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Class Action Litigation in the United States and Europe

A study prepared for the Legal Resources Centre, South Africa

May 2012

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In addition, the research co-ordinators would like to thank:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Professor Sandra Fredman**, **Dr Tarunabh Khaitan, Dr Liora Lazarus**, **Dr Jane Donoghue, Ms Dhvani Mehta, Mr Chris McConnachie, Ms Alecia Johns, Ms Meghan Campbell and Mr Paolo Ronchi**, for their support and assistance with the project.

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EXECUTIVE SUMMARY

1. Oxford Pro Bono Publico has addressed the four questions raised by the Legal Resources Centre. An overview of key findings is provided below.

1) THE APPROPRIATE RULES FOR INSTITUTING CLASS ACTIONS

2. There is a general requirement of certification in Europe and the United States before a class action can be instituted. A class action may be run either on the basis of an "opt-in" or an "opt-out" model, depending on the form adopted in a given jurisdiction. A summary of various regimes is provided in **Table 1**: 'Class Action Legislation by Jurisdiction'.[1]

2) CERTIFICATION

3. In Europe, class action legislation is generally conservative, with a majority of countries having chosen an "opt-in" system with a certification requirement.

- In the **UK**, a claimant or defendant may make an application to a court for a Group Litigation Order (GLO).[2] No guidance is provided in the applicable Rules and Practice Direction as to how a court should exercise its discretion. However, a court is bound by an "overriding objective" in the Civil Procedure Rules 1998 to deal with cases "justly".[3] In the field of competition, a body specified by the Secretary of State can bring claims for damages on behalf of a group of consumers before the Competition Appeal Tribunal (the CAT).[4] Claims must relate to the same infringement, and each consumer must give his or her consent to the action. There are some moves to reform the law to facilitate competition law class actions.
- In **Italy**, class actions were introduced in January 2010 after amendments to article 40 *bis* of the Consumer Code.[5] The claim must be declared admissible before it can proceed. This can be denied if the action is "clearly unfounded", there is a conflict of interest, the judge does not recognise the

[1] See viii-ix.
[2] See [14]-[18] below.
[3] See [17] below.
[4] See [19] below.
[5] See [25]-[27] below.

identity of the individual rights, or the representative does not appear to be capable of adequately protecting the class's interests.

- A similar system of consumer protection exists in the **Nordic States** (Sweden, Norway, Denmark, and Finland).[6] This system has traditionally been based on a Consumer Ombudsman that litigates on behalf of consumers in a special tribunal. However, since 2000, Sweden, Finland, Norway and Denmark have introduced collective action mechanisms for compensation of groups. In Finland, this claim can only be brought by the Consumer Ombudsman, but Sweden, Denmark and Norway also permit such claims to be made by individuals claiming on behalf of themselves and a group, and private organisations seeking damages on behalf of their members. Despite this possibility, there is a strong tradition of public enforcement, and it is likely that most collective damages cases will still be dealt with by the Consumer Ombudsman.

4. There is a strong tradition of class actions in the **United States**.[7]
   - Under Federal law, a class action may proceed where it meets the four pre-requisites of 'numerosity, commonality, typicality, and adequacy' in Rule 23(a) of the Federal Rules of Civil Procedure (FRCP).
   - The FRCP allows "opt-out" class actions where '*the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'* (FRCP, R23(b)(3)).
   - The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) are met, and that the case falls within one of the three categories outlined in Rule 23(b).
   - In 2011, the US Supreme Court in *Wal-Mart Stores Inc v Dukes* denied certification for a group of approximately 1.5 million former and current female Wal-Mart employees on the basis that they did not meet the 'commonality' prerequisite.[8] In a 5:4 decision, the Court held there was no 'specific employment practice' that tied their claims together. However, the

[6] See [28]-[40] below.
[7] See [41]-[57] below.
[8] See [49]-[57] below.

District Court, Court of Appeals, and four members of the Supreme Court would have allowed certification.

3) CLASS ACTIONS WITH MULTIPLE DEFENDANTS

5. There is no consensus on the stance to taken where class actions involve multiple defendants.[9] Jurisdictions with a longer history of class action litigation such as the United States, Canada and Australia, have relied on judicial pronouncements to deal with standing issues. Judicial approaches imposing stricter requirements have been criticized for defeating the purpose of class action litigation by potentially requiring each plaintiff to bring an individual suit and by placing multiple defendants in a better position than single defendants.[10] Canada and the United States have favoured less onerous approaches.

6. European jurisdictions that have recently introduced class action provisions have not dealt with the issue of multiple defendants, and subsequent reviews of the provisions do not highlight the issue as significant. This may indicate that countries with new class action legislation do not consider that suits against multiple defendants raise additional evidentiary challenges for plaintiffs.

