary to strengthen EU consumer protection.[19]

The objective of this study is to explore the connections, interactions and interconnections between these three enforcement pathways (CPC, RAD and ADR), in order to assist consumer organizations – that play a pivotal role in all three – to ensure an efficient and effective resolution of mass harm situations. These three enforcement methods have been studied extensively on an individual basis, but they have seldomly been evaluated on their functioning within a fully integrated three pillar model.

The following **three research questions** will be explored:

- RQ (1) how to improve the interplay between the different enforcement pathways and the respective instruments to maximize effective and efficient enforcement for consumers and maximizing the potential of each enforcement pathway?
- RQ (2) how to maximize the information flows between the enforcement pathways?
- RQ (3) how to help consumer organisations prioritize pathways to efficiently address mass harm affecting consumers across Europe.

[17] C. Hodges, "Current discussions on consumer redress: collective redress and ADR" (2012), 13 ERA Forum 19.
[18] I. Benöhr, "Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures" (2013) 36 Journal of Consumer Policy 103; M. Calu, "Collective Redress and Alternative Dispute Resolution – Remedies in the "Consumer Toolkit"" (2018) 12 Challenges of the Knowledge Society 207; C. Hodges, "Collective Redress: The Need for New Technologies" (2019), 42 Journal of Consumer Policy 83.
[19] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.

I. SETTING THE STAGE

A. Consumer Mass Harm Situations

This study focuses on consumer mass harm situations.

A **consumer**, according to all three instruments,[20] is any natural person who acts for purposes which are outside that person's trade, business, craft or profession. The scope of all three enforcement mechanisms is limited to consumers' interests. The CPC Regulation lays down the conditions under which competent authorities cooperate and coordinate actions with each other and with the Commission, in order to enforce compliance with those laws and to ensure the smooth functioning of the internal market, and in order to enhance the protection of *consumers' economic interests*.[21] The RAD sets out rules to ensure that a representative action mechanism for the protection of the *collective interests of consumers* is available in all Member States.[22] The RAD only applies to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I, including such provisions as transposed into national law, that harm or may harm the *collective interests of consumers*.[23] The purpose of the ADR Directive is to ensure that *consumers* can submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures.[24] It applies to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a *consumer* resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.[25]

On the other hand, the focus will be on **mass harm situations**, which are defined as situations in which the substantive rights of an unquantifiable and unidentifiable group of consumers are violated in the same or a similar way. The enforcement of this kind of situations goes to the heart of the RAD, which wants to guarantee that each Member States has at least one procedural mechanism that allows qualified entities to bring representative actions for the purpose of both injunctive measures and redress measures.[26] The CPC Regulation and the ADR

[20] Article 3(12) CPC Regulation, article 4.1(a) ADR Directive and article 3(1) RAD.
[21] Article 1 CPC Regulation.
[22] Article 1.1 RAD.
[23] Article 2.1 RAD.
[24] Article 1 ADR Directive.
[25] Article 2.1 ADR Directive.
[26] Article 1.2 RAD.

Directive also pay attention to mass harm situations, albeit in a brief and concise manner. The CPC Regulation states that it is without prejudice to the right to claim collective compensation, which is subject to the national law, and that it does not provide for the enforcement of those claims.[27] On the other hand, attention is paid to the harm to collective interests of consumers (i.e. actual or potential harm to the interests of a number of consumers that are affected by intra-Union infringements, by widespread infringements or by widespread infringements with a Union dimension).[28] The minimum powers of the competent authorities include the power to adopt interim measures to avoid the risk of serious harm to the collective interests of consumers.[29] The ADR Directive is without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.[30]

The goal of this study is to explore the connections between these instruments (RQ (1) and RQ (2)), so that consumer organizations can play a (better) role in ensuring (facilitating) an efficient and effective resolution for consumers in mass harm situations (RQ (3)).

B. Consumer Organisations

Consumer organisations play a crucial role in all three enforcement mechanisms.

Under the **CPC Regulation**, it is recognized that consumer organisations, besides their essential role in informing, educating and protecting consumers, should be encouraged to cooperate with the competent authorities to strengthen the application of the Regulation.[31] These organisations should be allowed to notify competent authorities of suspected infringements and to share with them the information needed to detect, investigate and stop infringements, to give their opinion about investigations or infringements and to notify competent authorities of abuses of Union laws that protect consumers' interests.[32] On the other hand, competent authorities, where applicable, may consult consumer organisations regarding the effectiveness of the proposed commitments

[27] Recital (46) CPC Regulation.
[28] Article 3(14) CPC Regulation.
[29] Article 9.4(a) CPC Regulation. See also article 9.4(g) CPC Regulation. In cases where there is a risk of serious harm to the collective interests of consumers, the competent authorities should be able to adopt interim measures in accordance with national law, including the removal of content from an online interface or ordering the explicit display of a warning to consumers when they access an online interface.
[30] Recital (27) ADR Directive.
[31] Recital (34) CPC Regulation.
[32] Recital (35) CPC Regulation.

by traders in bringing the infringement covered by this Regulation to an end.[33] The competent authorities concerned by a coordinated action, or the Commission, can decide to publish the common position or parts thereof on their websites, and may seek the views of consumer organisations.[34] In the context of monitoring the implementation of the traders commitment, competent authorities may, where appropriate, seek the views of consumer organisations and experts to verify whether the steps taken by the trader comply with the commitments.[35] Finally, each Member State shall confer on consumer organisations and associations the power to issue an alert to the competent authorities and the Commission of suspected infringements covered by the Regulation and to provide information available to them (this is a so-called external alert).[36]

Under the **RAD** Member States shall ensure that consumer organisations, including consumer organisations that represent members from more than one Member State, are eligible to be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both.[37]

The **ADR Directive** states that Member States should involve the representatives of consumer organisations when developing ADR, in particular in relation to the principles of impartiality and independence.[38] More specifically, when Member States provide for ADR procedures, they have to make sure that the natural persons in charge of this procedure are nominated by, or form part of, a collegial body composed of an equal number of representatives of consumer organisations and of representatives of the trader and are appointed as result of a transparent procedure.[39] Member States have to ensure that, with regard to disputes arising from cross-border sales or service contracts, consumers can obtain assistance to access the competent ADR entity. Member States shall confer the responsibility for this task on consumer organisations.[40] Moreover, Member States shall encourage relevant consumer organisations to make publicly available on their websites, and by any other means they consider appropriate, the list of ADR entities. Finally, the Commission and the Member States shall take accompanying measures to encourage consumer organisations, at Union and at national level, to raise awareness of ADR entities and their procedures and to promote ADR take-up by traders and consumers. They shall also be

[33] Article 9.8 CPC Regulation.
[34] Articles 19.5 and 20.2 CPC Regulation.
[35] Article 20.4 CPC Regulation.
[36] Article 27.1 CPC Regulation.
[37] Article 4.2 RAD.
[38] Recital (51) ADR Directive.
[39] Article 6.3(a) ADR Directive.
[40] Article 14 ADR Directive.

encouraged to provide consumers with information about competent ADR entities when they receive complaints from consumers.

This overview makes clear that consumer organisations play an important, and even key role in all three enforcement mechanisms. The question rises how these (to date isolated) roles can be connected (RQ (1) and RQ (2)) so that consumer organisations can optimize their general role in ensuring (facilitating) an efficient and effective resolution for consumers in mass harm situations (RQ (3)).

C. Blurring the Division Between Public and Private Enforcement

In this context is the crucial to refer to the (general) blurring division between public and private enforcement, in which the three enforcement procedures are embedded.

In common law jurisdictions, and most notably in the US, private class actions are viewed not just as vehicles for mass compensation, but also as regulatory enforcement mechanisms, intended to supplement the (by some arguable) failures of public enforcement. This relates to the 'private attorney general' role of class actions.[41] In Europe, **the division between public and private enforcement has been much stronger**, mainly because of historical reasons (the Napoleonic commitment to a strong central state and the Bismarckian support for an equally strong bureaucracy emphasizing technical expertise).[42] Public enforcement, through its reliance on state power, benefits from more effective investigative and sanctioning powers, by comparison to private enforcement. Moreover, public enforcement has the advantage of allowing better control in setting the optimal amount of the sanction.[43] Private actions for damages are driven by the private interests of the parties concerned, which may diverge from the general interest.[44] Private actions for damages are regarded as superior to public enforcement only with regard to the pursuit of corrective justice through compensation.[45]

---

[41] See e.g. J.C. Coffee Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working" (1983) 42 Maryland Law Review 215 and W. Rubenstein, "On What a 'Private Attorney General' Is – and Why It Matters" (2004) 57 Vanderbilt Law Review 2129.
[42] W.H. van Boom en M. Loos (eds.), Collective Enforcement of Consumer Law. Securing Compliance in Europe through Private Group Action and Public Authority Intervention, Europe Law Publishing, 2007.
[43] W. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages" (2009) 32 World Competition 3, 10-11.
[44] ibid, 11-12.
[45] ibid, 15.

This approach is **echoed in the policy on collective redress**. The 2013 Recommendation[46] points out that the collective redress mechanisms it envisages are not of a regulatory nature. It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights only supplements public enforcement.[47] On the other hand, it is recognised that in fields where public enforcement plays a key role (e.g. competition, environment, data protection or financial services) private enforcement can play an important compensatory function. Private collective damages actions for victim compensation should follow on from infringement decisions adopted by public authorities and rely on them.[48] These are called collective follow-on actions. The *ratio legis* is that the public interest and the need to avoid abuse can be presumed to have been taken into account by the public authority as regards the finding of a violation of Union Law.[49] The follow-on action only deals with the questions of damages and causation. If the proceedings of the public authority are launched after the commencement in court of a collective action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.[50] However, in the case of follow-on actions, the persons who claim to have been harmed should not be prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.[51]

However, today **the binary and traditional classification of private versus public enforcement is outdated** and unfit to properly address the issue of mass harm situations. Traditional private law has become public private law and public law has been privatized. Both have been replaced by a **'multilayered framework of regulation, lawmaking and law application'**.[52] In the collective redress area, this is evidenced by empirical findings and shifts in policy. On the one hand, empirical research shows 'that a public/private dichotomy is of little use in analyzing legal responses to mass harms. Their relationship is more like a complex origami figure than two adjacent boxes. Actors,

[46] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26 July 2013, 60–65.
[47] Recital (6) Recommendation.
[48] Article 33 Recommendation.
[49] Recital (22) Recommendation.
[50] Article 33 Recommendation.
[51] Article 34 Recommendation.
[52] This is a translation from Dutch to English of the title of the pivotal work in Belgium of Van Gerven and Lierman: W. Van Gerven and S. Lierman, Algemeen Deel. Veertig jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing, Kluwer, 2010, 515-523.

processes and outcomes overlap and intersect on a number of levels'.[53] Hensler and Thornburg discern three levels:

- (1) public processes often rely on private fact-gathering and the viability of private processes often depends on the outcome of public regulatory investigations and criminal prosecutions
- (2) the actors in these mass action dramas play multi-faceted roles (e.g. public entities appearing in private litigation) and
- (3) the outcomes of actions that are conventionally labeled as public and private overlap and interact (redress can act as regulation and public regulatory or criminal findings can provide a legal basis for redress).[54]

On the other hand, there are clear policy shifts. New approaches of enforcement and redress are emerging: 'a range of new techniques are being developed to deliver the objectives of behavioural compliance and of redress. Those objectives constitute restatements of what used to be called regulation and compensation, respectively delivered through criminal, administrative and/or regulatory structures and private law'.[55] According to Hodges and Creutzfeldt three aspects of the traditional public-private division have changed:

- (1) substantive law: the principles of the private law of damages still underpin payment of compensation or redress when a compensation order or consumer redress scheme is invoked in criminal or regulatory processes, but the details of damages law are in practice often of little importance,
- (2) forum: there is a shift from courts to ADR entities, ombudsmen and regulators, and
- (3) actors: besides lawyers in private litigation, regulators and ADR bodies have entered the stage.[56]

In other words, the public versus private angle alone is unsatisfactory to efficiently address the problem of mass harm situations. One should look at other and novel angles. It is against this broader background that this study should be seen.

---

[53] D.R. Hensler and E. Thornburg, "The public dimension of private collective litigation: A comparative analysis" in D.R. Hensler, C. Hodges and I. Tzankova (eds.), Class Actions in Context. How Culture, Economics and Politics Shape Collective Litigation, Edward Elgar, 276.
[54] ibid.
[55] C. Hodges and N. Creutzfeldt, "Transformations in Public and Private Enforcement" in H. Micklitz and A. Wechsler (eds.), The Transformation of Enforcement. European Economic Law in a Global Perspective, Hart Publishing, 2016, 130-131.
[56] ibid, 131.

II. Connecting the Dots: A Multilayered Framework of Regulation, Lawmaking and Law Application

Since the RAD, collective redress mechanisms, as components of private enforcement, are gaining momentum in Europe. Although the RAD is the leitmotiv to follow, there is a panoply of models and a large variation in procedural schemes. It remains to be seen whether these mechanisms will be successful or not. Even when these mechanisms are in their infancy and in full development, it is important to take a step back and look at the broader conceptual (dispute resolution) framework. As mentioned above, there is consumer ADR (as regulated by the ADR Directive) and public enforcement (as regulated by the CPC Regulation).

The bottom line is to **connect these different enforcement pathways**. The ultimate goal should be an integrated and holistic framework, or, as was mentioned above, a 'multilayered framework of regulation, lawmaking and law application'. Arguments to 'replace' public enforcement mechanisms by private or other mechanisms, or vice versa, are based on the wrong premise. The focus should be on exploring and optimizing *all* options for mass harm situations. Even more important is to connect these options so they can form an integrated (dispute resolution) framework. Only a broad and integrated instrumentarium, as a 'dispute resolution continuum',[57] which can avoid empty enforcement gaps, can tackle mass harm situations effectively and efficiently.

These connections, c.q. interactions, will generally be explored below from two angles: collective ADR (link between the ADR Directive and the RAD) and regulatory redress (link between the CPC Regulation and the RAD), and in particularly from the viewpoint of consumer organisations as key actors in all enforcement pathways.

[57] See J. Stuyck *et al.*, An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Final Report, 17 January 2007, http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf, 5.

III. Collective ADR

A. Typology

A great deal of attention has been focused in recent years on the benefits of ADR bodies for (collectively) resolving consumer-trader disputes, based on evidence that consumer ADR schemes can typically be far more swift, efficient and effective than court procedures in resolving individual claims. In relation to collective consumer redress, consumer ombudsmen schemes are able to deliver collective redress. This is a simple issue of system design. Schemes and procedures that are designed to deliver binding individual outcomes – such as court proceedings or arbitration – have difficulty when faced with multiple similar cases. But consumer ombudsman schemes have various ways in which they can resolve mass cases.

The following typology can be discerned:

- *A procedure for processing multiple claims*. This can often be remarkably similar to a court-based collective action procedure, in which individual claims are stayed whilst preliminary issues or test cases are decided, after which the individual claims are resolved
- *Feeding back information* to traders, sectors, regulators, consumers and others that directly affects the behaviour of an individual trader or a group of traders. An example might be where a trade practice is held by the decision to be in breach of the law or a code or practice. This technique goes beyond the situation where a court makes a decision. First, the ombudsman's decision may be about law or may be about fairness or practice (individual schemes differ in their constitutional provisions). Second, there is typically a permanent, continuing and strong channel of communication between an ombudsman and a sectoral regulatory authority, which identifies an issue quickly and triggers action to change behavioural practice. Such change can occur far more quickly than can occur after a court decision on a point of law, and on a scale that can affect the practice of many traders. Third, there is typically an equally strong arm's length channel of communication between the ombudsman and individual companies, which highlights the volume and nature of complaints or consumer requests for advice received by the ombudsman, and how the trader might take action to change its behaviour and reduce the incidence of problems.
- *Legislation and rule changes.* Providing information that triggers a change in the law or rules.

B. Current Framework

The ADR Directive states that it should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures. Moreover, comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level.[58]

The ADR Directive does not deal with collective redress, nor has it been amended after the entry into force of the RAD. At the moment, the only explicit link between the two is Article 4.3(b) RAD, which states that the statutory purpose of qualified entities – for the purpose of bringing cross-border representative actions – must demonstrate that they have a legitimate interest in protecting consumer interests as provided for in (several provisions among which) the ADR Directive.

However, it would be important to better coordinate the two pieces of law (Consumer ADR Directive and RAD) in order to determine what body is in the best position to decide over a number of similar cases and to avoid possible competing decisions.

A holistic approach to cooperation between competent national and European authorities and ADR entities cannot overlook collective claims.[59] An individual consumer complaint may result from an individual experience, but, in the context of mass production and consumption, the experience of one consumer may be the same for many others. The primary function of ADR schemes is to deliver individual redress, but even effective individual redress is insufficient to provide adequate consumer protection. Bringing evidence from the UK, Graham reports that not everybody raises a claim, and most consumers do not go beyond complaining to the trader: the cases heard before ADR entities are just a fraction of the total and are not necessarily representative of all the problems consumers face.[60] Moreover, if competing ADR entities operate in the same sector, there is the risk of obtaining competing decisions, especially considering that

[58] Recital (27) ADR Directive.

[59] ibid.

[60] C. Graham, "Consumer ADR and Collective Redress" in P. Cortés (ed), The New Regulatory Framework for Consumer Dispute Resolution, Oxford University Press, 2016, 429.

ADR outcomes are generally not public[61] and, even when they are binding, they do not deploy their effect further than the parties to the case, differently from in-court collective proceeding.[62]

Voet describes consumer ADR and class action as 'two-track' policies that should be developed to effectively address collective damages.[63] Gioia is more cautious towards collective ADR, which she remembers being 'a surrogate of justice'. She suggests that a compromise solution could result from the considerate use of class actions that facilitate consumer access to justice and ultimately provide judicial awards and ADR proceedings, which could base their decisions on the courts' previous interpretations.[64] On the other hand, Renier warns about the risks of collective ADR procedures, which require significant investments in terms of money and time and may be ignored by non-compliant traders.[65]

According to Biard and Hodges, some ADR proceedings are better placed than others when it comes to collective redress. Sectoral consumer ombudsmen have access to aggregated data from traders and individual complaints or information requests, providing them with a global view of market trends, and they collaborate closely with the regulators, which they can involve for an efficient solution to mass disputes. Additionally, sectoral ombudsmen are easy for consumers to identify, and they hold a position of authority in the market, making their opinions more persuasive.[66] Therefore, the authors believe the ombudsman model better serves the regulation function of consumer ADR, which also includes identifying traders' misbehaviours and nudging

[61] For this reason, some countries introduced limits to the confidentiality rule when mediators detect repetitive and severe misconducts. See A. Biard and C. Hodges, "Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir" Contrats Concurrence Consommation 2019, 1, 8.

[62] C. Graham, "Consumer ADR and Collective Redress" in P. Cortés (ed), The New Regulatory Framework for Consumer Dispute Resolution, Oxford University Press, 2016, 429.

[63] S. Voet, "Beslechting van consumentengeschillen in het Belgisch Wetboek van economisch recht", SEW 2015, 628.

[64] G. Gioia, "L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori", Revista Ítalo-española de Derecho procesal 2018, 3, 44.

[65] G. Renier, "Le nouvel encadrement de l'Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d'ADR", Revue européenne de droit de la consommation / European Journal of Consumer Law 2014, 135.

[66] C. Hodges, "Consumer Alternative Dispute Resolution" in B. Hess and S. Law (eds), Implementing EU consumer rights by national procedural law, CH Beck, 2019, 182-183.

them towards better compliance.[67] This is already the case in the UK, where ombudsmen play a *quasi-regulatory* role complementary to public regulators'.[68]

The RAD and ADR frameworks could also be usefully combined to ensure better compliance with final decisions from ADR bodies. For example, a 'fast track' could be created in court to enforce ADR awards.[69]

C. Examples

1. Belgium

Belgium's residual ADR entity is the Consumer Mediation Service.[70] It is an autonomous public body with legal personality, which is composed of a front office and a service for the out-of-court resolution of consumer disputes.[71] The Consumer Mediation Service has a particular structure, in the sense that it is composed of the existing federal economic ombudsman services and two private ombudsman services.[72] The latter two were chosen not only because they administer a large number of complaints, but also because their services are similar to the public ombudsman services.

Every year, the Consumer Mediation Service publishes an activity report,[73] which it makes available on its website.[74] Besides statistical information about the number of complaints, this report can contain recommendations about systematic or significant problems that occur frequently and lead to consumer disputes. These structural recommendations can indicate how such problems can be avoided or resolved in the future. The goal is to enhance traders' performance and to facilitate the exchange of information and best practices.

---

[67] A. Biard and C. Hodges, "Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir" Contrats Concurrence Consommation 2019, 1, 7

[68] C. Hodges, "Consumer Alternative Dispute Resolution" in B. Hess and S. Law (eds), Implementing EU consumer rights by national procedural law, CH Beck, 2019, 182-183.

[69] J. Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 89.:

[70] https://consumerombudsman.be/en. The Service is operational since 1 June 2015.

[71] Article XVI.5 CEL (Code of Economic Law).

[72] Two members of the Telecom Mediation Service, two members of the Ombudsman Service for the Postal Sector, two members of the Ombudsman Service for Energy, two members of the Mediator for Rail Passengers, the Ombudsman in Financial Matters and the Insurance Ombudsman.

[73] Article XVI.7 CEL.

[74] Article XVI.14 CEL.

This statistical information can play a key role in detecting mass cases and in exposing rogue traders. They can give rise to regulatory interventions (i.e. investigations, the imposition of (administrative) sanctions or criminal prosecution). It is vital that these entities and regulators have access to the collected data.

The ADR Directive pays attention to the cooperation between ADR entities and national consumer regulators. Article 17 states that this cooperation includes mutual exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints. It also includes the provision of technical assessment and information by such national authorities to ADR entities where such assessment or information is necessary for the handling of individual disputes and is already available.

The Consumer Mediation Service has three main functions:[75]

- informing consumers and traders about their rights and obligations, particularly about the options available for the out-of-court resolution of consumer disputes;
- receiving all requests for the out-of-court resolution of consumer disputes and, if applicable, transferring them to an existing ADR entity;
- handling all requests for the out-of-court resolution of disputes when no ADR entity is competent.

Regarding the first function, the Service establishes a front office.[76] The six ombudsman services that form the Consumer Mediation Service physically sit in the same office and share the same front office. For the consumer, the referral to one address, one office and one phone number is easier. Moreover, it is also cost efficient in the sense that one single front offices means that the six existing ombudsman services can save on logistics.

The other mission of the Consumer Mediation Service is receiving, referring and, if necessary, handling requests for the out-of-court resolution of consumer disputes. A request can be made offline (via paper, fax or phone), online or in person.[77] Referral will only take place if these entities are competent to deal with the dispute. The applicant is informed and the contact details of the ombudsman service or ADR entity in question are notified. Referring a dispute does not imply a decision by the Consumer Mediation Service about the admissibility of the request.[78]

[75] Article XVI.6 CEL.
[76] Article XVI.13 CEL.
[77] Article XVI.15, §1 CEL.
[78] Article XVI.15, §2 CEL.

When a request concerns a dispute for which no ADR entity is competent, the Consumer Mediation Service will deal with the request itself.[79] These are the residual consumer disputes. The Consumer Mediation Service can only mediate between a consumer and a trader. When the Consumer Mediation Service has reached a settlement, it will close the case. The same applies when no settlement is reached. In this case, the Consumer Mediation Service can issue a recommendation for the trader. When the trader does not follow this recommendation, he can formulate a reply or answer.[80]

When the Consumer Mediation Service examines the case, it can visit the offices of the trader, it can order access to all documents relating to the dispute (for example letters, reports, etc.), it can claim information from staff members and it can appoint an (objective) expert to conduct technical or other investigations.[81] All information is treated confidentially and can only be used for the out-of-court resolution of a specific dispute or for (anonymously) processing in the annual activity report.[82]

Finally, it should be mentioned that the Consumer Mediation Service also has standing to bring a consumer class action. The Consumer Mediation Service only has standing to initiate a class action and to negotiate a collective settlement.[83] If a settlement cannot be reached, and the court has to decide the merits of the case, a consumer association has to step in to continue the procedure.[84]

Belgium also has a number of other (sectoral) ombudsmen. These sometimes provide collective ADR procedures. The Office of the Ombudsman for the Postal Sector, for instance, allows a representative collective ADR procedure. Private persons as well as companies, administrations, associations or organizations can file a complaint whilst having themselves represented, on the condition that representative has a mandate and that the identity of both the client(s) and the representative can be established.[85] Also other ombudsmen accept complaints filed by means of representation, such as Ombudsrail (the Office of the Ombudsman for Train Travelers), the Office of the Ombudsman for Telecommunications,[86] the Office of the Ombudsman for Energy,[87] the

[79] Article XVI.15, §3 CEL.
[80] Article XVI.17, §2 CEL.
[81] Article XVI.19 CEL.
[82] Article XVI.20 CEL.
[83] Article XVII.39, 3° CEL.
[84] Article XVII.40 CEL.
[85] See http://www.omps.be/en/679/FAQ/Frequently_asked_questions/Frequently_asked_questions.aspx.
[86] See article 21 of the Rules of Procedure of the Telecommunications Ombudsman's Service, available at http://www.ombudsmantelecom.be/en/how-to-submit-a-complaint.html?IDC=106.
[87] See http://www.mediateurenergie.be/fr/faq (2nd question).

Office of the Ombudsman for Insurances,[88] Ombudsfin (the Ombudsman in Financial Conflicts)[89] and the Consumer Mediation Service.[90]

Two case studies can illustrate the above.

The Office of the Ombudsman for Energy

In March 2014, a residential consumer living in Brussels, Mr M, received a €5,200 bill from his supplier, covering the period from 5 December 2009 to 27 October 2013. This late invoicing caused great harm to Mr M, and is not justified by the supplier. The consumer tried to find an arrangement with the supplier but did not succeed. Mr M formulated a complaint towards the Energy Ombudsman Service.

The supplier acknowledged a non-compliance with its general terms but offered only a payment plan in 48 months (covering the period without invoicing), as well as a €520 credit note as a gesture of goodwill (i.e. 10% of the disputed bill). The supplier said Mr M never explicitly claimed his annual bills and therefore is also responsible for such a situation. The complainant refuted this statement and refuses the supplier's proposal.

The Ombudsman consulted with the DSO and they analysed that the invoicing should only take into account the period from 2012 to 2013, as the last meter reading dated back September 7, 2013 and the previous was up to 8 August 2012. The Ombudsman issued a recommendation arguing that the Technical Regulation in Brussels was not correctly applied by the supplier. The Technical regulation provided that the consumer has two years to challenge the meter reading indexes. Therefore, the supplier should not charge the consumer for the years 2009, 2010 and 2011.

