SUMMARY OF CONFERENCE

"BUILDING EFFECTIVE MARKETS - THE ROLE OF AN INTEGRATED LEGAL SYSTEM"

Tuesday 29th - Wednesday 30th January 2013
Venue: Swiss Re Centre for Global Dialogue, Rüschlikon, Zürich, Switzerland

Sponsors:
Swiss Re
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Executive Summary

There has been extensive scholarly debate on 'public and private enforcement', which largely takes place within a series of separate silos, such as public law and private law; justice, business, consumers, competition, and individual regulated sectors; regulation, litigation and ADR.

This conference examined major developments in the three pillars of the European legal system: public enforcement, private enforcement, and alternative dispute resolution (ADR). Reports were given on court-based collective actions in seven Member States, which reveal widely differing procedures and activity. Development of ombudsmen is proceeding quickly, and is set to spread across all consumer-to-trader disputes under EU legislation. Public regulatory bodies are established for all principal market sectors, and pan-EU networks are coalescing. Progress cannot proceed in any of these three pillars through harmonisation with a single model, but by evidence-based research and information, and by defining required principles and best practices.

Funding is required for every pillar to operate. Considerable pressures are undermining public expenditure on courts and regulators, so users are being forced to pay, but are also being driven away from courts. Ombudsmen are increasingly funded by business. Funding for litigation is being increasingly outsourced to insurers and intermediaries: lawyers (contingency fees) and litigation funders. Some intermediaries have been attracted to the process and have given rise to significant abuse (claims managers). The cost of collective actions is considerable, and there is widely felt concern over the potential for both abusive behaviour and for the imposition of safeguards to render the procedures ineffective. Since business is likely to end up paying whatever, it should step up and commit to supporting the necessary structures, with proper funding, transparent and fair governance, in return for efficiency.

There is considerable opportunity in these circumstances, but also considerable risk. It is possible to conceive of a legal system in which all pillars play a part, but are prioritised differently in relation to different problems. It is also possible to propose increased efficiency and better outcomes, including redress and behavioural compliance. In short, it is possible to re-design what a good, balanced relationship would be for European jurisdictions *between regulation and litigation*, and how it can *contribute to strong and competitive markets*. A holistic view needs to be taken but needs to be based on more information than is currently available, so powerful research is needed to inform wide-ranging and inclusive discussion of all options in European civil justice and EU legislative developments.

"Re/insurance: creating economic value and stability for society in a rapidly changing world"

Jayne Plunkett, Swiss Re, Member of Group Management Board, Head Casualty Reinsurance Division

Reinsurers absorb shocks, and contribute towards prevention. Insurers deal with the long-term effects of major disasters, such as 9/11, Hurricane Katrina and the Japanese tsunami. In Europe, we see new types of liability claims, including environment and competition. Tort costs are growing, notably exceeding GDP growth in US and UK. There is a need for balanced approaches. There is a need to lower transaction costs for judicial systems, such as through use of ADR.

Keynote Address: Andreas Schwab MEP

See text attached.

Part A: Setting the stage

"Lessons learnt and problems to avoid: a business perspective"

Renata Jungo Brüngger, Chefsyndika, Daimler AG, Stuttgart

[Mrs Brüngger was unfortunately prevented by illness from delivering her paper: her powerpoints are attached. She noted the lessons from USA, and the need for safeguards and a balanced approach in Europe.]

"Designing a holistic balanced legal system"

Prof. Dr. Christopher Hodges, Head of the CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford and Erasmus Professor of the Fundamentals of Private Law, Erasmus University, Rotterdam

The Objectives of this event are:

1. To examine critically a number of mechanisms for delivering redress and regulation, so as
2. To develop a consensus, especially amongst the European business community, on which mechanisms work best and should be supported in developing policy.

The starting point is: How to resolve disputes? A great deal of illumination can be derived from looking at the USA. American policy is to prefer private parties to enforce both private right *and public norms* through the civil law courts. Every citizen is empowered to seek out (through discovery and depositions) and seek judicial condemnation and redress from the behaviour of others. Such a system rationally empowers and incentivises citizens and intermediaries (no cost shift or one-way cost shift where consumer etc breaches, financial incentives through success/contingency fees, and punitive damages forming the 'public penalty' component). This inherently involves liability rules in which substantive rules are aligned to facilitate general enforcement, on a deterrence theory, such as not requiring proof of individual reliance for misstatements.

Such a system is a rational political choice. It is not the choice that exists in European legal systems, which traditionally separate public and private enforcement, and design private enforcement to be of full compensation for breach private rights, with a 'loser pays' basis, and enforcement of public norms to be primarily by public authorities.

These illuminations show, however, that in designing a legal system, we need to seek mechanisms that deliver both behaviour control and redress. Redress is not an option, it is a requirement. There are currently many developments in techniques of both public and private enforcement. So the traditional public/private divide is developing. But this means that fundamental questions need to be addressed:

- What do we want a legal system to do?
- How do we establish the rules?
- How do we maximise compliance with the rules?
- How do we identify non-compliance, as swiftly as possible?
- How do we restore the previous balance?
- How do we resolve disputes?
- What consequences/'enforcement'/'sanctions' should apply?

We may note that the German civil procedure system is highly efficient, with predictable costs and cost-shifting tariffs backed by insurance, but it may produce too much litigation and not easily facilitate settlement. In contrast, the English civil procedure system is too expensive, and many small claims are unable to be brought, although mediation and settlement are strong.

The major options include the following:

- Courts, including individual actions, collective actions, simplified small claims procedures, mediation for proceedings etc;
- ADR, including Consumer ADR (CDR), ombudsmen, business codes of practice and mediation/arbitration dispute resolution pathways;
- Regulators, including *ex ante* and *ex post* powers to influence or order or stop particular behaviour, including restoration/compensation;
- State or other administrative compensation schemes;
- Voluntary action by business, including practice influenced by internal compliance and ethics systems, the market (reputation), customers, competitors, trade associations, and self- or co-regulation.

It may be helpful to bear in mind a three pillar model:

Public regulation – negotiation/ADR/self-regulation – private litigation

In examining each option, technique and pathway, we should set criteria against which each can be evaluated. The criteria fall into two types, broadly classified as democratic accountability and performance. The former include aspects that we all expect from courts, and should require from regulators and ombudsmen, such as independence, expertise, transparency, fairness, absence of corruption and so on. The performance criteria include:

- Success in delivering desired **outcomes**;
- **Speed** in delivering desired outcomes; [should it take 10 years to hold that there was no safety issue with a drug (English MMR litigation) or no mis-statement in a prospectus (Deutsche Telekom)?]
- **Efficiency** (transactional cost, extent to which full compensation is reduced);
- **User-friendliness**;

- **Numbers**: how many cases can be brought as compared with other methods, and how successful have they been;
- **Legacy**: what effect did the procedure have on the subsequent behaviour of the business involved or on other businesses or the market?

Regulatory systems are developing quickly and now delivering speedy compensation as part of the public enforcement process. Ombudsmen are spreading quickly and delivering compensation to consumers either where courts are too expensive or because consumers prefer then, and are also capable of resolving mass problems and contributing to behaviour control. Collective All of these

The collective action debate has evolved considerably. It began with the assumption that the paradigm pathway for resolving infringement of private rights is through private litigation. Hence, there should be a court-based class (collective) action procedure. But the European consensus is that US experience shows that large financial incentives produce what Europeans regard as conflicts of interest and unacceptable abuse. So can we devise a European 'balanced' collective action that prevents abuse through safeguards? Collective actions in courts are unavoidable, but where should they be used? What safeguards should apply? Rebecca Money-Kyrle has analysed all class action procedures around the world, particularly the safeguards that they include. She and I have recently published the view that there is a Catch 22: if you do not adopt strong safeguards to guard against abuse then abuse is entirely predictable, but if you include adequate safeguards to prevent abuse the mechanism may simply not work. That suggests that one should look for other options, and should also prioritise the availability and use of the optional techniques.

The European Parliament has listed a series of safeguards. These include a ban on contingency fees and third party funding. But both of those funding options already exist in some Member States and seem likely to spread. So how realistic is it that safeguards can be applied, and is abuse not inevitable. One should not forget that safeguards are needed for every pillar (i.e. for regulators and ombudsmen as well).

Let us now look more closely at the ADR and regulatory options.

Permanent compensation schemes are very efficient, and good examples exist in the Nordic drug/medical/road traffic no fault schemes and in the French ONIAM medical injury system. Vaccine damage protection exists in many countries worldwide.

The CSLS Oxford research team has interviewed over 100 ombudsmen and code-based ADR schemes in 10 countries, and is now looking at others. There has been a considerable increase in CDR, especially on a sectoral basis.
Measures that *encourage* Member States to establish ADR schemes are:

- Distance Marketing of Financial Services Directive 2002/65/EC
- Timeshare Directive 2008/122/EC
- E-commerce Directive (EC) 2000/31
- Postal Services Directive EC) 2008/6 amending 97/67/EC
- Insurance Mediation Directive 2002/92/EC
- Markets in Financial Instruments Directive (MiFID) (EC) 2004/39 on markets in financial instruments amending 85/611/EEC, 93/6/EEC and 2000/12/EC and repealing 93/22/EEC

More recent measures that *require* Member States to establish ADR schemes are:

- Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to **electronic communications** networks and services
- Directive (EC) 2009/72 concerning common rules for the internal market in **electricity** and repealing Directive 2003/54/EC, [2009] OJ L211/55; and Directive (EC) 2009/73 concerning common rules for the internal market in natural **gas** and repealing Directive 2003/55/EC
- Directive (EC) 2008/48 on **credit agreements for consumers**
- Directive (EC) 2007/64 on **payment services** in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC

Forthcoming legislation to require comprehensive EU coverage for Consumer ADR is:

- 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.
- 'Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR)', COM (2011) 794/2, final, 29 November 2011

There are growing networks and pathways for cross-border DR and ADR:

- Council Resolution (EC) 2000/C on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ C 155/1: **ECC-Net**
- FIN-Net 2001
- Energy-Net 2012

ADR is not as new as many people think! There has been a silent growth and revolution. EU-driven expansion and institutionalisation at national and supra-national levels. CDR satisfies users' criteria: fast, cheap, user-friendly. It is increasingly free to the consumer: often funded by business (some state funded), rarely with a fee. It can capture of complaint data, aggregate it and identify issues and trends. Hence, CDR has the ability to affect market behaviour: i.e. to act (with regulators) as part of the regulatory system.