4) DAMAGES

7. A number of methodologies exist for quantifying damages and dispersing them to a given class. Broadly speaking, there are two ways to assess damages:

- Individual damages assessment;[11]
- Class-wide assessment.[12]

8. Under individual damages assessment, the court assesses the amount due to class members on an individual-by-individual basis, using evidence presented to the court. Different amounts are awarded to each class member. This methodology is generally used by the United Kingdom (via GLOs), and Portugal (via Representative Actions). It is one of several options available in the United States.

[9] See [58]-[73] below.
[10] See [62] below and accompanying footnotes.
[11] See [76]-[79] below.
[12] See [80]-[91] below.

9. Under a class-wide assessment, there is no need for claimants to prove their losses individually. Damages are assessed either through multiplying the damages due to a "hypothetical" claimant by the number of total claimants (the averaging assessment approach), or by determining a lump sum to be paid without reference to individual damage, either hypothetical or otherwise (the aggregate assessment approach). This methodology has been used in the United States. Although the United Kingdom generally requires individual damages assessment, damages were assessed on a class wide basis in *EMI Records Ltd v Riley*.[13] Punitive damages are allowed in the United States, but are generally impermissible in other jurisdictions.

10. There are two main ways that damages can be divided between members of a class:

- Direct distribution to Class Members;[14]
- Cy-pres distribution.[15]

Direct distribution is viable where a class is relatively contained and the exact amount due to each is ascertainable. In contrast, cy-pres distribution is used if distributing damages amongst class members is highly impractical. Mulheron notes that this approach is appropriate where class members are 'difficult to identify, change constantly, or where the claims of the individual class members are so small in quantum that they will not be pressed or economically distributed'.[16] Under this model, 'price reduction' has been used in cases to remedy overcharges.

[13] *EMI Records Ltd v Riley* [1981] 1 W.L.R. 923.
[14] See [92]-[97] below.
[15] See [98]-[99] below.
[16] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), 426, citing inter alia *In re Matzo Food Products Litig,* 1566 FRD 600 (D NJ 1994).

TABLE 1: CLASS ACTION LEGISLATION BY JURISDICTION

	UK	Italy	Sweden	Denmark	Norway	Finland
Legislation	Competition Act s.47(a) and s.47(b) (see also Part 19.III, Civil Procedure Rules 1998)	Article 40 bis of Consumer Code	Group Proceedings Act 2002	Administration of Justice Act Pt 23	Dispute Act 2005, ch.35	Act on Class Actions 444/2007
Date in force	7 November 2002	23 January 2009	1 January 2003	1 January 2008	1 January 2008	1 October 2007
Permitted claims	A body specified by the Secretary of State, on behalf of at least two individuals.	Each individual consumer or user has standing to sue on behalf of other prospective class members (consumers' associations may also be mandated to act, but do not have their own standing).	1. Any member of the group 2. Organisation whose regulations safeguard consumers' or employee's interests 3. Public authority suited to represent the group members	1. Any member of the group. 2. Association, private institution or other organisation where the proceedings are within the framework of object of the organisation. 3. Public authority with statutory authority to act.	1. Any member of the group. 2. Organisation or association charged with promoting specific interests, provided the action falls within its purpose and normal scope.	Consumer Ombudsman only.
Approval of class representative	Specified by the Secretary of State, according to published criteria.	If an individual, must be a consumer or user, as defined by Article 3.c1 a) of the Consumer Code.	Not explicitly required, but the court may replace a class claimant who is judged no longer suitable to represent the group.	By the court.	Nominated by the court.	-

	UK	Italy	Sweden	Denmark	Norway	Finland
Notification	Not mentioned in CAT rules or legislation: in only action so far, widely publicised by specified body.	The court indicates what form of advertising should be taken when declaring the admissibility of the action. Proper advertising is a condition for the action to continue.	Specific information detailed in the law.	The court decides the manner of notification. The court may order notification partly or wholly through publication. Costs initially paid by class representative.	The court both writes and determines how notice is to be given and who pays for it.	Given by the court, containing information detailed in law.
Opt-in or opt-out	Opt-in only.	Opt-in only.	Opt-in only. The court pays cost of notification of members of the group.	Opt-in (and the court may decide that only those who have provided security for costs may opt-in) unless the court decides opt-out is preferable, for claims for which it is evident that due to their small size it may normally not be expected that they may be furthered in individual proceedings and it is assumed that a class action with members opting in will not be a beneficial way to handle the claims.	Opt-in, unless the court decides opt-out if the claims involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, and are not deemed to raise issues that need to be heard individually.	Opt-in only: signed written letter.