The supplier proposed to grant a 30% discount on the consumption from December 2009 to August 2010; a 20% reduction on the consumption from August 2010 to September 2011 and a 10% reduction on the consumption from September 2011 to September 2013. This leads to -a commercial gesture of €1,695. The supplier also offered a payment plan in maximum 48 instalments to clear the remaining open balance. The complainant accepted this proposal.

---

[88] See http://www.ombudsman.as/nl/complaint/form.asp.
[89] See article 10 of the Rules of Procedure, available (in French) at http://www.ombudsfin.be/sites/default/files/Nouveau%20r%C3%A8glement%20de%20proc%C3%A9dure%20Ombudsfin.pdf.
[90] See article 21 of the Rules of Procedure of the Consumer Ombudsman's Office, available at http://www.consumerombudsman.be/sites/default/files/content/SMCDocuments/anglais_-_smc_-_reglement_de_procedure.pdf.

The Belgian ombudsman suggested adapting the Consumer agreement in order that they would not be any more such a period of more than twelve months from the reception of meter data by the distribution system operator in which the provider would still be able to charge a consumer. The same principle applied in France. In Act No. 2015-992 of 17 August on the energy transition as part of a renewable growth (Official Journal RF No. 0189 of 18 August 2015), the same principle was laid down in Article 202 of the law: unless exceptional cases, no electricity or gas consumption older than fourteen months before the latest meter reading can be charged to the consumer.

The Office for the Ombudsman for Telecommunication

Structural improvement following recommendation and policy suggestions by the Office for the Ombudsman for Telecommunication regarding premium SMS and M-commerce services charged by telecom operators

1. Introduction

The Office of the Telecommunications Ombudsman has the competence to mediate in complaints against telecom operators. The Office of the Ombudsman receives among other things complaints against mobile phone operators about the billing of premium SMS and M-commerce services. These are services that are not organised by telecom operators, but which use the operator's network, whereby the operator acts as the collector of the amounts due. The providers of those services, which are offered worldwide to telecom users, are often foreign companies, which are difficult to reach for Belgian consumers, also due to a possible language barrier. The content of these 'third-party services' is very diverse: ringtones, quizzes and contests, astrology, information messages, televoting, eroticism, dating, chatting, etc. Since 2002, the issue of the complaints about the billing of premium SMS services and (since 2013) of M-commerce services has many times been raised by the Office of the Ombudsman in its annual reports. Each time recommendations were formulated (and repeated) based on findings during the treatment of several thousands of appeals. Those complaints (and recommendations) have induced the sector to take self-regulating initiatives. In general, this has entailed structural improvements, which we discuss in more detail in this note. Nevertheless, there are still a number of challenges to be faced by the sector. Indeed, after years of declining numbers of complaints the Office of the Ombudsman again has been noticing a certain rise of disputes since 2015. As a matter of fact, it turns out that certain service providers do not entirely observe the existing directives and therefore violate consumer rights. As a result, the Office of the Telecommunications Ombudsman continues to closely follow this issue based on new complaints and will not fail to share its experiences and to make suggestions to the sector and policymakers.

The Office of the Telecommunications Ombudsman mainly uses its annual reports to make public structural problems that surface while treating appeals. This instrument is regularly consulted by all stakeholders and policymakers with a view to establishing provisions of a legal and/or self-regulating nature, as will be shown in this note. This also applies to the issue of premium SMS and M-commerce complaints. In addition, since the phenomenon started in 2002, the Office of the Ombudsman has continuously had contacts with the Government, the regulator, the FPS Economy and evidently also the operators and even service providers, regarding this important issue.

2. Examples of complaints

Example 1 (premium SMS complaint from 2009)

'I reacted to a contact advertisement by way of an SMS at number 7404. The advertisement said that each text would cost me € 1.50, without any further explanation. My bill of 16 April 2009 amounted to € 1,273.50. Apparently I also pay for messages received (...)'

Example 2 (premium SMS complaint from 2009)

'On 30/12/2008 I received from Proximus a bill on which was mentioned '30 received from 9989 Ring Logo Euro 49.5870'. I immediately called the Proximus customer service. They assured me that this service would be closed down. They also informed me that the company involved in this fraud was Eldorado. Through the Internet I managed to get hold of a telephone number of that company. The latter assured me that my cell phone number would be deleted from its lists. However, a month later, the same amount was billed again ... Surely this must be pure fraud and therefore I want to submit a complaint. I will also go to the police.'

Example 3 (M-commerce complaint from 2013)

'My 13 year old son has had a mobile phone since over a year and had acquired during the first months (by way of Internet access) a so-called free game. His mobile phone charges are indicated on a joint bill to my name. After the first bill from Proximus, on which we discovered that this game actually cost a lot of money nonetheless, we pointed out the costs to him and he had promised not to buy anything anymore. The deal was that he would have to pay the charges himself. After that month we blocked his Internet access. At first the indications on the bill were not clear to me: 'BOKU 282080471 (Game) 4400 P4F Funds'. No idea what this means (game, updates ...?). BOKU would be a payment service operating as an intermediary between the user and the provider. Yet, we kept on being charged regularly for this game on our next Proximus bills. We thought our son had continued to make purchases through that service. I called Proximus

several times in order to stop that payment service. Each time I was promised that it had been stopped. For a month things were OK, until the amounts started to appear on our bills again. (…) But, is it normal for such a service to be offered to minors? I have not had to give my consent in any way to activate that service, but I have had to make every effort to block it.'

3. Discussion

In 2002, the Office of the Telecommunications Ombudsman was faced for the first time with complaints about the charging of premium SMS services. In the following years thousands of times an appeal was to be made to the Office of the Ombudsman by users claiming not to have requested those services, yet to be charged for them by their operators.

The first time the Office of the Ombudsman drew attention to this issue was in its 2002 annual report and again in its 2003 annual report. In 2004, the sector took the initiative to draw up a code of conduct (the GOF Guidelines for SMS/MMS/LBS services) for the providers of premium SMS services.

This first version of the GOF Guidelines provided in many aspects an answer to the complaints. It was pointed out to providers that activation of premium SMS services was only allowed following an express request from users. Providers were also obligated to inform users by means of a standardised formulation by SMS about the tariffs for sending and receiving SMS messages. Moreover, the tariff indications in advertisements were regulated ('Graphic Charter'). Finally, the third important measure was that premium SMS services had to be stopped upon simple request from the user. In that context a universal opt-out method was created, i.e. sending a stop code. However, this first version of the GOF Guidelines did not give solace for the numerous complaints about extremely high costs sometimes resulting from participation in chat sessions through premium text messages. Indeed, that type of services was not or insufficiently regulated.

Although the first version of the GOF Guidelines was a fair initiative to avoid the activation of unsolicited services on the one hand and to better inform users on the other, the number of complaints submitted to the Ombudsman continued to rise unabated from 100 in 2003, 467 in 2004, 720 in 2005 up to 1,412 in 2007 and 1,586 in 2008.

In the 2005, 2007 and 2008 annual reports the Office of the Telecommunications Ombudsman again and again formulated and repeated recommendations based on what were observed to be structural problems during the treatment of complaints. The sector reacted, specifically by adapting the GOF Guidelines.

In the course of 2008 new codes of conduct (an update of the existing GOF Guidelines) became valid. The adaptations undeniably aimed at informing consumers in the best possible way, not in the least because providers of subscription services were from then on forced to use the so-called 'double opt-in'. In theory the principle is that from that moment on each user had to reconfirm his subscription to a premium SMS service and was at the same time informed by the provider in a transparent manner using a standard message about all terms, including the tariffs.

Despite the amendment to the GOF Guidelines a record amount of 1,931 complaints about premium SMS services was submitted the following year (2009) to the Office of the Ombudsman. As from 2010 however, there was a turning point, so that in general there was a sharp fall in the number of complaints to 400 in 2014.

This positive tendency can partly be explained by a late implementation of the renewed GOF Guidelines (which were slightly adapted in 2011), but just as well by the Royal Decree laying down the Ethics Code for telecommunications taking effect on 9 February 2011.

The most important new provision benefiting users included in the Ethics Code was that from then on, service providers were under the obligation to warn the customer by means of a free SMS message about every expenditure of € 10. In case of a subscription service this SMS notification also had to mention the terms to opt out. This measure offered a solution for the many complaints mentioned by the Office of the Ombudsman in its previous annual reports, when users were not aware of the high consumption charges when knowingly participating in premium SMS services. This was specifically the case for chat services, which could sometimes result in telecom bills of hundreds, even thousands of euro. Such dramatic bill shocks as the subject of a complaint submitted to the Office of the Ombudsman had not or had hardly existed since the Ethics Code had come into force.

Compared to 2014 (400 complaints) the Office of the Ombudsman again registered an increase up to 518 complaints in 2015, a number that in all likelihood is also going to be approximated in 2016. This still means a sharp fall compared to the record year of 2009 (1,931 complaints), though. Treatment of recent complaints shows that certain service providers violate the GOF Guidelines and the Ethics Code. Mediation in these cases almost invariably leads to crediting the disputed charges, precisely because it can be proven that the service provider has not followed the guidelines.

From mid-2013 onwards, the Office of the Ombudsman received complaints about 'third-party services' being charged denominated as 'M-commerce' or 'MPay'. The issue was almost identical to that of the premium SMS complaints: hundreds of users reported not to have any clue

whatsoever about what the contested charges related to, to be kept guessing about the possibility to stop those unsolicited services and not to get any cooperation from their telecom operators. In its 2013 annual report the Office of the Ombudsman raised this new issue and formulated recommendations to the sector. It is very probable that these recommendations have led to the drafting of a code of conduct specifically aimed at M-commerce services (the GOF Guidelines for 'Direct Operator Billing'). By analogy with the guidelines applicable to premium SMS services, this code of conduct mainly focused on the major difficulties, i.e. the activation of a service with the client's express consent, correct and transparent information about the tariffs and simple terms for opting out, among other things.

Provided that the sector observes the codes of conduct mentioned above, it can be said that they have entailed a structural improvement based on recommendations and policy suggestions from the Office of the Telecommunications Ombudsman. Especially for M-commerce a sharp fall of the number of complaints was noted a few months after the introduction of the first version of the GOF Guidelines. In the case of premium SMS messages, the positive effect (a decrease of the number of complaints) of establishing a code of conduct was not noticeable until various adaptations of the terms over a 6 year period. In that case the coming into effect of the Ethics Code played a decisive role in the decrease of the number of complaints. In addition, thanks to the mediation by the Office of the Ombudsman a solution can often be reached in disputes about premium SMS charges, precisely because violations of the Guidelines are very frequently found.

The recent rise in the number of complaints refocuses our attention back on the issue of premium SMS complaints specifically. Based on the current and future complaints the Office of the Telecommunications Ombudsman will continue to detect structural difficulties and inform and advise both the sector and policymakers.

It is clear that Belgian ADR entities do more than resolving individual disputes. Because they capture data on a large scale, they are in a position to easily detect systematic and structural problems, which they can (and do) share with regulators. The fact that this works, is proven by the following. In November 2023, the Belgian government submitted a legislative proposal to create a consumer platform, called Consumerconnect.[91] One of the functionalities of this platform is the possibility for consumers to make an application for ADR. Civil servants (!) will then forward the application to the competent ADR entity. This overlaps with the key function of the Consumer

[91] *Project de loi portant création de la plateforme numérique pour les consommateurs "Consumerconnect"*, DOC 55 3690/001, https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?legislat=55&dossierID=3690.

Mediation Service platform (see above). In other words, the Belgian government proposal wants to take over this task of the Consumer Mediation Service. The official reason is to make it easier for the consumer and to increase accessibility. The unofficial reason is that the ministry of economic affairs has realised that the Consumer Mediation Service is capturing a lot of data in real time, which they sometimes share with regulators in light of regulatory actions. Via the Consumerconnect platform the ministry wants to get hold of that data directly and clearly wants to curtail the "regulatory powers" of ADR entities. This initiative also threatens to undermine the independence of the Belgian ADR entities and the confidence (by consumers and traders) in the ADR process.[92]

2. Finland

The Finnish Consumer Ombudsman can initiate a group action for injunction in consumer matters before the Finnish Market Court, which was established to handle issues regarding competition, public procurement and consumer disputes related to general terms and conditions as well as disputes regarding marketing between companies and between authorities and companies. If the Consumer Ombudsman refuses to take action, a registered association representing either of the parties can also file a petition. In addition, foreign authorities and organisations also have the right to initiate such proceedings.

An injunction order is imposed by the Market Court if the trader's marketing practice is considered unfair. Usually, a conditional fine is imposed and has to be paid if the trader does not comply with the court order. The court may also order the trader to take corrective measures. The Market Court cannot impose criminal sanctions or award damages in individual cases.

Both parties, the Consumer Ombudsman and the trader, bear their own costs. There is no requirement to define the group represented by the Consumer Ombudsman, since the litigation is related to injunction and no individual damages are awarded.

The Market Court keeps an accurate database of all the cases solved. While the majority of cases handled are related to public procurement and intellectual property disputes, a fair amount of cases related to unfair business practices and consumer protection are brought annually. The most recent and most notable cases are related to marketing contrary to the Finnish Consumer

[92] An amendment to remove this functionality from the Consumerconnect platform (*Amendements*, DOC 55 3690/002, nrs. 4-9) was rejected in parliament.

Protection Act, unfair business practices, misleadingness and acceptability of marketing and fairness of contractual terms.

Some case studies can illustrate the above.

Decision no. MAO:185/13 relates to marketing contrary to the Consumer Protection Act. In this case, the Consumer Ombudsman had demanded that the Market Court should prohibit Nokian Tyres plc from using a mark specifying the parameters of the tyres in the marketing of the tyres, if such mark is not clearly differentiated from a similar mark in accordance with the EU regulation no. 1222/2009. The Consumer Ombudsman also demanded the injunction to be enforced by a conditional fine of EUR 100.000. In the Market Court's decision an injunction was issued, since the mark used by Nokian Tyres plc was similar to the official EU mark and that a consumer might mistake the mark used by the company for an official mark in accordance with the EU regulation, even though there were slight differences in the styles of the marks. Such misleading nature of marketing is prohibited in the Consumer Protection Act, especially when it has the ability to affect the consumer's purchase decision. The Consumer Ombudsman's demand for a conditional fine was dismissed since Nokian Tyres plc had announced that it had already stopped using the mark in the tyre marketing, and thus there was no need for the fine.

Decision no. MAO:372/13. In this case the Market Court addressed the fairness of a consumer contract term used by Oy Parknet Ab, according to which the company has the right to increase the amount of a parking supervisory fee of EUR 40 by 50 % after it has fallen due. The Consumer Ombudsman demanded that Oy Parknet Ab should be prohibited from using this term or any similar terms, which entitle the company to charge more for a fee that has fallen due than what they are entitled to according to the Finnish Act on Collecting of Receivables. The Market Court decided to issue an injunction based on the fact that the term used by the company was against the mandatory provisions of the Finnish Interest Act, not the Act on Collecting of Receivables, as claimed by the Consumer Ombudsman. According to the Court, if a term in a consumer contract is unlawful, it is to be deemed unfair from the point of view of consumers, and thus the use of such term is to be prohibited. Since Oy Parknet Ab had already stopped using the unfair contract terms, the demand for a conditional fine was dismissed.

In a more recent decision given in November 2015 (no. MAO:829/15) the Market Court addressed the misleadingness of price comparisons and special offer prices used by the sport and recreation equipment retailer XXL Sports & Outdoor Oy. The Consumer Ombudsman demanded that XXL should be prohibited from, inter alia, promising the customers price difference refunds should they find a certain product for sale for a cheaper price somewhere else and thus creating an image that XXL is the most affordable option on the market, and from making groundless statements

about certain products being sold for a special offer price, even though the same product is normally sold at the same price. One of the demands was also that XXL should be prohibited from comparing the prices of the products to the recommended retail prices of suppliers and distributors. The Consumer Ombudsman's demands were accepted partially, since the price difference refund promises were not deemed unlawful. Comparing the prices to the recommended retail prices misled the consumers into thinking that the actual price level of the products is higher than it really is, as did the false statements about certain products being for sale for a special price for a limited time. The amount of the conditional fine was halved from the EUR 200.000 demanded by the Consumer Ombudsman, taking into account the solvency and the effectiveness of the fine.

Decision no. MAO:18/03 dealt with identification of advertising. A Finnish vehicle inspection company Etelä-Suomen Autokatsastus Oy marketed its services by sending letters to consumers, reminding them about the mandatory inspection and containing an invitation. The let-ters also included pre-filled bank transfer forms, which the consumers were advised to use to pay for the inspection. The Consumer Ombudsman claimed that such marketing is contrary to the Finnish Consumer Protection Act, since it is not clearly identifiable as an offer made to the consumer, and thus demanded that the company should be prohibited from using such unidentifiable marketing and from including the bank transfer forms, through which the consumer can accept the company's offer, in the marketing letters. The Market Court accepted the Consumer Ombudsman's demands since from the point of view of a consumer the nature of the letters was indeed unclear. The Market Court issued an injunction in accordance with the Consumer Ombudsman's demands and enforced them with a conditional fine of EUR 50.000.

The Market Court has addressed the issues of unfair practice and marketing targeted at children already in the 1980s – in December 1987 the court gave its decision no. MT:1987:13, in which the Consumer Ombudsman demanded that McDonald's Oy should be prohibited from using the form of the packaging as a primary message of the advertisement instead of the product itself and from using children in essential roles in the advertisements. The company used a toy boat as a packaging and a tray for a hamburger meal, and the advertisements were focused on the boat, thus bringing the consumers' attention away from the meal itself. In addition to that, children in advertisements were directly asking their parents to buy them the meal, thus urging the children targeted by and affected by the advertisement to act in a similar manner. The Market Court issued an injunction prohibiting the company from using the packaging as the main point in the advertisements and from using the children in advertisements in such central roles, where the children express a direct invitation to purchase the product or otherwise suggests purchasing the product. Use of children as such in the advertisements was not prohibited. This decision was the

first case concerning cross-border marketing solved by the Market Court. The television advertisements in the case were broadcast from outside of Finland on behalf of McDonald's System of Europe Inc. based in Frankfurt. Since the target of the television advertisements was to facilitate sales of products of McDonald's Oy, and the advertisements were similar to and in a temporal connection with the advertisements on the radio and the on the posters, both ordered by the Finnish McDonald's Oy, the Market Court concluded that the television advertisements were also broad-cast on behalf McDonald's Oy.

3. France

In France, ADR mechanisms as tools to resolve mass claims, have gained in popularity. In particular, rules on collective settlements have progressively emerged from practice. In 2009, CMAP (The Paris Mediation and Arbitration Center) participated in a mediation process to resolve a dispute arising between the bank *Crédit Foncier* and several associations representing consumers. The dispute dealt with erroneous and misleading information on variable rate housing loans.[93] Parties managed to reach an agreement in only six months, which was perceived as a success.[94] Based on this first experience, CMAP developed a set of rules aimed at facilitating the collective settlement of mass claims.

Rules regulating collective settlements have formally been enshrined into French law in 2014, together with the creation of *actions de groupe* in consumer and competition law.[95] In October 2016, Act on the modernisation of Justice has introduced a general framework for settlement of mass claims. Association(s) and defendant(s) can agree to settle their case. The settlement is then submitted to the court for review. Worth noting is the fact that the court must conduct an in-depth evaluation of the terms of the proposed settlement agreement. In particular, judges must make sure that the interests of all potential class members are adequately protected. In other words, judges are required to endorse '*fiduciaries duties' vis-à-vis* absentees. The settlement agreement must then be advertised in the media to allow individuals to opt in.

A report of the French Market Authority dated January 2011 for instance highlighted the relevance of ADR for the treatment of mass securities litigation. The Financial Markets Ombudsman (*Autorité des Marchés Financiers*, here AMF) has resolved a number of mass cases. It is striking

[93] http://archives.lesechos.fr/archives/cercle/2010/11/10/cercle_31799.htm#P2zUWcRAJG1kThv6.99.
[94] http://www.cbanque.com/actu/13284/mediation-du-credit-foncier-un-accord-exemplaire-selon-afub and http://tempsreel.nouvelobs.com/immobilier/marche-immobilier/20091117.OBS2845/le-credit-foncier-trouve-un-compromis-pour-ses-taux-variables.html.
[95] Article L623-22 and L.623-23 Consumer Code.

how the AMF Ombudsman acted proactively in managing the process of resolution, contacting relevant lawyers and institutions. The Ombudsman's actions also led to change in the information provided by various companies in subsequent practice.

Two case studies to illustrate the above.

Failure to give Warnings to Multiple Investors [96]

During 2012 the Ombudsman was contacted by a lawyer representing 143 investors complaining that they had not been properly informed by around 20 financial institutions when acquiring, through those institutions, shares in a listed company that had since been placed into court-ordered insolvency proceedings. These investors had lost their entire investment. That the company had been placed into insolvency proceedings did not, on its own, warrant the Ombudsman's involvement: the Ombudsman's role is not to exonerate shareholders from the risk of financial market uncertainties inherent in any investment in stocks and shares. Furthermore, mediation could not result in a solvent financial institution bearing the consequences of a potential breach by a company of its duty to provide information.

What was unique about this mass dispute was not only that the company was listed on the Alternext market, but that it had done so through a private placement. In light of applicable regulations, the Ombudsman considered that the financial institutions were required to inform their clients of this dual risk when they placed orders to buy the share in question; the risk was aggravated by the fact that investors did not have access to a prospectus approved by the AMF.

Since all the requests related to the same grievance, the Ombudsman shared her analysis of the situation with the claimants' lawyer. First, she had reviewed the information provided to clients on the risk associated with investing in companies listed on Alternext through private placement. Second, she recommended that the amount of any goodwill gesture be fairly adjusted in accordance with the degree to which each investor was seasoned and experienced, so that only claims made by inexperienced investors who were genuinely unable to understand the risks associated with the Alternext market and the particular method used to list the company on that market would be upheld.

The Ombudsman then contacted each of the institutions involved to share this analysis with them and ask them, for each of their clients, to provide her with information on the order in question or any warnings given when it was placed, as well as information about each client's profile as an

[96] See AMF Ombudsman's Report 2012 (Autorité des Marchés Financiers, 2013), 4-5.

investor. While the Ombudsman's analysis necessarily looked at the obligation upon all the institutions involved, the losses suffered could only be assessed on a case-by-case basis. After reviewing each investor's profile, as a matter of equity the Ombudsman in some cases recommended no compensation while in other cases proposed a gesture of goodwill in line with the degree to which the investor in question was seasoned and experimented.

This case highlights the benefits of mediation. First, mediation allows equity to be restored – something that no court can do. In this particular case, this was an argument to which the financial institutions involved were sensitive. From the claimants' perspective, the involvement of the Ombudsman enabled imbalances between them and the institutions in question to be corrected. Given the uncertainty and cost associated with court proceedings, these claims may never have been brought to court, and would thus have remained without redress. Finally, the analysis of these requests as a combined whole by an independent third party removed the risk of unequal treatment before the law by examining the obligation upon each of the financial institutions together. The Ombudsman's actions in connection with a mass dispute should not be seen as a substitute for the introduction of class actions in France, an issue currently under discussion. In France, the use of mediation is always based on a voluntary and confidential approach by the two parties. The confidentiality associated with mediation is a critical factor in negotiations with companies: mediation makes it possible for individual losses to be compensated quickly without damaging the company's reputation. Conversely, the key unique feature and major benefit of a class action is that, because the court's decision is made public, it addresses the issue of dissuasion as well as that of compensation. As such, mediation is not a replacement for class actions; in reality, it should rather be seen as a helpful addition to a class action if the parties wish to avail themselves of it.

More generally, the mass dispute involving 143 claims received by the mediation unit in 2012 provided an opportunity for a number of account-keeping institutions to change the information they issue to their clients when the latter place orders in shares admitted to trading on the Alternext market via private placement. These institutions have included within their warning systems more detailed and specific information on the risks associated with this type of investment.

Financial Disclosure re a Foreign Company [97]

[97] See AMF Ombudsman's Report 2016 (Autorité des Marchés Financiers, 2017), 27-28.

A case was brought before the Ombudsman's Office in 2016 comprising 102 individual cases, of which 97 were closed by the end of the year. It related to the financial disclosure by French account keepers to their clients, shareholders of a large foreign company, and to the tax consequences under French law of a spin-off voted for by said foreign company. As a result of the spin-off, the former shareholders were allocated proportional bonus shares in the newly created subsidiary. Under French tax law, the newly awarded shares are deemed to be a taxable dividend.

French shareholders awarded these bonus shares contacted the Ombudsman after noticing on their transaction advice slips an advance, non-fixed withholding tax in respect of dividends, sometimes pushing the shareholders' accounts into the red. In their view, their account keeper should have given them prior warning of this spin-off and its tax-related consequences. In the absence of such notice, they felt they were denied the opportunity to sell their shares before the transaction and thus avoid these consequences. Initially, the Ombudsman reminded the shareholders that case law consistently considers that an account keeper is obliged neither in usage, equity nor law to inform its clients of an event affecting an issuer.[98] However, Article 322-12 II of the AMF's General Regulation establishes two exceptions to this disclosure non-obligation:

'II. - The custody account-keeper shall send, as quickly as possible, to each holder of a securities account the following information:

1° Information relating to operations in financial securities which require a response from the account holder, which it receives individually from the issuers of financial securities;

2° Information relating to the other operations in financial securities which give rise to a modification to the assets recorded on the client's account, which it receives individually from the issuers of financial securities;'

On reading this Article, it would appear that the second of these situations should apply in this particular case, given that the spin-off is an operation in financial securities giving rise to a modification to the assets recorded on the shareholder's account. However, the Ombudsman also noticed that the information sent by the foreign issuer to the account keepers contained no tax-related elements, which is perfectly understandable and normal in such a case.

Therefore, although complaints can be made against certain account keepers for not passing on information in their possession to their clients as quickly as possible, in respect of the Article quoted above, they cannot be criticised for not communicating the tax-related consequences of

[98] Ruling of the Commercial Chamber of the French Court of Cassation no. 88-17.291 of 9 January 1990; Ruling of the Commercial Chamber of the French Court of Cassation no. 06-18.762 of 19 February 2008.

this operation in financial securities because they themselves had not received such information from the foreign issuer.

Consequently, the Ombudsman issued a recommendation not in favour of the applicant in all these cases.

