RESPONSE TO THE COMMISSION

GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

prepared

within the framework of the European College of Paris

by

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SUMMARY

Q1: What are your views on the role of the EU in relation to consumer collective redress?

The EU must address and resolve the problems relating to consumer collective redress. By establishing collective redress mechanisms, the Community's goal of eliminating the remaining barriers within the internal market will be better achieved. In addition, such measures will promote increased consumer confidence in cross-border transactions.

> *See Introduction.*

Q2: Which of the four options set out above do you prefer? Is there an option which you would reject?

We are of the opinion that EU action is necessary and would therefore reject Option 1. We prefer Option 4 but believe certain elements of Options 2 and 3 are also essential.

> *See Part 3 (Proposed Framework Directive) and Part 2 (Necessary Steps: Building on Existing Networks, Mechanisms and Legislation).*

Q3: Are there specific elements of the options with which you agree/disagree?

We believe that the solutions described are not mutually exclusive and that the EU should encourage a comprehensive solution for consumer collective redress. Such a system should not only include judicial collective redress mechanisms but also extra-judicial, preventative, and informational measures. Finally, we believe that alternative dispute resolution ("ADR") can supplement, but not replace a consumer collective redress system.

> *See Part 2 (Necessary Steps: Building on Existing Networks, Mechanisms and Legislation) and in particular Part 2.3 and 2.4.*

Q4: Are there other elements which should form part of your preferred option?

Empowerment of Member States' courts to institute collective redress proceedings is essential together with the training of specialised judges. We believe that a framework directive, which empowers courts to decide on a case-by-case basis whether and how to organise collective redress proceedings, would best achieve the objectives of consumer collective redress.

> *See generally Part 3 and Part 3.4 (Specialised Judges) in particular.*

Q5: In case you prefer a combination of options, which options would you want to combine and what would be its features?

See answer to question 2 above.

Q6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?

We see a need for a flexible but binding instrument. However, it is important to build upon the networks and mechanisms already available and to encourage the use of ADR where appropriate. We consider the proposed directive to be necessary but believe judicial collective redress should be made available to consumers as a last resort.

> *See Part 3 (Proposed Framework Directive), Part 2 (Necessary Steps: Building on Existing Networks, Mechanisms and Legislation) and in particular Part 2.4.*

Q7: Do you consider that there could be other means of addressing the problem?

No, we do not.

1 INTRODUCTION

1.1 The European Union must take an active and leading role in addressing the issue of consumer collective redress

The European Union, rather than the individual Member States, is best placed to effectively address the problems of consumer collective redress and consequently better able to achieve the objectives of consumer protection in order to further the good functioning of the internal market.

The creation of a more uniform set of consumer protection rules is one of the Community's primary strategies in eliminating the remaining barriers within the internal market. The Community has passed more than 360 acts on consumer protection, 34 of which protect the economic interests of consumers.[1] By ensuring that all Member States have the same basic level of consumer protection, consumers can be more confident when engaging in cross-border transactions. Indeed, confidence in cross-border transactions is directly linked to access to effective judicial remedy. The existence of uniform consumer rights is meaningless if those rights cannot be asserted.

More importantly, in most Member States, effective redress procedures simply do not exist. Only thirteen Member States have some form of judicial collective redress mechanisms,[2] of varying effectiveness. This discrepancy in judicial redress options allows commercial operators to take advantage of national laws in the Member States without collective consumer redress and discourages them from providing goods and services in the Member States where collective redress exists. Consequently, the present system puts undertakings in an unfair competition situation which is contrary to the basic philosophy behind the integration of the internal market.

These reasons, taken together with the fact that national action on this issue remains largely absent—probably indicating that some Member States are waiting for the EU to propose a solution—lead us to the conclusion that it is for Community Law to establish a consumer collective redress system.

1.2 The relationship of a European consumer collective redress instrument to the *acquis communautaire*

Coherence of European Law is recognised by all Institutions as being a crucial value. This is why we think that any EU instrument on collective redress in consumer matters needs to take into consideration, and take a close look at, all procedural instruments already in existence, particularly in the Civil and Commercial Cooperation area.[3]

We urge the Commission not to repeat what has been done when preparing the 1998 Injunctions Directive[4] or the 2004 Intellectual Property Rights Enforcement Directive,[5] as a

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[1] Directory of Community legislation in force, 15.20 Consumers, http://eur-lex.europa.eu/en/legis/latest/chap1520.htm (last visited Feb. 21, 2009).