(Table drawn with additions from Christopher Hodges, *The reform of class and representative actions in European legal systems: a new framework for collective redress in Europe* (Hart 2008), 30-33)

QUESTION ONE: WHAT SHOULD BE THE RULES FOR INSTITUTING CLASS ACTIONS?

1. Determining which rules should govern the institution of a class action is complex and different models are used across jurisdictions. These variations are in part a result of the different ideologies that underlie class action litigation. They are also institutional, stemming from the use of different structures to hear and determine competition law class action claims.

2. As discussed below in Question 2, a class action can generally only proceed in the US and in European jurisdictions if a court certifies the action. This approach is required under US Federal Law, the UK Civil Procedure Rules, the Italian Consumer Code, and in Nordic States.[17] Certification is a means by which the court may regulate the introduction of class actions – ensuring that the matter is appropriate for treatment as a class action and enabling the defendant to present its views.[18] In contrast, Australian federal law does not require certification for the commencement of a class action.[19] The Australian approach, which was intended to reduce delays and expense,[20] has been criticised by Mulheron, who notes that 'it would appear … the streamlined process that was hoped for by the [Australian Law Reform Commission], and the avoidance of costs and delays, has not necessarily eventuated'.[21]

3. A key question in the initiation of class actions is who can be a member of a class. A regime may either be "opt-in" (ie, a potential class member must take affirmative steps to join a class action proceeding), or "opt-out" (ie, a representative may bring an action on behalf of a class, who may then be given notice to allow them to 'opt-out' of the action). Under the latter model, an absent or unidentified party may be included in the class and therefore have their rights litigated and determined without any input in the process. Mulheron notes:

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[17] See below.
[18] See discussion in Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), 24.
[19] See Federal Court of Australia Act 1976, Part IVA, discussed in ibid, 24.
[20] See discussion in ibid, 25.
[21] ibid, 27. For Mulheron's general critique of the Australian approach, see ibid 26-29.

> [e]ssentially, it is a question of policy as to whether a person's legal rights should be determined without his or her express consent and mandate to participate in the litigation.[22]

11. As discussed in Question 2 below, the United States is a strong proponent of the "opt-out" model. In contrast, class action legislation in Europe tends towards "opt-in" models.

12. European legislation on class actions is generally quite recent in origin and cautious in content. The emergence of class action procedures in Europe is driven by various factors. In some states, the impetus for such legislation was domestic. This was either due to a need for such an action becoming apparent in the courts (for example, claims regarding injuries caused by medicinal products) or due to academic advocacy, as in Sweden, where Professor Per Hendrik Lindblom of Uppsala University was instrumental in stimulating debate in the country. The EU has also played a role. While lacking competence to legislate directly on civil justice, several pieces of EU legislation have required the existence of a mechanism for enforcing the rights which they protect. For example, Directive 2005/29/EC, which prohibits unfair commercial practices, requires that persons and organisations regarded under national laws as having a "legitimate interest in combating unfair commercial practices" should be permitted to take action before courts or administrative authorities. The detail, however, is left to Member States, and the result is considerable divergence in this area. Legislation is generally conservative, with the vast majority of the countries having chosen an "opt-in" system.

13. Exceptions to this are Denmark and Norway, but even here the choice of an opt-out procedure is at the discretion of the court, and only to be chosen in specific circumstances (usually where the value of the claims are too low to justify bringing as individual actions).

[22] ibid, 29.

QUESTION TWO: IS THERE A REQUIREMENT FOR CERTIFICATION? WHAT EVIDENCE IS NECESSARY TO DISCHARGE SUCH A REQUIREMENT?

1) EUROPE

a) United Kingdom

14. In the UK, there are two main mechanisms for a group action. The Group Litigation Order (GLO) is a feature of general civil procedure. Rather than being a class action per se, it permits the court to manage similar claims together. In the field of competition, a "representative follow-on action" can be brought by a "specified body" in front of the CAT (Competition Appeal Tribunal). GLO's should be distinguished from "Representative Actions" under Rule 19.6 of the Civil Procedure Rules (CPR). Rule 19.6 states that a representative claim may be brought by one or more persons as representatives of others who have the "same interest" in the claim. Representative proceedings, provided for initially at common law and codified by the CPR, are not commonly used in England because of the strict interpretation of the requirement of "same interest" as "a common interest and a common grievance", and the requirement that "the relief sought being beneficial to all": *Duke of Bedford v Ellis* [1901] AC 1. The problem with this test, as illustrated by *Emerald Supplies Ltd v British Airways* [2009] EWHC 741 (Ch) is that the criteria for inclusion in the represented class is very much dependent on the outcome of the action itself. For example, the class in *Emerald* was to be determined by reference to those who suffered loss of a particular alleged, but not proven conduct in breach of trade practices regulation.

i) The Group Litigation Order (GLO)

15. Part 19.III of the Civil Procedure Rules 1998 (CPR) governs Group Litigation. Following that part, it is open to the court to decide that claims should be managed together pursuant to a GLO where there are claims, or claims are likely to arise, which raise "common issues of fact or law".