4. Italy

There are a number of established and well-functioning ADR entities in Italy. One example of these is the *Arbitro Bancario Finanziario* (ABF), which is the ADR scheme established by law for claims against banks.[99] The secretariat of the ABF is provided by the Banca d'Italia, and decisions in cases are made by a panel of independent members. The outcomes of the ABF's proceedings make a significant contribution to the supervision on the banking system. The rules specify that the ABF's decisions 'become part of the broader pool of information at the Bank's disposal for its regulatory and control functions'. An example of how the decisions of the ABF have led to systemic action is in the case study below.

Loans secured against one-fifth of salary or pension

The most common type of dispute submitted to the ABF in recent years concerns disputes concerning loans secured by a pledge of one-fifth of salary or pension (71% of all disputes in 2016). A consumer is by law entitled to terminate a loan fully or partially at any time, but disputes often arise if the lender demands repayment of part of the costs incurred by the complainant in the event of early termination.

ABF's decisions have highlighted that in many cases the intermediaries:

- provide for unclear contract terms, which do not clarify if a cost is referred to the initial part of the contract ('upfront cost') or accrues over time ('recurring cost');
- in case of early termination, do not properly reduce the recurring costs of the loan.

ABF's case law on this matter has prompted various measures adopted by the Banca d'Italia in its supervisory and regulatory tasks, such as issuing general communications, communications to specific intermediaries, and Guidelines.

[99] Consolidated Law on Banking (Legislative Decree no 385/1993), article 128-*bis*, introduced by Law 262/2005 (Investor Protection Law). See https://www.arbitrobancariofinanziario.it/.

In two general communications (dated November 2009 and April 2011) the Banca d'Italia underlined the need to include in the contracts the clear indication of the various costs, highlighting in particular those that accrue over time (recurring costs) and therefore should be reimbursed to the client in case of early termination. Those general communications resulted in:

- an increase in the number of settlements, even before the dispute has been filed before the ABF;
- higher amounts awarded to the clients;
- a greater attention of the panels on the fairness and transparency of the contractual clauses concerning the costs of the loan (this also triggered some uncertainties among the Panels with respect to the exact interpretation of the various clauses).

In February 2016, the Bank of Italy sent a communication to 11 intermediaries who had been most involved in this type loans reminding them that the ABF provisions require the complaints department of the intermediaries to keep up to date with the ABF's case law and assess customer complaints accordingly, and to resolve such disputes before a decision by the ABF's Panel.

In March 2016, a general communication of the Bank of Italy on complaints departments further underlined their duties. These communications were followed by a significant increase in the number of disputes settled by the 11 intermediaries. Since the number of disputes of this type of loans remains high, the Bank is to take further steps in 2018.

5. Sweden

The public out-of-court body, the National Board for Consumer Disputes (*Allmänna Reklamationsnämnden*) is assigned by law to safeguard consumers' interests by providing an out of court ADR mechanism for disputes between consumers and business operators. ADR is not mandatory for any party, and the National Board for Consumer Disputes only submits recommendations on how disputes should be resolved, which are not binding on the parties. The National Board for Consumer Disputes also provides mediation between the disputing parties.

The first legislation regarding group action ADR in Sweden was enacted as early as in 1991. Thereafter the Law (2015:671) on Alternative Dispute Resolution in Consumer Relations and Ordinance (2015:739) with Instructions for the National Board for Consumer Disputes was enacted in 2015 and came into force on 1 January 2016. This legislation was adopted in accordance with the ADR Directive.

The scope of application is sectoral as it covers civil disputes between natural persons and business operators excluding the following types of disputes: disputes concerning health care; purchase of real estates; lease or transfer of tenant-ownership and leasehold; lease or rent of an apartment where the dispute concerns something else than monetary claims. Disputes shall also exceed a certain value and be filed within a year from when the business operator denied the consumers complaint in order to be assessed by the National Board for Consumer Disputes. A dispute will not be assessed by the Board if it is pending before or has already been resolved by a court or the Swedish Enforcement Authority.

The Consumer Ombudsman may initiate a group action and accordingly have standing at the National Board for Consumer Disputes if: (i) there are several consumers who are likely to have a claim against the business operator on essentially similar grounds; (ii) the disputes concern a situation that may be considered by the board; and (iii) the assessment is justified in view of the public interest. A group of consumers may file a group action if the Consumer Ombudsman has declined to initiate proceedings. The group action is based on an opt-out system, meaning that all consumers with claims on essentially similar grounds are covered by the recommendation even if they are not named or involved in the group action. There are no specific rules on case management depending on if the claim is raised by one person or a group. The process at the National Board for Consumer Disputes is only in written form. The National Board for Consumer Disputes offers the business operator to comment on the consumer's complaint within reasonable time. The Consumer Ombudsman or the consumers in turn have an opportunity to comment on the business operator's response before a recommendation by the Board is given. Each party stands for its own costs. Costs for the National Board for Consumer Disputes and the Consumer Ombudsman are funded by the State.

Some case studies to illustrate the above.

No. 1991-5771, The Consumer Ombudsman/Fordonia Förvaltning AB

The dispute concerned a leasing agreement. The case was because more detailed information was proved and the dispute was more clearly shown. The same dispute resulted in the below referred decision No. 1992-0112.

No. 1991-6099, The Consumer Ombudsman/Skandinaviska Dataskolan AB

The dispute concerned the cancellation of a purchase of a computer course due to the consumers had cancelled the purchase because the course did not fulfil the consumers' expectations. The Consumer Ombudsman claimed that the National Board for Consumer Disputes should submit a recommendation on how disputes should be settled between Skandinaviska Dataskolan AB and

consumers in general. The Consumer Ombudsman had received several hundred complaints against the company and therefore a group action was the most suitable option. The National Board for Consumer Disputes recommended the company to reimburse the consumers with the tuition fee for classes which the consumers did not attend, but with a deduction of 10%.

No. 1992-0112, The Consumer Ombudsman/Fordonia Förvaltning AB

The dispute concerned clauses in a car leasing agreement between the company Fordonia Förvaltning AB and a number of consumers. The first clause gave the lessor a right to change the monthly rent of the car and the other gave the lessor the upper hand regarding the negotiations and arrangements following the consumer's return of the car. The National Board for Consumer Disputes considered that it was suitable with a group action in this case due to the number of consumers who were dissatisfied. The National Board for Consumer Disputes recommended the company to reimburse the monthly rent in accordance with the initially agreed fee since the clause was considered to be unreasonable. The second clause was, considered to be invalid due to mandatory Swedish legislation.

No. 1993-1642, The Consumer Ombudsman/Skurups Kabel TV AB

The dispute concerned an increase of fees from a company to its consumers for cable television services from SEK 300 to SEK 1,200 a year. In the agreement between the company and the consumers there was a clause that allowed the company a possibility to change the fees if it was necessary due to external factors. The company argued that change of ownership was such a factor that gave the company that right. The Consumer Ombudsman disagreed and applied for an ADR group action because over 60 complaints had been reported from consumers. The National Board for Consumer Disputes concluded that the company had no right to charge the consumers the excess amount and recommended the company to reimburse the excess amount to the consumers.

No. 1993-3381, The Consumer Ombudsman/Västindienspecialisten

The dispute concerned a company's right to increase agreed prices for trips due to currency fluctuations. The company's agreement with the consumers gave the company a right to increase the price if the currency fluctuations exceeded SEK 60 and was caused by an official decision regarding a devaluation of the Swedish currency. The Consumer Ombudsman claimed that the company should reimburse amounts charged due to devaluation. The Consumer Ombudsman claimed that a group action would be most suitable in the case since the dispute concerned many consumers and the fact that the company earlier had declared that it did not follow earlier recommendations by the National Board for Consumer Disputes regarding the same

circumstances. The National Board for Consumer Disputes recommended the company to reimburse the consumers because the devaluation decision on which the company was basing its price increase was not considered to be such an official decision as the agreement referred to.

No. 1996-0519, The Consumer Ombudsman/Hyllinge Buss och Resetjänst AB

The dispute concerned reimbursement due to lack of air condition during a bus trip to Lloret de Mar in Spain, which had caused inconvenience for the passengers because of the heat in bus company's buses. The bus company had announced in its marketing that most of its buses were equipped with air conditioning, and the consumers had therefore a legitimate reason to believe that the bus was equipped with air condition, especially due to it was a trip to warmer climate. The National Board for Consumer Disputes had earlier made decisions against the company in individual cases regarding the same trip. Due to the large amount of notifications and complains, the Consumer Ombudsman decided to apply for a group action. It is unknown how the underlying facts were discovered. The National Board for Consumer Disputes recommended the company to reimburse the consumers with a discount by refunding 17% of the price for tickets on trips where there was no air conditioning in the buses (repay 600 SEK on a ticket costing SEK 3,500). The time from filing of the case until decision was 157 days. The company did not follow the recommendation by The National Board for Consumer Dispute but compensated the consumers in another way, on which information is not available.

No. 1996-6109, The Consumer Ombudsman/Sydsvenska Dagbladet AB

The dispute concerned the admissibility of a surcharge. The company had, after the Swedish Parliament had adopted legislative changes to the VAT system, invoiced the consumers an additional fee corresponding to the increased VAT without having such a precondition in its existing agreement with the consumers. The Consumer Ombudsman claimed that the additional fee was not allowed and applied for an ADR group action since many consumers were affected by the additional fee. The National Board for Consumer Disputes recommended the company to withdraw its claims for additional charges corresponding to the increased VAT and to reimburse the affected consumers who had already paid.

No. 1999-3902, The Consumer Ombudsman/Måleri & Byggentrepenad i Liljeholmen AB and Naso-National Air & Space Outlet Sweden

The dispute concerned termination of agreement regarding purchase of binoculars, and compensation due to expenses in connected with the purchase. The National Board for Consumer

Disputes concluded that the binoculars were considered useless and did not meet the requirements of what an average consumer in general can expect. Therefore, the National Board for Consumer Disputes recommended the company to reimburse the purchase price of SEK 229 to the consumers and compensate the consumers for the additional costs incurred from purchasing the product.

No. 2000-0252, The Consumer Ombudsman/Telia Nära AB

The dispute concerned announcements of increased fees in accordance with an agreement between a telephone operator and the consumers. The increase was announced in a press release and on the operators' website. The National Board for Consumer Disputes did not considered this sufficient to be compliant with the terms in the agreement regarding how price changes should be announced. Therefore, the National Board for Consumer Disputes recommended the company to reimburse the affected consumers on a flat-rate basis with an amount of SEK 44 per month to the consumers from when the price increase was made until a correct announcement was made.

No. 2001-2785, The Consumer Ombudsman/Tele 2 AB

The dispute concerned a company's right to withhold an amount which the consumer's had paid for its mobile subscription, and whether the company could still claim the subscription fee once the consumer unsubscribed. In accordance with the agreement the consumers had the right to use the subscription fee to make calls etc., but this was not the case if the consumer unsubscribed. The Consumer Ombudsman claimed that the agreement terms were unreasonable and therefore invalid. The National Board for Consumer Disputes dismissed the application and concluded that agreement terms were clear and on no ground unreasonable.

No. 2003-6529, The Consumer Ombudsman/Kraftkommission AB

The dispute concerned damages due to a breach of contract when the company failed to supply electric power to the consumers. The breach of the contract caused the consumer additional costs when they had to enter a less favorable agreement with another company. The National Board for Consumer Disputes recommended the company to compensate the consumers for additional costs incurred by the company's breach of contract.

No. 2010-4253, The Consumer Ombudsman/Hammarö Energi AB

The dispute concerned the company's right to charge the consumers for administrative costs, despite the fact that they had no such right according to the agreement with the consumers. The company argued that it would lead to an unreasonable result if they were not able to charge the

consumers for increased administrative costs. The administrative cost was at first borne by the municipality, however in 2009 the company had to take over the responsibility, and therefore they urged that the changed circumstances gave them the right to charge the consumers for administrative costs. Due to complaints from consumers and the fact that approximately 200 consumers were affected by the company's decision, the Consumer Ombudsman decided to file a group action application. It is unknown how the underlying facts were discovered.

The National Board for Consumer Disputes recommended the company to repay the excess amount that was paid by the consumers and withdraw the new provisions. The National Board for Consumer Disputes stated that each contracting party shall bear the risk of changed conditions and the company had been able to predict the increased costs. Therefore there were no grounds for the company to adjust the agreement with the consumers. The process took 277 days. The company followed the recommendation and repaid the excess amount that was paid by the consumers. The media subsequently reported that the managing director of the company had to resign.

No. 2010-6177, The Consumer Ombudsman/Viking Airlines AB, Res Nu i Stockholm AB etc.

The dispute concerned 325 consumers right to compensation when airline companies had denied some consumers boarding. Several airline companies were subject to the application but the National Board for Consumer Disputes dismissed the application against all companies except for one, Viking Airlines AB, since it was not proved that the other companies had any responsibility towards the consumers. The company argued that the tickets were invalid and that the tickets had been sold without permission. The National Board for Consumer Disputes deemed that the company was responsible towards the consumers but the matter was dismissed because a recommendation would have been meaningless since the company was declared bankrupt before any recommendation could be announced.

No. 2014-09369, The Consumer Ombudsman/Gotlandsbåten AB

The dispute concerned consumer's right for compensation when their tickets for a ferry were cancelled. It was clear that the company had reimbursed the price for the ticket to the consumers, but according to the National Board for Consumer Disputes the company had not fulfilled its obligations due to the company had not offered the passengers new tickets with similar conditions. Therefore the company was responsible to reimburse the consumers for their additional costs to arrange alternative transportation. The company was, according to the National Board for Consumer Disputes, not only responsible for direct costs, but also for indirect costs, due to its negligence.

No. 2015-07942, Sveriges Aktiesparares Riksförbund/Swedbank Robur Fonder AB

Request for reconsideration of the above referred decision No. 2014-11304, regarding overcharging of management fees. The request was refused since the applicant had not presented any new relevant information for the National Board for Consumer Disputes to reconsider its decision.

According to the applicant's website, the association is planning to apply for a group action in the District Court against the company, Swedbank Robur Fonder AB, see above.

6. The Netherlands

The Netherlands has a well-established and effective national ADR system, in which the principal ADR bodies are a network of complaint boards (*Geschillencommissie*) and separate systems for financial services (*KiFiD*) and healthcare insurance (SKGZ). These bodies are designed to process individual complaints, but can inherently identify issues that affect multiple individuals. In relation to traders in around 50 business sectors, the *Geschillencommissie* apply the standard terms and conditions that are agreed every three to five years between the relevant trade association(s) and the national or other consumer associations, in a formal review conducted under the auspices of the Social and Economic Council's Self-Regulation Coordination Group (*SER CZ*).[100]

Although the system is designed to process individual cases (and class actions are excluded in the procedural rules of Kifid[101] and SKGZ[102]), there are various features that address mass issues. One important mechanism the fact that they are raised in the regular review and amendment of the standard terms and conditions of many sectors. As a result, requirements may be clarified. The Dutch system is thought to emphasise the importance of the observance of the agreed terms and conditions, supported by a strong element of self-regulation, through the persuasive power of a trade association over its members in this system, and the effects of decisions of courts or of the *Geschillencommissie* on complaints, and the public regulatory authorities.

Secondly, with regard to consumer disputes the *Geschillencommissie* system is administered by a single body, *Stichting Geschillencommissie* (SGC), which runs a computerised management system that enables case management techniques to be applied to cases. SGC will identify that a cohort

[100] Sociaal Economische Raad (SER), Coördinatiegroep Zelfreguleringsoverleg (CZ).
[101] Article 2.1 (e) Rules of Procedure Financial Complaint Committee (Kifid), Conciliation and (binding) advice (2017).
[102] Article 3(4) Rules of Procedure Healthcare Ombudsman SKGZ (2015) and article 3 (6) Rules of Procedure Healthcare Complaint Committee SKGZ (2015).

of cases have the same subject matter, and can then list them all for a panel hearing on the same day, or select a small number as test cases, possibly notifying parties that their cases are 'on hold' pending a decision by the complaint board of a representative selection of similar cases. The parties will be notified of the outcome of the representative cases, and invited to settle their cases between themselves, without which their cases will proceed to decision by the board. This technique has been used successfully in various instances, notably multiple cases against airlines over delayed boarding or flights.

Similarly, *KiFiD* uses case management in relation to financial services cases. The president and case handlers can, for example, decide whether to list cases together or to hold some back pending an authoritative decision by one of its panels (and the president of *KiFiD* decides how many members shall sit on a panel) or by a court. In the latter situation, the power to refer points of law to the Supreme Court of the Netherlands has proved useful.[103]

7. United Kingdom

Many sectors in the UK have operated ADR schemes, sometimes going back to the 1960s. Some sectors rely on mediation-arbitration models attached to business codes of conduct, such as travel (ABTA), motor vehicles (Motor Codes), dentists and so on. Official standards and matrices have been applied for ADR systems by regulators, such as the OFT (now CMA) and OFCOM, which mandate and raise standards of practice. There is a close link between ADR bodies and public regulatory authorities, as required by article 17 of the ADR Directive. There is also a move towards transparency of complaints (naming types, numbers, traders), which improves trading standards.

Another ADR model, what might be described as 'consumer ombudsman', has proved to be highly effective in delivering both individual and collective redress. The ombudsman model has increasingly been adopted for regulated industries, with ombudsmen in financial services, pensions, communications, energy, legal services, aspects of environment (Green Deal), property, furniture, and recently for any type of consumer dispute, and it is spreading. A sectoral consumer ombudsman is particularly effective where it operates together with the sectoral regulatory authority as an integral part of the market regulatory mechanism. This designed level of cooperation is far easier under an ombudsman model than a mediation/arbitration model of ADR. The sector that has the most experience in that respect is financial services, where the relationship between the Financial Services Ombudsman and the Financial Conduct Authority has proved to

[103] Code of Civil Procedure, Arts 392-394.

be highly effective, efficient, and swift. Similar effects can be seen in relation to communications and energy.

The effectiveness of the consumer ombudsman model is based on various features. First, traders in some sectors are bound by decisions of the ombudsman, so must engage with the process. Two main models exist here: in several sectors, statute can provide that traders are bound by the ombudsman's decision if the consumer accepts it,[104] whilst in some sectors the adherence is indicated in advance by membership of a particular scheme.[105] Second, traders typically fund the ombudsman scheme in full, so it is free to consumers. Third, ombudsmen decide every individual case, but have developed internal processes to identify and coordinate groups of similar cases so that consistent and efficient outcomes are achieved. The mechanisms are similar to how an English or Welsh court would case manage similar cases, especially by identifying (through efficient monitoring and use of information technology) where cases involve similar issues and then deciding critical common issues. Fourth, the ombudsmen have the ability to feedback information on trends to traders, regulators and consumers through publishing general data, and this can affect market behaviour.

Many consumer ombudsmen are free to consumers, being funded by business, either through statutory levies or contact arrangements between businesses and ombudsmen. Nearly all of them publish statistics on numbers of cases and case-handling times, which show that usage is broadly increasing (apart from a reduction in financial services form a large spike in numbers caused by one or two large cases, notably PPI), and durations are swift. In contrast, the arbitration-style ADR schemes usually charge a fee to consumers (although some may be refunded if the consumer loses); they can also be swift, but do not intrinsically have the ability to handle mass cases.

The Financial Ombudsman Service (FOS) was established by legislation in 2001,[106] but has roots in previous voluntary ADR bodies that were established 20 years earlier for insurance and banking. The procedure will not be explained in detail here, but it involves stages that can be classified as triage, mediation, and decision. Every individual contact received by the FOS is responded to.

The FOS is geared towards processing individual complaints. However, it is able to deliver 'individual "collective" redress'. First, although individual decisions do not create legal precedent, the large body of ombudsman 'lore' is available on the FOS' website, which demonstrates what constitutes fairness in particular situations and outlines approaches which can then be applied to

[104] This applies in legislation on financial services, pensions, legal services.
[105] This applies for communications and energy.
[106] The Financial Services and Markets Act 2000.

specific sets of facts in individual complaints. Second, there is a regulatory requirement on financial institutions to observe the Ombudsman's decisions. The ombudsman's experience means they have unparalleled insight into behaviours and trends across the whole of the financial services industry. That insight is shared through FOS publications and reports, for instance on age-related complaints or financial scams, and through liaison with the regulator, government, trade and consumer bodies and the press. The FCA requires businesses to take into account decisions they have received from the ombudsman so that systemic issues can be identified and addressed. Third, although the FOS has no specific collective claim mechanisms, it has developed a number of procedures to deal with multiple horizontal issues, notably a lead case process, a test case procedure (usually on a point of law, which may be referred to court),[107] and collaboration mechanism under the FCA/CMA/FOS Coordination Committee. The last of these applies where there is a new or emerging issue that raises significant implications for consumers in general, or for industry, or even for one business, and it may involve more than one of the FCA, FOS and OFT. Most issues have been identified by FSA or FOS; the consumers' association has raised one, and industry none.

Under the 'lead case' process, the FOS identifies is a common principle exists in a number of similar cases, and whether it would be appropriate to group the cases together and identify an individual 'clean case' for the group in which the common issue arises without other complications. The other cases would be put on hold pending resolution of the lead case, and the result of the lead case applied in the others, although, if the decision is against the provider, the FOS might 'lean on' the provider to settle the other cases voluntarily. If the consumer in the lead case loses, the FOS sends an anonymised copy of the decision to all group members, asking them to inform the FIS if they think that their cases are different and why. The 'lead case' procedure has significant similarities to how a court would approach case management under a Group Litigation Order. The common theme is simply efficient and effective case management.

The largest case has been claims against financial providers over sale of PPI policies, which is discussed further below as it demonstrates the important situation where the integrated actions of a regulator and an ombudsman can be highly effective. In responding to the huge increase in volume of cases relating to PPI, the FOS introduced an IT case management tool named 'Navigator', which 'helps to analyse the permutation of circumstances in each case, applies the ombudsman service "jurisprudence" to that permutation, and *suggests* an appropriate response

[107] The test case procedure has not been applied, although one insurance firm did seek to invoke the test case procedure over the impact of the Icelandic volcano on travel insurance claims, but the ombudsman said it was inappropriate in the circumstances of the particular case.

which the adjudicator can accept, reject or modify. Navigator has been absolutely essential in enabling the ombudsman service to reconcile the competing demands of volume, quality and consistency.'[108]

In his 2016 independent review of how the FOS handled the PPI challenge, Richard Thomas CBE concluded:[109] 'the ombudsman service's 'methodology' – an informal, inquisitorial/investigatory approach with very few hearings – proved scalable and robust and it is difficult to see how such large volumes could have been resolved any other way.' The Parliamentary Public Accounts Committee's examination of PPI claims also concluded that it was 'straightforward and free' for consumers to claim compensation through the FOS, and strongly criticised the fact that too many complaints were made through the services of claims management companies,[110] which were intermediaries who ought to have been unnecessary and who could take too much of an award as fees. A separate review by the FCA into the financial advice market concluded that the FOS 'has a valuable role in its outreach work with firms, publicising its resources and guidance, and the data it collects'.[111] It recommended that the FOS should go further and consider undertaking regular 'Best Practice' roundtables with industry and trade bodies where both sides can discuss relevant issues such as the evidence used when considering historic sales and suitability requirements.[112]

Some case studies to illustrate the above.

Wide scale impact

Perhaps the most visible effect of the FOS's findings is the recent change to insurance law. Previously, all UK insurance law was based on the Marine Insurance Act of 1906 which required anyone proposing for insurance to demonstrate utmost good faith by disclosing anything the insurer may consider material to the risk. This may be fine for commercial shipping contracts where the parties are equal but the consequences of getting it wrong might be very serious for the retail consumer who could hardly second-guess what the insurer would want to know.

Over a number of years FOS developed an approach to misrepresentation, in line with the Association of British Insurers' Statements of Good Insurance Practice, which recognised that consumers wouldn't necessarily know what an insurer would think was material to the risk and required that the insurer should ask clear questions to get the information it needed. This

[108] R. Thomas, The impact of PPI mis-selling on the Financial Ombudsman Service, Financial Ombudsman Service, 2016.
[109] ibid.
[110] "Financial Services Mis-selling: Regulation and Redress", House of Commons Committee of Public Accounts, Forty-first Report of Session 2015–16, HC 847.
[111] Financial Advice Market Review Final report, Financial Conduct Authority, 2016.
[112] ibid, Recommendation 22.

approach was considered by the Law Commission and adopted in the Consumer Insurance (Disclosure and Representation) Act 2012 which came into effect in April 2013. So now an approach which the ombudsman applied to individual complaints is imposed across the industry so that all consumers forming insurance contracts have the benefit of it, and not just those who complain.

And, of course, mass claims like mortgage endowments and PPI have required the development of processes and handling in a way that has impacted on consumers generally with many complaints being settled without individual consideration.

Other influences

But there are many less immediately obvious examples of how the ombudsman's findings can help other consumers. FOS has a duty to tell the regulator what it sees and it has always shared insight and information to help the regulator (and its predecessor, the Financial Services Authority) carry out its regulatory role. The FCA's interventionist approach means that concerns about businesses or issues can be followed up through supervision, and enforcement action taken where appropriate. This has important, beneficial consequences for all consumers – but is, of course, extremely hard to measure.

By way of example, over a period of three years FOS raised a number of concerns with the FCA about a particular business and its PPI complaint-handling process. This resulted in a fine of over £2 million and a remediation exercise meaning nearly 5,000 consumers received redress. Another business unfairly rejected complaints because it thought its sales processes were both compliant and robust. Sharing FOS experience and working with FCA meant a change of approach on the part of the business and the review of a very significant number of complaints.

And explaining its approach to issues through the newsletter Ombudsman News, material on the website, published decisions and outreach events means that FOS helps businesses understand exactly what fairness means in particular circumstances. Pointing bankers and insurance underwriters beyond the precise wording of their account terms or policies to consider what actually happened in a case benefits all their customers. Because rigidly applying policy or account terms and conditions without regard to the customer as a person can, and does, cause unfairness.

Another area where the FOS has influence is with claims management companies (CMCs). These commercial organisations thrive in the mass complaints areas of mortgage endowments and PPI. They bring complaints on behalf of consumers and receive a proportion of any compensation paid. A consumer does not need a representative to bring a complaint to the ombudsman whose procedures are easy to follow – even for those with vulnerabilities. And the CMCs often bring

speculative claims to businesses wasting time and money. FOS has worked closely with CMCs to ensure that only appropriate cases are brought and that the necessary information is provided. Ensuring they understand FOS' approach means that many issues can be resolved without the need for formal complaints. So, for instance, in 2014-15 80% of complaints about packaged bank accounts were brought by CMCs – that figure has now fallen to 40%.

FOS also works with the media to provide information about complaint trends and issues. As an example, publication of the insight report on financial scams attracted media attention to raise awareness of the tactics of fraudsters and help consumers avoid problems.