[2] Green Paper on Consumer Collective Redress, COM(2008) 794 final, 27.11.2008, p. 4 ¶7, http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf.

[3] *See infra* Part 3.5 to 3.7, Jurisdiction, Applicable law and Recognition and enforcement of decisions.

[4] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest, O.J. L 166, 11.6.1998, p. 52–55 [hereinafter "Injunctions Directive"].

number of incoherencies may be noticed between these texts and, for example, the rules on jurisdiction and enforcement of judgments in Regulation 44/2001.

1.3 Conformity with governance, better legislation principles, subsidiarity, proportionality, and flexibility

At a time when work has already been undertaken for some form of collective redress in the competition area, we think that it may be appropriate to pause and rethink a sectorial approach. We do not find the differences between competition collective redress and consumer collective redress as being so great, at least from the procedural point of view to command a separate instrument. In addition, competition collective redress actions may be started by consumers even though they are not limited to that occurrence and are open to companies as well. Thirdly, the type of instrument we are proposing here could be very well suited to a horizontal instrument. We are aware that the legal basis for a horizontal instrument may be more difficult to find but it is not impossible. Each of the possible legal bases, i.e. TEC Articles 65, 95 or 308, presents advantages and inconveniences but one of these legal bases is indeed suitable for the adoption of such an instrument.

We have considered with particular attention the principles of good governance, and especially subsidiarity, proportionality and flexibility, in proposing a framework directive that will create a binding instrument that contains enough flexibility to not only cater to many types of cases, but also adapt to the cultural differences of the Member States.

2 NECESSARY STEPS: BUILDING ON EXISTING NETWORKS, MECHANISMS AND LEGISLATION

We agree with the Commission's conclusions that collective redress will be best achieved through the complementary mechanisms of representative actions and collective actions. However, we believe that any collective action instituted under a EU instrument must be considered as a last resort. Therefore, in addition to considering a wholly new instrument, the Commission should also take steps to address consumer redress concerns as relates to the lack of information, prevention of unfair practices, and empowerment of public officials and consumer advocacy groups to seek compensation on behalf of consumers. Measures taken in the following areas should act in tandem with and in support of the proposed framework directive, thus creating a bundle of consumer redress resources from which the consumer may choose. Furthermore, a court should be empowered to refer consumers and transfer consumer disputes to the other dispute resolution mechanisms established and made available by these resources:

1. Expansion of the European Consumer Centers Network ("ECC-net");
2. Encouragement of self-regulation within industries and by undertakings;
3. Continued support of alternative dispute resolution as a supplement to consumer collective redress; and
4. Expansion of public enforcement and consumer protection group actions under the Injunctions Directive to permit individual consumer compensation.

[5] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. L 157, 30.4.2004, p. 32–36.

2.1 Expansion of ECC-net

Based on its 2007 Annual Report,[6] ECC-net has already achieved concrete success in providing consumers with the information and means to institute alternative dispute resolution ("ADR")[7] processes in the Member States. In addition, the Network has been instrumental in providing guidance in the formulation of new Community and national legislation.

We believe that the scope of the information-sharing and information-exchange responsibilities of the Network should be extended to information on Member States' judicial redress proceedings. Because the efficiency and effectiveness of consumer collective redress relies on very specific information exchange, we believe that consumer groups, national agencies, national courts, judges, and Member States must work collaboratively to keep each other abreast of legislation, actions, judgments and awards. With regard to cost, we believe that the expansion of ECC-net will impose fewer additional costs on the Community and the Member States than creating a separate judicial network. While certain expertise will need to be added to ECC-net, the Network is already functioning and the improved information-exchange will only make it more efficient. Further, we propose the creation of a European register of all consumer collective redress proceedings, to be managed by ECC-net. The addition of such a register would complete the expansion of the Network to become the central source of information on consumer redress.

In addition, we propose that the expanded ECC-net should not only provide a means for information-exchange but also conflict resolution at a macro-level. For its achieved success it is interesting to look at SOLVIT[8] as a possible inspiration. Conflict resolution facilitated by the Network could be based on out-of-court negotiation between, and cooperation of, affiliated Network centres within each Member State. In the instance where a dispute concerns collective interests, the Network could also facilitate and assist in the filing of cross-border collective claims before competent national courts. This proposal would require that Network members, whether they are consumer protection centres or public enforcement agencies, have legal standing both in their respective national courts and in the courts of other Member States. Adding these competencies to the Network would result in increased consumer confidence in cross-border transactions.

