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Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures

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Abstract Access to justice remains a major challenge in EU consumer law, which has become more pressing with growing cross-border purchases, negatively affecting the common market. Moreover, a recent surge in supranational mass damages cases has highlighted market failures and the need for collective procedures. Under the Lisbon Treaty, new opportunities have arisen to close this civil justice gap. This article analyzes how the wider competences of the EU on access to justice can facilitate consumer redress, by putting special emphasis on the issue of the affordability of litigation, which has been so far underexplored. This work argues that collective procedures, combined with coherent out-of-court mechanisms and funding schemes, are key elements of an effective consumer dispute resolution system. In particular, specific cases and financing models are assessed, which have the potential to foster judicial protection of consumers.

Keywords Collective access to justice of consumers · Litigation funding · ADR · Lisbon Treaty

The proliferation of cross-border exchanges and mass production has extended the role of collective litigation beyond the nation state. Recent market failures have been seen in multiple damages cases of shareholder losses, excessive telecommunication charges, and product liability (Hänsel and Micklitz 1994). This has indicated an urgent need for new, simple, fast, and cheap ways of enforcement.

As a policy response, a growing number of Member States have recently incorporated collective redress mechanisms as a way of dealing with multi-party actions (Mulheron 2004). In the EU, a similar trend has begun to emerge, where collective action mechanisms, as a tool to improving access to justice, are currently at the heart of European debate (Cafaggi and Micklitz 2009).[1]

Notwithstanding this development, many current civil justice systems are still ill-equipped to provide efficient procedures for multi-party claims. In particular, consumer redress at the cross-

[1]Collective action or redress has been defined by the Commission as: "encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices." See the European Commission Paper: "Towards a Coherent European Approach to Collective Redress: Next Steps," SEC (2010) 1192, Brussels 5.10.2010, p. 4.

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border level (Gessner 1997) and litigation funding remain major and persistent challenges in EU law. The resulting under-enforcement of consumer rights might have an adverse effect on confidence in cross-border markets, and on further economic integration.[2]

This raises important questions about consumer access to justice: What are the main obstacles and how can they be removed? What mechanisms would ensure a balanced dispute resolution system for both consumers and companies?

This article aims to evaluate how the formally recognized right of access to justice can be transformed into effective enforcement procedures. First, it analyses consumer access to justice in the EU, comparing collective redress mechanisms and major cases in the Member States, to evaluate the cross-border implication. Second, it analyses how the new competences in the Lisbon Treaty regarding civil justice may be applied to facilitate consumer redress, evaluating alternative dispute resolution (ADR) schemes and collective redress mechanisms. Finally, relevant financing models are proposed, such as a collective action fund and contingency fees, which may encourage the affordability of judicial actions.

The Civil Justice Gap

At a global level, access to justice has been clearly recognized as of paramount importance for consumer protection. The United Nations Guidelines for Consumer Protection highlighted the central role of access to justice, by stating that governments should promote measures to enable consumer organizations to obtain fair, cheap, and accessible regress.[3] Furthermore, at the European level, access to justice has been recognized as a fundamental right, through the procedural right to an individual hearing and to a defence in the European Convention of Human Rights (Article 6 ECHR), as well as in Article 47 of the Charter of Fundamental Rights of the EU (e.g., Storskrubb and Ziller 2007, see also Ward 2004). Finally, the Constitutions of all the Member States include the right to a fair procedure, which comprises the right to access to justice and efficient remedies.

Despite this formal recognition, consumers still face major barriers to enforce their rights in practice. This has created a civil justice gap that undermines the credibility of the EU legal system and impedes efficient functioning of the internal market.[4]

Access to Justice Barriers

As early as the 1970s, the access to justice scholars Mauro Cappelletti and Bryan Garth evaluated the effectiveness of complaint mechanisms to render law procedures more effective. Cappelletti and Garth identified three key challenges: cost, organizational problems, and lack of adequate procedures (e.g., Cappelletti 1979, p. 519; Cappelletti 1993; Cappelletti and Garth 1978, p. 49). Today, almost 40 years later, cost barriers and inefficient procedures are still cited as hindering access to justice for consumers in the EU.

According to 73% of consumers, the main reason for not bringing a case is the financial risk that litigation might involve.[5] In particular, the amount of damages claimed by consumers might be relatively low in relation to the cost of a claim, which is therefore often not filed.

[2] Over two thirds of Europeans (71%) think it is harder to resolve complaints, when purchasing from providers located in other EU countries, Eurobarometer 2006 Special Report 252, p. 22.
[3] GA res 248, 39 UN GAOR (106th plen. Mtg), UN Doc A/Res/39/248 (1985).
[4] 2006 Eurobarometer Report 252, 44% of consumers are less confident when purchasing in another EU state.
[5] In the Eurobarometer survey 2006, 73% of consumers indicated that they would not bring their complaint to court because of the high litigation costs, the length (33%), and the procedural complexity (33%).

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A second challenge is the lack of legal expertise of consumers and the length of court cases.[6] Due to procedural complexity, consumers grow more dependent on public bodies or consumer associations to enforce the law. However, the latter often lack funding and adequate knowledge in order to represent collective consumer claims.[7]

Finally, a third factor that might obstruct justice is the lack of adequate collective redress mechanisms for damages in the EU. In fact, 74% of European consumers would be more willing to defend their rights in court if they could join with other harmed consumers in the procedure.[8] However, at the EU level, such procedures are not available for actions for damages so that access to justice remains limited.[9]

Existing Redress Mechanisms in the EU

A set of dispute resolution instruments has already been put in place to facilitate consumer redress. In 1993, the European Commission published a Green Paper on Consumer Access to Justice in order to improve redress mechanisms and out-of-court procedures,[10] and in 1996, it presented an action plan to promote consumer dispute resolution.[11]

With the entering into force of the Treaty of Amsterdam in 1999, "judicial co-operation in civil matters" became a new EU policy, to improve the efficiency of the European civil justice system (Storskrubb 2008). Accordingly, three priority actions have been decided: better access to justice, mutual recognition of judicial decisions, and convergence of procedural law. For consumer law, the output of this new policy field was the adoption of common minimum rules on legal aid to improve access to justice[12] and a European Small Claims Procedure Regulation in 2007 (Haibach 2005).[13] While the latter Regulation reduces the length and cost of procedure, gaps in coverage, cost and complexities still pose a barrier to access to justice.[14]

The Regulation on Consumer Protection Co-operation improves the public enforcement of consumer law. This permits designated national authorities to request actions on an infringement by an authority in another Member State.[15]

Moreover, a particular instrument to address collective consumer redress was introduced by the Directive 98/27/EC on injunctions for the protection of consumer interests (hereinafter

[6] Forty-one percent of consumers according to the Eurobarometer 2006 were not satisfied with the handling of the complaint, and around 50% unsatisfied consumers do not complain against a company.

[7] A Consumer Law Enforcement Forum project has been established in the EU that could improve the expertise of consumer interest groups in redress mechanisms, see http://www.clef-project.eu/cms/index.php.

[8] Eurobarometer survey 2006.

[9] In addition, only a small number of 17% consumers wish to bring a case before the courts, as a complaint is time-consuming and expensive, Eurobarometer 2006.

[10] Commission Green Paper of 16 Nov. 1993 on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, COM (93) 576.

[11] Communication from the Commission, Action plan on consumer access to justice and the settlement of consumer disputes in the internal market, 14 February 1996, COM (96) 13.

[12] Directive 2003/8/EC of 27 January 2003, OJ L 26 of 31.01.03, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid.

[13] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure.

[14] J. Stuyck, E. Terryn and others, University of Leuven Study, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings', January 17. 2007 (hereafter Leuven Study 2007)"; And Replace footnote 22 into "Civic Consulting and Oxford Economics, Report on the 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, commissioned by DG SANCO, (finalised 26.8.2008), pp. 42–44 (hereafter Collective Redress Study, 2008).

[15] Regulation 2006/2004 of 27 October 2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws, OJ l 364, 9.12.2004.