Although impact is hard to measure, there are some instances where it can be gauged quite accurately. In 2011 the ombudsman issued a final decision concluding that the cloud of volcanic ash that had impacted on travel leading to a surge of travel insurance claims for delay, could amount to adverse weather conditions meaning that many claims would be paid. The decision reflected the fact that the majority of insurers had settled these claims where their policies did not specifically exclude this risk. The business in question brought proceedings for judicial review to challenge the ombudsman's decision but the court rejected this challenge. The business then agreed not to pursue its legal action and several hundred complaints were settled on the back of this single complaint.

In June 2012 the ombudsman issued a final decision in which he found that a business had not handled fairly its decision to withdraw from the pet insurance market. The approach the ombudsman took led to the business offering a completely new policy to the complainant and additionally to all those customers who had been adversely affected by its decision.

This section illustrates how various techniques can be integrated into a holistic practical approach. The three elements are:

- first, voluntary complaint and redress procedures by businesses, where procedures are sometimes subject to regulatory requirements
- second, redress powers of regulatory authorities to order redress (the specific powers vary between sectors)
- thirdly, the availability of a specialist ombudsmen service, to whom complaints that are not resolved direct between consumers and businesses may be referred, either on a 'normal' basis or under the rules of a specific redress scheme, such as one mandated by a regulatory authority.

The most prominent example of this integrated approach relates to claims over the mis-sale of Payment Protection Insurance (PPI) products in the financial services sector. PPI was a major retail market, with sales of over 5 million policies a year during 2000 to 2005, with premiums in the region of £7 billion a year. It was very profitable for firms. Often the underlying loan served as a loss leader on which to sell PPI. It was targeted at consumers taking on debt, many of whom were financially vulnerable, as their focus was typically on securing the loan with the insurance incidental to the transaction.[113] A 2016 independent report found that at least 45 million policies were sold,[114] possibly as many as 60 million. From these sales, well over 16.5 million[115] claims for compensation have already been brought forward by consumers – the vast majority stimulated by claims management companies (CMCs). At the top of the iceberg, 1.3 million[116] of these claims have converted into complaints brought to the ombudsman service. Over 1 million cases have been closed by the ombudsman service, with average "uphold" rates as high as 89% in 2009, dropping to a "mere" 62%[117] in 2015.[118] Sums set aside at early 2016 took the total potential compensation bill to almost £27 billion.[119]

Several important points arise from this case study. First, the actions of businesses, regulator and ombudsman can clearly be seen to form an integrated model of delivering redress. A summit of representatives from all the major banks and credit card providers, regulators and the Financial Ombudsman Service in April 2012 agreed action to help make PPI claims easier and that claims could be resolved without a consumer needing to use a Claims Management Company.[120] As experience accumulated, improvements were made to the arrangements.

It should not be overlooked that many banks and financial providers operated voluntary redress mechanisms, which processed the majority of PPI claims without the direct involvement of external agencies. Consumer complaint mechanisms have been subject to increasingly specific regulation and supervision by the regulator: The Financial Services Authority was succeeded by a new regulator, the Financial Conduct Authority, from the end of 2012.[121] The existence of both regulatory scrutiny and of the ombudsman as a second stage dispute resolution mechanism creates incentives for businesses to resolve disputes directly with consumers. However, the

[113] The Financial Conduct Authority: Approach to Regulation, Financial Services Authority, 2011, para 5.12.
[114] FCA August 2014 - Thematic Review TR14/14 - Redress for payment protection insurance (PPI) mis-sales.
[115] FCA November 2015 – CP15/39 Rules and guidance on payment protection insurance complaints.
[116] Financial Ombudsman service 2014/15 Annual Review.
[117] FCATR14/14
[118] R. Thomas, The impact of PPI mis-selling on the Financial Ombudsman Service, Financial Ombudsman Service, 2016.
[119] ibid.
[120] See http://www.bba.org.uk/media/article/commitment-to-help-consumers-agreed-at-ppi-summit.
[121] For the FCA's general approach see The Financial Conduct Authority: Approach to Regulation, Financial Services Authority, 2011.

general public impression has been that banks have been slow to respond well to rectify their selling of PPI and to paying redress.[122] During the 2000s, the FSA built a large part of its supervisory approach on the assumption that 'the vast majority of firms intend to treat their customers fairly'[123] but this was shown to have been wrong,[124] and major reforms to the regulatory system were introduced after the financial crash that commenced in 2008, including new legal power for supervisors to ban products.[125] The FSA set out a proposal for guidance on the fair assessment and redress of complaints related to sales of PPI, and rules requiring firms to re-assess complaints against the proposed new guidance,[126] in response to which the banks instituted judicial review proceedings, which the court rejected.[127] Final Guidance was issued in 2013, jointly by the FCA and Office of Fair Trading.[128] In 2016, the NAO concluded that 'Overall, banks' handling of complaints has been poor, requiring ongoing action from FCA and FOS'.[129]

The FCA issued guidance in 2012 on what a payment protection insurance customer contact letter should contain and how it should be presented.[130] The FCA has undertaken some interesting behavioural research aimed at how best to encourage consumers who may be due redress to respond to customer contact letters. While large redress exercises such as PPI receive considerable publicity, many instances where consumers are due redress understandably do not. In these cases, the firm alerts customers to a potential issue, often in the form of a letter that gives customers information, which they need to answer. The research (based on a real case in which a firm was voluntarily writing to almost 200,000 customers about a failing its sales process) found that a number of simple changes to the way that contact letters were written produced dramatic improvements in consumers' response rates, compatible with a simple model of busy people reviewing quickly the post that they receive.[131] The firm's original letter, received a 1.5% response rate, which was particularly low compared with other redress exercises undertaken by the FSA,

[122] The cost of redress: the lessons to be learned from the PPI mis-selling scandal, Citizens Advice Bureau, March 2014.
[123] FSA, Treating Customers Fairly – Towards Fair Outcomes, 2006, 7.
[124] E. Ferran, "The New Mandate for the Supervision of Financial Services Conduct" (2012).
[125] FS Act 2012, cl 22, inserting FSMA s137C.
[126] http://www.fsa.gov.uk/pages/Library/Corporate/Annual/ar09_10.shtml.
[127] R (on the application of the British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin); [2011] Bus LR 1531.
[128] Payment protection products. FSA/OFT joint guidance, FCA and OFT, 2013.
[129] Financial services mis-selling: regulation and redress, National Audit Office, 2016, HC Paper No.851.
[130] Payment protection insurance customer contact letters (PPI CCLs) - fairness, clarity and potential consequences, FSA, July 2012, FG12/17.
[131] Encouraging consumers to claim redress: evidence from a field trial, FCA, 2013.

although understandable in this particular setting.[132] Use of salient bullet points had the largest single effect, increasing response rates over the control by 3.8 percentage points, just over 2.5 times compared to the original letter. Use of a simplified text and including a statement that the claims process would only take 5 minutes each increased response by 1.4 percentage points, almost doubling the response rate. Adding a message on the envelope to 'act quickly' had only a small positive effect and there was no impact of use of the FSA logo. Unexpectedly, there was a small but statistically significant decrease in response using the CEO's signature. Sending a find that reminder letter, which was a copy of the original letter, had much more effect if it had salient bullets, and improved response rates to almost 12%, which was equivalent to an additional 20,000 people responding to claim redress. Gender plays little role in response to the letter, whilst there were marked differences across age groups.[133] There were fewer marked differences across those people due different amounts of redress. With the control letter there was little change in response between those who were due £50 or more and those who were due less than £10. But with the best letter, there was a stronger relationship between response and redress due; however, this variation was still less than the variation in response with age. The fact that response rates to the control letter did not vary much with the size of redress suggested that the control letter failed to focus consumers' attention on the amount of redress owed.

The FCA has audited firms' performance in the delivery of redress. It has found some redress processes to be inadequate, breaching requirements, in response to which it ordered rectification, and instituted sanctions against some. A 2013 review of 18 medium-sized firms found that 6 firms were handling PPI complaints as the FCA would expect but that for the remaining 12 firms there were still significant issues with their PPI complaint handling to be put right.[134] The FCA also carried out mystery shopping scrutiny of providers in 2013, which found problems in the quality of investment advice given by banks and building societies, following which the firms involved

[132] Several reasons were suggested. First, many consumers had already been provided with a refund from the firm on their own initiative. Second, a number may also have been happy with the sales process and not felt in need of redress. Third, the potential value of redress was low, the average redress due was only £21. Fourth, the relationship between the firm and the consumer had already ended, which may mean the firm has an out-of-date address or that the consumer is less likely to open the envelope.

[133] With the control letter the middle-aged responded the least and older age groups responded far more. But the pattern changed for the best letter: the young respond the least and response increased with age. So the treatments had the greatest relative effect on the middle-aged, who are arguably the busiest.

[134] TR13/7 - Payment protection insurance complaints: report on the fairness of medium-sized firms' decisions and redress, FCA, August 2013.

cooperated with the regulator and agreed to take immediate action.[135] Significant fines were imposed on some firms.[136]

The FOS took the strategic decision to process cases prioritising the proper handling of individual cases (considered to be a *sine qua non* of the ombudsman service) over an 'industrialised' approach. An independent review by Richard Thomas CBE strongly supported that decision.[137] He found commended the achievement of resolving more than one million cases, with 800,000 alone closed in the three years to 2016, involving a major exercise in expanding, trai9ning and supervising staff (around 4,000 at the peak) without resorting to out-sourcing.

The FOS was found to have operated well.[138] The NAO concluded that 'The Ombudsman has continued to provide an effective service to complainants following a massive increase in complaints, but it has struggled with a backlog of older payment protection insurance cases.'[139] Consumer satisfaction rate has been very high, even if the huge scale of the tsunami of PPI cases presented a considerable challenge for the FOS, causing some processing delays.[140] However, delays in relation to resolving historical cases, often caused by the unavailability of reliable evidence, would almost certainly have been longer if cases had been processed in court, either individually or collectively. The independent report concluded:[141]

---

[135] Assessing the quality of investment advice in the retail banking sector. A mystery shopping review, FSA, February 2013. Findings included that the adviser gave the customer unsuitable advice in 11% of cases and that the adviser did not gather enough information to make sure their advice was suitable, so it was not possible to assess whether the customer received good or poor advice, in 15% of cases.

[136] The FSA imposed a financial penalty of approximately £4.3 million on Lloyds TSB Bank, Lloyds TSB Scotland and Bank of Scotland for failure to pay redress promptly to PPI complainants between 5 May 2011 and 9 March 2012. The Final Notice contains detailed findings by the FSA of inadequacies in the implementation of the redress payments process. The Final Notice focused on failures in the planning of the redress payments process, a reliance on manual processes in the face of overwhelming numbers of complaints (which hampered the ability to track and check the processing of payments), a lack of quality control and inadequate resourcing of parts of the PPI redress process. The FSA highlighted that a full reconciliation process had been conducted to ensure that customers had not been disadvantaged as a result of the delays in payments being made. The FSA fined the Co-operative Bank plc £113,300 in January 2013 for its failure to handle a number of PPI complaints. The FCA fined Lloyds Banking Group £117 million for mishandling thousands of PPI complaints between March 2012 and May 2013, and extracted an agreement by the bank to review 1.2 million complaints, for which a further £710 million was added to the £12 billion already set aside to cover repayments. The FCA fined Clydesdale Bank £20,678,300 (after a 30% discount for early settlement) on 15 April 2015 for failures in processes for handling 126,000 PPI complaints between May 2011 and July 2013, in which 42,200 may have been rejected unfairly and 50,900 resulted in inadequate redress.

[137] R. Thomas, The impact of PPI mis-selling on the Financial Ombudsman Service, Financial Ombudsman Service, 2016.

[138] Financial services mis-selling: regulation and redress: Forty-first Report of Session 2015-16, HC Paper No.847: House of Commons Committee of Public Accounts, May 2016.

[139] Financial services mis-selling: regulation and redress, National Audit Office, 2016, HC Paper No.851.

[140] The NAO found that 'In 2014-15, 74% of complainants said it handled their complaints efficiently and professionally.'

[141] R. Thomas, The impact of PPI mis-selling on the Financial Ombudsman Service, Financial Ombudsman Service, 2016, para 1.7.

This report has also probed whether more could or should have been done to group cohorts of cases together and treat them all in identical or very similar fashion. However, given in particular the complexities of PPI complaints, there would have been significant risks from excessive standardisation in terms of unacceptable quality, inconsistency and poor customer service. It is not surprising that no obvious basis has been identified for aggregating cases more effectively or more efficiently than has been achieved by Navigator. The conclusion has to be that any wholesale attempt to group cases any further into cohorts has not been, and is unlikely to be, a viable option.

There were no apparent attempts to establish aggregated consumer litigation, or calls for such a solution by any of the many commentators on the PPI sage, including Parliamentary, consumer or other.

The fact that this integrated system is new has still allowed a new breed of parasitic intermediary to be established, claims management companies (CMCs), which have caused significant extra and unnecessary transactional costs. Lawyers have played almost no role in advising or representing consumers on PPI claims, or similar low value consumer claims. The estimated amount of commission received by claims management companies on PPI claims between April 2011 and November 2015 was between £3.8 billion and £5 billion, representing up to 23% of total compensation paid in such cases.[142] CMCs were assumed to charge between 25% and 33% of redress received by customers.

A significant number of PPI claims brought by CMCs were unsubstantiated or fraudulent, necessitating regulatory action. In a significant number of cases, CMCs have operated illegally and caused significant consumer detriment.[143] Regulatory pressure has been introduced to control CMCs, involving action by various regulators[144] and the FOS and the Legal Ombudsman. The Claims Management Regulator was given extra powers in December 2014 to fine CMCs for breaking the rules.[145] By mid-2016 it had issued four fines totalling £1.6 million. In January 2016, it revoked the licence of a company that made 40 million nuisance calls over a 3-month period. As the availability of ombudsmen has spread across different trading sectors, so has consumer knowledge of the availability of ombudsmen instead of lawyers. The existence of a free ombudsman service should make the role of CMCs or other intermediaries redundant in consumer claims. The NAO concluded that 'Although complaining directly to FOS is straightforward and free, many consumers who have been mis-sold financial products fail to

[142] Financial services mis-selling: regulation and redress, National Audit Office, 2016, HC Paper No.851.
[143] The cost of redress: the lessons to be learned from the PPI mis-selling scandal, Citizens Advice Bureau, March 2014.
[144] The main offices were the Claims Management Regulator, the Financial Conduct Authority, the Information Commissioner, and local authorities' Trading Standards Departments.
[145] Financial Services (Banking Reform) Act 2013, s 139.

receive full compensation, because of lack of awareness or reliance on claims management companies.'[146]

The FCA consulted in late 2015 on introducing a deadline for PPI complaints, with the stated rationale that 'An FCA-led communications campaign may empower consumers and encourage more of them to complain directly to the firms concerned, rather than using CMCs or other paid advocates, and therefore benefit in full from the redress paid out.'.[147] Proposals were made in 2016.[148] This took place against a background of widespread dissatisfaction over the activities of CMC, although the FCA was careful to take a balanced line.[149]

Ombudsman Services (OS) provides ombudsman schemes across a variety of regulated and non-regulated industries in the private sector. The two largest schemes provided are those in the energy and communications sectors.

Established in 2002, The Ombudsman Service Ltd, trading as Ombudsman Services, is a not for profit private limited company, and a fully independent organisation. While not created by statute, in most areas of its operation legislation requires that the services provided by OS are in place. OS was first approved by Ofcom, the UK communications regulator, as the Office of the Telecommunications Ombudsman, to provide redress under the terms of the Communications Act, 2003. In 2008, the Energy Ombudsman was approved by Ofgem to provide redress under the terms of the Consumers, Estate Agents and Redress Act, 2007. In 2015 OS launched a new service which accepts complaints across all consumer sectors, the Consumer Ombudsman. This service is approved by the Chartered Institute of Trading Standards under the Under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.

OS is impartial and independent of industry, consumers, regulators and government, although it works closely with all of these groups. OS's services are free to use for consumers, with the costs borne by business rather than the public purse.

---

[146] Financial services mis-selling: regulation and redress, National Audit Office, 2016, HC Paper No.851.
[147] CP 15/39, para 2.5.
[148] Rules and guidance on payment protection insurance complaints: feedback on CP15/39 and further consultation, CP16/20: FCA, August 2016. The FCA also sought views on making rules and guidance on handling PPI complaints in light of the Supreme Court judgment in *Plevin v Paragon Personal Finance Ltd*.
[149] Para 2.18 of CP 16/20 noted that: "We have always acknowledged that some consumers may reasonably prefer to pay for the assistance of a CMC in making their complaint. We also acknowledge that some CMCs have played an effective role in identifying and challenging some examples of poor complaint handling by firms, and that our own supervisory work has benefitted from the examples these CMCs have provided to us."

OS is developing procedures to deal with collective claims along the same lines as the FOS. However, OS currently utilises its data and insights to spot systemic issues and identify broader trends. Where OS determines that a large number of consumers have experienced a similar problem, rather than waiting to receive individual complaints and then dealing with these retrospectively, OS takes a more proactive approach. Firstly, it works with firms to clarify the decision making principles that the ombudsman would apply to such cases, and also by publishing information for consumers on what they should expect from their supplier in relation to that particular issue. This helps to ensure that cases are resolved appropriately by firms at the first tier, and can prevent a mass redress situation from developing at ombudsman-level. This facilitates a smoother complaint-journey for consumers and, as a result, can also help firms with reputation and customer retention.

OS's preventative approach also involves horizon scanning to proactively tackle future high impact events. By anticipating where large-scale issues may arise for consumers and by working with industry to prepare for them, potential consumer detriment can be addressed more quickly and robustly. This broader perspective allows OS to work with government and regulators to identify where there are emerging issues that can be addressed. This systemic approach therefore allows OS to inform policy and regulatory interventions and industry-led solutions to common problems.

Some case studies to illustrate the above.

Large energy network

Following a period of severe weather, OS identified that a large energy network operator was likely to receive a high volume of complaints regarding loss of supply. Around 70,000 customers had lost supply, with 30,000 claims made to the network.

It was the network's intention to reject claims for compensation and send a deadlock letter with the first response. They suggested that OS should not take on these cases because the decision to refuse compensation was in line with industry standards.

OS confirmed that, as consumers must have the right to ADR, it would not make any blanket rejection. However, OS committed to work with the network to help it resolve complaints fairly at the first tier, delivering fair resolution to all parties but with a swifter and simpler process for consumers. The following steps were taken:

- OS set out the decision making principles it would apply to cases on its website. The decision-making principles were not specific to the network operator but gave guidance on how OS would deal with complaints about loss of supply due to severe weather. That

way, consumers could better judge whether their energy network had handled their complaint reasonably.

- OS also set out the best practice for an energy network during loss of supply due to severe weather, which it published on its website, so consumers had a better understanding of the standards and practices they could expect.
- OS also published scenarios to help consumers see whether their circumstances might warrant a guaranteed standards payment.
- OS liaised with Ofgem regarding its intentions, to ensure that the regulator was satisfied with OS's approach.

The network's proposed approach could have meant significant cost to the business and its customers. OS's proactive work with this network led to early resolution of many complaints and provided clarity for consumers.

Preparing for high impact events- smart meter roll-out

The smart meter roll-out provides an example of where OS is focussing on horizon scanning and tackling future high impact events. While smart metering is likely to reduce the complaints that OS receives on matters such as billing and switching, the roll-out process itself will generate consumer complaints.

OS is working closely with industry to identify any problems that may emerge during the roll-out of smart meters. By doing so, it will enable suppliers to anticipate and avoid problems in the first place, and to develop clear protocols so that complaints on common issues (e.g. the installation process, or final bills from old meters) can be dealt with quickly and satisfactorily.

IV. Regulatory Redress

Regulatory redress is a generic term that describes the outcome of redress being paid, or made, as a result of the intervention of a public authority. The wide concept of 'intervention' by a public authority is used, since experience has shown that redress may in practice be achieved by less formal means than being 'ordered' by an authority or court.

In England & Wales, the power for public authorities that enforce market regulatory law or consumer protection law to make orders that traders should make redress to consumers, individually and collectively, has developed strongly since around 2012 and has now become the primary mechanism for delivering collective redress to consumers, clearly eclipsing private enforcement by or on behalf of consumers.[150] It has become typical practice in some sectors for traders and enforcers to agree redress arrangements as one element of a package of measures that settle infringement, behavioural actions and redress elements. It is now rare for such settlements to be fought in court: many are agreed between trader and regulator, even if the arrangement then has to be approved by the court in order to trigger its binding effect and enable independent oversight.

A. The CPC Regulation

In the EU, consumer protection law is not enforced by antitrust authorities: it is separately coordinated through the CPC Network, with an expanded role for the European Commission since Regulation 2017/2394.[151] As the Regulation applies to widespread infringements (possibly with an EU dimension) or intra-Union infringements, the instrument seems particularly fit for mass harm situations.[152] Indeed, while strongly dependent on volatile government budgets, public enforcement authorities often have more financial means to tackle serious and/or widespread infringements of EU consumer protection law. Moreover, public authorities might be able to impress traders more than ADR bodies or consumer organisations, resulting in more effective

[150] See R. Money-Kyrle, "Collective Enforcement of Consumer Rights in the United Kingdom" in M. Schmidt-Kessel, C. Strünck, and M. Kramme (eds), Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa, (Jena, Schriften zu Verbraucherrecht und Verbraucherwissenschaften, Band 5 Jenaer Wissenschaftliche Verlagsgesellschaft, 2015); C. Hodges, "Mass Collective Redress: Consumer ADR and Regulatory Techniques", European Review of Private Law 2015, 829; C. Hodges, Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics, Hart Publishing, 2015, ch 10 and C. Hodges and N. Creutzfeldt, "Transformations in Public and Private Enforcement" in H.-W. Micklitz and A. Wechsler (eds), The Transformation of Enforcement, Hart, 2016.
[151] J. Modrall, "The CPC Network – Consumer Protection, EU Style", (2021) Kluwer Competition Law Blog.
[152] Art. 2.1 CPC Regulation.

enforcement action. Indeed, it was specifically created to address the lack of effectiveness of enforcement in cross-border cases.[153] Importantly, the Regulation only applies to cross-border infringements.[154] However, as our society is more interconnected than ever through digitisation and globalisation, it is quite likely that infringements of consumer law will have an impact in multiple Member States.[155]

These 'natural strengths' of public authorities are supplemented with powers given to them under the CPC Regulation, substantially strengthened under Regulation 2017/2394.[156] The newest CPC Regulation has explicitly considered our digital society in the authorities' investigative and enforcement powers.[157] They are accorded a long list of investigative powers[158], including the power of access to any relevant documents, the power to require any relevant information, the power to carry out on-site inspections, and the power to purchase goods or services as test purchases. National enforcement authorities can thus for example request information from domain registrars and banks. Authorities are also awarded a complementing list of enforcement powers[159], including adopting interim measures, obtaining commitments from traders to cease infringement, receiving additional commitments for redress from traders, and receiving fines.

National enforcement authorities thus do not only have strong authority and investigative powers: they are also particularly equipped to ensure redress under the CPC Regulation. In some mass harm cases, the cessation of an infringement can constitute sufficient redress, at least for a part of the damaged consumers. In other cases, other additional remedies might be required to compensate the mass damage. In this case, authorities have the power to inform consumers that they suffered harm, or even to obtain commitments from traders to offer adequate remedies. The CPC Regulation also strengthens national enforcement authorities by installing a CPC Network. Within the Network, authorities can request information or even enforcement measures from

[153] Gerrit Betlem, 'Public and Private Transnational Enforcement of EU Consumer Law' (2007) 18 European Business Law Review.
[154] Cristina Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) 35 Journal of Consumer Policy 175.
[155] Claudia Massa, 'New CPC Regulation and ECN+ Directive: The Powers of National Authorities in the Fields of Consumer Protection and Antitrust' (2020) 4 Market and Competition Law Review 113.
[156] ibid.
[157] ibid.
[158] Art. 9.3 CPC Regulation.
[159] Art. 9.4 CPC Regulation.

each other, and request mutual assistance.[160] Hence, the Network ensures coordinated consumer enforcement.[161]

Lastly, next to strengthening enforcement individual powers, the CPC Regulation creates the possibility of cross-border enforcement: the Network, the national authorities together with the Commission, can also undertake coordinated actions when they suspect a widespread infringement.[162] Importantly, national enforcement authorities have to exert their powers proportionally and in accordance with national and EU law.[163]

The European Commission coordinates the cooperation between these authorities to ensure that consumer rights legislation is applied and enforced in a consistent manner across the Single Market. It can alert the CPC network and coordinate EU-wide enforcement action to tackle practices which harm a large majority of EU consumers.

Practice under the new CPC Regulation shows that the CPC Network has been used fairly often. Interestingly, the Network has never taken 'hard' enforcement measures against a trader: all enforcement action has ended with a commitment of the trader after 'informal dialogue'.[164] While the voluntary nature of ADR continues to pose a problem for the effectivity of the ADR framework, this route seems to work better for the CPC framework. This might be because national enforcement authorities pose more of a threat to traders: this can be explained both by their nature as by their quite extensive powers. Bargaining power is thus more equalized in the relationship between national enforcement authorities and traders, especially in the case of big multinationals.

However, it is remarkable that national enforcement authorities have always opted for a negotiated solution, while it is clear that this does not always work. A frequently cited example in this matter is the failure of the EU enforcement authorities in Dieselgate, often contrasted with the much more successful enforcement action of American authorities.[165] There thus seems to be a reluctance of national authorities to employ all their powers against traders.

---

[160] Art. 11-13 CPC Regulation.
[161] Laurens Van Kreij, 'Towards a Comprehensive Framework for Understanding EU Enforcement Regimes' (2019) 10 European Journal of Risk Regulation 439.
[162] ibid.
[163] Claudia Massa, 'New CPC Regulation and ECN+ Directive: The Powers of National Authorities in the Fields of Consumer Protection and Antitrust' (2020) 4 Market and Competition Law Review 113.
[164] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.
[165] ibid; J Modrall, 'The CPC Network – Consumer Protection, EU Style' (*Kluwer Competition Law Blog*, 2021).

To further strengthen public enforcement, it has been suggested that the Commission should take a more active role than merely coordinating enforcement actions by CPC authorities.[166] While the enforcement of EU law by national authorities is the presumption in the current legal framework[167], it has a few inherent weaknesses.[168] Giving the Commission their own enforcement powers could remedy some of these weaknesses.[169] Even if the Commission would not use these powers often, simply according the Commission these powers would increase the incentive for traders to engage in dialogue with national enforcement authorities due to the threat of enforcement action by the Commission.[170] This enforcement mechanism would then resemble enforcement of EU competition law more.