16. Practice Direction 19B explains that the application for the GLO can be made either by a claimant or a defendant. The application is made to a senior court,

specified in the Practice Direction, and can be made at any time before or after relevant claims have been issued. There are no set requirements as to the form or content of the GLO, but Practice Direction 19.B specifies, at paragraph 3.2, that the application notice should contain the following:

(1) A summary of the nature of the litigation;
(2) The number and nature of claims already issued;
(3) The number of parties likely to be involved;
(4) The common issues of fact or law (the 'GLO issues') that are likely to arise in the litigation; and
(5) Whether there are any matters that distinguish smaller groups of claims within the wider group.

17. No guidance is provided in either the Rule or the Practice Direction as to how the court's discretion should be exercised when deciding whether or not to make a GLO. Hodges has explained the court's relaxed approach to certification can be explained by the fact that the GLO is a "broadly conceived managerial tool"[23], which was first developed by judges before being put into legislative form. The court is, however, bound by the "overriding objective" of the CPR:[24] that cases should be dealt with justly (which includes, as far as is practicable, saving expense and dealing with cases in ways that are proportionate to the amount of money involved).

18. The decision as to whether the claims raise common or related issues of fact or law is naturally a complicated one, and while not obliged to do so, a court may consider the views of all affected parties at a certification hearing.

(ii) Competition Act s.47a and s.47b

19. In the field of competition, ss.47a and 47b of the Competition Act 1998, as amended by s.19 of the Enterprise Act 2002, provide for a system of opt-in, follow-on private enforcement for infringements of competition law. This enables a specified body to bring claims for damages on behalf of a group of consumers

[23] Christopher Hodges, *The reform of class and representative actions in European legal systems: a new framework for collective redress in Europe* (Hart 2008) ch 3, 56.
[24] CPR, Rule 1.1.

before the CAT if an infringement has already been found by either the Office of Fair Trading (OFT) or the European Commission. Such representative bodies must be specified by the Secretary of State. Currently only one body (the consumer organisation 'Which?') is certified as capable of bringing such actions.

20. Claims must relate to the same infringement, each consumer must give his or her consent to the action, and the complaints must relate to goods or services received by consumers.

21. Only one such claim has so far been brought,[25] which was eventually settled out of court. The case was not seen as a success, given the extremely low number of claimants who chose to "opt-in". Which? has expressed dissatisfaction with the current procedure, and its disinclination to use it again, given the disproportionate relationship between the settlement reached and the legal costs involved.

22. Rule 32 of the Competition Appeal Tribunal Rules 2003 provides that to commence proceedings under s.47A of the Competition Act 1998, a claim form must be sent to the Registrar. This claim form must not only identify the claimant and their legal representative, but must also include "a concise statement of the relevant facts, identifying any relevant findings in the decision on the basis of which the claim for damages is being made", a statement of legal contentions relied on, and "a statement of the amount claimed in damages, supported with evidence of losses incurred and of any calculations which have been undertaken to arrive at the claimed amount."

(iii) Future reform

23. There is an ongoing consultation by the Department of Business, Innovation and Skills entitled "Private actions in competition law: a consultation on options for reform", in which the UK government has expressed its opinion that "the current collective actions regime in competition law is inadequate in delivering restorative justice for consumers and small businesses."[26] Various tentative proposals have been made for reform of the current system.

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[25] See <http://www.which.co.uk/about-which/press/press-releases/campaign-press-releases/consumer-markets/2008/01/jjb-to-make-payments-to-consumers-for-replica-football-shirts/>, accessed 8 May 2012.

[26] See <http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law?cat=open>, accessed 8 May 2012.

24. The Consultation explicitly states that the UK government does not favour the introduction of a generic collective redress mechanism and, as a result, the scope of the reforms is confined to competition law. The initial leanings in the consultation are towards permitting stand-alone actions for consumers and businesses in the CAT only (given its expertise in competition matters). Standing would not be restricted to public bodies, nor would there be a pre-approved list of representative bodies. Bodies which "could reasonably be considered as representative" would be permitted to bring an action, this question being left to the determination of the CAT. The thinking is that a strong certification regime would obviate the need for a specified list of representative bodies. The CAT could also be empowered to adopt an "opt-out" model if it were persuaded that the case would benefit from this approach.

b) Italy

25. Class actions in Italy are a relatively recent phenomenon, introduced in January 2010, following the entry in force in July 2009 of Law no.99, amending Article 40 bis of the Consumer Code (originally introduced by Law no. 244/2007, whose effectiveness was suspended). According to the Code, "individual, homogenous rights of consumers and users" can resort to the class action in relation to infringements of contractual claims, claims for product-related damage and claims for damage related to unfair commercial practices or anti-competitive behaviour. An opt-in model is used.