Turning now to how regulators add delivery of compensation to their public behaviour control and sanctioning functions. There has been a huge growth in regulators, and it is time for consideration of their roles, techniques and effectiveness. Few seem to have defined formal enforcement policies. Deterrence is the sole policy adopted by some, especially the competition authorities. But does it work? Many others adopt more sophisticated enforcement policies, based on other theories of behavioural psychology. Enforcement should be researched and reviewed.

Many regulators are involved in risk identification, risk reduction, and rectification of imbalances. Regulators can deliver restitution as part of their enforcement dialogue. Various developments can be seen, such as:

- The *partie civile* system, in which criminal courts can award compensation to private parties
- Examples of formal restoration powers:
  - Danish Consumer Ombudsman
  - UK Financial Services Authority, under FSMA s404, and restorative action required by many UK sectoral regulators.

This conference is intended to provide an opportunity to review many developments, and to examine the development of underlying policies. I suggest that we need a legal system that delivers the following objectives:

- Set rules for behaviour
- Set systems and incentives to produce balanced desired behaviour

- Early identification of issues
- Stop non-compliance
- Restore the desired status
- Learn lessons, prevent recurrence, improve standards
- Sanction the right targets

The origins and roles of class action laws across the world: what types of problem do they deal with, and what safeguards do they have?
Dr Rebecca Money-Kyrle, Centre for Socio-Legal Studies, Oxford University
[Dr Money--Kyrle was unfortunately prevented by illness from delivering her paper: her powerpoints are attached. See also R Money-Kyrle and C Hodges, 'Safeguards in Collective Actions' (2012) 19.4 *Maastricht Journal of International and Comparative Law* 477-504]

Part B: Mechanisms for resolving mass problems: class actions
Reports from major jurisdictions on the current status of national class actions.

Germany: "The KapMuG story: failure of the Deutsche Telekom collective action"
Prof. Dr. Axel Halfmeier, Leuphana Universität Lüneburg

I. A brief history of the Deutsche Telekom prospectus liability case
- 1996-2000: privatisation of Deutsche Telekom.
- 2001-2005: 17,000 plaintiffs before the Landgericht Frankfurt.
- 2005-2012: KapMuG model procedure before the Oberlandesgericht, 16 May 2012: decision of OLG: this held there were "no errors in the prospectus".
- 2012-2013: plaintiffs appeal to the Bundesgerichtshof.

II. The development of the KapMuG
- 2005: KapMuG enacted as a reaction to the Deutsche Telekom case. There have been about 20 cases brought under KapMuG. Some were resolved quickly. The Daimler case, alleging lack of information, went to the ECJ but was resolved fairly quickly. But the KapMuG does require individual cases to be processed.
- 2012: German parliament reforms KapMuG. This includes an 'opt-in light' procedure.
- 2020: second evaluation of KapMuG is planned.

III. Lessons learned?
1) There are sufficient safeguards, especially loser pays. Why did the Deutsche Telekom claimants go on for so long? Because they had legal expenses insurance (LEI). The LEI insurers tried to get out of the case but were unable to do so. Since the case, the insurers have excluded securities cases from their policies going forward, so such cases could only be brought with external financing.
- Efficiency issues
- Behaviour modification issues.
    - Behaviour modification is not addressed in the KapMuG 2005 (ordinary filing necessary)
    - KapMuG 2012 includes "opt-in light". Are incentives too low in unfair contract claim cases?

IV. Conclusions
1) There is insufficient research on preventive effects of collective litigation.

2) hypothesis: threat of private enforcement has preventive effect. The US antitrust system seems an effective deterrence, at least on individuals.
    - empirical research in USA (e.g. Davis & Lande 2012 on antitrust; Bai, Cox & Thomas 2010 on securities class actions).
    - substantial further research under European conditions is necessary.

Spain: "The limited impact of class actions and the impact of regulators"
Alejandro Ferreres Comella, UriaMenendez, Barcelona

Spain has had a class action procedure since 2000, under which consumer associations can bring collective claims. They represent consumers in the action, and can seek compensation for individual consumers in relation to damages arising from sole damaging event. There is no certification procedure. It is mandatory for the consumer association to notify every affected consumer individually of the action, although in some cases, with the consent of the court, it can be published in 2 national newspapers so people can be made aware of procedure. There is no mechanism to opt-out in Spain, and it raises constitutional issues, which have not been raised so far in the Constitutional Court. There is an opt-in mechanism.

There have been the following major cases: about four major cases. All information is available online.

- A few cases about general conditions of contract. One was about the 'Opening' English language school, which went bankrupt, after which students were left with debts on loans to their banks. Several consumer associations instituted collective actions which held that the contract was not valid.

- **The Endesa case**. An electricity surge in local demand in September 2007 led to failure of supply to 40,000 consumers. One month later, the consumer association OCU filed a collective action claiming undetermined individual damages for those affected. The association submitted a complex calculation that claimed over € 450 per day. The national regulatory body intervened, as a result of which Endessa made a general offer, with compensation to be paid through a scheme, and amounts varying depending on the consequences for individuals, ranging from €122 to €300. The consumer association rejected the offer. The court proceedings took until November 2011 (4 years), when the Court of Appeal dismissed the claim on the basis that there had been failure to prove individual damages suffered, and it upheld the compensation package that had been offered in 2008 by Endessa. The collective action was the wrong way to deal with the problem, and OCU did not have a suitable approach.

- In March 2010 there was another electricity failure, affecting 10,000 people and businesses. This time, OCU did not file a collective action because of the previous experience. Endessa made a settlement offer, which 99% accepted, and the Girona Chamber of Commerce agreed to resolve individual issues through providing arbitration facilities.

- **The NGC bank case**. This involved the validity of swap agreements, under which customers ended up owing the bank. They alleged a flaw in consent. There were thousands of individual decisions, which went for or against customers/bank, depending on individual facts. In December 2010 the consumer association ADICAE decided to bring a collective claim on behalf of 16,000 customers. In the event, 1,216 people joined

the action. The same lawyer represented all claimants, with many identically drafted powers of attorney. The relief claimed was reimbursement of the initial payment. The consumer association needs to establish that the damage was caused by the same sole act event. In December 2012 the court held that (1) there was a lack of procedural standing by ADICAE and (2) there was misjoiner of actions in relation to the 1,260 aggregated cases. It would have taken perhaps 20 years for the court to work through all individual circumstances.

The courts have stated a series of points:

1) Represented consumers' procedural rights must prevail.
    a. Individual consumers should normally be identified at the start of an action.
    b. Personal notification must be proved by the consumer association that claims to represent people.
2) Defendants' personal rights need to be protected.
    a. Consumer associations' personal standing is limited to where commonality is not in issue (which is a highly exceptional circumstance). An opt-out does not help in case of commonality. There is a close approach to commonality and only if individual cases are not in issue can the consumer association proceed.
    b. An individual focus is necessary in order to preserve defendants' rights.

My conclusions are:

1) The Spanish collective redress is not the best example of the genre, but if you know the details of how it works you see that collective actions do not work in Spain.
2) Latin American professors who have proposed a class action approach in fact accepted in the pre-amble to their work that, in order for a class action to work, individual judges would need to be empowered to change the substantive law, on aspects such as the need to prove individual reliance, or market share. That is not consistent with a European approach. Would it be attractive to investors if judges could radically change the law during a court case?
3) Other means do collective redress are more efficient. Regulation plays an efficient role in European government-driven collective redress. An example occurred in the colza oil case. In the subordinated debt cases, individual issues were referred to consumer arbitration panels, and these can easily be set up.
4) Conclusion: Collective claims do not work in Spain or Europa.

Sweden: "The limited impact of class actions, the extensive use of the ARN and ADR system"

Andreas Joersjö, Hammarskiöld & Co., Stockholm

Sweden has had a class action Act for 10n years, in force since 1 January 2003. It has only generated a few cases. The model was influenced by the USA. It is estimated that there have been 20 collective cases in total. Only 12-15 cases have reached the courts; most were dismissed, some have been settled or withdrawn. Some claims have likely been settled/withdrawn before even getting to the courts.

A couple of judgments have been delivered.

– Class action against the Swedish University of Agricultural Sciences regarding gender discrimination, by 44 women.

– Class action against the Swedish State regarding customs seizure of privately imported alcoholic beverages, by 97 persons.

Only few cases are currently active

- Class action against an electricity supplier initiated in 2004, by the Consumer Ombudsman. Thus, unconcluded after 8 years.
- Class action against the aviation authority initiated in 2006, by residents near Stockholm's main airport Arlanda over nopise pollution.
- The "Acta group proceedings" not involving a class action, but this consist of hundreds of individual cases handled jointly; concerning asset management.

Most of the class actions in Sweden so far have targeted the Swedish State as defendant and have not been consumer oriented, which was probably not expected by the legislator. Some examples of other contemplated class actions discussed in the media

- Graffiti vandals requesting class action against a listed security company for breaches of the Swedish Personal Data Act
- Football hooligans considering class action against Danish(!) police for bad treatment
- Prison inmates considering class action against the Swedish State for bad treatment

The conclusion is that class actions have not been a success in Sweden. One reason why they are not used is the extensive systems, and wide use, of the consumer ADR system, headed by the ARN. The ARN had 11,000 claims in 2009. There are also 52 private self-regulatory ombudsmen and boards, which are mostly free to complainants and processed 10,000 claims in 2009. These procedures are quick.