2.2 Encouragement of self-regulation

2.2.1 Incentives must be created for businesses to self-regulate and improve internal complaint-handling systems

While we advocate the need for a consumer collective redress mechanism, it is important that the Community and Member States continue to create incentives for self-regulation by businesses. Resolution of consumer problems can and should begin with the problem prevention mechanism. Businesses should be encouraged to make available to the consumers easily accessible, effective hotlines because improvement of this initial stage of consumer redress process will benefit all parties—consumers, businesses, law enforcement agencies and courts—by reducing the need for adversarial solutions.

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[6] 2007 European Consumer Centre Network (ECC-Net) Annual Report, http://ec.europa.eu/consumers/redress_cons/docs/annual_report_ecc_2007.pdf.

[7] In the context of this Response, ADR shall include all extra-judicial dispute resolution mechanisms, from direct party negotiation and settlement to resolution via a neutral third-party, such as conciliation, mediation, and arbitration. It particularly includes legally mandated out-of-court dispute resolution.

[8] SOLVIT, Effective problem-solving in Europe, http://ec.europa.eu/solvit.

Many European businesses already take self-regulation measures because they recognise the need to gain goodwill of customers. However, consumers are often not satisfied with the existing mechanisms, citing among the most common problems long waiting times when calling hot-lines, lack of individual attention and lack of authority in the hotline staff to resolve particular issues. The EC should play a role in coordinating the efforts to improve these deficiencies because self-regulation can fulfill its potential only within a clear legislative framework. We propose that the Commission issues guidelines on best practices in setting up effective complaint handling mechanisms. The guidelines should provide for adequate monitoring and reporting channels, as well as the top management accountability for handling consumer complaints.

The EC coordination can also be used to create another kind of incentive—one that is based on the natural desire of business to be seen as trustworthy by their customers. We propose that the EC introduces and promotes a "consumer friendly business" logo recognisable by all the EC consumers. This logo should be made available to the companies that accept to be reviewed and monitored by an independent agency set up to ensure compliance with the above mentioned guidelines.

We recognise that businesses need to allocate limited resources to establishing or improving their complaint handling mechanisms. The Commission and the Member States should encourage development of specialised companies that can act as centralised hubs assisting businesses with processing of consumer complaints. Such specialised hubs act as pooled resources thus reducing financial burden on the companies. Given the wide variety of consumer complaints, it may be useful to organise these hubs either by the type of complaints (defective product, privacy, overcharging etc.) or by industry type (banking, food, retail etc.). These centralised hubs are not a substitute for the adequate internal complaint-handling processes but rather are a helping hand to the companies.

2.2.2 Complaint handling mechanisms and the collective redress system can mutually reinforce each other

The complaint handling mechanism and collective redress mechanism can be complementary and reinforce each other. First, an effective complaint-handling mechanism can alert companies to recurring problems by providing them with information about the frequency of complaints of a particular kind. Second, the complaint-handling mechanisms can be leveraged to inform consumers about alternative options they have if they are not satisfied with the solutions offered by the company. To accomplish this informational function, companies can be required as part of the complaint-handling process to inform consumers of the ADR or collective redress mechanisms available in the consumers' jurisdiction. If the two factors occur in an environment where judicial redress is known to be effective, companies will have a strong incentive to resolve the complaints at the initial stages of the process and avoid risking negative publicity and legal costs. Availability of collective redress mechanism throughout the EC will act as a catalyst for greater self-regulation. Without the threat of effective judicial redress available to consumers businesses are less likely to change the status quo and come up with the funds to improve on existing complaint handling mechanisms.

2.3 Alternative dispute resolution can supplement, but not replace, a consumer collective redress system

We share the Commission's opinion[9] that ADR provides a means through which consumers have improved access to justice. Certainly, the goals of ADR are harmonious with that of consumer collective redress, i.e., facilitation of efficient resolution of disputes, even in cross-border claims. As noted in Part 2.1, we believe that ECC-net should provide assistance with and facilitation of ADR for consumer claims. However, at this time we do not believe ADR can be a "realistic alternative to a dispute going through the courts"[10] when that dispute relates to collective consumer interests.