26. The claim proceeds in two stages, with a preliminary phase devoted to assessment of the admissibility of the claim before the merits are addressed. This can be denied if the action is "clearly unfounded", there is a conflict of interest, the judge does not recognise the identity of the individual rights, or the representative does not appear to be capable of adequately protecting the class's interests. To join a class action, the claimant must lodge an "adhesion contract" at the registry, indicating an address for service and the constitutive elements of the assertive right, with appropriate documentation. In addition to the specific requirements for class actions, a proposed class action must also satisfy the general requirements for

any consumer action; the lead claimant must be a consumer, and have "an interest" in the action.

27. Alternatively, the Consumer Code also provides for consumer associations to take action on behalf of consumers seeking injunctive relief, in respect of certain conduct, or individual claims may be consolidated if parties have a similar or identical claim.

c) The Nordic States

28. The Nordic system of consumer protection has traditionally been centred around the role of the Consumer Ombudsman, litigating in a special tribunal, commonly known as a Market Court. Before 2000, the focus of consumer protection was *ex ante* prevention. However, since 2000, Sweden, Finland, Norway and Denmark have introduced collective action mechanisms for compensation of groups. In Finland, this claim can only be brought by the Consumer Ombudsman, but Sweden, Denmark and Norway also permit such claims to be made by individuals claiming on behalf of themselves and a group, and private organisations seeking damages on behalf of its members. Despite this possibility, there is a strong tradition of public enforcement, and it is likely that most collective damages cases will still be dealt with by the Consumer Ombudsman[27].

i) Sweden

29. In Sweden, use of the group procedure is subject to court approval. As explained above, a group action can be one of three types; a private group action, an organisation action, or a public group action. There are various restrictions on each type. For example, the individual representative must have a personal claim subject to the action. Associations must be not-for-profit, and protect consumer or wage-earner interests in disputes between consumers and businesses operators regarding goods, services, or other utilities. Finally authorities must be approved by the government as suitable to represent the members of a group that is subject to the dispute. Section 8 of the Act on Class Actions, issued on 30 May 2002 sets out various preconditions which must be satisfied before a group action is permitted:

[27] See Christopher Hodges, *The reform of class and representative actions in European legal systems: a new framework for collective redress in Europe* (Hart 2008) ch 3, 35.

a) The action is founded on circumstances that are common or of similar nature for the claims of the members of the group;
b) group proceedings do not appear to be inappropriate owing to some claims of members of the group, as regards grounds, differing substantially from other claims;
c) the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group;
d) the group, taking into consideration the size, ambit and otherwise is appropriately defined; and
e) the plaintiff, taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action and the circumstances generally, is appropriate to represent the members of the group in the case.

30. If the court approves the group procedure, individual members of the group must be notified. Members who do not then give specific notice to be included are deemed to have withdrawn from the proceedings. The court is required to keep a register of members.

ii) Norway

31. In Norway, class actions are governed by the Act Relating to Mediation and Procedure in Civil Disputes, June 17, 2005, no.90 ("Norwegian Dispute Act"), effective as of January 2008.

32. In Norway, class certification is a mandatory step for court adjudication. The court must decide whether to certify the class as an opt-in, certify the class as an opt-out, or order the claim to proceed as individual litigation. If a claim is certified as an opt-in claim, the court must keep a register of members of the class; if the claim is an opt-out one, a register must be kept of withdrawals.

33. Section 35-7 explains that it is open to the court to decide to follow the opt-out procedure if the claims "on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions", and "are not deemed to raise issues that need to be heard individually."

34. According to Section 35-2(1), class actions can only be brought if "several legal persons have claims or obligations whose factual or legal basis is identical or substantially similar", the class procedure is the "most appropriate" way of dealing

with the claims, and it is possible to nominate a class representative. Section 35-2(2) further stipulates that only persons who could have brought or joined an ordinary legal action before the Norwegian courts can be class members. Section 35-3(3) provides that the writ of summons initiating the action must contain the information "necessary for the court to assess whether the conditions for a class action are fulfilled".

iii) Denmark

35. Class actions are provided for in Denmark by the Denmark Administration of Justice Act no.181 of February 28, 2007. Section 354b(1) states that class actions may be brought when, amongst other conditions, there is a common claim, the court possesses the requisite expertise to deal with one of the claims, class actions are judged to be the best manner of handling the claims, members of the class can be identified and informed of the case in an appropriate manner, and a class representative can be appointed. If the court is not convinced of any of these factors, the issue will not be allowed to proceed as a class action.