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"Injunction Directive"),[16] adopted in 1998. This Directive establishes common procedures enabling qualified organizations in one Member State (such as consumer interest groups) to bring actions for the cessation of an infringement of consumer rights in another Member State (Micklitz 2007a; Rott 2001). By so doing, this Directive protects the collective interest of consumers in the internal market. However, it has rarely been applied because of the intricate system it relies on and because it does not prescribe financial compensation of the consumer for the damage suffered (Leuven Study, 2007, p. 273).[17]

Finally, the EU has strengthened alternative dispute resolution by setting minimum-quality criteria for these schemes and by facilitating cross-border complaints.[18] These schemes offer an expeditious and cheap alternative to court procedures. However, they often lack binding force and are not available in all EU countries and market sectors.[19]

In conclusion, the EU consumer redress mechanisms still present important procedural flaws, which seriously undermine their effectiveness.[20] While these mechanisms tend to facilitate access to justice, none of them allow for collective redress for damages, which would compensate consumers for the harm or losses suffered. This might adversely affect a multitude of consumers and raises the question how Member States have dealt with this issue.

Collective Redress Mechanisms in Member States

A growing number of EU Member States are introducing collective redress mechanisms for consumers to respond to the sharp increases in multi-party cases (see Micklitz and Stadler 2006). At present, the principal *common* law jurisdictions already have a category of collective action for damages, while the *civil* law jurisdictions vary in the degree of availability of such actions. At least 14 Member States include collective redress mechanisms, while others have relevant legislative proposals.[21] This marks a new trend in recognizing consumer protection as a collective procedural right. Despite considerable differences in national collective redress procedures, three broad models can be distinguished within the EU: representative actions, group actions, and test cases.

Representative collective actions are introduced either "by an organisation, a state authority or an individual on behalf of a group of individuals, who are, however, not parties to the proceedings" (Leuven Study, 2007, p. 261).[22] Consumer associations or public bodies, such as an Ombudsman, can represent the consumer interest, depending on the country. In the case of Austria, Belgium, Finland, Hungary, Italy, and the Netherlands, representative collective

[16] Directive 98/27/EC on injunctions for the protection of consumers' interests (OJ L 166, 11.6.1998). This Directive has been modified subsequently and has been codified by Directive 2009/22/EC.

[17] See the European Commission's Report concerning the application of Directive 98/27/EC Brussels, 18.11.2008 COM (2008) 756 final.

[18] ADR Recommendations 98/257/EC and 2001/310/CE; Directive 2008/52/EC of 21 May 2008 on mediation in civil and commercial matters; http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm.

[19] See the Study on ADR in the EU, by Civic Consulting, 16 October 2009.

[20] The Green Paper on Consumer Collective Redress, p. 6 and Civic Consulting Report on the Effectiveness and Efficiency of Collective Redress, 2008, pp. 42–44 (Collective Redress Study, 2008).

[21] Collective redress exists in Austria, Bulgaria, Estonia, Denmark, Finland, France, Germany, Lithuania, the Netherlands, Portugal, Spain, Sweden, the UK, and Italy.

[22] For example, representative collective procedures exist in Austria, Estonia, France, Germany, Greece, the Netherlands, Romania, Slovakia, and the UK.

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actions take the form of injunction procedures[23] which cannot attribute any financial damages to the consumer. In other countries such as France, Greece, and Poland, the judge can effectively provide damages for the prejudice or moral harm caused to collective consumer interests (Franke 2002). These damages are, however, not distributed to the individual victims, but are kept by the representative consumer body or are used by the state for public policy objectives.

In a *group action*, a delimited category of persons may bring an action to enforce their individual claims together, in one procedure, and in accordance with specific rules designed for such a purpose (Micklitz and Stadler 2006, p. 1481).[24] Group actions can be differentiated according to whether they apply a so-called opt-in or opt-out procedure. Opt-out procedures include all the victims of a harmful action, with the exception of those consumers who explicitly ask to be excluded.[25] In countries such as Norway and Denmark, opt-out options are complementary to the opt-in mechanisms, but are only applicable where the harm caused to the consumer is low. Conversely, other countries have only introduced an opt-in approach, which requires the explicit authorization by the harmed consumer to be included in the procedure, before the court decision has been taken. Examples of such opt-in group actions exist in Sweden and Spain, where consumers or interest groups can lead the case.

In *test cases*, one or more individuals can file a claim, which leads to a judgment that forms the basis for other claims with the same interest against the same defendant. These test cases were developed in countries such as Germany (Halfmeier et al. 2010)[26] and the UK,[27] and can be filed either by a consumer or by an organization (Micklitz and Stadler 2006, p. 1478).[28] Consumers whose claims fulfil the requirements of a test case can subscribe to a register maintained by the acting claimant of the test case. The particularity of such a case is that the court chooses only one claim and bases its decision on this, which binds all the registered claims. Test case procedures offer the opportunity to have legal questions relevant for a number of claims clarified by the court at once, and can thus reduce litigation costs. One disadvantage, however, is that a judgment has no binding effect for the third parties that did not subscribe to the case (e.g., Leuven Study, 2007, p. 262).[29] Furthermore, the German test case procedure under the *Capital Markets Model Case Law* (KapMug) has been criticized, due to a number of shortcomings, such as complex and inefficient procedures, in particular for low stakes claims (Feess and Halfmeier 2010, pp. 3–4).[30]

The above facts suggest a trend in several Member States towards grouping individual claims for damages while still following different national traditions. These legal variations (and an outright lack of collective action for damages in some countries) create legal

[23] With the Directive 98/27/EC on injunctions for the protection of consumers' interests, (OJ L 166, 11.6.1998) injunction procedures have become mandatory under EU law. As a result, every Member State provides now for an injunction procedure to protect the collective interests of consumers. See the European Commission's Report concerning the application of Directive 98/27/EC Brussels, 18.11.2008 COM (2008) 756 final.

[24] Member States with group actions are Bulgaria, Denmark, Lithuania, the Netherlands, Portugal, Spain, Sweden, and the UK.

[25] In the Netherlands, only authorised associations can initiate such procedures to propose a settlement, while in Denmark, only the Ombudsman can apply the opt-out option.

[26] The German Capital Markets Test Case Act (also called Capital Markets Model Case Law), in force since 1 November 2005, introduced test cases for investors who have sustained loss through false, misleading, or undisclosed information relating to public capital markets.

[27] See the Civil Procedure Rules on test claims 19.15 at the webpage of the Ministry of Justice (accessed in 2009): http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm#IDA4FF5B.

[28] Usually, a test case requires different individuals with overall similar claims against the same defendant.

[29] The same, however, is true for group actions with an opt-in procedure.

[30] In order to improve the effectiveness of the KapMug, it has been suggested to introduce opt-in mechanisms and further extend the reversal of the burden of proof for causation to the defendant.

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inconsistencies, and may pose a barrier to an effective resolution of cross-border litigation. To understand the extent of these barriers, we will look at some important collective redress cases in the Member States, evaluating their cross-border aspects and implications.

A Typology of Collective Redress Cases and Cross-Border Implications

Up to 2008, approximately 326 collective redress cases took place in Member States, of which approximately 10% had a cross-border implication for the EU (Collective Redress Study, 2008, pp. 42–44).[31] Interestingly, a close analysis reveals that most of the cases actually occurred in four particular areas of consumer law.

A large number of collective redress cases (39%) concerned financial services,[32] which were further increased by the financial crisis. An example in this sector is the *Dexia* WCAM case,[33] in which private investors lodged a mass claim in 2005 in the Netherlands against Dexia for losses suffered from a financial product. After the court trial, the consumer associations and the bank reached a settlement agreement, which was approved in 2007 by the Amsterdam Court of Appeal and declared binding.[34] This entitled around 300 000 investors to compensation for the shareholder losses of their share lease contracts with Dexia. However, consumer claims with cross-border elements were excluded from the settlement indicating difficulties for individuals living outside the Netherlands to resolve the dispute. More far reaching was the decision taken in the Dutch *Shell* case in 2009, where a US$ 352.6 million settlement agreement was approved by the Amsterdam Court, including investors residing in 100 jurisdictions.[35] The Court therefore took jurisdiction over individuals residing outside the Netherlands. However, it remains to be seen if courts in other Member States will accept this decision.