Poland: "Lack of transparency in judgments, and lack of confidence in judges: limited impact of the Class Action Act"

Dr Magdalena Tulibacka, Centre for Socio-Legal Studies, Oxford

The Class Action Law in Poland has only been in force for two years, since 2010. Poland is suffering from numerous problems in the civil justice system inherited from Communist times. There are long delays. Introducing a new procedure such as the class action has not solved the underlying problems. Instead, the class action law has merely acted more like a magnifying glass for the underlying problems.

There was an appetite for change, and a political and academic will to introduce a class action law. But there was no research into the real gaps in access to justice. The Class Action Act itself is a fairly balanced mechanism. There was great expectation when it was introduced, and comprehensive media coverage and new websites (such as groupaction.com, sue-him.pl, suethegovernment.com), and law firms.

The reality of class actions in Poland is v disappointing. A lot of things do not work. Standing applies to a class member or the consumer ombudsman only. There must be commonality for all monetary claims in the class (a unique feature: all claimants must claim the same amount), which has the effect of incentivising pre-action coordination amongst claimants, and even on settlement with defendants, and creating subclasses. There are certification criteria, and it is an opt-in system.

In the first two years, 60 class actions appear to have been brought. People are talking about how to sue and get people to sue. Defendants include the state, banks and insurers. Most actions have been rejected, for formal weaknesses such as that the certification requirements are not met. Many lawyers now first bring a test case to then see if a class action can be

brought, such as asking for a liability only judgment. A leading lawyer told me that this is what 'saves class actions for us'. Claims can encourage settlements after declaratory relief. A handful of cases are in the group formation stage, but there are none at the substantive level yet. A single Supreme Court decision has held that lawyers have to represent the class in a class action.

Are the expectations realistic? Has there been improved access to justice? Are claims quicker? No. The mood has changed and people are talking about the 'death' of class actions.

The Act has a limited scope of application – only product liability, consumer protection and tort, but not personal injury. A case involving 60 injuries after the collapse of a trade hall in Katowice was not certified: instead, prosecutions were brought.

Contingency fees are banned in Poland as an exclusive means of lawyer remuneration, apart from up to 20% in class actions. But while contingency fees are increasingly common in individual litigation (and the Supreme Court upheld a novel agreement in 2011), they are not used in class actions. Instead, lawyers demand money up-front. Polish people love to argue, so there is much debate over percentages. Examples:

- Amber Gold case – Chałas & Wspólnicy demanded between 3% and 9% of value of claim. There were 100 sub-classes.
- KKG cases – flood victims: 1500 PLN per class member in one case, amount depending on claim in another.

A pro-bono class action case has occurred, but is rare. It is very expensive to run a class action. Instituting a declaratory relief class case presents a problem since there is no basis for the contingency to bite on. The court fee is 2% of the case value (unless it is an ombudsman case), plus fees must be found for experts, witnesses, translators and other expenses. There is no legal aid for class actions.

The loser pays rule applies, on a statutory tariff for cost shifting, so a successful claimant has to pay her lawyer on top. The financial risk involved in class actions is considerable. There is uncertainty of outcome, even if case is won there can be extra costs. Security of costs can be applied for to 20% of the value of case, to be paid in cash. How much can lawyers ask for in reality?

Technical criticisms can be made. There is a limited scope of the class representative: only class members and regional consumer ombudsman - why not consumer associations? There are inherent procedural problems. But the real problem is the insertion of this procedure into a procedural system that already has flaws. There is a problem of legal culture. People do not trust judges, so judges are afraid of appearing partial, and this limits their ability to exercise proper managerial control: they often call experts so as to be able to rely on them. People and society are not ready for this device: there has been no research into gaps in civil justice, and too much emphasis on court-based justice where the system is creaking. It does not encourage settlement. No discovery exists in Poland.

Discussion: points made by attendees

The picture so far is one of relative failure, although relativity cannot be assessed as the class action procedures are still young.

Is there any political appetite for moving towards a harmonised form of legislating instruments? It is clear that national 'class action' procedures operate within highly differing

national contexts, and an attempt at standardisation would result in a lot of things changing unexpectedly within different national contexts.

Do we know what changed as a result of any legal actions? What did the defendants, or others, do differently? There is no research on this, and no expectation that money or declarations of law actions necessarily change much in wider behaviour of businesses or governments.

In Spain, no-one is recommending changes in law to improve the system. Improving access to justice ought to put individuals in a position that is better off, but there is no interest in a European system of class actions, not much attention on European regulation from Spain anyway, no public interest and no academic publication on the real problems. There is ADR in Spain (the new law on mediation implementing the mediation directive) and there is more interest in Spain for ADR, but a realisation that there needs to be a combination of approaches and addition to the courts.

In Germany, the government commissioned a big study on group actions (1,000 pages) , which recommended an opt-in group action and gave an elaborated proposal, but it was shelved when the government changed. Opposition parties are still working on the issue. There is no end to the discussion.

The effect of European law and the case law of ECJ has been to challenge national traditions. It can be helpful to introduce rationality from an outside view. There can be pure historic coincidence, e.g. a judgment by ECJ in a case from Hungary which said that if one national court has declared a clause to be unfair then all other courts view it as unfair.

In Sweden, class actions are too young. A governmental review report was published in 2008 that said it was too early to judge the class action. Class actions are a popular topic for media, but the effect has been negative in Sweden.

Harmonising is positive as such, and class actions must be seen within the frame of national culture and legal culture. Industry does not see it as an effective model.

Poland is only newly democratised, a new member state, and still evolving. There is an appetite to improve class action laws, Poles are in love with courts, and do no trust in mediators.

Courts are out of date, and if one were to construct a system from scratch the mechanics would change. The courts should be computerised. We should deliberate on what to do holistically, rather than tinker with particular procedures. The courts are paper-based and simply cannot deal with mass claims.

In Germany, under KapMug cases the courts were physically overwhelmed with paper, so an ad hoc Internet system was introduced for file sharing, but an Internet based procedure is not for all KapMug cases.

In Spain, even if courts could be totally computerised, might not do it, boxes to provide evidence

B Hess: staffing and courts' experience is important. We need specialised courts that are equipped to deal with mass cases. Is there a choice between redress and law enforcement? If we enlarge ADR, do we impair law enforcement? Are they alternative or must they supplement each other? In looking at collective redress, we need to look at insolvency procedures too (see Equitable Life).

The concepts of failure and success are used in different ways. One needs an appropriate mechanism to detect inappropriate cases.

No matter how different the mechanisms are for mass disputes, they show how judges or courts do not know how to deal with cases (maybe a civil law vs common law divide).

A basic difference exists between US and Europe in that they have different approaches to pre-contract arbitration clauses. These can bind the consumer to use ADR in USA (to prevent mass claims), and this is not possible under European law and unlikely to change since it raises fundamental human rights issues.

The Netherlands: "The settlement approach: the Geschillencommissie system and the Class Action Settlement Act"
Prof. Dr. Ianika Tzankova, Tilburg University
This presentation is about two aspects of settlement in the Netherlands: the ADR system, especially that in financial services (Kifid) and the class settlement procedure.

Financial disputes are brought through Kifid. There is a modest registration fee, no mandatory legal representation, no loser pays, and the system is funded and supervised by the industry. The first stage is direct negotiation with the company. Then disputes can be brought to the Ombudsman, who is a former judge, and who makes non-binding recommendations.

The next stage is an 'appeal' to the Geschillen Commission. It has three members, includes financial expertise, and makes a binding ruling (with a few exceptions). It has an informal and flexible procedure. The Commission is very proactive during the oral hearing (fact finding, damage calculation etc). Aggregation of claims is excluded/prohibited. An appeal possible (Kifid Appeal Commission).

A critical evaluation would say the following. Ombudsman: there are doubts and concerns about his role. The Commission is overall positive, but there is a heavy case load and no formal aggregation options; and the informal and flexible procedure then raises due process issues. Is Kifid just another specialized court?

The WCAM was introduced in 2005. It operates after an out of court settlement agreement (SA). A representative organization must exist to bring the claim, and special purpose vehicles have been used to do this. Parties can contribute to a fund. The parties petition Amsterdam Court of Appeal, there is a case management conference, a notification fairness hearing, a fairness hearing, if SA approved, and the notification SA is approved. The opt out period starts, after which the SA becomes binding to non-optouters.

There have been the following cases:

Case	Number in Class	Total Settlement Amount
DES (2006)	34.000 (+)	€ 38 million

Dexia (2007)	300.000	€ 1 billion
Vie d'Or	11.000	€ 45 million
Shell (2009)	500.000	$ 352.6 million
Vedior (2009)	2.000	€ 4.25 million
Converium (2012)	13.000	$ 58.5 million

In these:

- 2 related to U.S. securities (Shell and Converium)
- 2 related to European financial products (issues focused on certainty, reputation and political pressure: Vie d'Or and Dexia)
- 1 was a merger
- In DES the rainmaker was the Supreme Court
- Vedior: there was no litigation, and reputational concerns spurred settlement
- In all cases companies instigated the use of the WCAM
- Industry feels that two cases were settled too late
- One case led to stricter regulation.

There have also been the following non-WCAM settlements, showing that the WCAM procedure is not a one-size-fits-all:

> Ahold and Unilever settlements
> Unit linked insurances
> World Online (prospectus liability)

Belgium: "Mass compensation in criminal proceedings, and the Belmed consumer ADR"
Dr. Stefaan Voet, Ghent University

Adopting the three pillar model of Professor Hodges, we can examine the particular and innovative approaches in Belgium.

In private litigation, we have as yet no class action procedure. There have been various proposals, and the political parties still debate.