Furthermore, most ADR processes are better suited to certain types of disputes over others. For example, some kinds of arbitral proceedings are mandated in certain industries, such as banking, insurance, and telecommunications. We believe that national governments and individual industries are best suited to determine the need for legally mandated ADR. Consequently, we do not see a present need for the Community to implement legislation creating a collective ADR system.

2.4 Expansion of the Injunctions Directive to include individual damages

2.4.1 Representative actions are an essential element of a collective redress regime

Under the Injunctions Directive and Consumer Protection Cooperation Regulation, Member States and their consumer advocacy and protection groups are already empowered to seek and enforce judgments on behalf of consumers in both their own States as well as any other Member State.[11] We believe that the availability of such representative actions is essential in the case of consumer collective redress. With 37 per cent of European consumers distrusting public authorities to protect their rights,[12] the ability of consumer advocacy groups to bring representative actions is especially important to increasing consumer confidence in the judicial system.

The 2008 Report from the Commission concerning the application of the Injunctions Directive[13] notes that Member States have found the Directive to be successful with regard to national infringement actions. However, it has had much more limited application in cross-

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[9] *See* Conclusions on alternative methods of settling disputes under civil and commercial law, May 2000; Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, O.J. L 115, 17.4.1998, p. 31, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF; Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, O.J. L 109, 19.4.2001, p. 56, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:109:0056:0061:EN:PDF; Opinion delivered on 21 September 2000 regarding Regulation (EC) No. 44/2001, O.J. L 12, 16.1.2001, p. 1.

[10] Commission Recommendation of 4 April 2001, *supra* note 9, Recital 13.

[11] Injunctions Directive, *supra* note 4, Arts. 3–4; Council Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation and between national authorities responsible for the enforcement of consumer protection laws, O.J. L 364, 9.12.2004, p. 1–11, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:364:0001:0011:EN:PDF.

[12] Country Fiches, Annex to Memo /08/741, Green Paper on Consumer Collective Redress, http://ec.europa.eu/consumers/redress_cons/m08_741%20en.pdf.

[13] Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, COM(2008) 756 final, 18.11.2008, *available at* http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf.

border claims due to the cost, complexity and length of such procedures. Such concerns are inherent in a collective redress system.[14] However, we believe that expansion of the ECC-net, as described in Part 2.1, will address most of the root causes of these problems. Therefore, we believe that the Directive should not only continue to play an important role in consumer collective redress, but also propose that it be expanded.

2.4.2 Representative organisations must be empowered to seek compensation on behalf of the consumers they represent

Although consumers may in theory pursue individual claims the reality is that they do not.[15] This is particularly true where the individual person's damage is very low. The disparity between consumer redress options within the Community only further prevents consumers from bringing their rightful claims. Adequate protection of consumers requires the abandonment of the concept that collective redress is a means of protecting "collective interests . . . which *do not include* the cumulation of interest of individuals who have been harmed by an infringement."[16] Consumer collective redress must incorporate the concept of individual remedy and remuneration. We therefore recommend that the Community supplement the Injunctions Directive by adopting an instrument based on the Greek and Italian consumer collective redress mechanisms for in-court disputes.

Under the Greek and Italian consumer collective redress regimes, injunction actions may result not only in an order for the defendant to cease its unlawful conduct but also the payment of damages or individual compensation to the affected consumers.[17] In Greece, consumer organisations may request a declaratory judgment, upon finding of infringement, recognising the individual consumers' right to be compensated. Individuals may apply directly to the defendant for relief. In Italy, the complaining party may request that the court make an order for the defendant to pay amounts to individual consumers joined to the action.

The exact procedure should be left to the discretion of the Member States so long as the ultimate goal of allowing individual consumers to obtain remedy as part of the infringement proceeding is achieved. Possibilities include the granting of damages or the imposition of a penalty that would constitute a common fund to be paid out to the identified group of affected consumers (through the opt-in or opt-out procedure). Or, a judgment against the defendant might made available for use by the individual consumer as prima facie evidence that he has been harmed and therefore a simplified (and potentially less costly) judicial procedure might suffice to determine the amount owed to the consumer. Such judgments would be recognisable and enforceable within the Community under Regulation 44/2001 and the Consumer Protection Cooperation Regulation.