A second category of large collective actions relates to services of general interest, such as telecommunications (12%).[36] An important example in this regard is the French mobile phone case. After the French competition board imposed a penalty on a collusive agreement among mobile phone operators in November 2005, a French consumer association created a website to help consumers calculate the individual damage they had suffered.[37] Despite this, only a very small number of consumers participated in the claim: Eventually, only 0.6% of the 20 million subscribers who could have been compensated subscribed to the webpage set up for complaints.[38] This may suggest that the law is poorly adapted to collective actions, and that dispute resolution may be simplified in France allowing "opt-out" procedures.

[31] On average, the value claimed was between € 10 000 and € 99 000, with some countries also including cases of more than € 5 million, the average individual consumer claim represented a value between € 100 and 999, with France, Spain, Germany, and Austria representing the largest number of cases.

[32] EU Collective Redress Study, 2008, p. 41.

[33] Dexia WCAM decision, Amsterdam Court of Appeals 25 January 2007, LJN:AZ 7033.

[34] This settlement procedure was made possible by legislation that went into effect in the Netherlands in July 2005—the Dutch Act on Collective Settlement of Mass Damages.

[35] In this case, investors were compensated for losses suffered after a decrease in the value of Shell securities and allegedly incorrect information by the company of its oil and gas reserves. https://www.royaldutchshellsettlement.com/Documents/en/RDS_Notice.pdf (viewed 10.01.2011).

[36] For example, in a *Swedish Electricity* Case, the Swedish Consumer Ombudsman filed a case for about 7 000 consumers against a company which supplied electricity under a fixed price contract. The price actually charged for the new supply of electricity was considerably higher than the price previously agreed upon with the company, Oe 522-05 Court of Appeal.

[37] The association invested considerable financial means: about 21 employees and € 300 000.

[38] A more successful example took place in 2004, against an overcharging telecommunication company in Portugal, which affected about 3 million consumers. The compensation to these consumers was largely in kind and non-monetary, Proc. 781/95; Comarca de Lisboa, 5° Juízo Cível, 1ª Secção.

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A third area of law in which collective redress mechanisms have often been used are transport (8%) and package tourism (7%). A significant example of collective redress damages in the transport sector occurred in Sweden in 2003, following the bankruptcy of a travel agency.[39] Here, about 700 airplane passengers had to buy new tickets as the travel agency could not comply with its obligations. Five hundred of these passengers chose to be group members of a collective redress action. For the first time, after this case, a collective redress mechanism was introduced in Sweden in order to deal effectively with multi-party cases. In another case, a group of Austrian tourists had fallen ill at the same time because of food poisoning in a holiday resort in Turkey in 2004.[40] A consumer association brought a test case against the Austrian tour operator, and the harmed tourists received compensation. However, here effective litigation was restricted because of the lack of a wider collective redress procedure for cross-border cases. Indeed, a group of *Swiss* tourists who were harmed at the same resort in Turkey could not be defended by the Austrian association because their tour operator was located in another country.

Finally, collective redress mechanisms are increasingly applied in product liability cases. This has been shown in the tobacco litigation cases in some Member States, as well as in product litigation cases in the pharmaceutical sector. For instance, the vast majority of Group Litigation Order claims in the UK involved pharmaceutical product liability claims (Hodges 2009).

These cases show that, at a national level, collective redress procedures often effectively improve dispute resolution in certain areas of law. However, they also demonstrate that although a growing number of consumers in different EU countries may have the same interests in very similar claims, shortcomings may prevail when it comes to cross-border claims.[41] Furthermore, the areas in which consumers find it most difficult to resolve mass claims (such as financial services and package tourism) are precisely those where they are likely to engage in cross-border activities.[42] This indicates that a collective redress mechanism allowing consumers from different Member States to file or settle a claim *jointly* could be desirable and effective to improve access to justice.

Interestingly, a large number of cases concern recently privatised markets, such as those for telecommunications or energy, which are of essential importance to consumers. This raises the question of whether it would be worth introducing sector-specific collective cross-border mechanisms, or if a general redress tool could fit all cases.

Summing up, the lack of trans-national collective redress provisions may make cross-border purchases less attractive for consumers, creating a gap in consumer protection and, moreover, resulting in an indirect obstacle to inter-community trade.[43] How then can procedural consumer rights be improved at the EU level?

[39] Swedish travel agency case T 1281-07 B./E., filed in March 2003 in Stockholm (T 3515-03), (2007.04.01).

[40] See *Bezirksgericht für Handelssachen Wien* (BGHS), Case 17 C 1148/04d that was brought in 9.12.2004.

[41] In these circumstances, consumers may be excluded from actions taken by a consumer organization or a public body. E.g., the Danish Ombudsman stressed that under the current regime, it is very difficult to represent consumers outside the country of their residence or to defend the rights of foreigners who have suffered a loss from a company located abroad; see the Danish Consumer Ombudsman Office, 2007, available at: http://www.forbrug.dk/english/dco/dcopressreleases/news/collective-redress/ (accessed 01.02.2009).

[42] Green Paper on Consumer Collective Redress, European Commission, 27.11.2008 COM(2008) 794 final, p. 4.

[43] It is likely that EU consumers would be more willing to become involved in cross-border purchases if procedures were set up to ensure adequate redress, whatever the country of purchase of their goods or services.

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Procedural Consumer Rights in the EU

In recent years, the European Commission has started to recognize the importance of enforcement as a central part of its policy. This trend is supported by the Lisbon Treaty, which expands and clarifies the EU competence to legislate in civil procedure, and provides new opportunities to promote a coherent redress model for consumer law. The ECJ's jurisprudence also had a major impact on the development of civil procedure rules in the EU (Tulibacka 2009, pp. 1535 et seq.).

ECJ case law and recent Development in EU Policy

Access to justice and collective redress mechanisms have been debated in different EU policy areas for some years now.

Collective redress mechanisms have been suggested in competition law (Keske 2010), inspired by the ECJ's judgment in the *Courage* case (see also Reich 2005, p. 35; Hodges 2006, pp. 1381-1407).[44] The ECJ held that the full effectiveness of European Community (EC) competition law would be put at risk if it were not open to any individual to claim damages. This ruling was confirmed in *Manfredi*, where the ECJ stated that: "(…) any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."[45]

As a result, the Commission has considered EU collective redress mechanisms in the 2005 Green and 2008 White Papers on Damages Actions for Breach of the EC Antitrust Rules.[46] Both papers encourage a proposal for a Directive on collective redress against infringement of competition law. Political pressure however prevented the publication of a draft Directive at the end of 2009. Should this Directive be adopted, it may also encourage consumer actions to obtain damages in relation to breaches of competition law. This would be an important innovation as companies infringing competition law often avoid paying any compensation to consumers.

Debates on effective judicial protection[47] and collective redress mechanisms have also resurfaced in consumer law and policy. This is reflected in the current EU Consumer Policy Strategy for 2007–2013,[48] which underlines that enforcement is a central part of consumer legislation. The EU also commissioned various studies on redress mechanisms in and out of court.[49] In 2008, the Commission adopted a Green Paper on Collective Consumer Redress,[50] suggesting four options to improve consumer redress: (1) no EC action, (2) co-operation between Member States, (3) a mixture of policy instruments to strengthen redress, and (4) binding or non-binding collective redress measures, or a mixture of the four options. A follow-up discussion paper[51] in 2009 provided a larger choice of policy options, including self-regulation and ADR schemes. The Commission also identified benchmarks for efficient collective redress systems.[52] More recently, DG Competition, DG Sanco, and DG Justice

[44] Case C-453/99 *Courage* v *Crehan Ltd*. [2001], ECR I-6314, para. 26.
[45] Joined Cases C-295/04-298/04 *Manfredi* v *Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, para. 61.
[46] On 2 April 2008, the Commission adopted a White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165, and on 19 Dec. 2005, a Green Paper COM (2005) 672.
[47] Case 168/05, *Elisa Marıa Mostaza Claro v Centro Movil Milenium SL* [2006] ECR I-10421; Case 40/08, *Asturcom Telecomunicaciones v Cristina Rodrıguez Nogueira* [2009] ECR I-9579.
[48] Consumer strategy 2007–2013, 13.3.2007, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/320.
[49] See the ADR and collective redress mechanisms studies in the EU http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Studies (viewed 3.1.2011).
[50] The Green Paper on Consumer Collective Redress, Brussels, 27 November 2008, COM (2008) 794, p. 7.
[51] Consultation paper: http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf.
[52] The Commission proposes 10 points, including financing of actions and the provision of satisfactory redress, see: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

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started to focus on a more coherent approach to collective redress.[53] On 4 February 2011, the Commission issued a new consultation paper on collective redress, which aims to identify common legal principles that would fit into the EU legal system. This document shows a more open approach to an EU redress framework, considering alternative dispute resolution and litigation funding alongside collective redress mechanisms. In the light of these policy debates, the question arises as to whether the EU has sufficient competences to adopt civil justice measures in the specific field of consumer law.