The public enforcement pillar is much more active. We have a wide range of public enforcement bodies, such as:

- energy: CREG, VREG, CWaPE, Brugel
- telecommunication: BIPT (Ombudsman for Telecommunications)
- financial services: FSMA
- environment: VMM (complaint coordinator), Spaque, BIM
- consumer policy:
    - Federal Public Service for the Economy, SME's, Self-Employed and Energy
        - DG for Market Regulation and Organization
        - DG for Quality and Safety
        - DG for Enforcement and Mediation

These have limited powers in dealing with (mass) damages cases. In case of harm, they transfer the case to the Public Prosecutor.

The public prosecution gives rise to a widely used technique for civil parties to 'piggy back' and claim damages. This technique is widely referenced in European policy:

- The Council of Europe

- Recommendation No. R(85) 11 on the position of the victim in the framework of criminal law and procedure
- Recommendation No. R(87) 21 on assistance to victims and the prevention of victimization
- Recommendation No. R(2000) 19 on the role of the public prosecution in the criminal justice system
- European Convention on the compensation of victims of violent crimes (1983)

- The European Union
  - Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) (see especially article 9)
  - Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims
  - 18 May 2011: EC Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275 final

This most recent proposal provides:

> Chapter 3. Participation in Criminal Proceedings
>
> Article 15. Right to decision on compensation from the offender in the course of criminal proceedings
>
> 1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time.
>
> The first subparagraph shall not apply where national law provides for restitution or compensation to be awarded in another manner.
>
> 2. Member States shall take measures to encourage offenders to provide adequate compensation to victims.

The piggy-back approach operates in Belgium (and France), which have the most liberal system. The injured party becomes a formal party to the criminal proceedings. He retains a quasi-absolute right to bring his or her civil claim during the criminal proceedings. The gain is that he is piggybacking the evidence of the Public Prosecutor, and only needs to produce proof of damages and causation; "criminel tient le civil en état".

Many Belgian mass cases are criminal cases> Major examples are:
- Lernout & Hauspie (securities): 19,000 civil claimants
- Spaar Select (securities): 350 civil claimants
- Gellingen (mass disaster): 400 civil claimants

The advantages:
- easily accessible
- cheap
- only proof of damages and causation (no proof of liability)

Disadvantages:
- burdensome opt in system
- overload of criminal court

A solution may be outsourcing the civil claims to special masters.

A Case Study is the Gellingen disaster. On 30 July 2004 there was a gas explosion in Gellingen. 24 people died and there were more than 150 victims. There was a criminal prosecution against 14 defendants. 400 "piggybacking" victims joined. On 22 February 2010, the court of first instance acquited most defendants. On 28 June 2011, the court of appeal

convicted most defendants and appointed two special masters ('coordinating experts') to try and reach an overall settlement between the defendants and victims – with success!

Comparisons can be drawn with the piggyback technique for crime victims in some other countries. In the Netherlands, it existed before the act of 17 December 2009, but there was a "clear case" criterion, which excluded many damages claimants. Under the Act of 17 December 2009, a criminal judge can declare the civil claim inadmissible if the adjudication of this claim leads to a disproportionate burden of the criminal case. So this might not be widely used in mass cases.
In Germany, under *Adhäsionsverfahren*, the criminal judge can refuse the civil claim if this claim does not lend itself to be adjudicated in the criminal procedure, for example when there are complex questions of civil law, or when the civil claims could slow down the criminal case. So there remains a question mark over mass cases.

Turning now to the ADR/CDR/ODR pillar. Belgium has an ambitious scheme. The DG for Enforcement and Mediation does not provide mediation in individual cases, but sectorial mediation and online mediation. The system is called Belmed (Belgian Mediation, see www.belmed.fgov.be) and was launched in April 2011. It is a digital ODR portal (platform) on ADR, with two sections, information and solutions. The information part is highly used, but so far the solutions part is not. [Operating details given, see powerpoint attached.] The online application is sent to the competent ADR authority, the Ministry serving as administrator / "serving-hatch", without knowledge of the identity of parties or of the contents of applications. The Ministry does receive statistical information on the need for additional ADR agencies and mass claims detection. To date, the following sectors are covered:

- Ombudsman Service for Energy
- Mediation Service Banks – Credits – Investments
- Second-hand Vehicle Reconciliation Commission
- Travel Disputes Commission
- European Consumer Centre
- Furniture Disputes Commission
- Real Estate Conciliation, Arbitration and Mediation Board

Statistics for April 2011 – January 2013 are disappointing:

total number of cases:	514	
- sectors not covered: 232	(45,14%)	
- sectors covered:	282	(54,86 %)
- still pending:	84	(29,79%)
- finished:	198	(70,21%)
- rejected:	106	(53,54%)
- stopped:	72	(36,36%)
- settled:	17	(8,59%)
- failed:	3	(1,52%)

Another approach is also being considered, as a mix of public enforcement and ADR.

- Act of 13 November 2011 on the compensation of physical and moral damages as a consequence of a technological disaster (entered into force on 1 November 2012)
- French inspiration (loi n° 2003-699 de 30 juillet 2003 relative à la prévention des risques technologiques et naturels et à la réparation des dommages)
- victim of a technological disaster can get a cash advantage of a government fund when the liability cannot be established immediately

- lot of exceptions (terrorism, natural disasters, nuclear accidents, war, product liability, traffic accidents, fire and explosion in public facilities, airspace accidents, medical malpractice)
- fund is financed by (specific) insurance companies (50 million euros a year)
- fund is subrogated to the rights of the victim and can claim the money back from he or she who is (in the end) liable (or his or her insurance company)

UK: "The limited impact of group actions, use of case management, and shift towards self-regulation and regulatory solutions"

Prof. Dr. Christopher Hodges

The UK has highly significant developments under each of the three pillars.

Under the private litigation pillar, there are the following technical options for bringing collective actions:

1. Representative Action CPR 19.II – this requires all claims to be identical, so is rare
2. Group Litigation Order CPR 19.III – the GLO was introduced in 1999 but as a codification of pre-existing practice that had been developed under the courts' inherent jurisdiction to manage a series of mass cases from the 1980s onwards.
3. Courts' inherent case management powers have since been used in preference to invoking the GLO procedure, since there is considerable flexibility. [Example of the Buncefield litigation].
4. Competition damages: a representative claim by the consumers association (only), under the Competition Act 1998, s47A & B in the Competition Appeal Tribunal.

There has been a distinct historical pattern in the incidence of multi-party actions.

- There are occasional transport accidents, mass murder, holiday health or service claims.
- 1980-90s: medicinal products, tobacco, many of which failed.
- 1995-2004: abuse in child care homes, following prosecutions.
- 2008 on: financial services

This pattern can be associated with the availability of funding to overcome claimants' and their lawyers' need for funding, and changes in the costs rules:

- 1957-1995: Legal Aid + one-way cost shift: an increasing number of claims, with decreasing merits
- 1995-1999: CFAs with success fee recoverable but two way cost shifts: cooling
- 1999-2012: CFA + ATE insurance, with both success fee and premium recoverable: massive increase in individual claims, Costs Wars: Claims Management scandals, leading to introduction of regulation of claims managers, but collapse of multiple claims
- 2005- on: arrival of third party funders (TPF) but selectivity of claims, and no appetite to fund mass claims other than follow-on cartel damages (because liability established)
- 2013: regulated contingency fees (confusingly called DBAs) and qualified one-way cost-shifting (QOCS) for personal injury claims – anticipation of a growth in personal injury, medical negligence and product liability claims.

The ADR pillar has expanded massively during the past decade, but is still not widely known. In the public sector, there has long been the Parliamentary and Health Service Ombudsman and the Local Government Ombudsman, whose rules and access are recognised need liberalising. The Ombudsman model has been widely adopted in the private sector, especially for regulated industries: Financial Services, Telecoms, Energy, Legal Services, asepcts of environment (Green Deal) and is spreading. Other sectors rely on mediation-arbitration

models attached to business codes of conduct, such as travel (ABTA), motor vehicles (Motor Codes), dentists and so on. Official standards and matrices have been applied for ADR systems by regulators, such as the OFT and OFCOM, raising standards of practice. There is a close link between ADR bodies and public regulatory authorities. There is also a move towards transparency of complaints (naming types, numbers, traders), which improves trading standards.

Highly important developments have occurred in the 'public pillar'. A sequence of official Reports has gradually shifted the enforcement approaches, policies and duties on almost all of the public regulatory authorities, which has included 'restorative justice' as one of their formal objectives. As a result, they are now delivering mass compensation 'as standard practice' in an increasing number of situations, and able to do so remarkably quickly, cheaply, and effectively. An important milestone was RM Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006), which led to the inclusion of regulators' duties and restorative powers (civil sanctions) under the Enforcement and Sanctions Act 2008. The odd-regulator-out is the OFT in relation to competition enforcement, which remains subject to a different regime (based solely on the economic theory of *ex post* deterrence) that is common to all competition enforcers worldwide, and can be compared to a pre-historic approach to enforcement.

Macrory's Six Penalties Principles, which include deterrence (but only at the end) and include restoration, are:

1. Aim to change the behaviour of the offender.
2. Aim to eliminate any financial gain or benefit from non-compliance.
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction.
4. Be proportionate to the nature of the offence and the harm caused.
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate.
6. Aim to deter future non-compliance.

Specific powers for the financial services regulator (FSA, shortly to be reformed) exist for mass compensation schemes, under the Financial Services and Markets Act s404, which are now being used, backing up negotiation of settlements.

The government has recently issued two contrasting policy decisions. First, competition damages in January 2013 include all 3 pillars: encouragement of ADR and a Dutch-inspired power for the CAT to approve mass settlements; a power for the regulator to order mass redress; and an opt-out class action available only to approved bodies such as the consumers' association, but not special purpose vehicles. Political arguments will continue on the last point, which is unlikely to be adopted soon.

In contrast, for consumer redress proposals in November 2012 reject a litigation approach as too slow and costly (with abuse and transactional cost of intermediaries), and instead propose wider regulatory powers to encourage voluntary redress, and impose redress, and schemes.