Moreover, Member States can indicate up to three authorities under the CPC framework. While these three authorities all have designated roles, this so-called internal fragmentation has been criticised: a central national node might be more effective.[171] It has also been questioned whether a totally separate enforcement of competition law and consumer law infringements is opportune: cases often concern both competition and consumer protection issues.[172]

Lastly, general issues at the level of the national enforcement authorities, specifically low budgets, the lack of priority for and the low engagement with the CPC Network hinder the effectiveness of the CPC Network.[173]

B. Typology

Hodges noted that the redress power may take a number of forms, and he identified a typology of them,[174] which shows that the activities of public authorities range from 'soft' influence (akin to resolution 'in the shadow of the law') to 'hard' enforcement (through the formal exercise of

[166] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.
[167] Gerrit Betlem, 'Public and Private Transnational Enforcement of EU Consumer Law' (2007) 18 European Business Law Review.
[168] Laurens Van Kreij, 'Towards a Comprehensive Framework for Understanding EU Enforcement Regimes' (2019) 10 European Journal of Risk Regulation 439.
[169] ibid.
[170] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.
[171] Cristina Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) 35 Journal of Consumer Policy 175.
[172] ibid.
[173] ibid..
[174] C. Hodges, "Mass Collective Redress: Consumer ADR and Regulatory Techniques", European Review of Private Law 2015, 841.

enforcement powers). The individual mechanisms might be grouped under the following functional headings, where the public authority acts on the parties, especially the defendant, through influence, approval or coercion.

In the context of mass harm situations, it has been suggested that public authorities' powers be extended to ensure better redress for consumers.[175] They could for example be given standing to pursue representative actions.[176]

Influence

The most obvious situation would be where the behaviour of a payer is influenced by the persuasive intervention of a public authority, perhaps backed by a coercive power. The authority might simply have influence by intervening as a neutral third party, akin to a conciliator or mediator, and persuade the payer to offer or make a payment.

The influence of the authority would, clearly, be increased where it has a number of powers that it could choose to use against the payer, such as to start an investigation or an enforcement action, culminating in imposing a fine or commencing a prosecution. The existence of such power or powers—including powers to coerce making redress—should clearly be influential, and form the background to a less formal or swifter resolution. Some enforcement authorities refer to having a 'toolbox' of enforcement powers that contains multiple weapons. Not only might it be advantageous to have the ability to select individual effective tools, but the combined effect of a range of effective tools should also be helpful.

In addition to the ability to rely on coercive powers, authorities may deploy effective 'nudge' or encouragement techniques. For example, they might be able to take into account, in deciding on imposing or asking a court for a sanction, the mitigating circumstances relating to the defendant's conduct, such as whether he had taken swift and effective action to make voluntary redress. Criminal courts typically take into account defendants' behaviour in mitigation or aggravation of

[175] C. Hodges, "Collective Redress: A Breakthrough or a Damp Sqibb?"(2014) 37 Journal of Consumer Policy 84.
[176] C. Hodges, "Collective Redress: The Need for New Technologies" (2019), 42 Journal of Consumer Policy 83.

offences in deciding on the size of sanctions.[177] This technique offers a clear financial incentive for infringers to implement redress speedily.

A similar technique might be the ability to interrupt an enforcement process after the investigation stage and interpose a 'time out' period before taking a decision on imposition of sanctions. This would incentivise defendants to agree (perhaps through ADR) voluntary redress payments, especially so as to seek a reduction in the level of a public penalty. This 'nudge' was suggested by Andreas Schwabb MEP in 2013 as Rapporteur of the European Parliament Rapporteur in relation to enforcement of competition law.[178] He suggested that after the statement of objections (and thus before a decision regarding the fine for infringement), an authority could define a time frame in which the infringers could voluntarily seek a settlement with their victims. If the authority considered that the compensation paid were accurate and lawful, it should subsequently take it into account when setting its fine. The Rapporteur noted that this solution 'seems to provide the fastest and most cost-efficient way' to compensate victims.

A further technique applies where the authority has power to accept an undertaking by a prospective defendant that it will make redress. Such undertakings have been used in connection with resolution of enforcement actions by agreement rather than full—and hence lengthy—formal enforcement proceedings. Examples are Deferred Prosecution Agreements (DPAs), introduced in UK in 2013,[179] supported by a Code of Practice.[180] This technique incentivises speedy and comprehensive resolution of behavioural and redress aspects of the enforcement activity[181]. It might be used where the principle of redress is agreed by a defendant, but the detailed

[177] In competition enforcement, the European Commission and some national authorities have either reduced or even waived fines after firms have paid compensation, see A. Ezrachi and M. Ioannidou, "Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation", Journal of European Competition Law Practice 2012, 1.

[178] Draft Report of the Committee on Economic and monetary Affairs on the proposal for a directive of the European parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union, COM(2013)0404-C7-0170/2013 – 2013/0185(COD), 3 October 2013.

[179] Crime and Courts Act 2013, s 45 and Sch 17. See Deferred Prosecution Agreements Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations (Cm 8463: Ministry of Justice, October 2012), available at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf.

[180] Issued under Crime and Courts Act 2013, Sch 17, para 6. See Crime and Courts Act 2013: Deferred Prosecution Agreement Code of Practice. Consultation on draft Code (SFO, 27 June 2013).

[181] DPAs have increased been used in USA since 2004. See J.M. Anderson and I. Waggoner, The Changing Role of Criminal Law in Controlling Corporate Behaviour, RAND Corporation, 2014 and J. Arlen and M. Kahan, "Corporate Governance Regulation through Non-Prosecution", New York University Public Law and Legal Theory Working Papers 2016, 551.

distribution of redress to all individual recipients might take time, and can be agreed to occur under an approved mechanism of scheme.

The European Commission adopted the approach in enforcement of competition law in 2013 by proposing to accept commitments from a trader that include introduction of a new pricing system and paying some customers compensation.[182]

Approval

There can be situations in which a public authority might itself approve redress arrangements, or might agree to place or recommend a redress arrangements before a court for its approval. This mechanism may incentivise one or more of the parties to propose a redress arrangement.[183]

It may be thought that this mechanism would be little used unless it occurs against the backdrop of a power to compel a defendant to create or propose a redress arrangement. However, there may be a national culture of settlement, as has been identified in the Netherlands, or there may be several reasons why it would be advantageous for a defendant to propose a settlement—such as speed, closure, mitigation of damage to reputation of the risk of sanctions, or just to do the right thing. The cases under the Dutch Mass Claims Settlement Act show that the technique can be useful and effective in some situations. Some of those Dutch cases approved settlement agreements reached spontaneously by the parties, and some cases related to the need to resolve all cases that occurred outside the USA, after the intra-USA cases had been settled there.[184]

There are indications that the mere existence of the power can act as an incentive for parties to short-circuit litigation and move straight to settlement discussions. This power can obviously be

[182] Press release: Antitrust: Commission market tests commitments proposed by Deutsche Bahn concerning pricing system for traction current in Germany (European Commission, 15 August 2013), IP/13/780. The company proposed to pay railway companies that it does not own a one-time retroactive refund of 4% of their latest annual traction current invoice, and to provide the Commission with the necessary data to assess if the price levels charged under the new pricing system would lead to a margin squeeze.

[183] In UK consultation discussions, The Office of Fair Trading favoured this option, as it operates on a 'high level basis' and avoided involvement in any aspect of quantifying individual loss, and in overseeing the satisfactory implementation of any payment scheme, and that the authority should only approve proposals put forward voluntarily by firms in general terms: Response by the OFT to Consultation on Private Actions in Competition Law, Office of Fair Trading, 2012, para. 4.4.

[184] F. Weber and W.H. van Boom, "Dutch Treat: The Dutch Collective Settlement of Mass Damage Act (WCAM 2005)", *Contratto e Impresa/Europa* 2011, 69; B. Krans, "The Dutch Class Action (Financial Settlement) Act in an international context: The *Shell* case and the *Converium* case" CJQ 2012, 141 and X.E. Kramer, "Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)" in C. Hodges and A. Stadler (eds), Resolving Mass Disputes. ADR and Settlement of Mass Claims, Edward Elgar, 2013.

used together with other coercive powers. The advantage of official approval is to afford independent scrutiny that the terms are fair, especially if the agreement thereby becomes binding on all class members.

Coercion

A power that orders redress might take one of a number of forms.

One power might be for an authority to propose a redress scheme. Such a scheme might subsequently be approved by the authority and/or by the court, or by some independent (e.g. ADR) body.

There may be a power to order a defendant to negotiate, or some other regulatory pressure that incentivizes a business to propose to make redress.[185] An example of this arises under the 2017 revision of the CPC Regulation, where competent authorities are to have power to seek or obtain remedial commitments from the trader for the benefit of affected consumers.

There may be a power for an authority to bring court proceedings for an order that redress be paid to those harmed. One example of this is the ability of the Consumer Ombudsman of Denmark to bring a class action in the Market Court on behalf of affected consumers, on an 'opt out' basis.

The most obvious powers are where the authority may order a person to pay redress, or order a redress scheme to apply. The former power is similar to where a criminal court has power to order a defendant who is convicted to pay redress, such as under a compensation order. A public regulatory authority might have a similar power. However, the simple redress order is more likely to be applicable in circumstances where there is certainty over the identity of the recipient of the redress, the number of recipients is small, and the amount payable to each recipient is known or easily ascertainable. In more complex circumstances, involving a large number of potential recipients and/or uncertainty over who is entitled to what amount of money, an order to create a redress scheme offers a solution. The parameters of the redress scheme might be fixed in

[185] In Italy Decision no. 173/07/CONS of the Public Authority for Telecommunication required that there must be a mandatory attempt at settlement before local administrative bodies, or before the Chambers of Commerce, or through a conciliation body on which representatives of telecommunication companies and the consumers associations sit. If a settlement is not reached, any party could refer the case to be decided by the Public Authority for Telecommunication, which operates on an arbitration basis. Separate procedures for settlement of telecom disputes exist for mobile phones, which can be activated also through the internet, and for normal phones. The decision was overturned by the Constitutional Court but reinstated in 2013.

advance (by agreement or order) or certain details might be left for later resolution (for example by the administrator of the scheme).

As discussed below, many UK regulatory authorities have revised enforcement policies to require them to achieve redress.[186] The UK financial services regulator has power to order a consumer redress scheme or its equivalent on several or an individual provider.[187] An example of this power was where the Office of Fair Trading agreed that the 50 infringing independent schools that had colluded on prices should not pay a fine (since that would close them all down, and by funded by future innocent parents) but instead make *ex gratia* payments totaling £3 million to create an educational trust for the pupils whose fees had been fixed.[188] This approach has the obvious limitation that all the details need to be known, so does not on its own have the flexibility to cope with situations where the exact quantification of loss due to each identifiable recipient is unknown. However, where it applies, it should be highly efficient and speedy.

It will be seen that there are various options as to how a power and approach towards redress might be designed and used. None of these options need stand alone. Indeed, the effectiveness of the technique is enhanced where several of the powers listed above are combined—whether with each other, or with other powers in the enforcement toolbox, or other options such as ADR techniques, as discussed below. As Hodges has said: 'functionally, there are three main elements. First, a power to order redress, or to seek a court order for redress. Second, a power to approve the fairness of a proposal to make redress. Third, a power to reduce a penalty where redress is paid. Individually and together these elements incentivize but also facilitate the outcome of redress.'[189]

C. Cooperation between public authorities and other entities

Public authorities and consumer organisations

Cooperation between the CPC Network and consumer organisations has strengthened over the past years, both on a formal and informal level. In the legal framework, of note is the possibility

[186] Regulatory Enforcement and Sanctions Act 2007, Part 3.
[187] Financial Services and Markets Act 2000, s. 404 and 404 F(7).
[188] Exchange of Information on Future Fees by Certain Independent, Fee-Paying Schools (OFT, 20065). See Evaluation of an OFT intervention. Independent fee-paying schools, Office of Fair Trading, May 2012, OFT1416; and A. Ezrachi and M. Ioannidou, "Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation", Journal of European Competition Law Practice 2012, 1.
[189] C. Hodges, "Mass Collective Redress: Consumer ADR and Regulatory Techniques", European Review of Private Law 2015, 829.

for designated external actors, i.e. the ECC Network or consumer organisations on an individual basis, to 'alert' the CPC Network and the European Commission.[190] On a more informal level, according to the ECC Network, the CPC Network and the ECC Network work closely together, and hold regular meetings.[191] According to the ECC, they are an important provider of information to the CPC Network on complaints, which helps the public enforcement authorities to define their priorities. BEUC has suggested earlier that the cooperation between national enforcement authorities and consumer organisations should be strengthened further.[192] Suggestions include further inducing dialogue between enforcement authorities and consumer organisations at the national and European levels and keeping consumer organisations in the loop during the process of the coordinated action.

Public authorities and ADR entities

Hodges has suggested that ADR and regulatory redress should be combined, and work best when used as a combination.[193] More specifically, through using both regulatory redress and ADR, consumers are compensated and behavior change of the trader is achieved.[194] This is why ADR entities and public authorities, both on the national and European level, should work closer together.[195]

In particular, Ombudsmen seem particularly suitable for cooperation with national authorities.[196] These ADR entities are equipped to address a high number of cases and can thus collect a large amount of data on disputes, often within one specific sector.[197] Information flows between ADR and public authorities are also facilitated if there is only one general ADR entity, instead of a multiplicity of bodies.

Cooperation between ADR entities and public authorities is also vital for the maximization of information flows on mass harm cases. In particular, a constant feedback loop between ADR

[190] Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' [2023] European Journal of Risk Regulation 1.
[191] https://www.eccnet.eu/partnerships/enforcement-authorities.
[192] https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf
[193] C. Hodges, "Collective Redress: The Need for New Technologies" (2019), 42 Journal of Consumer Policy 68.
[194] C. Hodges, "Collective Redress: A Breakthrough or a Damp Sqibb?"(2014) 37 Journal of Consumer Policy 84.
[195] H. De Coninck, 'Buitengerechtelijke regeling van consumentengeschillen' (2014) 105 DCCR 23.
[196] C. Hodges, "Mass Collective Redress: Consumer ADR and Regulatory Techniques" (2015) 23 European Review of Private Law 829.
[197] A. Biard and C. Hodges, « Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir » (2019) 2 Contrats Concurrence Consommation 7.

entities that have a view on the incoming (mass damage) cases and public authorities ensures that frequent or even structural problems are dealt with correctly.[198] Frequent face-to-face meetings between (residual) ADR entities and public authorities can facilitate this feedback loop.[199]

D. Examples

1. Belgium

There are multiple public enforcers or regulators in Belgium, but generally their powers regarding restitution or civil sanctions are limited.[200] The focus is on deterrence rather than restitution.[201] Nevertheless, victims can claim compensation following a public enforcement decision (*follow-up*), arguing that the tort (or at least the fault element) has been proven by the findings of a violation.

However, some remarks have to be made regarding two important regulators and their link with redress, namely the Financial Services and Markets Authority (FSMA)[202] and the Commission for the Regulation of Electricity and Gas (CREG).[203] A first remark relates to the general finding that restitution and civil sanctions are not the main focus of public regulators or enforcers.[204] One could take the example of the FSMA. When a supervised trader does not comply with the regulations in place, the FSMA has a wide array of instruments to deal with this non-compliance and to sanction the trader.[205] The (administrative) sanctioning has to be situated in the relationship between the

[198] S. Voet, 'De toekomst van CDR in België' in S. Voet (ed), CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen (die Keure 2018), 235.
[199] Economische Inspectie FOD Economie, 'Federale Overheidsdienst Economie' in S. Voet (ed.), CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen (die Keure 2018), 191.
[200] S. Voet, "Public enforcement and A(O)DR as mechanisms for resolving mass problems: a Belgian perspective" in C. Hodges and A. Stadler (eds), Resolving Mass Disputes: ADR and Settlement of Mass Claims, Edward Elgar, 2013, 274 and 279.
[201] S. Voet, "Collectieve afwikkeling van consumenten-massaschade. Pleidooi voor een geïntegreerde aanpak", DCCR 2013, 210.
[202] See http://www.fsma.be/. The FSMA is an autonomous supervising entity responsible (together with the National Bank of Belgium) for the regulatory supervision of multiple player in the field of Belgian financial business.
[203] See http://www.creg.be/nl/index.html. The CREG is one of the four regulators in the Belgian energy sector. It is the federal regulator which (among other tasks) looks after the essential consumer interests, although consumers are referred to the Energy Ombudsman for complaints.
[204] S. Voet, "Public enforcement and A(O)DR as mechanisms for resolving mass problems: a Belgian perspective" in C. Hodges and A. Stadler (eds), Resolving Mass Disputes: ADR and Settlement of Mass Claims, Edward Elgar, 2013, 274 and 279.
[205] For instance, require the publishing of a correction, inspections, publishing warnings, suspend trading, striking an intermediary from the register, revoking authorization, imposing fines or penalties.

FSMA and the supervised trader, not vis-à-vis the financial consumer.[206] Although a consumer's complaint might trigger an investigation and administrative action, a harmed financial consumer will need to have recourse to other instruments outside the regulatory framework.[207]

One should nevertheless pay attention to the possibility of including the consumer indirectly in a settlement between the FSMA and the non-complying trader. The fact that the consumer is not a party to that settlement, does not imply that the consumer cannot be kept in mind when drafting the terms of the settlement. A settlement concerning interest rate derivatives to cover variable rate loans to SMEs between the FSMA and a number of financial institutions provides an excellent example.[208] After inspection, the FSMA concluded that not all rules regarding the duty of care and the supply of information were observed by the financial institutions concerned so that the FSMA pressed for several interventions. Some only regarded the institutions, such as their duty to make sure that their employees are qualified to assume the responsibility imposed onto them. Yet, the consumer was not forgotten. The financial institutions concerned agreed to pay each client a certain amount of money by way of commercial compensation. That way, compensation is provided to the consumers although the settlement was only reached between the FSMA and a number of financial institutions.

In addition to including consumers' redress in settlements, the statutory framework can also provide some assistance to financial consumers. In that regard, article 30*ter* of the Act of 2 August 2002[209] comes to mind. It contains a rebuttable presumption that in case a financial consumer is harmed by a transaction and a trader listed in the next paragraph of the provision has committed a certain breach as a result of that transaction, the transaction at hand is presumed to be the result of the breach. This means that the presumption entails that the investor would not have made the same decision without the breach.[210]

A second remark concerns the CREG. The statutory framework provides for the creation of a Dispute Resolution Chamber which would resolve disputes between the network administrator

---

[206] This also seems true for the Directorate-General Enforcement and Mediation (part of the Federal Public Service Economy, SMEs, Self-Employed and Energy) which can arrange the transactional settlement of violations for some legislations and in the framework of some legislations has the power to offer the offender the opportunity to pay an amount of money to halt further prosecution, but this doesn't directly concern the relationship with the harmed consumer..

[207] R. Houben and D. Vanderstraeten, "De bescherming van de financiële consument door de FSMA", *DCCR* 2016, 60.

[208] See http://www.fsma.be/en/in-the-picture.aspx, 'Interest rate derivatives to cover variable rate loans to SMEs' (only available in Dutch and French).

[209] Law of 2 August 2002 on the supervision of the financial sector and on financial services, *Official Gazette* 4 September 2002.

[210] T. Van Dyck and L. Denturck, "De burgerlijke sanctie van artikel 30*ter* van Twin Peaks II/ De tanden van een papieren tijger?", Bank Fin. R. 2013, 275, no 6.

and the network users regarding the duties of the network administrator, the distribution network administrators and the administrators of closed industrial networks within the context of the Law on the organization of the electricity market (and its implementing orders), except for disputes regarding contractual rights and obligations.[211] The (administrative) decision of the Dispute Resolution Chamber is binding.[212] The *law in the books* certainly leaves room for offering redress to consumers, but the *law in practice* has not yet developed since the Dispute Resolution Chamber is currently unable to operate due to a lack of appointment of its members.

2. Denmark

The four Nordic states – Denmark, Finland, Norway and Sweden[213] – each have a public official responsible for enforcement of consumer law called a Consumer Ombudsman. It is important to realise that this use of the term 'Ombudsman' differs from its use in non-Nordic states, since the functions of Ombudsmen differ, as appears below. In the Nordic model, the Consumer Ombudsman is the principal national enforcement officer of consumer law, with power to initiate prosecutions for breaches of the national Marketing Practices Act, and usually brings cases in the Market Court.[214] Each of these states has introduced a class action mechanism, but the Danish Law differs from that of the other states. In Denmark, Norway and Sweden, a member of the class may commence an application to the court for a class to be ordered, but in Denmark such a class can only be constituted on an opt-in basis. Unlike the other Nordic states, Denmark permits an application to be made for an opt-out class action, but restricts the power to make such an application solely to the Consumer Ombudsman.

In Finland, the application may only be made by the Consumer Ombudsman, and not be a class member or anyone else.[215] The reason for this restriction was 'to diminish suspicions concerning the possible misuse of the new act' and 'to ensure the actions could not be taken for the purpose of blackmail or damage'.[216] The fundamental point is that the intermediary—here, the Consumer Ombudsman—has to be trusted to exercise the redress power independently in the public interest. The Danish Consumer Ombudsman is does not have a conflict of interest by the potential to benefit from the action.

---

[211] Article 29 Law of 29 April 1999 on the organization of the electricity market.
[212] Article 29, §3 *in fine* Law of 29 April 1999 on the organization of the electricity market.
[213] A fifth Nordic state is Iceland, which does not have a Consumer Ombudsman.
[214] Danish Class Actions Act 2007, Act No 181 of 28 February 2007; Finnish Consumer Protection Act 34/1978.
[215] Act of Class Actions 444/2007.
[216] HE 154/2006, p 16.

The Consumer Ombudsman of Denmark is constantly active in taking preventative or enforcement action, such as issuing opinions, negotiating with traders and trade associations, or instituting prosecutions. The Consumer Ombudsman has strong powers, but is subject to a 'principle of negotiation', which is a typically Nordic approach: he or she must 'seek by negotiation to influence traders to act in accordance with good market practices'.[217] The class action power may only be used by the Consumer Ombudsman where two conditions apply, both of which were included in the legislation to emphasise the exceptional nature of this mechanism. First, the case must concern claims that are individually so small that it is evident that they cannot generally be expected to be brought through individual actions. Such claims are stated normally to involve under DKK 2,000. Secondly, an opt-in class action must be deemed to be an inappropriate method of examining the claims. This will be the case if the class includes a very large number of persons so that the practical administration of opt-in notices will require a disproportionate amount of resource. The normal rules on 'loser pays costs' apply to a class action.

However, since the Consumer Ombudsman was awarded the power to initiate a class action, no such applications have been brought, although this has been threatened regularly. The redress power is regarded as just one tool in the enforcement armory of the Consumer Ombudsman, to be deployed alongside other tools on cessation of infringements, undertakings as to future conduct and so on. The Consumer Ombudsman has resolved a series of cases, of which leading examples are given below.

A number of case studies illustrate the above.

Investment Bonds

DiBa Bank sold portfolio management agreements concerning investments in ScandiNotes and Kalvebod bonds to customers. Nine holders of the bonds made claims against the bank through the ADR body, the Danish Complaint Board of Banking Services (Pengeinstitutankenævnet), eight of which were upheld. However, unusually, the bank refused to accept the decisions of the Complaint Board. The Financial Services Authority criticised the bank's hedge fund for its written marketing material and the bank itself for the financial advice it had given, stating that both were against the requirements of good financial practices. The Consumer Ombudsman then instituted proceedings at Næstved District Court, based on his power to take action, including a class action, against breaches of honest principles and good practice, under the Financial Business Act s 348(1).

[217] Marketing Practices Act, s23.

Following grant of free legal aid, the unit trust decided to bring a class action against the bank and the hedge fund.

In June 2013 the Consumer Ombudsman concluded a Settlement Agreement with DiBa Bank A/S that included the following terms:

1. The bank would pay compensation to all present and former customers who had a low-risk profile according to the relevant portfolio management agreements (low-risk and/or risk score 1 to 4 referred to as either 'low risk' or 'moderately low risk' in the portfolio management agreements).

2. Customers classified as medium-risk customers who can be reclassified into low-risk customers according to the current practice of the Danish Complaint Board of Banking Services or, subject to agreement by the Parties, who are in an equal position. The Agreement did not include any other medium-risk, moderately high-risk or high-risk customers or customers with risk scores between 5 and 10.

3. The compensation would be 80% of the customers' losses on ScandiNotes and Kalvebod notes. The loss was computed as a whole for all ScandiNotes and Kalvebod notes as the difference between the purchase price, exclusive of transaction costs, and the market value on 21 June 2013, exclusive of transaction costs. Any notes sold, redeemed or written down were included in the computation as the difference between the purchase price and the value on sale, redemption or write-down. To perform the Settlement Agreement, DiBa Bank bought the notes from those existing customers who accept the settlement, and paid the market value at 21 June 2013 with the addition of the above amount of compensation. No deduction will be made for interest paid, and the amount of compensation will not accrue interest from the date of the purchase of the notes.

4. For customers who had switched to another bank and therefore no longer held the notes in a custody account with DiBa Bank or had any portfolio management agreement with the Bank, the loss on all ScandiNotes and Kalvebod notes as a whole was computed as the difference between the purchase price, exclusive of costs, and the market value on the date of cessation of the customer relationship with DiBa Bank.

5. Schedule 1 of the Agreement provided four computation examples for existing customers who held notes, existing customers who had sold their notes, former customers who had sold their notes and former customers who still held notes.

6. The offer of compensation was in full and final settlement of any claim by the customer against DiBa Bank concerning investments in ScandiNotes and Kalvebod notes made under the portfolio management agreement.

7. Individual customers, including customers who have authorised others to conduct their legal action, were free to decide whether to accept the offer of compensation made by DiBa Bank.

8. DiBa Bank made the offer of compensation by means of a letter to the customers appended as Schedule 2. The offer was binding on DiBa Bank for three months from the date and publication of the Settlement Agreement. DiBa Bank could withdraw the offer during the three months if the offer was not accepted by a substantial number of the customers to whom it is made.

9. The legal actions before Næstved District Court were withdrawn.

Share sales in Roskilde Bank A/S

Roskilde Bank A/S engaged in aggressive sales campaigns to sell its own shares between January 2006 and August 2008. It was warned repeatedly by the Danish Financial Supervisory Authority (*Finanstilsynet*) that its business conduct was more risky than that of comparable banks in a number of central areas, but this was not made public.