EU Competences Under the Lisbon Treaty

The EU has traditionally had a narrowly circumscribed remit for legislative provisions regarding civil procedure (Hodges 2008, p. 95; Storme 1992, p. 180 et seq). In turn, the Member States are relatively autonomous in determining their civil justice systems. The principle of national procedural autonomy was highlighted in the European Court of Justice's (ECJ's) early jurisprudence (Craig and De Búrca 2003, pp. 230–232; Tulibacka 2009, pp. 1536–1537). In *Rewe-Zentralfinanz*, the ECJ held that it is the role of the Member States "to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law."[54] However, the ECJ also imposed two basic requirements on national procedural rules: They should be non-discriminatory, and they should not make the exercise of a right impossible in practice. Subsequently, the ECJ intervened in national civil procedures applying, among others, *effective protection* as a guiding principle. In *von Colson*,[55] the ECJ ruled that Member States have to guarantee real and effective judicial protection of remedies, emphasizing the importance of the principle of effectiveness. This approach was reiterated in the following ECJ decisions, including *Johnston*. As a consequence, it was argued by some scholars that "the EU has a combination of national procedural competences and European procedural primacy" (Storskrubb 2011, p. 301).[56]

The principle of effectiveness was eventually integrated into the Lisbon Treaty at Article 19 (1) TEU, which states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

Importantly, the Lisbon Treaty broadens the competences of the EU in the field of civil justice and may serve as a general basis for cross-border measures. While the pre-Lisbon Treaty Article 65 EC stated that measures with cross-border implications could be taken "in so far as necessary for the proper functioning of the internal market,"[57] the new Article 81 (2) Treaty on the Functioning of the European Union (TFEU) on civil procedure provides the possibility for the EU to adopt civil justice measures without requiring a

[53] "Towards a Coherent European Approach to Collective Redress: Next Steps," Joint information note by Reding, Almunia and Dalli, European Commission, SEC (2010) 1192, Brussels, 5 Oct. 2010.

[54] Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

[55] For example, see Case 14/83, *von Colson and Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891, para. 23.

[56] Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986], ECR 1651; see also inter alia Case 222/86 *Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens and Others* [1987] ECR 4097.

[57] Art. 65 EC further stated, inter alia, that measures could be taken "(…) (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

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market-making objective (Tulibacka 2009, pp. 1527–1565). These measures can be on, inter alia:

> "(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
> (…)
> (e) effective access to justice;
> (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
> (g) the development of alternative methods of dispute settlement; (…)."

For consumer dispute resolution, Article 81 (2) (e) and (g) TFEU is particularly relevant. Based on this, the EU may adopt measures that facilitate collective and alternative redress mechanisms in order to promote "effective access to justice." This competence is nonetheless generally restricted to cross-border matters, so that Member States procedures may remain unaffected (Fairgrieve and Howells 2009, p. 406). However, the EU may adopt broader measures by relying on the specific consumer protection provision of the Lisbon Treaty. Article 169 (1) TFEU (ex 153 Article (1) EC) states that (…) "to ensure a high level of consumer protection, the Union shall contribute (…) to promoting their right to information, education and to organize themselves in order to safeguard their interests."

Collective redress procedures, in or out of court, would be one way to guarantee a high level of consumer protection and facilitate consumer associations to organize themselves. In particular, Article 169 (2) (b) TFEU is of relevance for collective and alternative dispute resolution because it allows the EU to adopt consumer measures "which support, supplement and monitor the policy pursued by the Member States." As a large number of Member States have already introduced collective and alternative redress mechanisms for consumers into their national systems, the EU can support or complement the national redress schemes upon the basis of Article 169 (2) (b) TFEU. Such a measure may allow a more coherent dispute resolution system across the EU and provide an inspiration for Member States without collective redress mechanisms.

Alternatively, Article 169 (2) (a) TFEU and Article 114 TFEU (ex Article 95 EC) could be an additional basis for EU access to justice legislation. The majority of consumer protection measures have traditionally been developed on the sole basis of these provisions. However, they require a market-integration objective. Thus, in order to evaluate whether Article 114 TFEU can also be applied, we have to consider whether diverging dispute resolution mechanisms in the European Member States pose a barrier to trade, and whether a relevant EU measure would improve market integration (Micklitz and Stadler 2006, pp. 1496–1497). The fact that different redress mechanisms for consumers exist in the Member States may lead to disparities and obstacles to trade, so this provision may become a potential basis for EU action.

In conclusion, since the introduction of the Lisbon Treaty the EU has broader powers to adopt civil justice measures. In particular, Article 169 TFEU in conjunction with Article 81 TFEU can be considered as a potential basis for an EU access to justice measure for consumers. The following sections explore how these EU competences may be applied to boost affordable and effective consumer dispute resolution.

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Collective Redress Mechanisms

In an enlarged EU market with a growing exchange of similar goods and services, collective redress procedures are important for the effective functioning of the consumer dispute resolution system. These procedures present several advantages, but may also require specific safeguards.[58]

Collective action procedures could provide an incentive to participate jointly in litigation cases as this would be a means of spreading litigation costs and risks among individuals (Klauser 2005, p. 745).[59] These procedures may also increase the prospect of success for consumers. For example, a large number of individuals showing similarities in the harm received, may find it easier to prove the existence of the damage and the causal link with a certain product.

Furthermore, these mechanisms may, to a certain extent, redress an asymmetrical balance of power between the consumer and the firm, due to the fact that the latter generally has access to greater resources and information to defend its interest.[60] Collective redress may also contribute to procedural economy and to legal certainty. For damages affecting numerous people, similar individual claims would be a major burden for the judicial system, and may lead to inconsistency in the case law. Thus, collective redress mechanisms could be a way to increase the effectiveness of the judicial procedure by saving resources, speeding up the judicial process, and increasing coherence (Leuven Study 2007, p. 265; Ziegel 2006, p. 587 at seq.).

Finally, collective redress mechanisms can have a deterrent effect on business and may exert a regulatory function on the market.[61] Without this pressure, companies might be less inclined to comply with protection standards, which can lead to unfair trade practices and distort competition. Thus, collective actions may be a means of market control in case of insufficient oversight by public bodies (Micklitz 2007b, p. 17), and can achieve a better compliance, preventing future harm to consumers (Wagner 2007, p. 693; Wilhelmsson 1999, p. 229).[62]

Nonetheless, these procedures have been controversial as they may entail several risks requiring safeguards to prevent excessive claims. For example, it has been suggested that they might lead to an over-regulation of the market (Säcker 2006, p. 60). While in the USA class actions were established to compensate for the government's relatively light-handed approach, the EU already has strong administrative protection for consumers, so collective actions may overload the judicial system (Säcker 2006, p. 78). Although these aspects need to be given serious consideration, recent market failures in the product safety[63] and financial sectors indicate that the public control mechanism does not always seem to function in the EU. Furthermore, the proliferation of collective redress schemes in Member States reveals a real need for these new enforcement methods.

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[58] Cross-border collective redress proceedings can also pose new challenges for private international law that would need to be addressed by EU law. See for example: Danov (2010).