Discussion

The expansion in regulators' powers is intriguing but who will fund it? In UK, public budgets are being cut, so regulators are increasingly charging business for licence fees but also for

costs of inspection and enforcement. Business needs to recognise that it will have primary responsibility for paying the transactional costs of transferring compensation under each one of the three pillars. Accordingly, it has a strong interest in identifying which of the available techniques is the cheapest and most effective. There seems to be evidence that regulatory powers plus ADR are the cheapest and, quickest and most effective, and significantly more so that court-based systems. The tort system has been seen as expensive for many years, but alternatives have only recently been recognised. We seem to be on the brink of a major shift in the legal system.

Concerns arise here. Will ombudsmen and regulators be independent, properly funded, and not captured? Problems arise with every pillar. Every pillar needs safeguards. System design should involve accountability, oversight, governance and transparency (full stakeholder involvement in boards, audit, media transparency, judicial review). One mechanism to avoid collusive deals between claimant lawyers and defendants, as between regulators and defendants, is for deals to be public and to be approved by courts.

Some concerns arise from the Netherlands. The Vie d'Or case arose because the regulator did not act in a timely fashion and it lead to company failure and losses. But regulators cannot be held liable, so industry paid for regulatory failure.

Not all regulatory regimes have proper coverage (eg global linkage for what is a financial services industry) or intensity of depth (again, the depth of interference by regulators in financial services if less than in pharmaceuticals, and in the former regulators have been more concerned with keeping banks in a country than with prudential behaviour, but that is why the UK is splitting its regulator into two bodies, one dealing specifically with prudential regulation.)

In Belgium, consumers do not know that regulators have powers that can help with complaints. All these factors are changing, however.

Cross-border collaboration of regulators is problematic in the EU. But it is improving. The CPC network exists for consumer enforcement, and similar networks are crystalising for every sector. Of course, there are variations between the performance of different Member States, but further concentration on transparency, best practice, collaboration, audit and competition between regulators, is developing.

A key question is how the costs of the tort system compare with those of regulators and ombudsmen. It is not known how to compute these. But if class actions are to be incentivised adequately enough to provide the primary source of challenge and compensation (even ignoring deterrence) it does appear that they will inevitably be more expensive than regulators-plus-ombudsmen. Internal compliance costs arise in any event. If one has costs of all three pillars, that will be expensive, for business, their customers, and the economy.

Who clarifies or 'vindicates' the law if courts give way to ombudsmen? Remember that arbitration, widely used and accepted in commercial disputes, hardly clarifies the law since outcomes are confidential. Many court disputes end in settlement. Regulators, guidance and codes provide extensive clarification of the law on an ongoing basis. Ombudsmen provide identification of issues that can be clarified by others, even if they are not clarified in any individual case. It is the practice of the German Insurance Ombudsman not to decide cases

that involve points of law, and the Oxford team's book suggests that CDR bodies should be able to refer points of law to courts.

Huge national variations exist, looking across the three pillars. Note the safeguards and catch 22 point. National systems are hugely complex and involve multiple inter-connected features, which differ widely between states. Harmonisation of 'systems', whether 'collective actions' or 'regulatory systems' would just produce chaos.

How do we know what has changed after any intervention? Do isolated court decisions change the behaviour of large or small organisations (companies or governments)? If you rely on a theory of post facto deterrence, it needs to be very high to be effective. But what is to stop people offending again the next day? Ongoing inspection and scrutiny is needed, and internal compliance systems and external regulators are usually better at that than external lawyers.

Dinner Keynote Speech
Professor Dr Burkhard Hess, Executive Director of the Max Planck Institute for Procedural Law, Luxembourg
Introduction to this Institute, founded in 2012, and currently being expanded. It is one of the 80 Max Plank scientific institutes, and is the first research centre to focus exclusively on procedural law. It has three divisions: international (UN, WTO etc); European and comparative; and regulatory. A multi-national staff is in place and being expanded, in collaboration with the University of Luxembourg. The Institute has excellent links with the European Institutions (Council, Commission, Parliament and Court). The annual budget is €10 million. A major library is currently being established.

Part C: How can regulatory systems influence behaviour, compliance and compensation? What approaches and what results? What safeguards are necessary for regulators?

Henrik Øe, Danish Consumer Ombudsman, Denmark
The Danish Consumer Ombudsman[CO] is a public enforcer. There are only two ombudsmen in Denmark – the name has a special restricted classification. The CO does not operate an ADR system, but am a supplement to the separate ADR system.

Consumer protection landscape involves many stakeholders, who inter-connect. The CO is an independent public authority. But he is open to influence by multiple stakeholders, and inter-links with them {see slide}:

- The Consumer Complaint Board and other complaint boards, eg the Complaint Board of Banking Services.
- The Consumer Council and other interest organisations and NGOs.
- The Ministry of Business and growth (political issues).
- Trade and business organisations.
- Other public bodies [The Danish FSA, foodstuff, health, justice etc, where legal consumer interests are involved].
- The Competition and Consumer Authority [consumer law].
- EU Commission and Consumer Protection Cooperation network. The CO is the national, cross-border enforcer.

- Legal community [representing businesses in legal matters]
- The media [consumer issues are good copy]. Full transparency is regarded as very important.

Enforcement of consumer protection law at national level: Remedies available to the consumers (individual redress):

- Complaint boards (ADR): only if the claim exceeds DKK 800. But the CO can act before the conclusion of any case.
- Individual action in court (small claims procedure – nobody uses this).
- Complaint to the CO.
- Complain to the Consumer Council, which gives voice through the press.

ADR must be fair and respect procedural safeguards.
Advantages of ADR:

- Informal, quick, and inexpensive for consumers (maybe not always for companies)
- Most decisions are followed.

Disadvantages:

- Decisions are not directly enforceable: it would be a violation of the Constitution if they were.
- Often not possible to produce evidence (eg witness statements), so a subsequent court procedure may be necessary. Possible solutions:
    - The decision is enforceable by default if the trader does not inform the ADR board that he does not intend to follow its decision
    - Free legal aid to consumers and the small claims procedure
    - 'Name and shame': the CO does not like shaming people.
    - Decision is binding according to prior agreement between the parties.
- One-case solutions only. It is the CO's job to aggregate, eg on contract terms.

The role of the Consumer Ombudsman as a public enforcer:

- 'Hard' law enforcement in cases that are of more than general interest:
    - Administrative orders
    - Injunction/order and/or penalty imposed by the court
    - Civil lawsuit (eg for compensation) on behalf of one or more consumers
    - Collective redress, as of 1 January 2008.
    - CFriminal law remedies.
- 'Soft' law approach:
    - Intervention (eg by negotiation with trade and industry) can:
    - Rectify the market
    - Give trade and industry 'ownership' of the interpretation of the law (guidelines).

Small and founded claims are not necessarily left unpursued. There are sufficient safeguards in the Danish legislation to avoid unfounded claims: court approval of settlements, loser pays principle, and no punitive damages. Two models are necessary: the traditional opt-in model (led by a group representative) and, if a claim is under €270 (which needs to be increased), an opt-out model *only* available to the CO. The opt-out model has not yet been used through the courts, but it is an effective power in negotiations.

The following collective proceedings have been through the courts:

- Bank Trelleborg; redemption of minority shareholders

- Løkken Savings Bank; compensation of guarantors who lost guaranteed capital
- Jyske Bank; a risky investment product ('casino product') involving both public and private enforcement. Settlement totalling £40 million, 3,000 investors, paying 809% of the loss.
- There may be a further Sampension case; pension fund withdrawal of 4% guaranteed interest rate; objection to changing this retroactively; legal aid has been sought for private enforcement, but the legal; aid authorities are waiting for the outcome of a negotiation commenced by the CO [an issue of public-private prioritisation].

The following cases have gone through settlement:

- Basic Bank; the CO wrote a letter about an unlawful increase in interest rate, and settlement was immediate.
- Tyrkiet Eksperton; travel agent said customers could fly to a new airport in Turkey which had no landing permit and people were bused. Agreement is awaited
- Diba bank; products sold with a 7-10 year investment horizon. The Supreme Court ruled in a test case, in favour of a 92 year old woman. She was apid but there was an appeal; it is not being tried to settle all individual cases.

Most collective redress are banking cases. The test case mechanism can be useful. There is an interaction between public and private in some cases. Merely talking and suggesting settlements makes a difference and can solve the issue. The CO chooses whether a case fits opt in or out.

The principle of negotiation - Section 23 of the Marketing Practices Act requires the CO to 'seek by negotiation to influence traders to act in accordance with good market practices'.
In individual negotiations, the CO can use warnings or undertakings to comply or change. It is possible to include compensation for unfair practice.
Under s 24, the CO will 'seek to influence the conduct of traders by the preparation and issue of general guidelines in specified areas'. He does this by inviting the Consumer Council and industry to sit together and negotiate. The involvement of industry means they can take ownership, and later go public and said they have discussed the position with the Ombudsman. Guidance also provides legal certainty. The involvement of NGOs means they will not later complaint to the press.

The Consumer Ombudsman, ADR, and the small claims procedure together provide a constant system to counter unfair commercial practices. The CO needs an opt out model, as opt in does not move things forward. The CO uses his full criminal resources only on rogue traders. Negotiation resolves things much faster than court proceedings.

Health & Safety: **Mark Tyler**, Salutaris Legal Services Ltd., UK

The area of health and safety in the workplace has provided a laboratory for discussions. This is not an area in which 'enforcement' involves class actions or 'access to justice'. Ensuring compliance is not easy, given the vast number of workplaces, owned by businesses of all shapes and sizes. It is a challenge to design an effective regulatory model. Compared with 2,200 unsafe products notified across Europe, there were 2.6 million injuries notified (and probably twice as many occurred). 8.6% pf the population suffer from work-related injuries.