A number of customers complained to the Consumer Ombudsman, who launched an investigation in August 2010. He was afforded access to all relevant documents on request. He found that two share campaigns, in August-September 2006 and March-April 2007, had involved letters sent to a very large number of customers that did not comply with the rules on good practice in s43 of the Financial Business Act, by emphasising the advantages but not providing a balanced description of the advantages and disadvantages. It was agreed in December 2013 between the Consumer Ombudsman and Finansiel Stabilitet A/S, the publicly-owned banking compensation scheme, that the latter would offer private customers who had bought shares on the basis of the invitation in the campaign letters would be offered compensation of 60% of their net loss. It was taken into account that capital losses were suffered on bank shares generally during the relevant period. The settlement agreement set out various criteria under which particular classes of purchasers would qualify. They were given 12 weeks to accept the offer from the date of the offer letter, after which they would be deemed to have refused the offer.

Jyske Bank

Investors started individual actions and an opt-in class action over the purchase of and investment in a product marketed by Jyske Bank called the Jyske Invest Hedge Markedsneutral-Obligationer ('JIHMO'). The Consumer Ombudsman also started enforcement proceedings in the Western High Court. Meetings were held in May-August 2012 between the Consumer Ombudsman, the Investor Association and Jyske Bank that resulted in agreement on three Conditional Offers, each involving different classes of investors.

The Consumer Ombudsman and an attorney acting for investors undertook to send out the Conditional Offers 2 and 1, to collect acceptances, and send them to Jyske Bank before or immediately following the expiry of the time limits for acceptance of the two conditional offers.

The Investor Association undertook to suspend the enrolment of new members as from the date of publication, and to send out the Conditional Offer 1 and convene a general meeting for the purpose of achieving a final and irrevocable dissolution of the Investor Association, which will result in the abatement of the class action (B-284-11) at the Western High Court (*Vestre Landsret*). The parties to the class action agree that an attempt to reschedule the appeal proceedings (H-65/12) at the Supreme Court (*Højesteret*) must be made immediately following the conclusion of this Agreement, but that the appeal will not be withdrawn until the abatement of the class action at the High Court (B-284-11) is final and any time limit for appeal has expired without the initiation of any appeal proceedings. Additionally, the Association undertook, either prior to or simultaneously with the dissolution of the Investor Association, to authorise the attorney to be in charge of all kinds of practical and administrative initiatives related to the implementation of the Conditional Offer 1 and the abatement of the class action.

The Consumer Ombudsman undertook to withdraw legal actions B-1083-11 and B-1082-11 from the Western High Court on the condition that each party will bear its own costs when and if the eight plaintiffs in action B-1083-11 accept Conditional Offer 2 and Jyske Bank has declared that all the conditions of Conditional Offer 2 have been fulfilled.

Distribution of telephone directories

Many customers were unlawfully charged for so-called 'extra entries' in a telephone directory. When challenged by the Consumer Ombudsman, the company was not able to substantiate that a contractual relationship did in fact exist in all the cases brought forward. The settlement, made in 2009, eventually comprised all consumers who had been unlawfully charged for the extra entries. As part of the settlement the company committed itself to send out an individual letter to the customers affected, thereby also enabling customers who had not lodged a complaint to come forward and claim the money.

3. Italy

The decisions of regulatory authorities may affect or involve the rights of a high number of people, who may have been damaged by another entity's unlawful conduct. Some of these are noted below, particularly those acting in sectors where mass protection may be an issue. In general terms, the decision of these authorities may consist of a relevant basis, in terms of evidence, for the affected consumers to bring an action in Court and obtain compensation of the damages suffered.

The Autorità Garante della Concorrenza e del mercato (AGCM) is an independent body established by Law no. 287 of 1990. The Authority enforces rules against anticompetitive agreements among undertakings, abuses of dominant position, concentrations (e.g. mergers and acquisitions, joint ventures) as well as misleading advertising, which may create or strengthen dominant positions detrimental to competition. Its decisions are directed only towards the 'damaging' party, and they do not give rise to an automatic 'right' to compensation for damages to all citizens having been affected by the unlawful conducts ascertained by the Authority. However, any citizen (or group of citizens) who considers himself affected by an unlawful conduct, ascertained by a decision of the Authority, may claim compensation for damage before a civil court (but he/she will need to prove both the damages suffered and the causal link between said damages and conduct).

AGCM is granted quite a number of enforcement powers in the interest of consumers. The AGCM can protect consumers against unfair commercial practices used by traders, as well as against unfair contract terms; it has also enforcement powers aimed at shielding micro-enterprises from unfair commercial practices used by traders, and traders, too, in case of misleading and illegal comparative business-to-business advertising by competitors. The powers of enforcement granted to AGCM as regards consumer protection have been extended by a statutory instrument (no. 21 of 2014) issued as implementation of Directive 2011/83/EU on consumer contract and consumer rights.

The Authority carries out its enquiries against companies on the basis of (i) its own research, (ii) complaints received by private citizens/companies or (iii) self-denunciation by companies.

The AGCM can begin an investigation, acting *ex officio* or pursuant to a complaint lodged by an interested subject or entity (individual consumers or consumer associations, but also public entities). The investigation follows the procedure laid down by specific regulations adopted by the AGCM itself, a procedure aimed at safeguarding the right to be heard and a full scrutiny of the evidence produced. During the investigation, interim measures can be issued with a view to halting temporarily unfair commercial practices, insofar as reasons of urgency make that

advisable. If the outcome of the investigation is against the trader, the AGCM shall issue a decision by which the trader is ordered to refrain from the unfair commercial practices, and to pay a fine whose amount may range from €5,000 to €5,000,000, depending on the seriousness and the duration of the infringement. Furthermore, the trader can be ordered to give public notice of the decision, for instance having it published in the most appropriate media. Additional penalties can be imposed in case of non-compliance with the decision (or interim measures) issued by AGCM. It is worth mentioning that the investigation conducted by AGCM can be stopped if the trader commits himself to putting an end to his illicit practices, provided that this commitment is deemed to be serious enough and is made known to the public.

The Italian Regulatory Authority for Electricity Gas and Water (AEEGSI) is the independent regulatory body of the energy markets and the integrated water services. It was established by Law no. 481 of 14 November 1995, with the purpose of protecting the interests of users and consumers, promoting competition and ensuring efficient, cost-effective and profitable nationwide services with satisfactory quality levels in the electricity and gas sectors.

Amongst its services, it monitors the conditions under which the services are provided, with powers to demand documentation and data, carry out inspections, obtain access to plants and apply sanctions, and to determine those cases in which operators should be required to provide refunds to users and consumers.

Upon its activities, it may sanction companies, but also condemn them to refund their clients amounts they have unlawfully charged. In these latter cases, the clients should receive automatically said refund by those companies (which are obliged to present proof of the refunds to the authority, under penalty of other sanctions).

In such cases, all clients falling within the field of application of the decision of the Authority will benefit from a refund, without the need to file a judicial claim.

Those decisions of the Authority may be encouraged by a single consumer, groups of consumers, or through consumers' associations, who may file a complaint to the Authority (such a complaint must identify an irregular conduct or a violation of the law or any other unclear behaviour; the Authority carries out enquiries, requests clarifications etc. and, should it not be satisfied or should it assess a violation, it may sanction the company or order it to refund amounts).

The AEEGSI uses two instruments of collective redresses in the electricity and gas services that it regulates. In addition, AEEGSI operates an effective ADR system for electricity and gas customers (and TLC as well) targeted at individual disputes resolution

First, both suppliers and DSOs are required to pay automatic compensation to customers when quality standards set by the regulator are broken. Second, where AEEGSI has opened regulatory proceedings aimed at the imposition of sanctions against a supplier or DSO, the company may, within 30 days, propose 'commitments' (economic compensation or other) in favour of those customers who were affected from regulation violation, so as to avoid or reduce sanctions from the AEEGSI for violation of the rules.[218] The approval of commitments by the Authority ends the sanctions procedure without proof of the infringement and without the imposition of the sanction. In order for commitments submitted to be eligible, the company has to provide evidence of the end of the misconduct, and must also demonstrate the suitability of the proposed commitments to restore the interest prior to the infringement or to eliminate, at least partially, any direct and immediate consequences of the violation. These features, therefore, ensure that the commitments both protect the public interest in compliance with the regulation and provide for the compensation of private interests affected by the misbehaviour. The fact that the commitments should be able to remove the injurious effects of the offence, namely to restore the interests before the violation, makes this institution a tool capable of satisfying compensatory damages suffered by third parties, in most cases consumers, because of the violation.

Two Examples of Redress Commitments Accepted by AEEGSI.

By deliberation 92/2014/S/gas AEEGSI approved the commitments offered by ENI S.p.A. (ENI) in proceeding initiated for delay billing against about 86,000 customers, both the gas and the electricity sector. The measures contained in the commitments provided:

1. compensation of €25 to all customers involved in disruptions for whom, on December 31th 2013, there was a delay billing; another compensation of €10 to customers for whom, on December 31th 2014, there was a further delay billing;
2. for all cases of delay billing, automatic extension and interest free instalments (in a number of monthly payments equal to the not issued invoices) on the owed sum, in order to reduce the inconvenience caused to customers;
3. ENI's various initiatives aimed to stimulating the customers self-reading of consumptions;
4. ENI's adherence to the 'Energy Customers Conciliation Service' instituted by the Authority with deliberation 260/2012/E/com.

[218] The commitments procedure arises under article 45, paragraph 3 of Legislative Decree 93/2011. The proceedings for evaluation of commitments was defined by AEEGSI in decision 14 June 2012, 243/2012/E/com (arts16 and subsequent of Allegato A to that decision).

By deliberation 529/2016/S/eel AEEGSI approved the commitments offered by Acea Energia S.p.A. (Acea Energia) in proceeding initiated for no or late provision of automatic compensation for failure to comply with specific commercial quality standards against about 8,700 customers. The measures contained in the commitments provide:

1. compensation of €15 to customers that in second semester 2012 and year 2013, were compensated over a period of 8 months expected by TIQV;
2. compensation of €15 to customers that starting from year 2014 have gained the right to compensation provided by art. 18 of TIQV until the date of presentation of the commitments and have not received it within 8 months expected by art. 20 of TIQV.

Since 2013 the new Insurance Supervisory Authority (IVASS) assumed all the powers, functions and competencies of the former authority ISVAP. Established under Law no. 135 of 2012 ratifying, with amendments, Law Decree no. 95 of 2012, IVASS is charged with ensuring the stability of the Italian insurance market and the protection of consumers who have suffered damages from the unlawful conduct of insurance companies, agents or brokers.

Complaints can be filed by the policyholder, the insured party, the beneficiary of an insurance contract or the injured party and by consumer organizations with a legitimate interest in protecting consumers.

If IVASS finds out that there has been a breach of the rules in force by the supervised entities, it starts a sanctioning procedure. However, if a violation is identified, the Authority decision does not give all individuals who deem to have suffered damages by said unlawful conduct the right to be compensated: a judicial claim must be filed in order to have that right to compensation recognized.

The Italian Data Protection Authority is an independent authority set up to protect fundamental rights and freedoms in connection with the processing of personal data, and to ensure respect for individuals' dignity. It was set up in 1997, when the former Data Protection Act came into force.

Amongst its several functions, it supervises compliance with the provisions protecting privacy and private life; handling claims, reports and complaints lodged by citizens; it may also ban or block processing operations that are liable to cause serious harm to individuals, check, also on citizens' behalf, into the processing operations performed by police and intelligence services and carry out on-the-spot inspections to also access databases directly.

Once a complaint is received, the Authority carries out its enquiries. A mechanism of opting-in/opting out is not set out, but it may happen that the Authority receives more complaints for the same unlawful behaviour or that a complaint is filed by a group of people allegedly damaged by an unlawful conduct or by a consumers' association. Should the violation be ascertained, the Authority may prevent unlawful data processing and impose sanctions to the damaging party, but it is not endowed with the powers to condemn the same party to refund amounts/to compensate for damages those citizens having been affected by said illicit conduct.

There are no specific rules on 'funding' or 'financing' these procedures, since the damaged party is 'involved' solely at the first stage, when the complaint is filed (this filing does not involve any costs). The damaged party has no more access to the files of the sanctioning procedure, which is confidential (only the person/company under investigation may have access to them). However, all final decisions are made public on the Authority's website.

Every year the Italian Competition Authority issues several decisions against companies for unfair competition, however without directly granting the consumers any right to compensation.

A significant case regards Dieselgate. On 4 August 2016 the Authority issued a decision against Volkswagen for unfair competition. Said decision was grounded on the ascertainment (also due to a self-denunciation of Volkswagen) that around 11 million vehicles sold worldwide were equipped with software, the "defeat device" in relation to the production of pollution of the same vehicles. Because of this, the Authority condemned the company to a sanction of Euro 5 million. However, said decision has not a direct impact on consumers: each owner of the vehicles equipped with the software could claim compensation form damages within a civil Court, supporting his/her claim with what has already been ascertained by the Authority.

According to the Italian Consolidated Banking Law, the Bank of Italy (*Banca d'Italia*) oversees the disclosure and the fairness in the relations among banks/other financial intermediaries and their respective customers. Article 128-ter of the Italian Consolidated Banking Law, which entered into force in 2010, provides that the Bank of Italy:

a. can hinder banks and other financial intermediaries from keeping going with the violations noticed in its control activity related to disclosure and fairness in the relationship among regulated entities and their respective customers;

b. can order regulated entities to redress customers for sums unduly paid; and

c. can intimate any further measures required.

An order to redress (under b) above) is issued when, following the controls performed by the Bank of Italy as the Italian Authority responsible for the disclosure and the fairness in the relations among banks/other financial intermediaries and their respective customers, violations emerge that impinge on the customer protection legal framework.

The Bank of Italy can publish on its website any orders issued under article 128-ter of the Italian Consolidated Banking Law – including the order to redress –and may mandate any further publicity needed (e.g. on newspapers).

Pursuant the law the Bank of Italy is not mandated to define in detail neither the customers to be redressed, nor the amounts to be precisely disgorged to each of them. However, the orders issued so far by the Bank of Italy included a duty for the regulated entity involved to identify in detail the customers to be redressed and the sums to be refunded, and to provide the Bank of Italy with updates on the execution of the order.

Should the regulated entity fail to comply with the order, the Bank of Italy may impose a fine. It is worth noting that the law does not specify whether the customers may sue the regulated entity for being restored solely on the basis of the 'order to redress'.

All these Authorities issue several decisions per year, all published on their respective websites. As noted, the procedure of enquires which may led to a condemnation/sanctioning decision is not made public. Moreover, those decisions, even if ascertaining an illicit conduct which may have an impact on a high number of individuals in terms of compensation for damages, no information is available about cases when a decision of an Authority has led groups of consumers to judicial remedies, apart from those already mentioned above (and related to Antitrust Authority decisions).

However, with reference to the Italian Regulatory Authority for Electricity Gas and Water, as noted above, some decisions may have that 'direct impact' on consumers. We mention only two of them as examples. In 2011 the AEEG Authority carried out enquires against ENI on the basis of a high number of complaints (the number is not available in the final decision) for continuous delays in the recognition and application of tariffs adjustments to its clients. Having ascertained the violation, the Authority condemned ENI to pay a sanction of almost €700,000 and to update and complete all the tariffs adjustments, giving then proof of the fulfilment of both those obligations to the same Authority.

Similarly, in 2011 the AEEG Authority issued a decision condemning 71 water providers to return €55 million to around 11 million consumers, because of the unlawful cashing of amounts as return on capital (*remunerazione del capitale*), for 5 months, even if those amounts had been abolished

by a national referendum. Those companies where thus obliged to refund their respective clients in the bill following the issuance of that decision.

IVASS issues a very high number of sanctioning decisions every year (around 50 advisors are sanctioned, and around 300 sanctions are issued each month). It is thus very difficult to map how many decisions, amongst them all, may directly affect consumers (for example, some sanctions are dealing with irregular data management, some with unfair conduct, some with lack of transparency towards their clients). However, these sanctions, even if adopted after an enquiry conducted upon a consumer's complaint, do not lead to a condemnation of the advisor to refund the damaged party, who must sue the advisor judicially. Up to now, we have not detected any decision of the Authority which has led to a mass litigation phenomenon, where a high number of individuals were involved and decided to file mass claims to Court.

4. United Kingdom

The 'regulatory redress' technique is used to a great extent in the UK. It is now a mainstream consideration of many regulatory authorities, as an integral part of their oversight of markets and of the behaviour of traders towards consumers and others. The technique has spread quickly, starting from use by regulatory authorities in particular sectors (financial services, then energy, water, environment and others) and then mandated on a generic basis for consumer trading under the Consumer Rights Act 2015. A redress power was first introduced as part of the major reform of the regulation of financial services in 2000, alongside the creation of a powerful Financial Services Ombudsman. The power was significantly upgraded in 2010 as a response to the financial crisis, and was copied into the legislation governing the regulatory system for energy in 2013. In parallel, a movement occurred towards including redress in the functions and hence powers of enforcers responsible for consumer protection generally, and this led to the codification and extension of powers in the Consumer Rights Act 2015, which firmly included redress as one of the 'enhanced consumer rights' powers.

The general development of regulatory policy beyond just 'enforcing' the law and towards ensuring that markets are returned to fair balance after breaches, are continuously monitored, and that consumer confidence in markets is maintained—hence that redress is made where it is due—can be seen to have had a broad development from the 1960s and especially from 2000.[219] A sequence of official Reports gradually shifted the enforcement approaches, policies and duties

[219] For a broad review, see C. Hodges, Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance, Culture and Ethics, Hart Publishing, 2015.

on almost all of the public regulatory authorities, which has included delivering 'restorative justice' as one of their formal objectives. As a result, most authorities are now delivering mass compensation as standard practice in an increasing number of situations, and able to do so remarkably quickly, cheaply, and effectively.

An important milestone was the 2006 Review by Professor Richard Macrory of regulatory enforcement penalties,[220] which included in its six objectives the aims of eliminating any financial gain or benefit from non-compliance and restoring the harm caused by regulatory non-compliance. Duties on regulators to consider such wide outcomes were included in the Regulatory Enforcement and Sanctions Act 2008 (RESA),[221] together with the ability for individual authorities to be awarded restorative powers as civil sanctions. In the event, that awarding regime was overtaken by later developments that widened the same general approach. Regulators were made subject under RESA to a Regulators' Compliance Code,[222] which included an express aim of eliminating any financial gain or benefit from non-compliance. Although this aim disappeared when the Code was revised and shortened in 2013,[223] there was no change in policy. Indeed, the Enforcement Policies subsequently published by many regulatory and enforcement authorities, expressly include statements of intention to focus on delivering outcomes and redress.[224]

Under RESA, certain regulators may apply to their minister to be granted general civil sanctions in addition to existing criminal sanctions.[225] The civil sanctions include accepting undertakings to restore the position to what it would have been or to pay money to benefit a person harmed by the offence.[226] Approved regulators may make a 'discretionary requirement', which can include a

---

[220] R. Macrory, Regulatory Justice: making sanctions effective, HM Treasury, 2006; reprinted in R. Macrory, Regulation, Enforcement and Governance in Environmental Law, Hart Publishing, 2010. Underlying this approach are 'restorative justice' and 'responsive regulation' policies.

[221] See J. Norris and J. Philips, The Law of Regulatory Enforcement and Sanctions: A Practical Guide, Oxford University Press, 2011.

[222] Regulators' Compliance Code: Statutory Code of Practice for Regulators, Department for Business Enterprise and Regulatory Reform, 2007, para. 8.3. The Code is made under section 22 of the Legislative and Regulatory Reform Act 2007. As mentioned above, the same approach was previously mandated under 'Purpose (e)' of the purposes of sentencing set out in s 142 of the Criminal Justice Act 2003: 'Any court dealing with an offender in respect of an offence must have regard to the following purposes of sentencing … (e) the making of reparation by offenders to persons affected by their offences.'

[223] Regulators' Code, Department for Business Innovation & Skills, 2013.

[224] For an analysis of various Enforcement Policies see C. Hodges, Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance, Culture and Ethics, Hart Publishing, 2015.

[225] Empowering Orders may be made by ministerial order under Part 3 of RESA to 118 regulatory bodies and 400 local authorities. The principles that the Government would, in general, observe when considering whether to make Orders under the RESA to provide a regulator with powers to impose certain civil sanctions as an alternative to prosecution were published in: Written Ministerial Statement - Department for Business, Innovation and Skills: Use of civil sanctions powers contained in the Regulatory Enforcement and Sanctions Act 2008, Department for Business, Innovation and Skills, November 2012.

[226] RESA, s 50.

'compliance requirement',[227] designed to secure that the offence does not continue or recur,[228] and a 'restoration requirement',[229] to take steps specified by the regulator, within a stated period, designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed.[230] The process for issuing discretionary requirements specifies that the regulator should serve a proposed notice, and give an opportunity for the business to make representations, before exercising discretion by issuing a final notice, after which the business may appeal to a tribunal.

Under an 'enforcement undertaking'[231] a regulator who reasonably suspects that a person has committed an offence may accept an undertaking from that person 'to take such action as may be specified in the undertaking within such period as may be so specified'.[232] The action that a firm can offer to undertake must be:[233]

i. action to secure that the offence does not continue or recur;
ii. action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed;
iii. action (including the payment of a sum of money) to benefit any person affected by the offence; or
iv. action of a prescribed description.

Thus, an enforcement undertaking could provide for reimbursement, compensation to be paid, or other redress be made. The undertaking mechanism is technically voluntary but can in practice be reached by negotiated agreement, in substitution for the institution of a prosecution, which would trigger the mandatory compensation order mechanism.

Enforcement powers in relation to consumer protection were codified and updated in the Consumer Rights Act 2015. The basic enforcement powers available to domestic enforcers are as follows. Firstly, there is power to require *the production of information* specified in a notice,[234] for the purpose of ascertaining whether there has been a breach of the enforcer's legislation,[235] either

[227] RESA, s 42(3)(b).
[228] Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act, BERR, 2008, para 44.
[229] RESA, s 42(2)(c).
[230] Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act, BERR, 2008, para 44.
[231] RESA, s 50.
[232] ibid, s 50(2).
[233] ibid, s 50(3).
[234] Consumer Rights Act 2015, Sch 5, article 14.
[235] ibid, Sch 5, art 13(4).

where the enforcer is a market surveillance authority, or where the an officer reasonably suspects a breach.[236]

Secondly, there is a *toolbox of general powers*, which may be exercised subject to specific purposes and in specified circumstances. The toolbox comprises powers to purchase products, to observe carrying on of business, to enter premises without a warrant, to inspect products and take copies of records or evidence, to test equipment, to require the production of documents, to seize and detain goods, to decommission or switch off fixed installations, to break open containers or access electronic devices, to enter premises with warrants, and to require assistance from persons on premises.[237]

Supplementary provisions include an offence of obstruction or of purporting to act as an officer, a right of persons to access seized goods and documents, a requirement for notice to be given of the testing of goods, a right to appeal against detention of goods and documents, and a requirement on officers to pay compensation to any person with an interest in goods seized for loss or damage caused by the seizure or detention if the goods have not disclosed breach and the power was not exercised as a result of any neglect or default of the person seeking compensation.[238]

The Consumer Rights Act 2015 amended Part 8 of the Enterprise Act 2002[239] to allow specified enforcers (and many authorities were designated)[240] to attach remedies focused on behavioural undertakings ('enhanced consumer measures') to Enforcement Orders and undertakings.[241] Where an enforcer accepts an undertaking from a business, the remedies to be attached to the undertaking are to be agreed between the parties. *Enhanced consumer measures* can fall within three categories: the redress category, the compliance category and the choice category.[242]

---

[236] ibid, Sch 5, art 13(5) and (6).
[237] ibid, Sch 5, arts 19-35.
[238] ibid, Sch 5, arts 36-42.
[239] Consumer Rights Act 2015, s 79 and Sch 7.
[240] The Enterprise Act 2002, s 213 provides for four categories of enforcer: *general* (the Competition and Markets Authority, Trading Standards Services in Great Britain; Department of Enterprise, Trade and Investment in Northern Ireland); *designated* (see SI 2003/1399 as amended SI 2005/917 and SI 2013/478: the Civil Aviation Authority, Director General of Electricity Supply for Northern Ireland, Director General of Gas for Northern Ireland, Ofcom, The Water Services Regulation Authority, The Gas and Electricity Markets Authority, the Information Commissioner, ORR, the Consumers' Association and the Financial Conduct Authority); *community* (a qualified entity for the purposes of the Injunctions Directive EC 98/27); and *CPC* (various bodies designated as national contract points under Regulation (EC) No 2006/2004 on Consumer Protection Cooperation).
[241] Available under Part 8 of the Enterprise Act 2002, ss 215, 217 and 219. An enforcement order that the infringer stops engaging in the conduct in question is issued by a court, and either a court or an enforcer may accept an undertaking from the business that it will not engage in conduct that involves an infringement.
[242] Enterprise Act 2008, s 219A, inserted by the Consumer Rights Act 2015, Sch 7, art 8.

- *redress*: including (a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking, (b) offering consumers the option to terminate (but not vary) a contract, and (c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers. Such measures are subject to a cost proportionality requirement[243] and certain safeguards.[244]
- *compliance*: measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates (including measures with that purpose which may have the effect of improving compliance with consumer law more generally).
- *choice*: measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.

It will be noted that these definitions of enhanced consumer measures are deliberately wide and purposive, and allow flexibility for businesses and enforcers in deciding, and negotiating, what actions and undertakings are appropriate in the circumstances in responding to the underlying and future behaviour and in providing redress. However, any enforcement order or undertaking may include only enhanced consumer measures as the court or enforcer considers to be just and reasonable.[245]

In introducing these enhanced consumer remedies, the Government sought to encourage businesses to put in place *schemes* aimed at providing redress to consumers collectively when a breach of consumer law arises and causes consumers significant losses.[246] The Government cited three examples:

- *Where a trader has access to a list of all customers*, the trader could write to all customers informing them of their right to a sum of money if they send back tear-off slip within a set time-period. Terms and conditions should not be complex. The trader would reimburse

[243] An enforcement order or undertaking in the redress category may only include redress measures in a loss case and if the court or enforcer is satisfied that the cost of such measures to the subject (excluding administrative costs) is unlikely to be more than the sum of the losses suffered by consumers as a result of the underlying conduct: Enterprise Act 2008, s 219B (2), (4) and (5).
[244] Enterprise Act 2008, s 219C.
[245] Enterprise Act 2008, s 219B(1).
[246] Civil enforcement remedies: consultation on extending the range of remedies available to public enforcers of consumer law, Department for Business Innovation & Skills, 2012.

every consumer who responds within 30 days. *Enforcers would check that letters had been sent out and all claims answered within 30 days.*

- *Where a trader has no list of customers but there is likely to be take-up if advertised*, the trader could take out adverts in national, regional or specialist press. Advertising would be proportionate, targeted and effective. The advert would operate in a similar way as product recall where if people showed they were affected by the issue they would receive a sum of money. Additionally, the availability of redress could be flagged to consumers complaining to the Citizens Advice consumer helpline. *Enforcers would monitor that adverts had been placed and compensation paid to claimants.*
- *Where individual consumers cannot be identified*, however, alternative measures may be effective, such as advertising that consumers (who can prove they were affected by the issue) can claim an agreed sum of money from the company or from an appointed ADR provider or offering discounts to all future consumers for a fixed period of time to mitigate against any financial gain arising from the breach.