[59] The EU Leuven Study shows that possible savings could range between 46% and 99%, p. 63; some cases in Austria have also demonstrated savings by using collective redress actions.

[60] Regarding "collective justice," see Micklitz 2007b, p. 17.

[61] See the Collective Redress Study, 2008, p. 10.

[62] E.g., in the USA, some cases have rendered companies more responsible and diligent towards consumers, enhancing information.

[63] Product scandals in Europe, such as the contaminated blood scandal and BSE, lowered public opinion with regard to EU consumer protection, and called into question the traditional public regulatory system.

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Another risk of collective redress mechanisms is that they could lead to abusive practices. On the one hand, the representative of the group, such as an overcharging law firm, might take advantage of the situation at the expense of the consumer. Yet, this may be prevented by a compulsory judicial review of redress settlements, as is already the case in some national procedures.[64] On the other hand, collective redress might increase the financial risks for companies through high damages claims or "settlement blackmail." The US-style class actions are often mentioned as an excessive model not to follow in this regard (Willet 2005). However, the EU approach remains fundamentally different from the US class action system (Leuven Study, 2007, p. 268; Mulheron 2004),[65] so the risk of excessive claims remains limited. This is evidenced by the experience in Member States, where these cases have not constituted unreasonable costs for businesses or led to the bankruptcy of reputable companies (Collective Redress Study, 2008, pp. 10–12; Mulheron 2005, p. 66).

The risk of abuse can also be prevented with the help of integrated safeguard measures, such as a mandatory assessment of the claim by a judge, at an early stage of the procedure, through formal "certification." Other forms of "gatekeeper procedures" can be achieved through the "loser pays" principle and via the mandatory representation of collective claims by consumer organizations or public bodies (Fairgrieve and Howells 2009). These safeguard measures have diminished the risk of unmeritorious claims in national systems. Thus, the argument that collective redress mechanisms per se overburden the legal system in the EU is questionable.[66]

A balanced collective redress measure that respects pre-existing legal schemes in Member States and includes safeguards against abuses may improve consumer dispute resolution. This can spread litigation costs and therefore lead to easier access to justice for consumers. Nonetheless, a financial risk of long and complex court cases and the "loser pays" principle poses further barriers to the practical application of such procedures. Thus, cheap out-of-court schemes are, in addition, an important complement, leaving judicial collective actions as a last resort to the parties.

Alternative Dispute Resolution Procedures and Effective Judicial Protection

ADR includes mechanisms aimed at resolving conflicts without the direct intervention of a court.[67] Extrajudicial procedures are defined by the EU as: "any method enabling a dispute to be resolved through the intervention of a third party that proposes or imposes a solution."[68] These procedures may be established by public authorities, professionals in the legal sector, professional bodies, or civil society organizations.

Originally, the EU did not enjoy express power in the area of ADR. It therefore applied soft law instruments, such as recommendations, to determine minimum-quality criteria of these schemes.[69] Subsequently, the EU has adopted a Directive on aspects of mediation in civil and commercial matters, which includes requirements for mediation in cross-border

[64] E.g., the Dutch Act on Collective Settlement of Mass Damages requires a court approval of settlements.
[65] Example of differences between US and EU collective redress mechanisms include jury participation, pre-trial discovery, punitive damages, contingency fees, relaxed standing and opt-out actions in the USA, and the "loser pays" principle and preference to opt-in procedures in the EU.
[66] See also Collective Redress Study, 2008, p. 12.
[67] Study on the use of ADR in the EU, Civic Consulting on 16 October 2009, (ADR Study, 2009), p. 11.
[68] See europa.eu/legislation_summaries/consumers/protection_of_consumers/l32031_en.htm.
[69] Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998, p. 31; Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.4.2001, p. 56.

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disputes.[70] This Directive encourages judges to promote mediation, and aims at ensuring a sound relationship between the mediation process and judicial proceedings by establishing common rules (see Benöhr 2012). Moreover, several EU Directives, such as the E-commerce Directive,[71] the Markets in Financial Instruments Directive,[72] and the Consumer Credit Directive,[73] encourage or require Member States to adopt adequate ADR schemes.[74] The Commission has also set up two networks to facilitate consumer access to ADR for cross-border complaints. A European Consumer Centres' Network (EEC-Net)[75] directs consumers to an appropriate ADR scheme in another Member State and promulgates a consumer claim form. For financial services, a Financial Services Complaints Network of national ADR bodies deals with out-of-court cross-border complaints in the EU.[76]

The advantage of such procedures is that disputes are generally resolved more rapidly and are less costly than ordinary court procedures. They are often free for consumers or available at a modest cost and are settled within a short period of time. However, recent studies on ADR have uncovered serious shortcomings in these procedures,[77] such as a lack of information regarding available out-of-court mechanisms, and insufficient independence of ADR schemes.[78] Although at the Member State level more than 750 ADR schemes exist there are gaps in the coverage, so that the availability to consumers varies substantially throughout the EU. They are also often voluntary, which may leave the individual consumer without sufficient means to obtain either a settlement or compliance on the part of the company.[79]

On the other hand, a compulsory use of specific ADR schemes may pose a barrier to the fundamental right of effective judicial protection under EU Law. The ECJ recently had to decide on this issue in *Alassini v. Telecom Italia*.[80] In this case, Italian provisions imposed the use of mediation as a mandatory condition for the admissibility of a claim before the courts, in certain disputes relating to telecoms services.

The ECJ held that the principles of equivalence and effectiveness do not preclude such legislation, provided, among others, that the ADR procedure does not result in binding decisions and cause a substantial delay to bringing legal proceedings or involve significant additional costs.[81]

This case was also of particular constitutional importance because the ECJ analysed the principle of effective judicial protection from a wider human rights angle. The ECJ stated that effective judicial protection "is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union."

[70] Directive 2008/52/EC on mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3.
[71] Directive No 2000/31/EC; OJ L 178, 17.7.2000.
[72] Directive No 2004/39/EC; OJ L 145/1, 30.4.2004.
[73] Directive No 2008/48/EC; OJ L 133, 22.5.2008.
[74] See also the Services Directive No 2006/123/EC; OJ L 376, 27.12.2006.
[75] See http://ec.europa.eu/consumers/redress_cons/index_en.htm.
[76] See http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm.
[77] ADR Study, 2009, p. 9 and Annex of the EU ADR consultation for an overview on the existing ADR schemes p. 164 to 324; Leuven Study, 2007, p. 159.
[78] In 2009, only 3% of European consumers who did not get a satisfactory reply from the trader took their case to an ADR scheme, Eurobarometer No 282, p. 20.
[79] See the ADR consultation paper by the European Commission, note 22 http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf.
[80] Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213.
[81] Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213, para 67.

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However, the Court held that in accordance with previous case law, these fundamental rights are not absolute, but can be restricted by measures of general interest, provided they are proportionate.[82] In this particular case, the Italian rules imposing a duty on the parties to attempt to find an amicable dispute resolution solution pursued legitimate objectives in the general interest because they allowed a "quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system." Furthermore, the national legislation was proportionate since "no less restrictive alternative to the implementation of a mandatory procedure exists."[83] Therefore, the ECJ decided that the Italian rules on mandatory mediation complied with the principle of effective judicial protection and were consistent with EU law.

This case shed light on the conditions under which mandatory national ADR procedures are likely to comply with EU law. They should not result in binding decisions or cause substantial delay in bringing proceedings. Furthermore, they should suspend the period for the time-barring of claims and be available, free of charge, or at low costs. Moreover, electronic means should not be the only means by which the settlement procedure may be accessed and interim measures should be possible in exceptional cases[84] (see also Davies and Szyszczak 2010, pp. 695–706). The ECJ also emphasized the significant role of the quality requirements included in the Commission's Recommendations to promote consumer ADR,[85] which should be respected by Member States. Importantly, the judgment highlighted that effective judicial protection is a general principle included in European fundamental rights, which may only be limited under specific circumstances. This case will provide some guidance for Member States on how to implement consumer ADR into their national system. At the same time, it remains to be seen to what extent the requirements established by the ECJ also apply to voluntary ADR schemes created by private parties (see more on consumer ADR in Reich 2009).