Two enforcement paradigms exist and are somewhat opposed: compliance and deterrence. These are not either/or choices. Deterrence involves detection and penalising. It is needed so that businesses know that competitors are complying and that competition is fair.

There is an EU Agency, but Member States are responsible for enforcement, and the picture is a patchwork of different approaches and effectiveness. EU laws (89/391) impose a requirement for businesses to adopt a management system. The Seveso Directive also has other layers of control, with a regulator approving plans. A hybrid model is evolving, with a regulator imposing a duty to self-regulate.

The position is similar to the new anti-bribery legislation in the UK, which was introduced because UK was behind OECD standards. The bribery approach looks like the H&S model of proportionate monitoring and compliance.

A commonly used diagram illustrates a successful H&S management system. A variety of guidance exists for particular industries. Performance in fatal accidents has improved (fallen!).

Deterrence appears constantly in the literature. But how relevant is it? 99% of businesses employ under 50m people. A food sector study found little deterrent effect. A 2005 HSE study found other motivators. You need a strong, active, visible regulator. A lot more research exists for large organisations. The regulator maintains a name and shame website (names are never removed); and uses publicity orders. In Australia a retailer was ordered to print its conviction on all carrier bags issued.

What factors motivate compliance? Positive indicators exist. Supply chain pressure (the Olympic Authority imposed strong pressure, and safety performance was outstandingly good) and insurance pressure. Academics and regulators are polarised over the choice between deterrence and compliance. The UK regulator proposed but backed off imposing punitive duties, because it felt that positive motivations were stronger. The corporate homicide panel's recommendation for 2.5%-10% of turnover-based fines was rejected, because it was too blunt, arbitrary, and did not send the right motivational message.

The conclusions are that management systems requirements are the key. The evidence for deterrence is weak, as it is across all criminal law.

Part D: How can ADR systems resolve mass problems? How will ASDR develop? What safeguards are necessary in ADR?

David Thomas, Chairman, International Network of Financial Ombudsman; Lead Ombudsman (Strategy), Financial Ombudsman Service, UK

Financial ombudsmen exist in more than 40 countries around the world, with different powers and relationships with regulators. In UK, previous financial ombudsmen started in the 1980s for banking and insurance, and in the 1990s separate regulator-based schemes developed for investment advice and investment management. The Financial Ombudsman

Service was established by law in 2000 as a single combined scheme. It was later extended to new areas, and is compulsory for 100,000 financial businesses.

The FOS receives over 1,000,000 enquiries a year, and processes over 250,000 cases a year. The procedure starts as mediation then a recommendation for outcome (85% are resolved at that stage), and then a decision, which is binding on the institution if the consumer accepts. Jurisdiction is up to £150,000. Data is published on the website on named businesses. A great deal of information is made transparent to the regulator and public. This influences future behaviour. The FOS is not a specialist court: it involves outreach, handles inquiries, has an informal and adaptable procedure, is an active investigator, and feeds back lessons. All these functions are not to be found in specialist court.

Workload has increased steadily over the decade. The impact is of mass claims in three topics, primarily (PPI), mortgage endowments, and bank and credit card charges. Those three issues exceed everything else. The banks have reserved €15 billion to cover their PPI claims. The FOS receives 659 cases per working day, last year coming in at 2000 per working day.

Mass issues are dealt with in two ways. First, lead cases can be selected. We identify a 'clean' typical case or cases and progress it/them as a lead case (not a test case), to decision. We then ask parties to similar cases how their cases differ from the lead. 95% accept that their case is the same, 5% do not agree. This approach works in mass same cases but is not suitable for a group of cases in which individual issues may differ, such as whether a product is suitable for an individual customer. For them, a spread sheet approach is adopted. We draw up a spread sheet that records all the essential characteristics, and send it to the industry for them to apply internally, subject to oversight. Individual cases can be mapped against the matrix.

Court-based collective procedures have been proposed in UK. In 2008 the Civil Justice Council suggested a collective action procedure, but it was not favoured by the government. In 2009 the government proposed, in the financial services sector, both collective action and a consumer redress scheme. When the government fell in 2010, the consumer redress scheme was adopted and the collective action was dropped.

Potentially conflicting legal objectives apply to the regulator and ombudsman: the regulator seeks a fair result across the market for those who apply (and maybe those who don't), a rough and ready across the board approach. The Ombudsman seeks fair redress in the circumstances in the individual case for those who complain.

The consumer redress scheme was invented to address this issue. The regulator considers whether a widespread problem exists and a court would award redress. The regulator can require businesses to take various steps and can issue a determination. The consumer can appeal to the ombudsman, who decides if the business has done what the regulator required.

Consumer redress scheme can be either across the market or for a single business. Public accountability exists through the regulator, who has to consult before imposing the scheme. The Ombudsman applies the scheme result. For an Inside scheme, there is a specified result for those who apply (and maybe those who don't). For an Outside scheme, there is fair redress in the circumstances of the individual case for those who complain.

Experience to date is limited since there is only 2 years' use.

- Single-business schemes have been used twice: for a mortgage interest rate variation (the regulator ruled that letter were to be sent to all customers, and £30 million was paid in compensation: customers got less than going to the ombudsman but got money faster), and an investment fund management.
- An across-market scheme has been applied to investment fund sales (applies to anyone who gave advice).
- An informal schemes has applied to cash-machine (ATM) withdrawals where the customer alleges he walked away leaving the money behind and the machine swallowed it. This was agreed informally after regulators approached banks, against the background of the regulator's powers to go further.
- Meanwhile, the FOS are still wading through PPI cases.

Francis Frizon, *Médiateur de la Fédération Française des Sociétés d'Assurances*, France

The French Insurance Mediator is elected by the National Consumer Institute, CCFS (Council) and industry (the insurance federation). Appointments are for three years.
The techniques adopted are, first, those of mediation and then of ombudsman (a non-binding finding, which is written to look like a court opinion). Opinions are generally followed by consumers and insurance companies.

The scheme was established in 1993, started with about 400 cases a year, and now handles about 8000 cases a year. Information is published in an annual report.

There has been a long story over whether to adopt a court-based class action. Jacques Chirac said this would happen twice, Sarkozy said it once, and now Hollande has said it will happen before his time is over. But in any event, the procedure will not be a US style, but 'Class actions à la Française' (whatever that turns out to mean). In a public consultation, about 7000 responded online in favour of a class action, but 74% favoured mediation and court only

20%. Questionnaires can always be biased. Consumers associations have supported class actions. It appears that 'à la Française' is likely to mean an opt in system, with a consumer association in a key role. Industry (MEDEF) has been instead in favour of ADR, but the new EU Directive requires ADR bodies to be independent of businesses, which many are not, and many areas have no mediateur. The CNC advice favoured a law on compensation. A draft law will be adopted in April based on CNC limited to prejudice to the Code de la Consummation, except for health and environment claims.

An example of a mass case involved La Poste bank's product which claimed that an investment would 'double' in two years. 500 consumers organised themselves and wanted to sue. I held that the bank was wrong, but my decision was not binding. One man claimed to act for all the others. I can only advise the insurance company to reimburse. Individuals needed to be treated as a case by case basis. There is a need for a law as the court cannot deal with the caseload. There is also a problem of education of individuals, and there are sector specific challenges.

Britta Ahnmé-Kågerman, Chair and Managing Director of the ARN, Sweden

The National Board for Consumer Complaints was established in 1968, and has recently changed its translated name from Complaints to Disputes. It does do not deal with complaints. People have to approach the company first. It is fast, simple and free of charge, financed by government. It is faster than a court. There are various exceptions. Jurisdiction applies to all Swedish operators, and foreign businesses with premises in Sweden, or through e-commerce. There are 13 specialist departments, the largest being motor vehicles and electronic appliances. Insurance has a low caseload (900 cases, but an increase of 16%) since the sector has its own board.

The ARN is impartial. Impartiality is important for both consumers and companies. It supports local consumer advisers. In 2012 there were 11,500 applications, and increase of 24%, which was probably due to the introduction on an online facility.

Only 38% of cases were decided in favour of the consumer. Compliance with the non-binding decisions is 80% overall, but varies between sectors (100% in insurance, which takes good care of its consumers, and lowest in hair restoration). Name and shame works well, and there is public access to official records.

The President and senior officials are judges, appointed by government. There are 20 presiding judges, about 20 presiding clerks and about 250 lay judges. A panel comprises a presiding judge, a presiding clerk and 4 external lay judges. This works well, since they have experience of relevant consumer and business affairs, and better expertise than judges in the courts. There is no oral hearing, and it is a problem that we have to dismiss cases if evidence is lacking.

A Class Action has been possible since 1991, only 20 cases have been brought, only one in the ARN. Test cases are an excellent option as an alternative to a class action, which are tried with three judges, and ARN does this several times a year.

Lewis Shand Smith, Chief Ombudsman, Ombudsman Services, UK

Ombudsman Services was established ten years ago. It has extended to cover the telecom sector (now with 75% of the complaints, another ADR scheme also operates and this creates problems), energy, environmental (the government's Green Deal), and copyright licensing.

Chris' three pillars are different sizes in different countries. In UK, the CDR pillar is small and patchy: the passenger transport and water sectors are not covered. OS is funded by industry on a 'polluter pays' basis, i.e. with an annual subscription and a case fee based on usage last year. Independence is given through very strong governance.

The process has been completely overhauled recently. We only look at a complaint if the company has dealt with it first. 10 years ago very traditional methods applied, usually a paper based investigation followed by a written report and then possibility to appeal. Today there are the following main approaches:

- Early resolution: we recognise the type of dispute, and agree a decision with both sides within 48 hours. This is a case that follows a particular path that we have seen before, and is like a class action with a bit of fine tuning.
- Mediation type: we try and 'negotiate' a settlement, but the decision remains our decision. It is usually done just by phone.
- Traditional: this is a paper based process, more formal, with a call for evidence and written report. If it is accepted by the customer, it becomes legally binding on the trader. It is a final outcome and not taken further.