36. The action is initiated by filing a writ of summons, which must include a description of the class, information on how the class members can be identified and informed of the case, and a proposed class representative who is willing to act in that capacity. Section 254c of the Act provides that class actions are to be conducted by a class representative. As explained briefly above, this representative may be a member of the class, an association, private institution or other organisation if the action falls within the framework of the organisation's purposes, or a public authority authorised for the purpose by law.

37. Under the standard opt-in model claimants must register with the court, and can be required to pay a security deposit.

38. The Act also permits a public authority (for example, the Consumer Ombudsman) to bring an opt-out class action if the amount of each claim is low.

iv) Finland

39. The Finnish Act on Class Actions (444/2007), as noted above, restricts the standing to bring class actions to the Consumer Ombudsman. In comparison to the other Nordic Acts, its application is further restricted in that it only applies to civil cases between consumers and businesses.[28] According to section 2, a case may be heard as a class action if several persons have claims against the same defendant, based on the same or similar circumstances, the hearing of the case as a class action is expedient in view of the size of the class, the subject-matter of the claims presented in it and the proof offered in it, and the class has been defined with adequate precision.

40. Section 5 provides that application for a summons in a class action should include the class to which the action pertains, the known claims, the circumstances on which the claims are based, the basis on which the case should be heard as a class action, the circumstances, as known to the plaintiff, that are relevant to the hearing of the claims of given class members only, and in so far as possible, the evidence that the plaintiff intends to offer in support of the action.

2) UNITED STATES

41. There is a requirement of certification under US Federal law. Certification is governed by the Federal Rules of Civil Procedure (FRCP) and 28 U.S.C. § 1332(d).

a) Legislative Framework

42. Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure (FRCP) declares that a court "must determine by order whether to certify the action as a class action" at "an early practicable time". The order certifying the class must:

- Define the class;
- Define the class claims, issues, or defenses;
- Appoint class counsel under rule 23(g) of the FRCP.[29]

Under 228 U.S.C. § 1332(d)(1)(D), "class members" encompasses both persons "named or unnamed" who fall within the definition of a proposed or certified class.[30]

[28] Anna Roubier, Christian Wik, Current developments in Member States: Finland. Euro. C.J. 2007, 3(1), 237-241.
[29] FRCP, R 23(c)(1)(B).

43. The criteria for certifying a class action are laid out in R 23(a)-(b) of the FRCP. Under Rule 23(a) FRCP, there are four pre-requisites that must be met before a class can be certified. These four pre-requisites are:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;
- the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- the representative parties will fairly and adequately protect the interests of the class.[31]

These pre-requisites are often referred to as the numerosity, commonality, typicality, and adequacy requirements.

44. The numerosity requirement is easily met in competition law class actions.[32] Similarly, Foer et al note that commonality is an undemanding test in competition law cases given that "the same course of conduct in a competition law case generally has broad effects on prices market-wide".[33] The typicality requirement requires an alignment between the interests of the representative parties and the broader class, which must be determined on a case-by-case basis. Adequacy of representation overlaps considerably with the requirement of typicality, but also includes questions of competence.[34]

45. The US Supreme Court held in *General Telephone v Falcon* that '[a]ctual, not presumed, conformance with Rule 23(a) remains [...] indispensable'.[35] The Supreme Court affirmed this approach in its 2011 decision *Wal-Mart Stores Inc v Dukes.*[36].

46. Once it is determined that these four criteria are met, a class action can be maintained if it falls into one of three categories. These three categories are outlined in R 23(b) FRCP:

1) Cases where pursuing separate actions against individual class members would "create a risk" of either (a) inconsistent or varying adjudications that would lead to incompatible

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[30] In a class action filed under R 23 FRCP or similar State statute or rule of judicial procedure: 228 U.S.C. § 1332(d)(1)(B).
[31] FRCP, R 23(a)(1)-(4).
[32] See discussion in Foer et al, *The International Handbook on private enforcement of competition law* (Cheltenham: Edward Elgar, 2010), 129.
[33] ibid, 130.
[34] See ibid, 131, citing *Amchem,* 521 US 626, n 20.
[35] *General Telephone Co. of Southwest v. Falcon*, 457 U. S. 147, 160 (1982).
[36] *Wal-Mart Stores Inc v Dukes*, 564 US __, 10 (2011).

standards of conduct for the opposing party; or (b) adjudications regarding individual class members that would impair or impede the ability of others to protect their interests;

2) Cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"; or

3) Cases where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy". In reaching this finding the following factors are "pertinent":

(a) the class members' interests in individually controlling the prosecution or defense of separate actions;
(b) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(d) the likely difficulties in managing a class action.[37]