In a number of cases, the ECJ also had to decide on the conflict between consumer protection included in the Directive 93/13 on unfair terms and contractual arbitration clauses. In *Claro v Centro Móvil*, the standard contract terms of a company included the use of an arbitration tribunal to resolve disputes, raising issues of fairness.[86] The ECJ ruled that the national court was required to assess whether a contractual arbitration clause was void, even if the consumer had not raised the issue of unfairness in the arbitration proceedings, but only in the action for annulment. This was considered as a way of compensating the imbalance of power between the consumer and the company.[87] Arbitration clauses may not always be geared towards consumer protection as they often include a waiver to go to court. Thus, a court procedure or different ADR options such as mediation or ombudsmen schemes might sometimes be more favourable for consumers in terms of location or procedure (Reich 2007, p. 42 et seq.).

A more recent judgment, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*,[88] concerned the enforcement of an arbitration award which had become final and was made in the absence of the consumer. The ECJ ruled that under these circumstances, a

[82] Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213, para. 63; see also the settled case law: Case C-28/05 *Doktor and Others* [2006] ECR I-5431, para. 75.
[83] Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213, para 65.
[84] Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213, para 53–59.
[85] The ECJ clarified the legal effect of Recommendation 98/257, stating that while recommendations are not binding and are not capable of creating rights: "Member States should take account of them when establishing ADR procedures and national courts must take them into consideration in order to decide disputes brought before them." Joined cases C-317/08 to C-320/08, *Alassini and others v. Telecom Italia*, [2010] ECR I-2213, para. 63.
[86] C-168/05 *Claro v Centro Movil Milenium SL* [2006] ECR I-10421.
[87] The consumer often lacks legal knowledge and has limited power to change contractual arbitration clauses.
[88] Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I-9579.

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national court "is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature."[89] In this case, the ECJ also particularly stated that Article 6 of the Directive on unfair terms, which provides that unfair contract terms should not be binding on the consumer, is to be regarded as having equal standing to national rules of public policy rank.[90]

As a result of this jurisprudence, the national courts have to become active under certain conditions and act of their own motion to verify the potential unfairness of standard terms or to annul an arbitration award if it is based on an unfair contract clause[91] (see also Sein 2011). This might well influence EU Member States practice to undertake stricter assessment of arbitral clauses in consumers' contracts (more in Graf and Appleton 2010, p. 417).

The European Commission's Legislative Proposals

At the EU policy level, several actions were taken to strengthen consumer ADR. The European Commission published a consultation paper in 2010 on how to improve ADR,[92] highlighting the inconvenience of current consumer ADR procedures and a lack of collective proceedings. Only 62% of the existing ADR schemes deal with claims from consumers residing in another Member State, so that overseas consumers are faced with additional burdens.[93] While the ECC-Net manages to resolve approximately half of consumer cross-border complaints on an amicable basis, for a large number of cases ADR schemes do not exist or are inapplicable.[94] In particular, cross-border cases are often linked to e-commerce transactions, for which it would be useful to elaborate a common legal framework on online redress mechanisms (Cortes 2009, pp. 90–100).

As a result of the aforementioned consultation, the European Commission published two legislative proposals in November 2011: a draft Directive on consumer ADR[95] and a draft Regulation on Online Dispute Resolution (ODR).[96] Both proposals are based on Article 114 TFEU and intend to overcome three key shortcomings in consumer ADR: gaps in coverage of out-of-court schemes, insufficient awareness about these tools, and variation in quality (Benöhr 2012).[97]

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[89] Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I-9579, para. 59.

[90] Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I-9579, para. 52.

[91] See also the recent Case C-137/08, *VB Pénzügyi Lízing Zrt. V Ferenc Schneider*, of 9 November 2010, report not yet published, para. 46–49 and Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, [2009] ECR I-4713.

[92] See the 2010 ADR consultation paper by the European Commission, http://ec.europa.eu/dgs/health_consumer.

[93] E.g., unfamiliar ADR systems and hearings are inconvenient in cross-border cases, ADR Study, 2009, p. 339.

[94] ECC-Net Publication, Cross-border Dispute Resolution Mechanisms in Europe—Practical Reflections on the Need and Availability, 2009, pp. 10–11 and 57–58, e.g., the data showed that only 500 out of 11 500 complaints from 2007 and 2008 could be transferred to ADR schemes.

[95] Commission (EC) "Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)," COM (2011) 793/2, final, 29 November 2011.

[96] Commission (EC) "Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR)," COM (2011) 794/2, final, 29 November 2011.

[97] Commission (EC) "Communication by the European Commission on Alternative Dispute Resolution for consumer disputes in the Single Market," COM (2011) 791, final, 29 November 2011, p. 2. See Study on the use of Alternative Dispute Resolution in the European Union of 16 October 2009, http://ec.europa.eu/consumers/redress_cons/adr_study.pdf, pp. 56–63, 112–115, and 120–121.

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The draft Directive on consumer ADR aims at ensuring the quality and availability of ADR schemes for contractual disputes. According to Article 2 (1), the draft Directive applies "to procedures for the out-of-court resolution of contractual disputes arising from the sale of goods or provision of services by a trader established in the Union (…)." Hence, the proposal covers both domestic and cross-border disputes. However, it does not apply to in-house dispute resolution services operated by traders, to direct negotiation, or judicial attempts at settlement [Article 2 (2)].

The four main elements of the legislative proposal are:

1. *Ensuring that ADR procedures exist for all consumer disputes*. Member States under the proposed Directive have to ensure that all consumer disputes can be submitted to an ADR scheme. In addition, ADR schemes should provide the possibility to file a case online and exchange information via electronic means (Article 5 draft Directive).[98]
2. *Information on ADR and cooperation*. According to Article 10 of the draft Directive, traders must inform consumers about the relevant ADR schemes and whether or not they commit to use ADR in relation to complaints lodged against them. Member States have to ensure that consumers can obtain help regarding their cross-border complaints—an obligation that can be delegated to their ECC-Net offices (Article 11 draft Directive). Moreover, the proposal encourages cooperation between ADR entities and national authorities entrusted with the enforcement of consumer protection legislation.
3. *Quality of ADR entities*. The draft Directive includes a number of requirements that an ADR scheme has to comply with: expertise, impartiality, transparency, effectiveness, and fairness (Articles 6–9). In addition, the proposal requires that disputes are resolved within 90 days, and that ADR procedures are free of charge (or of moderate costs) to consumers.
4. *Monitoring*. In each Member State, a competent authority will be in charge of monitoring the work of ADR entities established on its territory.

The draft Regulation on Consumer ODR has a special focus on e-commerce. It was proposed because recent data[99] showed that only half of the existing schemes offer the possibility of submitting consumer complaints online, and very few provide the option to deal with the entire process online.[100] A key element of the draft Regulation addresses precisely this point, by proposing the establishment of a *European online dispute resolution platform* ("ODR platform").

This platform would consist of an interactive website offering a single point of entry to individuals who seek to resolve disputes out-of-court that have arisen from cross-border e-commerce transactions. National ADR schemes notified to the Commission would be automatically registered with the ODR platform. Consumers and traders would be able to submit their complaints through an electronic form on the platform's website, accessible in all EU official languages. The platform would then check if a complaint can be processed and seek the agreement of the parties to

[98] Commission (EC) "Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)," COM (2011) 793/2, final, 29 November 2011, 4.

[99] The 2010 report of the European Consumer Centre's Network indicates that more than half of complaints (56.3%) received by the ECC-Net were linked to e-commerce transactions. However, out of the 35 000 cross-border complaints received by ECC network in 2010, 91% could not be referred to an ADR scheme in another Member State as no suitable ADR scheme existed (ec.europa.eu/consumers/ecc/docs/2010_annual_report_ecc_en.pdf).

[100] Commission (EC) "Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR)," COM (2011) 794/2, final.

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transmit it to the competent ADR scheme. The chosen ADR scheme would in turn try to resolve the dispute, in accordance with its own rules of procedure, within 30 days and would notify the platform of the outcome.