Are we loosing expertise of formal procedures? OS are not looking at resolutions, tracing changes, trying to capture knowledge, and advantage for the person making a complaint. We cannot afford to use old techniques. The cost of the Local Government Ombudsman has just been cut by the government by 37% but areas of jurisdiction been added. There is an expectation and impatience by customers to get a quick resolution: we are required by the regulator to complete energy and communication disputes within 6 weeks.

The regulator appoints the Ombudsman. We report to regulators on complaints, performance, and systemic failure every month. We report potential breeches of regulations and suggest investigations.

Under the Green Deal, the Secretary of State can ask us to investigate a breech, and we can ask the Secretary of State to ask us to do so. Will this move to other regulators? There is an overlap between ombudsman and regulator. We can, and do, process mass disputes, as can the regulator. An example in the energy sector was 'the Dartford incident', in which it took the regulator months to decide whether they or we should deal with individual redress. In the E.ON example, the company agreed to repay customers, but if they had not agreed it might have given rise to a problem. Would it be for the ombudsman as regulator to consider redress?

BIS said rejected class actions in the general consumer sector, but this is because collective redress is already happening in the private and public sector. We cover apartment managers in this respect. However, the Equitable Life story is not ideal: but without pressure from the PHSO finding against the government people would not have got any money from the courts.

In Scotland, the public sector ombudsman represented 130 people over a school closure, and can represent the entire nation where just one individual raises an issue (a large non-opt-in-and-out).

In the Collective Management Organisations sector in the UK (copyright and licence holders) there is a voluntary model but the Secretary of State has the right to impose a code of conduct and ADR scheme by law, see the Regulatory and Enterprise Reform Bill going through parliament now.

Legal enforcement has significant drawbacks. The Ministry of Justice is introducing the rule that the small claims track cannot be accessed unless there has been prior mediation. More ombudsmen are doing resolution and not decisions. It might be dangerous to move away from courts altogether. Someone still needs to hear cases and make formal decisions, but the trend is moving more and more towards ombudsmen and away from the courts. OS agreed a solution in the communications sector, and the issue was subsequently taken to court, which threw it out as the ombudsman had already resolved the position.

Discussion
To what extent do the alternatives provide a good opportunity to the plaintiff? Piggy-backing on a criminal case enables people to get information that a public official is far better placed to find and collate at public expense. Companies have a legal contract with Ombudsman Services to provide evidence.

In the Netherlands, decisions are technically not binding but the trade association guarantees payment, and this exerts pressure on the non-compliant trader.

Part E: Implications & Solutions

Panel discussion: Solutions for Business

Moderator: **Anders Stenlund**, Director, Legal Affairs, Confederation of Swedish Enterprise, Stockholm, Sweden; representing BusinessEurope, Brussels
What works? What are the solutions for business? It is crucial that we get it right. BusinessEurope does not side with perpetrators. We need a realistic opportunity to fix tort compensation within a realistic time frame.

Frau Dr. Anke Sessler, Chief Counsel Litigation, Siemens AG, München
We do not earn money by disputes, but from providing big projects, healthcare, infrastructure and so on. A well-functioning legal system is key for an international business. We need an effective dispute resolution system. It needs to satisfy the following principles.

1. Proceedings must be efficient and cheap for all. That means affordable court fees. Why is it that the same case will cost court fees of €40,000 in the Netherlands and €600,000 in Germany? ADR and settlements must be encouraged. A good step is Brussels I, which prevents abusive litigation. WCAM and KapMuG are also helpful. There need to be sufficient resources in manpower for the courts, and assistant judges in mass claims.
2. Compensation must be strictly separated from punishment. There is nothing wrong with the partie civile mechanism, but punitive damages are not legitimate.

3. There must be a balance between chances and risks. Proceedings should not be for free: that avoids frivolous claims. Siemens recently paid €2 million in legal fees in a case that was dismissed early; that cannot be right. I do not like the KapMuG 'opt-in light'. The loser pays is necessary.
4. Extra-territorial application must be restricted. The US *Morrison* decision is helpful. The UK Bribery Act is bad, in permitting prosecution regardless of where the crime occurred.
5. No o0ne size fits all. Long national legal traditions must be respected. It is better to create standardisation than detailed provisions.

Dr. Lorenz Ködderitzsch, standing in for **Joe Braunreuther**, Deputy General Counsel, Johnson & Johnson, New Brunswick NJ USA

Civil justice is important for Johnson & Johnson. We have been part of the European Justice Forum since the start in 2006. J7J is known for its consumer products, band aid, and immodium, but these are only 15% of the business. Our main business is in manufacturing pharmaceuticals and medical devices. Our annual turnover is $65billion, and we affect one billion people across the world every year. Our products are technology-driven, by innovation, and therefore inevitably have a risk profile. In drugs and medical devices, products are highly regulated, and marketed on the basis of risk-benefit. There is no 100% fail-safe medical product. So we have liability claims. It does not make sense for us to argue to get us out lightly, and escape our responsibilities. We rely on keeping the trust of our regulators, physicians, and patients. Where things go wrong, we need to address them properly.

An example is the ASR hip prosthesis product. This was developed in 2004. The regulators consider a revision rate of 1% per year as an acceptable rate. After 5 years of use and monitoring, it became apparent that the trends were significantly higher than that. So we initiated a voluntarily recall in 2010, involving 95,000 patients worldwide. In USA plaintiff lawfirm websites sprang up seeking clients, followed by extensive litigation. We do not know who our patients are, for data privacy reasons, so we have to contact them through physicians and other means. We encouraged our customers to ask patients to register on a database we set up so that we could settle their claims. We appointed claims handlers for USA and Crawford for the rest of the world. The scheme involved an annual diagnostic treatment, for the surgeon to determine if a replacement was needed with a device of his choice. We would pay all the costs of this, including claims for damage. We were confronted in USA by a law firm that tried to injunct us to stop these programmes, to stop people contacting us so we could help them and pay them what they were due. What else should you expect from a responsible company? This seemed to be driven solely by the business of maximisation of money for plaintiff lawyers. We dealt with damages claims by appointing a network of outside counsel to reach individual assessments, with instructions that we wanted to settle claims fairly. It was not possible to aggregate the individual claims, since every one was different. There was nothing to gain by aggregation. In the EU, we were helped by the existence of court decisions on damages awards, so we could draw up a grid of fair damage payments, and we included that in the offer.

I agree with Anke Sessler's principles. In those markets where the rule of law prevails, we do better business. The World Bank ranking demonstrates this. We are interested in supporting the rule of law, and this implies maintaining a good reputation. We do not like "the lighter the better". We like rational discussion, fair enforcement. All three pillars play a role. But should

we be nudged or blackmailed into settlements? We are more comfortable if there is a backstop of appeal to a court.

We really appreciate the value of this forum. Policy chould be based on empirical facts and backed by research. It is not easy to obtain empirical facts on these issues. Do we know how much litigation costs in the EU? How much resource is needed for courts? ADR has an important role to play. Out hip recall could have been handled in a more efficient manner – we had to create a framework. So we need to resource ADR.

Kaarli Eichhorn, Senior Counsel, European Competition Law, Government Affairs and Policy, General Electric Co., Brussels

I agree with the other speakers. I will focus on the competition law area, and the issues of compliance and compensation. Business wants effective law enforcement and payment of compensation. We want to be paid back when we are harmed, and to avoid unfair competitive advantages. UAE and Africa are adopting new controls. A lot has been spoken about private enforcement of competition law, and increasingly the debate has raised the concept of compliance. But the authorities are reluctant to take ownership of compliance. I spend most of my time drafting policies, training, monitoring and investigating compliance. We have no way of avoiding some individuals who do not comply, but we can work very hard to stay out of trouble. GE has 1,400 lawyers and large compliance forces working on this permanently. The authorities say they do not want to consider compliance in their enforcement policy. They say they do not want to "reward" compliance. I think that is highly inappropriate. We should be individually assessing companies for investing in compliance. Competition enforcement is only one aspect of law enforcement – there is nothing special about competition law. It is a normal approach for courts to consider what a company actually did. Why is competition law special?

Looking at the compensation issue. GE is interested in looking at which of our suppliers have cartelised the market. We discuss the official findings internally, and then discuss with suppliers when we renegotiate supply agreements. We don't want to sue them, since that is highly inefficient, but we seek settlements. The Commission's draft is forthcoming. There is a sense of frustration over the debate. If we were to adopt a more compliance-based approach, we might: detect more violations; spur greater compliance; encourage the setting up of compensation schemes (which is an approach that the Commission has taken some notice of in the past, but now ignores); take a holistic approach that incorporates compensation into the enforcement process. We need effective enforcement with further incentives to apply. Compensation should be significantly encouraged, with the authorities taking ownership of the whole thing.

Discussion

Should self-regulation be another pillar? It can be seen as a tier within the public pillar, in the same way as the German Wettbewerbcentrale private self-enforcement approach, or as in advertising standards.

We need to get business to promote own compliance. Good business drives compliance. It is included within remuneration. In GE, Compliance Review Boards review the performance of business managers, who have to explain what they and their business is doing to drive

compliance, and explain the data from complaints, ombudsmen and regulatory reports on health and safety, competition and every area. They are remunerated and fired on this basis. Compliance is cheapest: we do not want the disruption of non-compliance. Reputational damage is feared most. A company can pay damages but reputation hurts more, and impacts owners, consumers and stock prices. Those who break the law will be fired and go to prison.

Public companies that are listed on stock exchanges have an expectation that they will do the right thing. We need to live by ethical behaviours that flow down to compliance programmes. There are many examples of this.

However, it has to be recognised that not all businesses have the right incentives and behaviours. For example, the financial services sector has demonstrated that capitalism that is driven by profit and 'success' targets and remuneration will produce abuse. The UK FSA has just issued guidance on banning inappropriate incentives for selling. Companies should be measured on how they balance good and bad incentives.