A major reform of financial services regulation was undertaken in 2000 (the 'big bang'). The legislation created the Financial Conduct Authority (FCA**)** as regulator, and included a provision for the Treasury to order the regulator to establish and operate a multi-firm scheme for reviewing past business.[247] That mechanism was cumbersome,[248] and not formally used in the subsequent decade, although a significant number of cases where it might have been used were resolved through settlements that resulted in agreed payment of redress. The authority was reluctant to get involved in mass redress issues and the Labour government did not wish it to get involved. However, pressure to resolve mass cases mounted as the number of complaints to the Financial Ombudsman Service rose over the same of payment protection insurance (PPI) products. In September 2009, the authority set out a proposal for Guidance on the fair assessment and redress of complaints related to sales of PPI, and rules requiring firms to reassess, against the proposed new guidance, complaints about PPI sales.[249] The banks then challenged the Guidance through judicial review, but lost.[250]

[247] Financial Services and Markets Act 2000, s 404.
[248] For example, s 404(1)(b) required consumers to have a private law remedy, and the FSA was required to implement detailed rules. The restitutionary powers under ss 382-384 are less unwieldy and were invoked on occasion by the FSA. However, voluntary arrangements were not impeded by such barriers.
[249] See Reforming Financial Markets, HM Treasury, 2009.
[250] R (on the application of the British Bankers' Association) v Financial Services Authority [2011] EWHC 999 (Admin).

The Labour government proposed to introduce a representative claim in the courts in 2009, to be a mechanism of last resort,[251] but it was unacceptable to the Conservative opposition[252] and was dropped in the swift 'wash up' of Parliamentary business when the general election was called in early 2010. However, a proposal to expand the regulator's power to impose a redress solution survived.

The FCA currently has a sequence of redress powers that support the imperatives for firms to take voluntary actions. First, by 2011 the Authority was empowered with four linked measures to require firms to take pro-active steps to deliver collective redress:

1. an obligation on firms to carry out proactive reviews of their complaints and sales in the complaints handling rules;
2. a requirement that when assessing complaints they take account of decisions of the FOS;
3. requiring firms to provide the FCA with complaints handling data;
4. a requirement for a firm to appoint an 'approved person' with official responsibility for oversight of the firm's compliance with complaints handling rules.

Second, the FCA may apply to the court for a Restitution Order, or use its powers to require restitution itself where it is satisfied that an authorised person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and either that profits have accrued to him as a result of the contravention, or that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.

Third, the FCA has two procedures for putting in place procedures for handling mass claims, where the regulator considers a widespread problem exists and a court would award redress to consumers. The first of these is under a '*consumer redress scheme*' (section 404) that can apply to multiple firms, and the second is a *single firm scheme* (section 404F(7)). Under either approach, the initial complaint handling and spontaneous repayment is to be undertaken by the relevant firm(s), and dissatisfied consumers may then apply to the Financial Ombudsman Service (FOS). In either case, the FOS's basis of decision is effectively amended by the regulator to that of applying

[251] Financial Services Bill, cl 18 – 25, which proposed that an individual may bring representative proceedings on behalf of others who are entitled to bring proceedings of the same, similar or related issues of fact or law, subject to the court approval of a collective proceedings order. The court would decide on whether an opt-in or opt-out model would apply. .

[252] The Labour government was also greatly concerned about introducing a collective action procedure, since it would at that stage have exposed every local government authority to equal pay collective actions. In the subsequent Equality Act, a proposed collective action procedure was dropped, and instead the mechanism that was passed imposed a duty on local authorities to have a stated policy on equal pay, which would equalise pay over time and could be policed through judicial review.

the terms of the scheme. A single firm scheme under section 404F(7) is effected by the FCA altering a firm's permissions or authorisation to operate,[253] and can be done either *at the request of the firm* or on the FCA's initiative. The FCA may include the same requirements on the individual firm as under a section 404 scheme, and apply the Ombudsman's jurisdiction as under section 404B. Public accountability for a redress scheme exists through the regulator, who has to consult on rules before imposing the scheme, and through firms' right of appeal to the Tribunal.

A consumer redress scheme may be ordered where it appears to the FCA that there has been a widespread failure to comply with applicable requirements and as a result, consumers have suffered loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available.[254] The regulator can make rules which may include requirements for the firm to:

- investigate whether, on or after a specific date, it has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
- determine whether the failure has caused (or may cause) loss or damage to consumers;
- determine what the redress should be in respect of the failure; and make the redress to the consumers.[255]

The result is that a procedure for handling mass claims is put in place. Under this procedure, the initial complaint handling and spontaneous repayment is to be undertaken by the relevant firm(s), and consumers may then apply to the Ombudsman. In either case, the Ombudsman's basis of decision has been effectively amended by the regulator to that of applying the terms of the scheme. The Ombudsman may, of course, consider cases which fall outside the scope of the scheme or variation of permission, on the normal basis (applying the criterion of fairness).

Public accountability for a redress scheme exists through the regulator, who has to consult before imposing the scheme, and through firms' right of appeal to the Tribunal.

[253] The FCA Register states firm's permissions.
[254] FSMA s 404, as amended by Financial Services Act 2010, s 14: the power for the Authority to make rules requiring each relevant firm (or each relevant firm of a specified description) to establish and operate a consumer redress scheme arises where it appears to the Authority that there has been a widespread failure to comply with applicable requirements and as a result, consumers have suffered loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available.
[255] FSMA, s 404 (4)-(7). A firm may apply to the Tribunal for a review of any rules made by the Authority: s 404D..

Fourth, it can also be noted that under the FCA's enforcement action leading to a penalty or public censure, the decision-making process for considering the full circumstances of each case when determining whether or not to take action for a financial penalty or public censure lists, among the factors that will be taken into account, any remedial steps that the person has taken in relation to the breach.

In this context, the FCA may be involved in discussions on the appropriateness of voluntary redress schemes created by a regulated firm in relation one of its activities inside or outside the regulatory perimeter.

In a 2016 consultation on its future mission, the FCA confirmed that it sees its role is 'to bring firms which have breached regulatory requirements to account and to ensure that redress follows, so consumers who have suffered because of this breach are compensated.'[256] It summarised its approach thus:[257]

We believe the financial conduct regulator, alongside the Financial Ombudsman Service and the Financial Services Compensation Scheme, has a role in ensuring consumers can receive redress through cheaper and quicker routes than the courts. We also believe these routes are important for market confidence.

We will use the following criteria to help inform our decisions about whether or not to effect redress:

- how quickly and urgently the redress is needed
- the number of consumers affected
- if the activity that led to the harm occurs inside or outside our regulatory perimeter.

Noting that the courts deliver redress too slowly, and that cost issues can deter those harmed from claiming, the FCA said:[258]

Consumers, firms and regulators judge how successful these alternative routes are based on their ability to deliver fair outcomes more quickly and cheaply than through the courts. We commonly seek injunctions, prosecute and obtain redress for victims of unregulated businesses through the courts. This has been a major part of our work for many years.

[256] Our future Mission, Financial Conduct Authority, 2016, 27.
[257] ibid, 5.
[258] ibid, 27.

The 2011 enforcement policy of the FCA included 'in the area of consumer protection, holding firms to account for misconduct and requiring them to make good on the losses they cause consumers.'[259] The FCA said that it would 'require firms to provide prompt and effective redress' and 'ensure that firms are not benefiting from exploitation of market failures'.[260] The authority may place requirements on a firm's permission, and this may affect behaviour and redress. Redress was again afforded a central place in the FCA's 2016 Consultation on its role.[261]

In the decade in which the original powers under FSMA 2000 applied, redress was paid in a number of significant cases that resulted from enforcement action by the FCA, usually as a result of agreed settlements and any redress element was given little publicity, so little information is identifiable.[262] Cases often involved a voluntary agreement to pay redress rather than being agreed as part of the settlement of official action. Over time, the FCA became more keen to publicise the redress element of a settlement.[263]

As noted above, a new regulatory regime was adopted from 2010, after which a number of cases were resolved through the intervention of the regulator with firms, in different ways. The amount of redress the firm has to pay can be well in excess of the fine. Firstly, a series of cases was dealt with under the *single firm scheme* of section 404F(7).

The interest rate applied to Halifax tracker mortgages was Bank of England base rate plus a percentage, which varied. The regulator considered that the variations were applied in a questionable way. The regulator reached agreement with Bank of Scotland, the owner of the firm involved, that letters were to be sent to all customers and that it would automatically compensate some borrowers.[264] Possibly £20 million was paid in compensation fairly quickly and without any

---

[259] The Financial Conduct Authority: Approach to Regulation, Financial Services Authority, 2011, para 1.1. The instances cited included personal pensions, mortgage endowment policies, split capital investment trusts and payment protection insurance (PPI). 'Millions of consumers have suffered detriment on a large-scale and, together, the industry has had to make compensation payments of approximately £15 billion, with most PPI redress still to come. Such outcomes would be regarded as unacceptable in other sectors of the economy.'

[260] The Financial Conduct Authority: Approach to Regulation, Financial Services Authority, 2011, para 5.40.

[261] Our future Mission, FCA, October 2016. The subsequent policy, which was more general, was Our Mission 2017. How we regulate financial services, FCA, 2017.

[262] Note that redress can also be agreed with a firm without preceding enforcement action.

[263] See Enforcement Annual Performance Account 2010/11, FSA, 2011, para 21.

[264] See paras 10-18 of the October 2012 BoS Final Notice for details re the SVR and cap issue. The firm was fined for its failure to keep accurate records which had affected the compensation programme: https://www.fca.org.uk/publication/final-notices/bank-of-scotland.pdf. Details of the compensation programme can also be found in this document, which describes the requirements included in the firm's permission i.e. the variation of permission: http://www.fsa.gov.uk/pubs/other/vvop.pdf.

consumers having to complain.[265] Significantly, the FSA agreed the scope of the compensation programme with the bank. That formal agreement therefore pre-empted other litigation.

Welcome Financial Services Ltd got into severe financial difficulties after mis-selling PPI. It reached an agreement with the Financial Services Compensation Scheme and the FSA.

Three arrangements related to the manager and two depositaries involved in Arch Cru funds, which promised high returns and were in fact speculative investments made through Guernsey. The facts were complicated and there was no proof that the managers, Capita, had done anything wrong. However, the following variations in permissions providing compensation arrangements were agreed: Capita Financial Managers Ltd agreed voluntarily to contribute (i.e. £32m towards £54m payment) to compensation without admission of liability, together with HSBC, depositary of one of the funds; and BNY Mellon, depositary of another of the funds.

Secondly, a *consumer redress scheme* was made under section 404 in relation to intermediaries involved in Arch Cru funds.[266]

Thirdly, various *other arrangements* were agreed 'in the shadow' of the rules, without formal powers being invoked. The National Audit Office commented on the extent to which the FCA had encouraged firms to enter voluntary redress arrangements, whereby firms accept terms of redress agreed with the FCA.[267] It gave the example of redress in relation to interest rate hedging products for businesses.

IRHPs

Interest rate hedging products (IRHPs) were sold to small and medium sized firms. An FSA review in 2012 found serious failings in the sale of IRHPs by four banks. After discussions, those four banks, followed by nine others, had agreed to review their sales. A pilot review of sales to 'non-sophisticated' customers from the first four banks found that over 90 per cent did not comply with one or more regulatory requirements, and that the involvement of independent reviewers plays a vital role in ensuring that outcomes for customers are fair and reasonable. The banks undertook

[265] The Notice mentions that £20m was erroneously paid out to customers and the firm reportedly stated that it would set aside £500m for compensation: https://www.lovemoney.com/news/11197/halifax-to-pay-500m-to-overcharged-customers-

[266] Consumer redress scheme in respect of unsuitable advice to invest in Arch cru funds: Consultation Paper, FSA, CP12/9, April 2012.

[267] Financial services mis-selling: regulation and redress, National Audit Office, 2016, HC Paper No.851, para 4.5.

to continue their internal reviews and to achieve fair and reasonable redress in each non-compliant case, according to a set of principles about outcomes, depending on whether the customer would have purchased the same product in any event, or would not have done so, or would have purchased a different product.[268]

ATMs

Customers withdrawing cash from automatic telling machines (ATMs) might walk away from the ATM leaving the money behind, after which the machine swallowed it and the customer's account remained debited. A voluntary arrangement was applied by retail banks to credit relevant customers in relation to ATM withdrawals covering a certain period from 2009 and the date of new rules. It appears that the banks' voluntary action occurred after regulators approached the banks against the background of the regulator's powers to go further.

Payday Loans

CFO Lending Limited (CFO) launched a platform in 2009 for High Cost Short Terms Credit ('payday loans'). It traded as Payday First, Flexible First, Money resolve, Paycfo, Payday Advance and Payday Credit. After widespread concern about firms in this market, and an investigation by the FCA, in 2014 HCSTC providers Wonga Group Limited, Ariste Holding Limited and CFO voluntarily agreed to stop seeking to collect outstanding debts. CFO was required to carry out an independent review to investigate whether its debt collection practices and automatic customer balance calculations had caused loss to its customers.

The investigations determined that CFO had engaged in a series of unfair practices, dating back to 2009. Failings included:

- The firm's systems not showing the correct loan balances for customers, so that some customers ended up repaying more money than they owed
- Misusing customers' banking information to take payments without permission
- Making excessive use of continuous payment authorities (CPAs) to collect outstanding balances from customers. In many cases, the firm did so where it had reason to believe or suspect that the customer was in financial difficulty
- Failing to treat customers in financial difficulties with due forbearance, including refusing reasonable repayment plans suggested by customers and their advisers

[268] *Interest Rate Hedging Products. Pilot Findings* (FSA, 31 January 2013), http://www.fsa.gov.uk/static/pubs/other/interest-rate-swaps-2013.pdf.

- Sending threatening and misleading letters, texts and emails to customers
- Routinely reporting inaccurate information about customers to credit reference agencies
- Failing to assess the affordability of guarantor loans for customer.

CFO entered a redress scheme agreement with the FCA in September 2016 to provide over £34 million in redress to nearly 100,000 customers, comprising writing off £31.9 million in outstanding balances and making £2.9 million in cash payments to customers.

1. In 2014, the FCA fined Credit Suisse International £2,398,100 and Yorkshire Building Society £1,429,000 for failing to ensure that promotions of a structured product were clear, fair and not misleading, since the financial promotions highlighted the maximum return whilst the chances of investors receiving it were 'close to zero'.[269] Both companies agreed to contact customers who bought the product between 1 November 2009 and 17 June 2012 to offer them the chance to exit the product without penalty and with interest paid up to the date of exit.

2. In 2015, customers of Affinion International Limited approved a compensation scheme agreed voluntarily by the company and the FCA in relation to various card security products sold from 2005 at an average cost of £25 each.[270] The High Court approved the scheme, and it was closed in March 2016, after £108.2m of compensation had been to 533,000 claimants, an average of £203 per claim.

3. In November 2016, Motormile Finance UK Ltd, a debt purchase and collections firm, entered into an agreement with the FCA to provide redress to more than 500,000 customers for historic failures in its due diligence and collections process. Its inadequate systems and controls produced failure to conduct sufficient due diligence upon the purchase of a debt portfolio to be satisfied that the sums due under customer loan agreements were correct. This in turn led to unfair and unsuitable customer contact for recovery of those sums. The redress was £154,000 in cash payments to customers and the writing-off of £414m of debt where the firm was unable to evidence the outstanding debt balance is correct and properly due. Additionally, in February 2015, the FCA appointed a skilled person to conduct a review of Motormile's (which also trades as MMF, MMF Debt Purchase and MMF UK) existing loan portfolios and collections processes, including its due diligence. Motormile had since amended its processes, systems and controls to mitigate the risks identified. It had also implemented major changes including a bespoke new IT system and

[269] The Cliquet product, which was designed to provide capital protection and a guaranteed minimum return with potential for significantly greater return if the FTSE 100 performed consistently well. The fines were set to reflect settlement by the banks at an early (Stage 1 of the prescribed procedure), therefore qualifying for a 30% discount.
[270] See Compensation—card security product holders invited to vote on scheme, FCA, 2015.

the appointment of a new Chief Executive Officer, which the FCA considered should be sufficient to ensure compliant standards are maintained. Customers did not need to take any action, as MMF will contact affected customers by February 2017, and set up a dedicated page on their website to provide further information to customers.

4. RBS established to a voluntary redress scheme for small businesses (SMEs, as opposed to consumers), following its treatment of SMEs in financial difficulty, leading to allegations of excessive and aggressive charging that forced some businesses unnecessarily into insolvency. In January 2014, the FCA appointed Promontory as a skilled person under s 166 of the Financial Services and Markets Act 2000 to review RBS's treatment of SME customers transferred to its Global Restructuring Group (GRG) between 2008 and 2013. Promontory, with the assistance of its sub-contractor Mazars, provided its final report to the FCA in September 2016, and identified a number of areas of inappropriate treatment of customers, some of which were systematic. After discussions with the FCA (the key aspects of the activity were not directly subject to FCA regulation),[271] the bank issued a public apology in November 2016 and created an independent complaints process overseen by a retired High Court judge and instigated an automatic refund for complex fees charged to SME customers in GRG, estimated to amount to approximately £400 million to be paid in Q4 2016.

The Financial Conduct Authority issued a guidance consultation (GC16/6) in late 2016 on the fair treatment of mortgage customers in 'payment shortfall', or arrears.

In June 2010, the Financial Services Authority introduced a rule that firms must not automatically capitalise a payment shortfall where the impact on the customer would be material.[272] The FCA subsequently identified that some lenders automatically included customer arrears balances within their monthly mortgage payments.

It published a case study drawing attention to the practice, which it estimated potentially 750,000 customers. It consulted on rule changes, but also issued a remedial framework that firms could apply voluntarily, against the stated expectation that firms should start identifying affected customers and then contact them, in advance of the final guidance.

Voluntary Redress

1. HSBC voluntarily agreed in January 2017 to set up a redress scheme for customers who may have suffered detriment by paying an unreasonable debt collection charge imposed by HFC Bank

[271] House of Commons Treasury Committee, oral evidence of Financial Conduct Authority, 8 November 2016, HC 812.
[272] Mortgages and Home Finance: Conduct of Business Sourcebook, MCOB, ch 13.

Ltd (HFC) and John Lewis Financial Services Limited (JLFS), the Financial Conduct Authority (FCA) has announced today. Both HFC and JLFS are now part of HSBC Bank Plc.

2. In the first use of powers under FSMA s384 to require a listed company to pay compensation, Tesco plc and Tesco Stores Limited (Tesco) agreed in July 2016 that they committed market abuse in relation to a trading update published on 29 August 2014, which gave a false or misleading impression about the value of publicly traded Tesco shares and bonds. Tesco agreed to pay compensation to investors who purchased Tesco shares and bonds on or after the 29 August 2014 and who still held those securities when the statement was corrected on 22 September 2014.[273] The scheme would to be launched by 31 August 2017, administered by KPMG,[274] and accepted claims until 22 February 2018. About 10,000 retail and institutional eligible investors would be eligible for compensation, who between them purchased approximately 320 million shares during the period. Each net purchaser was entitled to compensation of 24.5p per share purchased. The FCA estimated that the amount of compensation would be £85 million, plus interest.

3. As part of the FCA's 'High Cost Credit Review', and after working with the FCA since 2014, BrightHouse undertook in October 2017 to pay over £14.8 million (in the form of cash payments and balance adjustments) to 249,000 customers in respect of 384,000 agreements for lending which may not have been affordable and payments which should have been refunded.[275] The rent-to-own firm provided household goods to customers on hire purchase agreements.

In response to these concerns that the firm's lending application affordability assessment processes and collections processes did not always deliver good outcomes for customers particularly those who were at a higher risk of falling into financial difficulty, BrightHouse undertook an extensive programme of work to improve its lending application assessment to ensure that loans are affordable and customers are treated fairly throughout the collections process, including revising its late payment fee structure.

[273] Final Notice, Financial Conduct Authority, 28 March 2017, which set out agreed details of the infringement and the scheme. See also press release, 'Tesco to pay redress for market abuse' FCA, 28 March 2017, https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse

[274] An online claims portal was established for claimants, who were required to provide identification documents, a bank account statement for the account to which payment was requested, and evidence of the transactions, eg broker statements and contract notes.

[275] Press release, 'Rent-to-own provider BrightHouse to provide over £14.8 million in redress to around 249,000 customers' Financial Conduct Authority, 24 October 2017.

In addition, BrightHouse has identified customers that may have been treated unfairly where its processes fell short of FCA expectations and has committed to putting things right for these customers.

The firm proposed redress for customers in two sets of circumstances:

- customers whose circumstances had not been assessed properly at the outset of the loan to determine whether they could afford it and may have had difficulty making payments. Customers who handed back the goods will be paid back the interest and fees charged under the agreement, plus compensatory interest of 8%. Customers who retained the goods would have their balances written off. This redress totals around £10.1 million for 114,000 agreements entered into between 1 April 2014 and 30 September 2016, covering 81,000 customers.
- customers who made the first payment due under an agreement with the firm which was cancelled prior to the delivery of the goods. This first payment was not returned to all customers. BrightHouse agreed to refund this first payment plus pay compensatory interest of 8%. This redress totals around £4.7 million for 270,000 agreements entered into after 1 April 2010 covering 181,000 customers.

BrightHouse agreed to write to all affected customers, some of whom are affected by both sets of circumstances, to explain the refund or balance adjustment that they will receive. Customers were advised by the FCA that they did not need to take any action until they were contacted by BrightHouse.

The Office of Communications (Ofcom) has a number of means that clearly incentivize the making of redress by suppliers. Consumer complaints are referred to an approved ADR body. A notification of contravention of conditions by a provider of electronic communications networks or services is to include not just the condition contravened but must also specify a period within which the provider may address the contravention and remedy its consequences.[276] The 2011 Penalty Guidelines include 'any steps taken for remedying the consequences of the contravention' as one of the matters to be taken into account in establishing a penalty.[277]

[276] Communications Act 2003, s94.
[277] Penalty Guidelines (Ofcom, 2011), para 4 (iv).

Case study: GMTV competitions

The television channel GMTV Ltd included viewer competitions in its programmes between August 2003 and February 2007. The communications regulator, Ofcom, found GMTV to be in breach of various provisions of the Broadcasting Code (not conducting competitions fairly, prizes should be describing prizes accurately, and making rules clear and appropriately made known) and the ITC Programme Code (not retaining control of and responsibility for the service arrangements, including all matters relating to their content). Ofcom imposed a fine of £2,000,000 and required GMTV to broadcast a statement of Ofcom's findings on three occasions.

In its decision,[278] Ofcom stated that the financial penalty would have been higher had GMTV not put in place such an extensive programme of reparations and remedies. These included that GMTV did not intend its competitions to be conducted in a way that was not compliant with the relevant Codes. GMTV co-operated willingly and fully with Ofcom's investigation and had taken extensive steps to remedy the consequences of the breaches. These included:

- the decision by its Managing Director to take full responsibility for GMTV's failures and therefore to resign from his post, along with the Head of Competitions;
- offering refunds on a potential 25 million entries, a number which it believed was 'certainly far higher than the number of people who would have actually been disenfranchised';
- setting up a Freephone number for viewers to request a claim form, which could also be downloaded from its website;
- promoting the refunds every day on GMTV for a five-week period and taking out advertising for the refunds in national and regional newspapers;
- holding 250 new free prize draws, each with a £10,000 prize, for all entrants on the refund database, at a total cost of £2.5 million; and
- making a £250,000 donation to the children's charity ChildLine, to take account of the data it had not been able to retrieve.

In addition to the reparations and remedies, GMTV had introduced improved internal codes of conduct and compliance for any future premium rate activities.

The result in this case should have produced, as a result of voluntary action by the company, restitution of loss to consumers, an improved system to guard against future non-compliance, retribution for those held responsible, and imposition of a public penalty. The public penalty was

[278] Decision of Ofcom Content Sanctions Committee, 26 September 2007 at www.ofcom.org.uk.

based on both responsive and restorative approaches: if the risk of future infringement was low, there was a low need for individual deterrence. General deterrence was provided by swift publication of these actions. But this approach would not be possible under an approach in which general deterrence is deemed to be the paramount enforcement goal, as it is in competition policy. This begs the question of which approach is more just and more effective in controlling behaviour. The individual approach is clearly more just. The behavioural outcome could only be answered by lengthy empirical observation, not by assertion.

The Gas and Electricity Markets Authority, acting through the Office of Gas and Electricity Markets (Ofgem),[279] operates a licencing regime for suppliers. Ofgem's priority is always putting things right for those consumers directly harmed, including doing this quickly (incl. without taking formal enforcement action. Redress may arguably be taken into account under the requirement on Ofgem to issue a final compliance order where it is satisfied that a licence holder is, or is likely to be, in contravention of a condition or requirement so as to secure compliance.[280] Ofgem's 2014 Enforcement Guidelines on complaints and investigations cover sanctioning for breaches of licences or licence conditions.[281] Customer complaints are required to be handled by companies under strict complaints handling standards[282] within eight weeks and may then be referred to the Energy Ombudsman.

In order to improve both payment of redress to consumers, and the regulator's leverage in bringing about redress, the Energy Act 2013 copied the regime used in the communications sector and included powers to secure direct redress for customers, whether domestic or businesses, pursuant to breaches of regulatory requirements, through a consumer redress order.[283] Under these provisions, Ofgem is required to give notice to the company and any other affected party at least 21 days before making the order for redress. When giving notice, Ofgem is required to set out which condition has been breached, how in its view the licensee has breached it, and the remedy it deems appropriate. The licence holder has a minimum of 21 days to make

[279] See http://www.ofgem.gov.uk.
[280] Gas Act 1986, s28 and Electricity Act 1989, s 25.
[281] Enforcement Guidelines, OFGEM, 2014.
[282] The Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 (SI 2008/1898).
[283] As principally set out in the Electricity Act 1989, s 27G, and the Gas Act 1986, s 30G, inserted by the Energy Act 2013, s 144 and Sch 14. See Consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers (Department of Energy and Climate Change, 2012), 2D/060.

representations to Ofgem regarding the proposed order for redress. Enforcement Guidelines set out more details.[284]

The 2014 Enforcement Guidelines provide for resolving cases, either before they are open or during an investigation, through 'Alternative Action'.[285] Direct redress and voluntary redress may be applicable to an 'Alternative Action', although Ofgem has no formal powers to impose redress in this instance. This mechanism would result in cessation of a formal investigation without a finding of breach of the regulations.