47. The third category above is the most relevant for current purposes. Unlike the first and second categories, it is an "opt-out" class, allowing large class action groups to seek damages for misconduct.[38] As such, "[i]t allows class certification in a much wider set of circumstances but with greater procedural protections".[39] If a class action is certified under the third category, the court is obliged to give "the best notice that is practicable under the circumstances" to class members.[40] In contrast, the first two classes are "mandatory", with no statutory opt-out procedure.[41] The court may give notice of actions under the first and second categories, but this is not obligatory.[42]

b) Evidentiary Standard for Certification

48. The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a), and at least one requirement (ie category) of Rule 23(b), have been met.[43] Prior to the Supreme Court's ruling in *Wal-Mart Stores Inc v*

[37] R 23(b) FRCP.
[38] R 23(c)(2)(B)(v)-(vi) FRCP.
[39] *Wal-Mart Stores Inc v Dukes*, 564 US __, 22 (2011).
[40] R 23(c)(2)(B) FRCP.
[41] See discussion in *Wal-Mart Stores Inc v Dukes*, 564 US __, 22 (2011).
[42] R 23(c)(2)(A) FRCP; see discussion in *Wal-Mart Stores Inc v Dukes*, 564 US __, 22 (2011).
[43] See *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001), citied with approval in *Dukes v. Wal-Mart Stores, Inc.,* 603 F. 3d 571 (Court of Appeals 9th Cir 2010). The Court of

Dukes, jurisprudence on the precise evidential standard required to discharge the certification requirements was unclear.[44] In *Wal-Mart Stores Inc v Dukes*, the Supreme Court stated:

> 'Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.'[45]

In a partly dissenting, partly concurring opinion, Ginsburg J (joined by Breyer, Sotomayor, Kagan JJ) challenged the rigorous standard applied to R 23(a)(2):

> 'The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore'stice §23.23[2], p. 23–72 (3d ed. 2011).'[46] (ft omitted)

c) Wal-Mart Stores Inc v Dukes

49. In 2011 the Supreme Court addressed R 23 FRCP in the case *Wal-Mart Stores Inc v Dukes*.[47] Although certification of the class ultimately failed in the Supreme Court, the case is a highly relevant recent authority on US class action litigation. It can also be distinguished from the current litigation in key aspects.

i) The Facts

50. The case concerned approximately 1.5 million women who had been employed by Wal-Mart at any time since 26 December 1998. It was alleged that Wal-Mart had discriminated against these women in violation of Title VII of the Civil Rights Act of 1964 through a range of practices including lower pay, fewer promotions, and a slower movement to seniority. It was not contended that these practices were part of an express corporate policy. Instead, the plaintiffs (respondents before the

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Appeals judgment was overturnined in *Wal-Mart Stores Inc v Dukes*, 564 US __. However the Supreme Court affirmed the burden held by the party seeking certification (at 10).

[44] See John M Husband and Bradford J Williams, '*Wal-Mart v. Dukes* Redux: The Future of the Sprawling Class Action' (2011) 40 *The Colorado Lawyer* 53. Accessed via <http://www.hollandhart.com/articles/Sept2011TCL_Labor&Employment.pdf>. Husband and Williams note a tension between *Eisen v Carlisle and Jacquelin,* 417 US 156, 77 (1974) holding that a court had 'no authority to conduct a preliminary inquiry into the merits of a suit', and *General Telephone v Falcon* 457 US 147, 161 (1982), calling for a 'rigorous analysis' during the certification process (54).

[45] *Wal-Mart Stores Inc v Dukes*, 564 US __, 10 (2011). See also discussion in Husband and Williams, 54.

[46] *Wal-Mart Stores Inc v Dukes*, 564 US__, 8 (2011) (partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ).

[47] *Wal-Mart Stores Inc v Dukes,* 564 US __ (2011).

Supreme Court) argued that local managers' discretion over pay and promotions disproportionately favored men, a fact known to Wal-Mart.[48]

ii) The Supreme Court judgment

51. By a 5:4 majority, the Supreme Court held that the certification was not consistent with R 23(a)(2). The 'commonality' pre-requisite was not met as the respondents had not challenged a 'specific employment practice' common to the group: "[o]ther than the bare existence of delegated discretion, respondents have identified no "specific employment practice" – much less one that ties all their 1.5 million claims together."[49] This factual assessment is arguably distinguishable from the situation where a high-level decision is made between entities to engage in price-fixing.