This proposal would be a preferred first step towards the harmonisation of consumer collective redress as all Member States have already transposed the Directive and therefore

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[14] The American Law Institute has stated that representative actions will "give rise to significant management, cost and under representation risks" that collective actions bring forward. ALI-ABA, Update on the ALI project on Aggregate Litigation, May 29–31, 2008, *available at* http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CN066_chapter_12_thumb.pdf.

[15] 51 per cent of European consumers do not take further action after complaining to a trader. Country Fiches, *supra* note 12.

[16] Injunctions Directive, note 4, at 51 Recital (2) (emphasis added).

[17] Country Fiches, *supra* note 12; *see also* 28 National Reports, The study on alternative means of consumer redress other than redress through ordinary judicial proceedings, http://ec.europa.eu/consumers/redress/reports_studies/28nationalreports.zip.

permit representative actions. Thus, it builds on the existing national regimes rather than requiring Member States to develop wholly new mechanisms. This option also, however, is predicated on the ability of representative entities to be granted accreditation by Member States and the existence of effective public enforcement through government agencies or ombudsmen. We further recognise that there may be some limitations in scope of this option, particularly because the Directive only applies to acts falling under specified Community legislation, and therefore also propose a new EU consumer collective redress instrument.

3 PROPOSED FRAMEWORK DIRECTIVE

3.1 Introduction

Instead of imposing one uniform collective redress procedure on all Member States we propose the adoption of a framework directive which will empower national courts to decide, on a case-by-case basis, whether to organise a collective redress proceedings and, if so, whether to utilise the opt-in or opt-out procedure. We would like to emphasise here that, although we think it better to create a horizontal instrument, we consider that our proposal fits the needs of consumer collective redress.

Standing for starting a collective redress action is an important question which must be solved by the framework directive. We are of the opinion that the directive should accept a large choice of persons or entities who have standing to commence such actions. It would be appropriate to accept the following:

3.1.1. A "public prosecutor" or any other public body which is specifically organised or authorised by the State to represent groups of claimants.

3.1.2. An association or other group duly accredited in the State within whose territory it was formed and authorised by that State to represent groups of claimants.

3.1.3. A group of individuals or legal entities who have suffered similar common losses based on the same set of factual circumstances. Foreign nationality or residence outside the State in which the claim is brought must not, as factors in and of themselves, prevent claimants from bringing or participating in a Group Action.

3.1.4. An individual or legal entity who proves, to the satisfaction of the tribunal, to be capable of managing the proceedings for the benefit of the represented parties, and who has no conflict of interest in respect of the represented parties.[18]

The choice between the opt-in and opt-out procedures is a never-ending controversy, with pros and cons discussed at length by many. Some argue that the choice must be made upfront by a Member State in order to provide legal certainty. However, we believe that it is unproductive to decide which procedure should be applied in all cases, as neither is perfect. Some Member States have dictated the selection between the two procedures in their national law and they already warn that they will balk at changing it. That is why we propose that the EC should avoid the controversy and not force the Member States to make a definitive choice. Instead, it will be left to the court reviewing each case to weigh the benefits and disadvantages of choosing either procedure in the given circumstances of the case. This solution will lead to the organic development of a collective redress process whereby the courts are able to work

[18] The same has been proposed by the International Law Association in the Resolution adopted in Rio on 21 August 2008, available on the website of the Association, http://www.ila-hq.org. The rationale behind this proposal can be found on the accompanying Report also available on the website.

within their existing legal culture while at the same time allowing them to get a taste for an alternative method. Therefore, we maintain this choice should be made by the court on a case-by-case basis. Below, we propose a list of criteria that a court should consider before making its decision. These criteria should be evaluated applying a balance of factors or totality of circumstances test, whereby no one criterion is determinative and should be weighed in combination with the others.

3.2 Criteria that a court should consider when deciding whether to utilise the opt-in or opt-out procedure

1. Type and complexity of the case

   a. Subject matter

   Depending on the area of law in which the dispute arises, with particular consideration to the level of regulation, one procedure may be more appropriate than the other. For example, in cases involving competition law issues, there should be a presumption in favour of the opt-out procedure. The same can be true of cases involving environmental and labour law. In cases of product liability, where it may be easier to identify the affected group of consumers, there should be a presumption in favour of the opt-in procedure.

   b. Nature of damages

   Damages can stem from either personal or economic injuries to the consumers. In cases involving personal injury, there should be a presumption in favour of the opt-in procedure, taking into account evidentiary concerns, the need to ensure access to individual judicial redress, and the need for a balanced assessment of the award to be distributed. In cases involving pure economic injury, it is more advisable to use the opt-out procedure.