Ofgem uses similar powers in relation to wholesale transactions. It included a clear incentive for companies to agree restitution in implementation of the EU 'REMIT' Regulation,[286] which includes requirements on market participants to notify the national Authority without delay if they reasonably suspect that a wholesale energy market transaction might breach the prohibitions on insider trading or market manipulation, and to publicly disclose inside information in an effective and timely manner.[287] Ofgem's 2013 Statement of Policy included the objectives of ensuring that no profits can be drawn from market abuse, and protecting the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers.[288] Ofgem proposed to 'take full account of the particular facts and circumstances of each case when determining whether to impose a financial penalty and/or issue a statement of noncompliance.'[289] Included in the factors relevant to determining the level of penalty were 'the amount of any benefit gained or loss avoided as a result of the breach (financial or otherwise, potential or actual)' and 'the degree of harm or increased cost incurred or potentially incurred by consumers or other market participants *after taking account of any restitution paid to those affected*' (emphasis added).[290] One of the resolution options open to the Authority would be its early resolution Settlement Procedure:

The aim of settlement is to reach agreement on the nature and extent of breaches, an appropriate level of penalty and, where appropriate, proposals for restitution. Ofgem may agree other terms

[284] Enforcement Guidelines, Ofgem, 2014; The Gas and Electricity Markets Authority's 'Statement of Policy with respect to Financial penalties and Consumer Redress under the Gas Act 1986 and the Electricity Act 1989, 2014).
[285] Enforcement Guidelines (2014), paras 2.9 and 3.26.
[286] Regulation (EU) No 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency.
[287] ibid, articles 15 and 4.
[288] Consultation decision - REMIT penalties statement and procedural guidelines, Ofgem, 2013.
[289] The Authority's Statement of Policy with respect to financial penalties under REMIT, Ofgem, 2013, para. 3.2.
[290] ibid, para. 4.2.

with the person as part of settlement. Where agreement is reached on the breaches, Ofgem will seek to agree the amount of the financial penalty and/or restitution to those adversely affected.[291]

Private sector bodies can raise or investigate complaints from consumers if they are of wider public interest. Citizens Advice or the Energy Ombudsman are relevant here, and have a Tripartite Agreement with Ofgem to improve coordination and ensure consumers are receiving timely and appropriate redress via our coordinated efforts. Until it ceased in 2014, Consumer Futures successfully negotiated with energy companies to secure redress for consumers, for example, securing payments of £70 million for Npower customers in 2010 when the company made changes to its tariff structure without giving adequate notification to its customers.[292]

The influence that Ofgem is able to wield, given its ability to amend or remove licences and to attract publicity to energy issues, means that redress can often be achieved through settlement or an informal agreement. A series of cases has been swiftly and effectively resolved by this route in the past four years.

Ofgem started to produce redress outcomes before it was given formal redress power, as a result of its influence, given its ability to amend or remove licences and to attract publicity to energy issues.

In March 2015 Ofgem found Drax and InterGen to have breached the Electricity and Gas (Community Energy Saving Programme) Order. The companies were fined £25 million and £11 million respectively. From these penalties, £26.2 million was allocated to National Energy Action (NEA) in the form of voluntary redress.[293] NEA used these funds to launch the Health and Innovation Programme (HIP) with the aim of bringing affordable warmth to over 6,500 fuel poor and vulnerable households in England, Wales and Scotland.

In October 2016, Ofgem announced that Co-Operative Energy had agreed to pay £1.8 million to customers affected by issues relating to Co-Operative Energy's implementation of a new IT system. In this instance Ofgem chose not to open a formal investigation into Co-Operative Energy, but did engage with the company to oversee the steps taken to restore customer service levels. Ofgem agreed the compensation package of £1.8 million with Co-Operative Energy. Any

[291] Proposed Procedural Guidelines on the Authority's use of its Investigatory and Enforcement Powers under REMIT, Ofgem, 2013, para. 8.6.
[292] Consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers (Department of Energy and Climate Change, 2012), para 11.
[293] Ofgem's first priority in allocating redress is to compensate customers directly affected by the breach identified. In these cases however no customers were directly affected by the breach identified, therefore redress was allocated to charities.

compensation that could not be distributed to Co-Operative Energy customers would be allocated to the charity StepChange, to help energy consumers who are in financial difficulties.

On 9 March 2012 Ofgem accepted an offer from EDF Energy to invest £4.5 million to help vulnerable customers and consequently reduced a penalty for breach of marketing rules to £1.

In November 2012, Ofgem secured a commitment from E.ON to pay back around £1.4 million (an average rebate of £14.83, including eight percent interest) to approximately 94,000 consumers who were incorrectly charged exit fees or overcharged following price rises that were incorrectly implemented too early. In addition, E.ON agreed to make an additional payment of around £300,000 as a goodwill gesture to a consumer fund which they run in partnership with Age UK.[294]

In August 2013 E.ON paid a £500,000 penalty and £2.5 million to benefit customers in fuel poverty after incorrect claims under the Carbon Emissions Reduction Target.[295]

In October 2013, ScottishPower agreed with Ofgem that it had misled customers in sales approaches, and agreed to pay £7.5 million to around 140,000 vulnerable consumers (identified under the Warm Home Discount Scheme) estimated to be £50 each and establish a £1 million compensation fund for customers to access.

In December 2013, Npower agreed to pay £3.5 million under a similar arrangement after breaches on telesales and face-to-face marketing, and separately apologized to customers and agreed a £1 million payment.

In February 2013, Ofgem called on the energy companies to return credit balances retained after customers had switched suppliers. It estimated 3.5 million domestic and 300,000 business accounts were affected, involving £202 million and £204 million respectively. It issued advice to customers to contact their suppliers, which was given wide publicity.

In July 2014 British Gas repaid £130 to around 4,300 customers (totaling £566,000) and paid £434,000 to the British Gas Energy Trust in relation to a further 1,300 customers it had been unable to trace, following misleading statements that customers would save money by switching.

Seven companies in the npower group upgraded its computerised billing system, following which major problems occurred, including sending incorrect and late bills. Many customers complained

[294] The Engage Fund is run in partnership with Age UK Group helps fund services to maximise incomes of older people by providing benefits advice and financial help through benefits health checks carried out either face to face or by telephone in local Age UK offices enabling some to be lifted out of fuel poverty.
[295] Annual Report and Accounts 2013-14, Office of Gas and Electricity Markets, 2014, 11.

but the company's complaint handling system was poor.[296] The company acknowledged that its practices fell far short of requirements in relation to its billing and complaints handling, and that it had breached various Standards of Conduct (SLC 25C.5 on treating customers fairly, and SLC 27.17 on provision of final bills) and regulations (3(2), 4(6), 6(1), 7(1)(a)-(b) and 10(2) on complaints handling). Ofgem accepted that npower had made significant improvements in these areas during the investigation and improved its performance. Ofgem acknowledged that npower's senior management took action to remedy the contraventions, particularly on the billing issues, and did not consider that npower's senior management had intentionally contravened the requirements. However, the actions taken were not enough to stop the contraventions from happening, nor did the actions stop them quickly enough to minimise the consumer impact. In late 2015 npower undertook to take a series of improvement actions, to comply with a series of specific targets, and to make consumer redress payments totalling £26 million. Penalties of £1 each were imposed on seven companies in the group.

Ofgem sets Guaranteed Standards for suppliers, which include customer service standards where suppliers need to visit a customer's premises. Where a supplier fails to meet a performance standard, they must pay compensation to the affected customer. The supplier Guaranteed Standards in force at the time of the failures in question were set under the Gas (Standards of Performance) Regulations 2005 and the Electricity (Standards of Performance) Regulations 2010. Those Regulations were later superceded by the Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015.

In 2014 E.ON voluntarily informed Ofgem that its agents had missed some appointments with customers, and hadn't then paid compensation to affected customers as required by the Guaranteed Standards. The company and Ofgem worked together to ensure, first, that the supplier improved its customer services processes and would make sure that, when things go wrong, customers receive the compensation they are entitled to; second, that E.ON would pay £1.2m to affected customers and will pay £1.9m to energy charities; and third, that the company would also pay £1.9m to charity to help consumers in need. This includes helping service personnel through National Energy Action's 'Help for Heroes' scheme. The arrangements were announced after the first two actions had been implemented.

[296] Notice of intention to impose a financial penalty pursuant to section 30A(3) of the Gas Act and 27A(3) of the Electricity Act 1989, Gas and Electricity Markets Authority, 18 December 2015.

The watchdog Consumer Futures can investigate complaints from consumers if they are of wider public interest. It has no legal powers to secure redress on their behalf,[297] but it has successfully negotiated with energy companies to secure redress for consumers, for example, securing payments of £70 million for Npower customers in 2010 when the company made changes to its tariff structure without giving adequate notification to its customers.[298] An example of a case by a predecessor body, Consumer Focus, is given below.

Consumer Focus published this case study in 2012.[299] It argued that all early settlements should be judicially approved by the court, but it can also be argued that various other forms of oversight and approval also exist.

In 2007 the energy group, npower changed the way it applied charges for the first block of higher priced gas units that households paid. These changes were not properly communicated to customers and some 1.8 million customers ended up paying for more of these high priced units than they had expected. Some customers complained to Ofgem, which launched an investigation, and in February 2009 npower was made to repay an average of £6 each to 200,000 customers.

… With out-prejudice talks with npower were being held concurrently and in February 2010, a Sunday Times article came out which implied that litigation could be on the cards if an agreement was not reached between Consumer Focus and npower. After about four months, npower agreed to calculate each overpayment made by the affected customers. The individual payments ranged from £1 – £100 and the total figure to be repaid was £63 million plus VAT.

Some regulatory mechanisms do not require any specific power in relation to consumer redress, but have grown out of a general policy of delivering fair services and outcomes to consumers, supported by power to impose penalties under a supervisory licensing regime. Any financial penalties go to HM Treasury rather than being retained by the regulatory authority, whereas various regulators have instead delivered money back to customers.

Ofwat has power under section 22A(1) of the Water Industry Act 1991 (as amended), subject to certain conditions being met, to impose a penalty on a water and sewerage undertaker which

[297] See http://www.consumerfutures.org.uk.
[298] Consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers, Department of Energy and Climate Change, April 2012, para 11.
[299] Response to Consultation on Private Actions in Competition law, Consumer Focus, July 2012.

Ofwat is satisfied has contravened or is contravening any Condition of its Appointment. Ofwat has used this power in a case in 2014 to impose a nominal fine on the basis of an undertaking by a water company to reduce prices to consumers and make additional payments for the benefit of consumers (see case study).

On 9 June 2011 Ofwat served a Notice on Thames Water Utilities Limited (Thames Water)[300] stating that it appeared to Ofwat that, when it submitted information on 11 June 2010, Thames Water may have contravened Conditions of its Appointment (namely Condition J and/or M in respect of regulatory reporting), and requiring Thames Water to produce certain documents and to furnish certain information specified and described in the Section 203 Notice. After considering the position, including representations by Thames Water, Ofwat issued a Notice stating that it was satisfied that Thames Water had submitted unreliable and inaccurate information on 11 June 2010 in its June return and thereby contravened Condition J of its Conditions of Appointment. In subsequent discussions, Thames Water committed to a package of measures for its customers. Ofwat gave notice of its intended actions,[301] and received representations from two stakeholders (the Consumer Council for Water and an individual consultant), both supportive of the proposed action.

On 22 July 2014, Ofwat issued a Notice stating that it was satisfied that the measures pledged by Thames Water (together with a nominal penalty of £1) would be of greater benefit to customers than the penalty Ofwat had been minded to impose absent these measures. Thames Water had committed to:

- accept a £79 million (2012-13 prices) reduction by Ofwat to its regulated capital value (RCV)1, plus a financial adjustment to remove any benefit Thames Water received from this expenditure being included in its RCV during 2010 to 2015. This resulted in lower bills for Thames Water's 14 million sewerage customers for years to come; and
- spend £7 million on customers, over and above what it would otherwise have spent, over the next five years through:
    - increasing the amount of money available to the Trustees of the Thames Water Trust Fund (£2million) to assist customers who are having difficulty paying their bills; and

[300] Under the Water Industry Act 1991, s 203(2).
[301] Notice in writing dated 5 June 2014, under and in accordance with section 22A(4) WIA91, of its proposal to impose a nominal penalty of £1 on Thames Water.

- investing £5 million to support additional community projects such as local programmes to better protect rivers and improve the natural environment.

Railway operators are regulated by the Office of Rail Regulation (ORR) and subject to licences and conditions. A new enforcement policy issued in 2012 allows ORR to take account of reparations made when setting a penalty but only if the reparations are made unconditionally (so, for example, without knowing how they will be treated).[302] The prior consultation proposed a policy of accepting 'reparations' where there had been a breach, to encourage rail operators to spend money within the industry to 'make good' the harm brought about by a breach of licence instead of paying a financial penalty.[303] This approach received widespread industry support, and would 'incentivise operators to think about the impact problems have on their customers and could bring more immediate, tangible benefits than a financial penalty alone would'. Two main changes were proposed to the policy statement. Firstly, the requirement that reparations must be offered unconditionally was removed. Secondly, ORR would be prepared in principle to reduce a penalty '£ for £' to reflect reparations offered where appropriate. These changes were also to bring ORR more into line with the approach adopted by other regulators, such as Ofgem's acceptance of 'alternative reparation'.[304] ORR expected that these changes would give it more flexibility to accept reparations in lieu of a financial penalty than it had previously, and that it would be more likely an operator would offer to make good the harm brought about by a breach of its licence obligations as an alternative to paying a financial penalty. 'The reform should incentivise compliance and change future behaviour no less than a penalty without reparations would, but with the added advantage that operators will be actively encouraged to think directly about the impact they have had on their customers and their customers' needs.'[305] ORR cited that the change would be compliant with the Macrory principle that penalties should aim to restore the harm done by non-compliance.

From 1 October 2016, rail customers were given the right to claim redress under the Consumer Rights Act 2015 legislation if train operators:

- fail to provide a passenger service reasonable care and skill
- breach other consumer rights provided under the CRA.

[302] Economic enforcement policy and penalties statement, Office of Rail Regulation, 2012, paras. 1.9 and 4.6.
[303] Rail operator penalties to benefit customers, proposes regulator, ORR, 14 May 2012.
[304] ORR had previously said that it was not minded to reduce a penalty '£ for £':
[305] ORR letter, 14 May 2012, above.

A number of pre-existing rail industry compensation schemes continued to be available after 1 October 2016, and remained the main means of redress for customers. The government is expected to enhance passengers' negotiating power by introducing a single railways ombudsmen.

V. Conclusions – Policy Recommendations

(RQ1): How to improve the interplay between the different enforcement pathways and the respective instruments to maximise effective and efficient enforcement for consumers and maximizing the potential of each enforcement pathway (CPC, RAD, ADR)?

(RQ1a): How can the enforcement pathways be established to benefit the achievement of consumer redress in mass harm situations?

1.

As a preliminary remark, and this can be considered as the main conclusion, the three enforcement mechanisms (CPC, RAD and ADR) should all be strengthened. This – and the subsequent higher level of (the threat of) enforcement – contributes to the overall enforcement of consumer protection, not only in the context of consumer mass harm situations.

2.

The CPC and ADR schemes should be adapted to explicitly consider mass harm situations.

2.1.

As mentioned above, the technique of regulatory redress should belong in the toolbox of every national authority (regulator). Chapter IV, B gave an overview of what these redress measures could look like: from 'soft' influence and approval to 'hard' coercion and enforcement through the formal exercise of enforcement powers. In the context of mass harm situations, it is suggested that the powers of public authorities should be extended to ensure better redress for consumers.

The current redress power as laid down in Article 9, 4 (c) CPC Regulation ("the power to receive from the trader, on the trader's initiative, additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation, or, where appropriate, to seek to obtain commitments from the trader to offer adequate remedies to the consumers that have been affected by that infringement") only refers to the first type, i.e. 'soft' influence. These powers should also include approval and coercion.

In jurisdictions where criminal courts are obliged to deal with civil claims for compensation (*e.g.* Belgium and France), it should be made possible for national authorities to join compensation on to a public prosecution.

A practical – and regularly identified problem – is the lack of knowhow, experience and expertise of national authorities in dealing with (and quantifying) consumer damages on an individual or a collective basis. Here, consumer organisations could play a key role. In many instances, they are not only the discoverer of consumer mass harm situations, but also the trigger (or facilitator) for redress (and even public) actions. In that capacity, they have good knowledge and experience in assessing, quantifying and calculating consumer damages. They could share that knowledge and experience with national authorities.

2.2.

On 17 October 2023, the Commission adopted a proposal to review the ADR framework.[306] The proposal amending the ADR Directive explicitly refers to collective ADR. Recital (11) states that Member States should enable ADR entities to bundle similar cases against a specific trader, to make ADR outcomes consistent for consumers subjected to the same illegal practice, and more cost-efficient for ADR entities and for traders. Consumers should be informed accordingly and should be given the opportunity to refuse from having their dispute bundled. According to the proposed Article 5, 2 (d) ADR Directive *"Member States shall ensure that ADR entities (…) may bundle similar cases against one specific trader into one procedure, under condition that the consumer concerned is informed and does not object to that."*

This is a laudable suggestion. However, how the information obligation and the consent of the consumers concerned will look like in practice, remain to be seen. On the other hand, it would have been wise to include a number of good practices of collective ADR – as mentioned and illustrated in Chapter III, C – in a separate recital.

3.

[306] https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en.

The three forms of enforcement (CPC, RAD and ADR) combined – the so-called 'three pillar model' – can and should strengthen and complement each other through an integrated approach.

Examples and suggestions of this integrated approached are the following.

3.1.

The possibility (*i.e.* the threat) of a representative action or an action by a public authority could incentivize traders to use ADR services and accept ADR solutions. Representative and public actions could be designed (used) as 'sticks' for (collective) ADR.

3.2.

A problem of (individual and collective) ADR decisions and awards is the fact that they are not enforceable as such. Therefore, a judicial 'fast track' procedure for the enforcement of ADR awards – similar to arbitration decisions – should be created.

3.3.

Article 15 RAD states that Member States shall ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence.

A similar provision for CPC common positions is needed. The CPC Regulation should have a provision stating that the common positions adopted by CPC Authorities in the context of coordinated actions, or a decision issued by the European Commission in case of widespread infringements constitute evidence in follow-on private (individual or collective) actions that an infringement has taken place.[307]

[307] In the same sense: BEUC, Strengthening the coordinated enforcement of consumer protection rules. The revision of the Consumer Protection Coordination (CPC) Regulation, 21 December 2022, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf.

3.4.

In order to facilitate the above (under 3.3.), a parallel representative action procedure or collective ADR procedure should be stayed and there should be no prescription, in case an overlapping regulatory investigation is being conducted and as long as there is no final decision or adopted common position. Inspiration can be found in Article 16 RAD regarding the suspension or interruption of limitation periods applicable to subsequent or parallel claims for redress when a representative action is brought.

3.5.

According to Article 4, 7 RAD Member States may – depending on national legal traditions – designate public bodies as qualified entities for the purpose of bringing representative actions (*e.g.* in Denmark, see Chapter IV, D).

A similar provision – to be laid down in the RAD or ADR Directive – should be provided for ADR entities. Depending on national legal traditions, the should also be giving standing to bring a representative action. This is already the case in some Member States, albeit with mixed success (*e.g.* in Belgium, see Chapter III, C).

3.6.

When the core of a (collective) consumer problem is an unclear or vague issue or interpretation of law, many ADR entities will not be able to resolve the dispute in case there is no amicable resolution. A potential solution could be the possibility for ADR entities to ask a prejudicial question to a court (or the highest court) to elicit a preliminary ruling on these issues of law. Subsequently, and based on that ruling, a collective ADR solution can be pursued. The technique is laid down in Article 267 TFEU which empowers the Court of Justice of the EU to give preliminary rulings on the interpretation of EU law and on the validity of acts of the institutions and other bodies of the Union. In the Netherlands, and since 2012, there is an act on prejudicial questions to the highest court of the Netherlands. One of the criteria for lower judges to ask such a question is the relevance of the question for other similar disputes (in other words, the question needs to have a collective dimension). This is a technique that could be made available to ADR entities.

4.

The cooperation between national authorities and ADR entities could be strengthened further by a mix of additional measures, which can easily be implemented without invasive policy changes. After all, evidence – as shown in this report – proves that both redress and behaviour change are delivered best when ADR techniques and regulatory techniques are combined.

On the one hand, ADR entities are particularly suited to signal problems through their accessibility for consumers. Most of these ADR entities receive complaints online. Capturing that data allows them to easily detect structural, systematic and collective problems. On the other hand, national authorities are well-suited to take structural and coercive action against recurring problems.

At the junction lies Article 17 ADR Directive focusing on the cooperation between ADR entities and national authorities enforcing Union legal acts on consumer protection. This framework could and should be made more robust. An option could be the mandatory cooperation between ADR entities and national authorities via the exchange of data and publication of this data so that consumer organisations have access to it. It is regrettable that this is overlooked in the 2023 proposal of the European Commission to amend the ADR Directive.

National authorities are in a position to compel traders to comply with ADR outcomes, especially for traders that are known not to comply. They could also provide, if necessary, additional guidelines for or requirements to the ADR entities they supervise.

ADR entities should focus in their annual reports on collective and structural problems and on how they interacted by national authorities.

(RQ1b): When can different enforcement pathways paralyze or be detrimental to each other?

5.

According to Recital (29) ADR Directive, confidentiality and privacy should be respected at all times during the ADR procedure. Member States should be encouraged to protect the confidentiality of ADR procedures in any subsequent civil or commercial judicial proceedings or arbitration. Recital (41) CPC Regulation states that information exchanged between competent authorities should be subject to strict rules on confidentiality and on professional and commercial secrecy, in order to ensure investigations are not compromised or that the reputations of traders are not unfairly harmed.

These confidentiality obligations can undoubtedly be detrimental to any later possibility of private (collective) enforcement.

6.

In the context of regulatory enforcement, there is the possible influence of the *ne bis in idem* principle. According to Article 50 of the EU Charter of Fundamental Rights no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. The CJEU has clarified that, although classified as an administrative penalty under national legislation, a fine imposed on a company by the competent national consumer protection authority in order to punish unfair commercial practices constitutes a criminal penalty where it has a punitive purpose and has a high degree of severity. The Court also answered in the affirmative the question whether the principle *ne bis in idem* precludes national legislation which allows a criminal fine imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of res judicata.[308]

This adage and case law have no (detrimental) impact on the relationship between the CPC framework within which the above has to be understood, and RAD actions, since the nature (criminal vs private) and object (fine vs redress) of both actions is different. The *ne bis in idem* principle only applies to a second criminal proceeding for the same criminal offence. If a trader was subject to a criminal procedure (in the sense of the above case law), this does not preclude a following civil representative action procedure based on the same facts. The only consequence is that the criminal decision can be used as evidence in this civil representative action procedure.

(RQ2): How to maximize the information flows between the enforcement pathways?

[308] Judgment of 14 September 2023, Volkswagen Group Italia SpA, ECLI:EU:C:2023:663.

(RQ2a): Where should – and if relevant how can – information exchanges between CPC authorities, ADR entities, RAD actions be facilitated?

7.

The exchange of information between CPC authorities, ADR entities and RAD actions is crucial and could be facilitated in the following ways.

7.1.

Qualified entities, national authorities and ADR entities should always retain a broader view than singular dispute resolution. They should monitor constantly recurring problems and possible structural problems. This should be part of their DNA and enforcement policy.

7.2.

ADR entities and national authorities should create a continuous feedback loop. This loop should not only be online but these entities should organize frequent face-to-face meetings. It is a given and proven fact (as this report shows) that data collected by ADR entities mapping systemic market problems and communicated to competent national authorities (as foreseen by Article 17 ADR Directive; see *supra*) are of crucial relevance for these authorities when performing their market monitoring roles.

7.3.

The creation of a unique portal or front office for consumer disputes, to be managed by one (or a limited number) of ADR bodies is essential. Reference can be made to the Belgian example and the recent government 'threat' to undermine this unique portal (see Chapter III, C).

A 'one-stop shop' is not only more accessible for consumers, but also ensures that all information is concentrated in one entity, that can then dispatch this information to other entities as needed. A *conditio sine qua non* are efficient and well-working information flows between all the entities that are part of such a portal.

(RQ2b): Where relevant, how and in which situations can the confidentiality of information be overcome?

8.

As mentioned above, confidentiality is viewed as a golden principle in the area of consumer ADR. Proper data collection by ADR entities might require data protection clearance in some jurisdictions. The impact of the GDPR and its surrounding case law on information exchanges should be closely researched and monitored.

Besides explicit legislation allowing for information sharing, two other proposals can be made. On the hand, there is the possibility – *e.g.* in the context of regulatory actions – to make a document request with the European Commission,[309] or an access to file regarding competition law.[310] On the other hand, national legislation usually provides for court orders ordering the submission of documents by other parties or even third parties.

(RQ3): How to help consumer organisations prioritize pathways to efficiently address mass harm affecting consumers across Europe?

9.

In general, the three pillar model is honoured taking into account the following elements.

All enforcement methods (CPC, ADR and RAD) have their pros and cons. The best method depends on the concrete facts of the case at hand and the (budgetary) situation in a specific jurisdiction. In the Dieselgate case it was clear that – at least at the outset – the public enforcement path was most important because of the deliberate violations of the law and the subsequent criminal prosecution.

In some jurisdictions, representative actions procedures are novel or in their infancy, or there is still disagreement on whether representative proceedings are a good tool of consumer

[309] https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/access-documents/how-access-commission-documents_en.
[310] https://competition-policy.ec.europa.eu/index/access-file_en.

enforcement. Here, alternative pathways, such as regulatory action or ADR can be a quicker and more efficient redress tool.

In this context, it is vital to underline that ADR entities and national authorities, as opposed to representative actions proceedings, do more than delivering redress. They provide assistance to both consumers and traders and gather and process data, which can trigger subsequent or parallel actions.

Published in January 2024 by BEUC, Brussels, Belgium

The European Consumer Organisation
Bureau Européen des Unions de Consommateurs
Europäischer Verbraucherverband

Rue d'Arlon 80 Bte 1 - B - 1040 Brussels