Moreover, the draft Regulation proposes to establish a network of online dispute resolution facilitators ("ODR facilitators' network"). Offering one contact point in each Member State, such a network would provide support to the resolution of disputes submitted via the platform. Another important element of the draft Regulation is that it requires EU traders engaged in cross-border e-commerce to inform consumers about the ODR platform. This information shall be made easily and permanently accessible on the traders' websites, and would be provided when the consumer submits a complaint to the trader.[101]

Both legislative proposals are ambitious and welcome initiatives to strengthen consumer ADR in the European Union. The mixture of ODR Regulation and ADR framework Directive is a promising move towards a comprehensive solution for consumers to access out-of-court schemes. At the same time, the proposals build on existing ADR schemes, leaving Member States free to decide how to transpose the obligation into national legislation.

However, it remains to be seen how these wide-ranging measures will be funded. As all Member States have to provide full coverage of consumer ADR, the establishment of such a system may turn out to be expensive. Furthermore, the proposal excludes in-house dispute resolution services offered by companies and therefore does not set any quality requirements for these schemes.

Nonetheless, these broad legislative proposals can be seen as an important step to facilitate access to justice of consumers. In particular, they will be essential to ensure a wider availability of *affordable* dispute resolution mechanisms for consumers.

Meanwhile, binding court procedures and collective redress mechanisms remain important both as an incentive for businesses to use ADR and if no amicable settlement is found. While ADR mechanisms offer a simple and inexpensive way to improve consumer dispute resolution, they do not eliminate the need of collective redress procedures. ADR schemes are often most effective if combined with a balanced judicial collective redress mechanism which encourages the use of out-of-court schemes and acts as a deterrent against noncompliance. However, such court procedures would also require adequate funding models, so that consumers can resort to this solution if the ADR option remained unsuccessful.

Litigation Funding

The availability of adequate funding schemes is a significant pre-condition to attain collective consumer access to justice as litigation costs are often high compared to the consumer's personal finances.[102] Despite this, the subject of funding collective actions remains still under-explored. This section aims to fill this gap, exploring traditional and innovative financing models.

[101] The compliance by ADR schemes with the obligations set out in this Regulation will be monitored by the competent authorities to be established in the Member States, in accordance with the Directive on consumer ADR.

[102] Funding difficulties is one reason for the limited use of collective redress in the Member States, Leuven Study, 2007, p. 267.

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Legal Aid

State funding through legal aid is one of the classic solutions to facilitate access to justice. In 2003, the EU adopted a Directive that set minimum standards concerning legal aid for individuals who do not have sufficient resources for court proceedings, in order to improve access to justice in cross-border civil justice cases.[103] Legal aid usually includes the services of a lawyer, exemption from the costs of the proceedings, and provides cover for additional cross-border costs, such as interpretation and travel funding.

The right to legal aid is also an important topic of human right explicitly guaranteed in a number of human rights documents. Article 6 (3) (c) of the European Convention on Human Rights guarantees the right to legal assistance where the defendant "does not have sufficient means to pay for legal assistance." This legal aid has to be provided free of charge when the interest of justice so requires. In addition, Article 47 of the Charter states that "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." At the policy level, Commissioner Reding also recently emphasized the key role of fundamental rights to promote legal aid.[104]

Since 2003, many EU Member States have enacted local rules which allow some form of legal aid to fund lawsuits. In general, in the event that an individual is eligible for legal aid, he or she has to substantiate that the case has a reasonable chance of success, and that the result would be proportionate to the costs which would have to be spent on the case. The lawyers providing legal aid receive their fees from a fund or, if the case is won, from the succumbing party.

Today, however, the legal aid scheme is often under pressure because of its cost and limited public resources (Hodges et al. 2010, pp. 21-25).[105] In the UK for example, although a large part of the financial risk involved in a dispute remains on the legally aided person (which in most cases is liable to pay the costs of adversarial parties if the case is lost), the costs of legal aid have increased considerably. As a consequence, these schemes are available under strict merit conditions and only for a small number of individuals (lowest-income consumers).

Another reason why the legal aid scheme is losing popularity are some unintended consequences it may generate. In particular, the application of legal aid for the purpose of collective actions is sometimes contested, as it might raise unmeritorious claims (Collins 2005, p. 211 et seq). This could have a major impact on the defendant entity, such as a loss of confidence in a public authority or company, because large-scale litigation usually receives high media attention (for the discussion on damages for antitrust actions, see Riley and Peysner 2006, pp. 748–761). Thus, a proportionate allocation of legal aid to multi-party claims is necessary (Collins 2005, p. 211). This can be achieved through strict scrutiny of the reasonable prospects of the success of the case by the legal aid authority. In conclusion, while legal aid can lower litigation costs for consumers for *individual* cases, it remains less convenient to fund collective actions.

[103] Directive 2003/8/EC of 27 Jan. 2003, OJ L 26 of 31.01.03, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[104] Speech by V. Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship: "Legal aid: a fundamental right for citizens to access justice," CCBE-ERA conference Brussels, 26 November 2010.

[105] See the report of the Civil Justice Council in the UK on improved Access to Justice, Funding Options and Proportionate Costs, 2007, Appendixes, n. 26 et seq.

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Contingency Fees

In the contingency fee system, the lawyer usually agrees to provide legal representation, and his or her payment is only required in the event of a favourable result through a settlement or recovery. This system exists in the USA, which allows various success fees that—depending on the state in question—can be limited to a certain percentage (Kritzer 2004, pp. 258–259). In the EU, contingency fees are still generally regarded with suspicion. The reasons for this are often of political and moral origin. Nonetheless, the European Commission's emphasis on promoting consumer access to justice has pushed Member States to review their laws relating to the funding of litigation,[106] with the result that contingency fee systems are increasingly available. For instance, France, Italy, Luxembourg, and Portugal authorise law firms to charge fees which are based, to some extent, upon results. In Scotland and Ireland, the plaintiff pays the lawyer's normal fee if he or she wins the case. Greece permits a US-style contingency fee by limiting the fee to 20% of the amount recovered.

Although a contingency system is expensive, it facilitates access to justice if consumers cannot afford to pay the lawyer's fees or do not qualify for public legal aid funding. Moreover, under a contingency scheme, the lawyers often assume the financial risk of the litigation, which might move the burden away from the plaintiff and partially reduce unmeritorious cases. Lawyers may also have an additional incentive to win the case, dedicating time and funding in order to succeed, whilst becoming more specialised in consumer claims.[107] All this suggests that contingency fees could overcome the financial and legal knowledge barriers to access justice. Having said this, in order to prevent lawyers from taking advantage of overpayment, it might be important to legally limit contingency fees to a certain percentage rate of the awarded damages (see Riley and Peysner 2006, pp. 748–761). However, this and the financial risk of the "loser pays" principle may make it less attractive for law firms to engage in contingency fees and collective redress cases in the EU.

In conclusion, contingency fees can facilitate consumer access to justice and should be included in the discussion on collective actions.[108] However, this method of litigation funding often only functions well for particularly profitable cases. Thus, it should be considered as a complementary solution to legal aid and alternative funding methods described below, which are especially needed in complex or low financial value cases.

Conditional Fee Agreements

In the UK, the option of a "conditional fee agreement" was introduced to compensate for a general reduction of legal aid.[109] Under this scheme, a lawyer represents a client upon the basis that, if the case is lost, either no fee or only a reduced fee is payable by the client. These conditional fees are linked to an "after-the-event insurance," which would pay the adversarial party's costs in the event of losing the case.[110]

A drawback of this system is that the losing parties have to pay considerable compensation for the litigation, as well as the lawyers' fees and the insurance premium. This has

[106] See: http//europa.eu.int/comm./consumers/redress/acc-just/index-en.htm.

[107] In contrast, legal-aided clients might be treated with less importance because of the lower compensation and might be represented by more inexperienced lawyers.

[108] See also Civil Justice Council, The Future Funding of Litigation—Alternative Funding Structures, Access to Justice through the Development of Improved Funding Structures, 2007, p. 68 et seq.

[109] Section 58 of the Courts and Legal Services Act of 1990 in the UK.