   Damages can also be either scattered across long distances and time periods or more localised in geography and time. The more scattered the damages are the greater presumption exists in favour of the opt-out procedure, because of the relative ease or difficulty of identifying all affected victims.

   c. Amount of damages

   Experience shows that when the amount of each individual claim is minor, consumers are unlikely to either take individual action or even participate in a case using the opt-in procedure.[19] Even if the total amount of damages sought is significant vis-à-vis the defendant but individual consumer damage is small, there should be a presumption in favour of the opt-out procedure.

   d. Number of consumers affected

   As stated above, damages can be either scattered or localised, making it harder or easier to identify with precision the number of affected consumers. If it is clear from the outset that the affected consumers can be identified and their numbers are such that effective individual notice and other necessary procedural steps can be taken in a cost-effective manner, the opt-in procedure can be used.

[19] Green Paper on Consumer Collective Redress, *supra* note 2, at 13 ¶55.

However, when the exact members of the affected group cannot be effectively identified upfront, or their numbers are such that individual notice would create an undue burden, the opt-out procedure should be preferred.

2. Number of Member States affected

   Depending on the other criteria, the opt-in procedure can be adopted if no cross-border claims are anticipated. However, if it is known or anticipated that there are potential victims in multiple Member States, the opt-out procedure should be preferred. Subsequently, a coordination of procedures should be carried out according to the procedural guidelines on organised transfers.

3. Risk of excessive litigation

   A major advantage of the opt-in procedure is that it reduces the risk of excessive litigation or unmeritorious claims. If a court believes that the case could lead to unmeritorious claims, the opt-in procedure would be appropriate.

4. Applicable law

   We are aware that, because the collective proceedings proposed may deal with pan-European damages, there may be several laws applicable to the same case. The fact that several laws may be applicable on the merits in a single collective action should not necessarily mean that such an action is inappropriate. However, the court seised of the matter may decide that it is better to organise the proceedings in a different manner. For example, inspiration could be taken from the Insolvency Regulation and organise a main proceedings together with ancillary proceedings.

5. Distribution of compensation

   When a court foresees particular difficulties in the equitable distribution of the compensation award to the consumers, the opt-in procedure should be preferred as it ensures effective and transparent distribution to a pre-identified group of victims.[20]

6. Financing ability

   Courts should recognise that the opt-in procedure can "be burdensome and cost-intensive for consumer organisations which have to do preparatory work such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff."[21] Therefore, a court should take into account whether there are any public or other alternative sources of funding available for the administering of a given case before it chooses on opt-in procedure.[22]

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[20] *Id.* at 13 ¶57.

[21] *Id.* at 13 ¶55.

[22] For example, in Sweden, where the opt-in procedure is used, the costs for sending out notices to group members and compiling the list of the ones who opt-in, are paid by the court/public, not the parties. Per Henrik Lindblom, *Group Litigation in Scandinavia* 20, prepared for the Academy of European Law Conference, Collective Redress: Towards a System of Class Actions in Europe? (October 30–31, 2008).

3.3 Possible conflicts that will result from the presence of both procedures

We note two primary concerns that need to be addressed for the proposed Directive to be effective. First, attention must be paid to ensure the due process rights of "absent plaintiffs"[23] are secured. We believe, however, that our proposed solutions regarding jurisdiction, applicable law, and recognition and enforcement, *infra* Parts 3.5–3.7, adequately address this important issue. In addition, the need for legal certainty and fulfilment of the expectations of the consumer must be taken into account. If the choice of procedure is made on a case-by-case basis, the consumer cannot know in advance how to join, or decline to join, the claim and consequently whether he is, or will be, bound by a judgment within the Community. We envision that the expansion of ECC-net, as proposed in Part 2.1, will address this issue as consumers can utilise the Network to obtain all relevant information about an action.

3.4 Specialised judges

It is absolutely essential that, whatever system is chosen for the new European Instrument, Member States are encouraged to appoint specialised judges who are given management training so that they know how to handle collective redress. These procedures are too specific to be left to judges who would deal with them from time to time. We are aware that this system of specialised judges may not fit in the judicial culture of some Member States. This is why we consider that it should not be imposed on Member States but that they are strongly encouraged to do so.