Court systems need real attention. The Italian system is far too slow, the German expensive. Staffing and financing have to be addressed. The courts are way behind in adopting efficient systems of IT data control.

Can a class action be made usable and reliable, or is it "unsafe at any speed?" It is necessary to see who is behind any action, and to be able to settle it: some do not do this. A court procedure needs to be embedded within the whole architecture, at the end of a pathway of other elements, as a last resort: the exception, not the default position. But that means that the other elements (voluntary schemes, ADR and assistance from regulators) need not just to be available but also to work. The collective action paradox is that the more safeguards one has, the less it works. So where do you need it? We should look for more efficient options. The financial incentives of intermediaries is what gives rise to the problem – and this is true of any pillar. It is not a failure to end up in court, even if a case is dismissed. It means that there are no better options.

Hope is not a strategy.

Panel discussion: Implications for Insurance and Reinsurance

Moderator: **Rick Perdian**, Senior Business Development Manager, Swiss Re Centre for Global Dialogue, Rüschlikon, Switzerland

Professor Ken Oliphant, Director, European Centre of Tort & Insurance Law ECTIL, Wien

We see new fields of liability that are not covered by traditional insurance products, such as harassment. There are increases in damages awarded; changes in calculation methods, more sophisticated actuarial models and realistic discount rates, plus general economic pressures. There are new patterns of claiming. In UK RTA claims have doubled (whiplash is dominant, at 75% of RTA claims). We must question whether traditional court focus is appropriate in all cases. No one-size-fits-all. People are looking for more economic, less time-consuming, more flexible systems and outcomes, that satisfy all parties.

Dr. Sebastian Stolzke, Zürich Insurance Group, Zürich

1. Insurers are open to ADR. Insurers want to cover risks, and need a balanced approach to resolve disputes. They have massive claims departments with modern techniques. ADR plays a vital role. It is important to see that each ADR system is specific to the jurisdiction. Quality systems are important. There should be educated, speedy recovery. Ombudsman qualifications are important.
2. Effects on insurance risks. Risks need to be predictable, known, so that insurers can afford to underwrite them. It is questionable whether we can insure all risks, eg medical risks. There has been a dramatic increase in medical practice fees, which has prompted schemes like the Belgian compensation scheme.
3. The role of insurance in helping compliant behaviour. Premiums set incentives. We have particular expertise in helping medium-sized companies.

Dr Wolfgang Winter, Syndikus, Rechtsanwalt, Allianz SE, München

One needs to consider how mass claims might impact our industry. We are a highly regulated industry, unlike many. There are limits on types of business, territorial application and so on. We are used to dealing with claims – it is ordinary business. But that business is affected by mass claims. There is a direct effect through insureds, eg where courts declare a contract term void. There is also an indirect effect on liability insurance, where the behaviour of the insured is in issue. The interests of the insured are relevant.

Robert W. Hammesfahr, Senior Vice President, Claims, Accounting & Liability Management, Swiss Re, Chicago

ADR was common in the USA, is becoming mre common in UK, but is far less well known on continental Europe. Several questions arise:
1. Are judges moving from public to private spheres, and what considerations arise?
2. Is cost transoparent in a private compensation system? BP was not insured for Deepwater, and set up the Gulf Coast Claims Facility, which paid $6million to private claimants, needed 3,000 handlers, and then set up a $20 million fund. What was the cost – and was it too high?
3. What is covered by insurance? Payments are made for reasons of maintaining reputation, marketing reasons, disgorgement of profits, or liability.

ADR is an effective solution to achieve social justice.

Leonard Böhmer, CMS Derks Star Busmann, Utrecht, Netherlands

I speak as a litigator and (Chair of the regional Bar) as regulatory enforcer. The Dutch Bar is set to adopt 'no cure no pay' in March, since the government is anticipated not to strike it out. The reason is simply greed. Judges have revolted at the workload as the funding for courts has been cut. Judges have to process a target number of cases a year to final judgment or settlement, otherwise next year's budget is cut. This is a cancerous affliction.

What can insurers do? The claims management process has to be looked at. You should take the initiative – why wait? I do 4 or 5 mediations a week, and there is always a difference between the problem and the complaint. People want their problems addressed - that means a wider and more flexible approach. I never hear "this result is exactly what I wanted".

Discussion

A lot of cases in court are worst cases. That drives bad jury results in USA.

The design of DR has to reflect the interests of all parties. Most EU ADR schemes achieve transparency. Most lawyers will not recommend ADR as this reduces their fees. Early or late resolution is the issue. Insurers have to initiate this. More businesses need to get involved with EJF to look for a balanced policy on effective systems.

In industrial insurance policies, we can go for ADR and arbitration. In consumer policies, which are standard, things end up in court: this result can be looked at. WE need to be more pro-active in contacting claimants. The University of Michigan project on healthcare is a good example, and introduced a new risk management process to early identification and early contact of people who deserved compensation. It led to a 50% reduction in cost.

Policy wording is an issue. What is it responding to?

Part F: Conclusions: What are the best techniques, and combination of techniques, to deliver clear rules, optimal compliance, and rectification of imbalances?

Panel discussion

Jacqueline Minor, Director, European Commission, DG SANCO

1. Policy should enable a fair assessment of risk. The spur for the Consumer ODR and ADR proposals of the EC was to provide an appropriate scheme for every dispute. Data showed that large sums of consumer detriment went uncompensated, and the accumulation added up to an enormous amount, that it is not fair for non-compliance traders to retain.
2. The legal system must offer an array of instruments - a toolbox. The only traditional approach was a court system. Anything else can be added or removed as desired. Examples in the consumer field are Small Claims, ADR, the Injunctions Directive, and co-regulation. Regulation is great, but does not work for all situations. For some companies (some airlines) it is a badge of honour to amass criticism. For small fly-in/fly-out traders or scams, the public enforcement pillar is important, and obtaining compensation will be futile.
3. The goal is to use combinations. Some public enforcers (Danish Consumer Ombudsman) are able to combine public enforcement and ADR/compensation. One starts by looking at different sector regulators, and aspects of licences or settlement. For example, can we use the skimming-off approach to compensate or to fund intermediaries? Widespread use of ADR will generate a wealth of information on what is going on in the market. This information can then be put back into the system, and identify persistent problems and traders.
4. The diversity of existing solutions gives rise to an EU issue. This is why the CDR proposals preserve existing national solutions. Thus, we do not take a stance on the 'mandatory' issue (should traders be required to belong to a CDR), nor on the 'binding' issue (should traders be bound by decision). But we have put in quality principles, with

which all systems will need to comply. We are likely to take a similar approach in relation to collective redress. 18 Member States have their own different approaches, and there is no single EU model. We look at principles, and safeguards against abuse. Is it possible to maintain balance? We shall see.

5. We take the same approach to 'Better Regulation'. We require wide consultation, looking at Impact Assessment, randomized pre-testing of new techniques, evaluation of evidence, and consequential change.

Professor Stephen Burbank, University of Pennsylvania

1. Do not give up on collective redress. Do it carefully on a sectoral basis (horizontal or trans-substantive class actions are a mistake) and watch out for overregulation. In the US, the class action landscape has changed radically in the last couple of years (WallMart changed the commonality rule, Morrison makes it more difficult to get class actions certified by a merits-test). In personal injury cases the class action device has been dead for years. If we can solve the funding problem, liability only collective action is useful.
2. Aggregation is inevitable. One should anticipate abuses of non-class aggregation.
3. Until you solve the funding problem. Access to justice remains a pious hope. The German LEI insurers' change in KapMuG coverage is salutary.
4. Beware of the "highway effect". If the alternatives for class actions are built well, there is a danger of overload.
5. Beware of budgetary pressures. Courts are seriously under-funded. Watch out with privatizing justice.
6. Some alternatives make up for insufficiency of civil courts in obtaining discovery. Courts could contract out evidence collection to ombudsmen.
7. Beware of efficiency. Civil procedure needs accuracy and justice, and they are not necessarily achieved by efficiency. In the US, for example, the federal courts of appeal are efficient in the sense that they created discretionary dockets. They only take cases they want (just like the Supreme Court). This is maybe "efficient" but doesn't lead to access to justice.
8. What is left for courts? Courts are important, eg for declaring human rights.

Dr. Lorenz Ködderitzsch, Chairman, European Justice Forum, Brussels and Legal Counsel Europe, Johnson & Johnson

EJF seeks to find and promote fair and balanced access to justice and redress. We need more evidence and research. We need to engage in dialogue. The paradigms have shifted. ADR schemes offer opportunities but need will have to be created and funded (by business). Regulators can assist, although there has to be a mechanism to challenge them, and well as fund them. Class actions present a real funding problem.

Discussion

Minor. It cannot be efficient for 27 authorities in Member States to have to take individual action. We face a prolonged period of scrutiny over government expenditure. Pressures for efficiency will increase. Evidence is needed on good techniques. We are likely to see more cooperative intervention by different authorities.

Burbank. The teeth may have been taken out of US litigation so it has become a paper tiger. So what drives behaviour and compliance?

Professor Christopher Hodges

We are seeing major shifts in legal systems in the EU, in all three pillars, and combinations: in civil justice through individual and collective actions; in ADR, CDR, ODR, compensation schemes and other types; in regulatory theory and practice, and the construction of pan-EU enforcement systems, both sectoral and horizontal.

The debate has also shifted to outcomes. Redress, enforcement and compliance are all connected. How do systems reduce the incidence of problems occurring, reduce their impact when they do occur, stop them quickly, and deal with the consequences, and affect future behaviour? New techniques and combinations need to be assessed. If several pillars are to be available or used, in should they be used in particular priorities? Which should be first and which last?

All this gives rise to a need to re-design systems, but involves multi-dimensional chess. It needs knowledge and research.