[110] As litigants are often unable to fund the insurance premiums, the solicitor sometimes funds the premium, or a loan is obtained from a bank.

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generated criticism of the enforceability of conditional fee agreements and has even been seen as potentially conflicting with human rights.[111] In the recent case of *MGN Limited v. The United Kingdom*, the European Court of Human Rights ruled that the conditional fee agreement regime, in which the loser is liable for the success fees on their opponent's legal costs, breaches the applicant's right to freedom of expression.[112] It held in particular that "the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters."[113] The Court therefore decided that there had been a violation of Article 10 ECHR.

Third-Party Funding and Legal Expenses Insurance

A new trend is the emergence of third-party funders in Australia and some EU countries, such as the UK, Germany, Austria, the Netherlands, and Ireland (more in Hodges et al. 2010, p. 27). Third-Party funding involves a third party, such as a bank, that finances the case, without having a direct interest in the case.[114] The fees of third-party funders can be between 20% and 40%, depending on the country (Hodges et al. 2010, p. 27). However, third-party funding tends to apply mainly to high value cases (Hodges et al. 2010, pp. 30–31) and therefore does not offer a solution for smaller consumer claims. Given the recent appearance of third-party funders, questions arise regarding their role in controlling litigation and the need to regulate this phenomenon in order to prevent potential abuses (Hodges et al. 2010, pp. 30–31).

Another way of third-party funding in order to offset the heavy financial risks of litigation is for the claimant to subscribe to legal expenses insurance before a court claim arises. This type of funding is particularly prominent in civil law countries with predictable litigation costs, such as Germany, where tariffs exist for lawyers' fees (Hess and Hübner 2010, pp. 358–359; Hodges et al. 2010, p. 21). Legal expenses insurance also exists in the UK through the so-called Before the Event Insurance and is obtainable as a separate policy, such as an add-on to household and motorcar insurance policies (Peysner 2010, p. 293). The advantage of such a funding model is that it is cheap and relatively safe for the insurer because it usually excludes success fees. On the other hand, legal expenses insurance has been criticised in Germany for increasing spurious lawsuits (Hess and Hübner 2010, pp. 358–359). It is also questionable if this funding model is suitable for collective redress actions. Given that this type of litigation could expose the insurer to significant financial risks, it may often be excluded from legal expenses insurance schemes.

Consumer Actions and Class Proceedings Funds

Legal actions funds are public, non-commercial funds that help plaintiffs to finance a case. They exist in various countries outside Europe, such as Canada and Hong Kong, and are often funded by public entities, or third-party financiers taking the initial liability of the case.

[111] On average, lawyers charge between 25% and 50% of the damages awarded to the client; see the Civil Justice Council Report in the UK on improved Access to Justice, Funding Options and Proportionate Costs, 2007, Appendixes, n. 26 et seq.
[112] Case *MGN Ltd v United Kingdom*—39401/04 [2011] ECHR 66 18/01/2011.
[113] Case *MGN Ltd v United Kingdom*—39401/04 [2011] ECHR 66 18/01/2011, para. 219.
[114] E.g., in the above quoted Austrian Case 17 C 1148/04d, filed in 9.12.2004 *Bezirksgericht für Handelssachen Wien* the consumer organization was funded by a bank, which also assumed the financial risk of losing the case.

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A great variety of different funds exist, but, in general, an accepted claimant would receive an indemnity against the opponent's costs as well as payment disbursements. The consumer's lawyer would be paid by the fund or by contingency fees.

An interesting funding scheme exists in Hong Kong. The "Consumer Legal Action Fund" (the Fund) provides financial assistance specifically for consumer legal actions. This Fund is managed by the Consumer Council in Hong Kong and helps consumers to pursue their claims in courts.[115] Both individual consumers and a group of consumers can apply for assistance for a court claim. The requirement is that the case relates to consumer transactions and involves significant public interest or injustice. Further, a consumer must have exhausted all other means of resolving the dispute in question and be unable to qualify for any form of legal aid.[116]

The advantage of the scheme is that the consumer only has to pay a moderate fee at the beginning of the case, whereas the Fund pays for all the costs and expenses. Furthermore, the consumer has no financial risks because if the case turns out to be unsuccessful, he or she does not need to refund any payments. On the other hand, if consumers win a case they are required to pay a contribution to the Fund.[117]

Other interesting models can be found in Canada, in which a number of collective redress funds were established to promote access to justice (Ziegel 2006, pp. 587–598). In Quebec, a particular fund serves exclusively for collective actions. This fund is financed by the reimbursements made by the collective redress claimants if they win their collective actions, and also by the residual amount of the damages, which were not vindicated by individual victims. The fund also serves as a central point of information with regard to group actions, such as the publication of actions, information on how to exclude oneself from a group, or the indication of the procedure of how to obtain damages (Riley and Peysner 2006, pp. 748–761).

In addition, in 1992 a Class Proceedings Fund was established in Ontario. The objective of the fund is to give financial assistance to plaintiffs for the costs of a court case. In return, the plaintiff would have to return 10% of the damages obtained in any settlement or judgment. In the event that the Fund finances the litigation, it will be liable for any costs awarded to the defendants, so that the plaintiffs will not have to support the liability risk if they lose a case. This fund offers great support to the plaintiffs. Since the introduction of class actions in Canada, a considerable number of cases have already been filed at the court (Watson 2001, p. 275).

In conclusion, the development of different funding models is necessary in the EU in order to provide effective consumer access to justice. Legal aid and legal expenses insurance can be particularly useful for individual claims. Contingency fees, third-party funding, and collective redress funds could be valuable for the application of collective actions. A trend of accepting contingency fees in certain Member States and at EU level is already becoming apparent.

[115] See http://www.hkclic.org/en/topics/consumer_complaints/channels_for_consumer_complaints/q2.shtml (2009).

[116] A Supplementary Legal Aid Scheme in Hong Kong also provides legal assistance to individuals who do not qualify for ordinary legal help, funded by a loan from the Lottery. If a litigation case is successful, the legal aid scheme receives a reimbursement from damages of 6–10%, in addition to the costs that are recovered from the unsuccessful party. See the webpage of the Legal Aid Department in Hong Kong: http://www.lad.gov.hk/english/las/fcic.htm.

[117] For more information, see http://www2.consumer.org.hk/claf/briefe.pdf (accessed in 2009).

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Conclusions

Despite being recognized as a fundamental right, access to justice still remains a major challenge to be solved in consumer law. The risk of high costs and increasingly complex cross-border procedures represent barriers to the exercise of consumer rights.

This article has highlighted the significant role that collective actions, specific ADR procedures, and new funding schemes could play in order to improve consumer access to justice in increasingly consolidated markets. While at this stage there are no consumer collective action procedures for damages at EU level, they are becoming increasingly present within the Member States. However, models vary considerably, and a large number of Member States do not provide for collective redress mechanisms for damages. This leads to legal uncertainty and inconsistent access to justice depending on the country of purchase. Furthermore, consumer litigation contains a cross-border implication that may be hampered because a common EU procedure is missing. Therefore, a balanced collective redress measure at the EU level would facilitate consumer access to justice and motivate companies to use ADR mechanisms. It may also pinpoint market failures, providing an incentive for regulatory change and compliance. The EU is currently discussing the introduction of collective redress procedures for damages. However, in order to provide affordable means of redress and prevent excessive court litigation, ADR remains a primary first step in the process of dispute resolution. The recent European Commission's legislative proposals on consumer ADR are important initiatives to promote consistent ADR standards and will be instrumental in making out-of-court dispute resolution widely available. A number of financing methods have been suggested in this article, such as contingency fees and consumer redress funds, to facilitate judicial access of consumers.

Since the introduction of the Lisbon Treaty, the EU has a broader and explicit competence to adopt civil justice measures. The ECJ's recent case law highlighted the importance of effective judicial protection applying a fundamental right assessment, and it supported ADR mechanisms as an option to facilitate consumer dispute resolution. Despite the current focus in this regard, it remains to be seen if at the EU policy level, binding dispute resolution mechanisms, and funding schemes will be established, or if they will merely be given soft law status.

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