3.5 Jurisdiction

The determination of which tribunal has jurisdiction to deal with collective redress cases is one of the essential aspects of the system to be put into place. Indeed, considering the working of the internal market, more often than not, collective redress will have a cross-border element; claimants located in different Member States may want to join forces against one or more defendants who may not be located in the same Member States. We consider that Regulation 44/2001 is not entirely suited to the needs of collective redress. We do not pass a judgment on the question whether the new rules on jurisdiction must be included in the new instrument or in a special chapter in the revised Regulation 44/2001, which is underway. Suffice it to say that if the jurisdictional rule is to be included in the new instrument, the revised Regulation 44/2001 must exclude collective redress from the scope of the Regulation.

We think that the policy chosen by Regulation 44/2001, i.e., that the choice of the tribunal among those which have jurisdiction is left to the plaintiff, is not a good system in a collective redress setting. Indeed, the usual philosophy behind the policy chosen by Regulation 44/2001, particularly when dealing with consumer, is that the plaintiff is left in an inferior position vis-à-vis the defendant who has no choice but accept the choice made by the plaintiff. In a collective redress scenario, plaintiffs are stronger because of the mere fact that they join forces. It is the defendant who is in a relative weaker position. Hence, we consider that the defendant's forum must have jurisdiction. It is only in exceptional circumstances, when the matter is more closely related to another forum, and it was foreseeable to the defendant, that another tribunal may have jurisdiction. However, it is not for the plaintiffs alone to choose, but the jurisdictional rules must be drafted in a neutral way. In such a case,

[23] "Absent plaintiff" is a concept specific to opt-out proceedings. In such proceedings, a claimant who has not opted out is not formally part to the proceedings, but is nonetheless bound by the outcome of the proceedings.

and to avoid any *lis pendance*, we would favour a direct communication between the different judges who may have jurisdiction (see Part 3.8 below), so that they decide together, within a limited time period, which judge should hear the matter. In a very complex case, borrowing from the matter of insolvency, it would be possible to accept that several proceedings continue side by side, but there should always be a main proceeding (at the defendant's forum) and ancillary(s) proceedings in the other *fora*.

3.6 Applicable law

Applicable law is an issue even more delicate than jurisdiction, whenever there is no uniformity under a European set of norms, such as in competition matters. First, some cases may be of a contractual nature, some other of a tort nature, yet others may present a mix of both. This is why the present division into two separate instruments of conflict of laws rules to contractual and non-contractual obligations does not work for collective redress. Consequently, we consider that the proposed EU instrument on collective redress must contain specific rules on applicable law. Second, as mentioned above in Part 3.2 above, applicable law issues should be one of the factors that the judge takes into consideration to decide whether the matter should go to a collective redress mechanism and, if so, whether to organise an opt-in or an opt-out proceeding. Third, in very complex cases, where a great number of Members States are concerned, and where the laws to be applicable are divergent, the judge may decide that each of the Member States should organise proceedings for its own residents. In other cases, the judge will have to apply different laws to different groups of claimants. This may not be too difficult particularly if the new Network for legislative cooperation[24] does function well. Finally, and in any case, *lex fori* is not the right solution in view of our proposal for jurisdiction. Indeed, the balance would tilt too much in favour of the defendant if he has not only the ability to defend in his own forum (as we propose above), but also to have his own law applied to the entire case. This is why we think that the judge should apply the laws of the place where the effect of the conduct occurred (e.g., the law of the affected market(s)) as already provided for in article 6.1 of Rome II Regulation. This law is predictable for the defendant whenever he has acted on that market. It is also predictable for the claimants who have been affected on that market. Of course, and contrary to article 6.4 of Rome II Regulation, parties may agree to settle on a single law, after the facts, which would make things easier if such an agreement could be reached. It may be one of the first tasks of the judge seised of a collective redress action, to try to help the parties come to an agreement on applicable law.

3.7 Recognition and enforcement

Because we have proposed a system by which the judge would choose between the opt-in and an opt-out procedures, we must provide for rules on recognition and enforcement that cater for each of the possibilities. Again, we do not pass a judgment on whether these rules should be in the new instrument or in the revised Regulation 44/2001 (see Part 1.2 above). If a Member State is requested to enforce a decision resulting from an opt-in procedure, the existing rules are fine and can work. If a Member State is requested to enforce a decision resulting from an opt-out procedure, there must be an additional control by the

[24] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the establishment of a Network for legislative cooperation between the Ministries of Justice of the Member States of the European Union, O.J. C 326/1, 20.12.2008, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:326:0001:0002:EN:PDF.

requested court, i.e., that of the due process rights of the absent claimants. In any case, and in addition, contrary to Regulation 44/2001, which does not provide uniform rules on *effet de titre*, *effet de preuve* or *effet de fait*, three types of effects that can be granted to foreign decisions, although they are not recognised so to speak, we consider that this would be of utmost importance in a collective redress instrument.

3.8 Cooperation

We consider direct communication, coordination and cooperation among judges to be at the centre of a well functioning pan-European system of collective redress. The European Community is already a party to at least one system in which direct communication among judges is experienced.[25] Moreover, some rules or inspiration could be borrowed from the work of the International Law Association and the guidelines approved by that organisation in August 2008 in Rio de Janeiro (see Annex 1).

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[25] This is the system put into place by the Hague Conference on Private International Law on matters of family law. A conference on this matter was held in Brussels on 15 and 16 January 2009.

ANNEX 1

Extract from the Rio de Janeiro Guidelines on Transnational Group Actions

RESOLUTION NO 1/2008

INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC

The 73rd Conference of the International Law Association held in Rio de Janeiro, Brazil, 17-21 August 2008:

HAVING CONSIDERED the Report of the Committee on International Civil Litigation in the Interests of the Public on Transnational Group Actions;

ADOPTS the Paris-Rio de Janeiro Guidelines of Best Practices on Transnational Group Actions, as incorporated in the Report and annexed to this Resolution;

COMMENDS the Guidelines to the attention of:

1. national courts and law reform agencies, with a view to facilitating the progressive development of the law on this subject, and

2. organisations concerned with international legal co-operation with a view to considering measures at the international level of mutual co-operation in the field of transnational group actions.

REQUESTS the Secretary General of the Association to transmit this resolution and the Committee's Report to International Organisations such as the Hague Conference on Private International Law and the Unidroit;

[…]

PARIS-RIO GUIDELINES OF BEST PRACTICES FOR TRANSNATIONAL GROUP ACTIONS AS ADOPTED BY THE INTERNATIONAL LAW ASSOCIATION AT ITS 73RD CONFERENCE HELD IN RIO DE JANEIRO, BRAZIL, 17—21 AUGUST 2008

RECOGNISING that transnational litigation in a global world has increased the possibility that Group Actions be commenced in one or several countries with claimants from many different countries

DESIRING to promote transnational cooperation between courts with a view to increasing judicial efficiency in cross border collective cases

MINDFUL of the fundamental rights of persons or entities who may be affected by a group action although they have not been participating in the proceedings

HEREBY STATES the following guidelines of best practices:

[…]

8) Transnational Judicial Cooperation

8.1. Whether expressly authorised by States or not, judges from different countries should cooperate with one another to best manage transnational group actions. A Court may communicate with a Court in another different country in connection with matters relating to proceedings in a group action which is also pending or foreseen in other countries with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the

administration of justice. A court may appoint a special judge to carry forward the communication.

8.2. These means of cooperation must not be carried out in such a way as to prejudice the rights of the parties to the proceedings. The adversary principle must always be respected by judges during the cooperative process, even if it may be adapted in case of urgency.

8.3. The courts using these Guidelines should clearly inform the parties as to their intention to do so and keep them informed of each step they intend to take.

8.4. Courts using these Guidelines may communicate in any stage of the proceedings, including as to questions of jurisdiction, the categories of claimants who will be included in the group action, the level of proof necessary to certify or otherwise admit any given category of plaintiff and, more generally, all the issues which are peculiar to cross border group actions.

8.5. Courts may use various means of communication, be they in writing, by telephone, via video conferencing, or other electronic means to communicate with one another. Counsel or representatives of affected parties should be entitled to participate during the communication or, where this is not feasible, to be informed of them. An official transcript of the communication should be kept by the court and made available to all affected parties. Whenever possible a collaborative website should be organised for the group action and all documents pertinent for that group action should be posted on the website.

8.6. Courts may also conduct one or more joint hearings via video conferencing or other techniques available to the courts. Submissions made during such joint hearings will be considered to be made to all participating courts, unless the courts provided otherwise in advance of the hearing or unless the person making the submission decides that it is directed to only the specified court or courts.

8.7. Courts may wish to coordinate their orders so that they are rendered at the same time and do not conflict with one another.