52. The Court further held that the respondent's claim for back-pay was improperly certified under R 23(b)(2), because the monetary relief sought was not incidental to injunctive or declaratory relief and would have resulted in individualized awards of damages.[50] An individualized award of damages could be made in class actions certified under R 23(b)(3) (category 3 class actions).[51] However, the Court held that because the 'commonality' pre-requisite was not met, the class could not be certified under R 23(b)(3).[52]

53. In a judgment concurring in part and dissenting in part, Ginsburg J (with whom Breyer, Sotomayor, Kagan JJ joined) held that there was no ground to overturn the District Court's finding that the 'commonality' prerequisite in R 23(a)(2) was met.[53] She agreed however with the majority that the case should not have been categorised as a R23(b)(2) case, and thought that the issue of whether it fell into the 'opt-out' R23(b)(3) category could be decided on remand.[54] This finding, and the findings in the District Court and Court of Appeals, are briefly discussed in the next section.

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[48] *Wal-Mart Stores Inc v Dukes*, 564 US __, 4 (2011).
[49] *Wal-Mart Stores Inc v Dukes*, 564 US __, 17 (2011).
[50] *Wal-Mart Stores Inc v Dukes*, 564 US __, 20-21 (2011).
[51] *Wal-Mart Stores Inc v Dukes*, 564 US __, 22 (2011).
[52] See *Wal-Mart Stores Inc v Dukes*, 564 US __, 8-20 (2011); see also discussion in the partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ), *Wal-Mart Stores Inc v Dukes*, 564 US __, 1 (2011).
[53] *Wal-Mart Stores Inc v Dukes*, 564 US __, 3 (2011) (partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ).
[54] *Wal-Mart Stores Inc v Dukes*, 564 US__, 1 (2011) (partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ).

iii) Views on Certification in the District Court, Court of Appeals, and Supreme Court minority opinion

54. The class proposed for certification in this case was "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices".[55]

55. The class action was certified at the District Court under R 23(b)(2) FCPR.[56] This finding was substantially affirmed by the Ninth Circuit Court of Appeal.[57] The Court of Appeal found that the respondents met the 'commonality' prerequisite in R 23(a)(2) (that there are questions of law or fact common to the class).[58]

56. It is notable that both the District Court and the Court of Appeals held that it would be appropriate to certify the class of approximately 1.5 million women for the purposes of the claim.[59] In affirming the District Court's certification of the class, the Court of Appeals stated

> '[u]nsurprisingly, the class in this case is broad and diverse, encompassing both salaried and hourly employees in a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. The district court found that the large class is united by a complex array of company-wide practices, which Plaintiffs contend discriminate against women.[60] …
>
> Based on the evidence before the district court, which it rigorously analyzed pursuant to *Falcon,* 457 U.S. at 161, 102 S.Ct. 2364, and the standard herein described, the district court did not abuse its discretion when it found that the Rule 23(a) elements were satisfied.[61]

57. Moreover, four justices of the Supreme Court held it was inappropriate of the majority to disqualify the class by holding that it breached the 'commonality' requirement.[62] Justice Ginsburg (with whom Breyer, Sotomayor and Kagan JJ agreed) held:

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[55] *Dukes v. Wal-Mart Stores, Inc.,* 222 F.R.D. 137, 141-42 (ND Cal. 2004).
[56] ibid.
[57] *Dukes v. Wal-Mart Stores, Inc.*, 603 F. 3d 571 (2010).
[58] *Wal-Mart Stores Inc v Dukes*, 564 US __, 12-20 (2011).
[59] *Dukes v. Wal-Mart Stores, Inc.,* 603 F. 3d 571 (Court of Appeals 9th Cir 2010), 600.
[60] *Dukes v. Wal-Mart Stores, Inc.,* 603 F. 3d 571 (Court of Appeals 9th Cir 2010), 598.
[61] C *Dukes v. Wal-Mart Stores, Inc.,* 603 F. 3d 571 (Court of Appeals 9th Cir 2010), 615.
[62] *Wal-Mart Stores Inc v Dukes*, 564 US__, 1 (2011) (partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ).

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F. R. D. 137, 145 (ND Cal. 2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See Califano v. Yamasaki, 442 U. S. 682, 703 (1979) ("Most issues arising under Rule 23 … [are] committed in the first instance to the discretion of the district court."). …

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm.[63]

[63] *Wal-Mart Stores Inc v Dukes*, 564 US__, 3, 6 (2011) (partly dissenting, partly concurring opinion of Ginsburg J, Breyer, Sotomayor, Kagan JJ).

QUESTION THREE: WHAT IS THE POSITION OF CLASS ACTIONS WHERE THERE ARE MULTIPLE DEFENDANTS?

1) INTRODUCTION

58. The issue of class actions against multiple defendants has rarely been dealt with explicitly by legislators and enshrined in statutory form; it has also received scarce attention from commentators.[64]

59. Judicial pronouncements have tended to originate from jurisdictions where class actions are long established, such as the United States, Canada and Australia. The courts' approaches have varied greatly; however, there is no consensus as to which is to be preferred. The strictest stance was taken in Australian cases by requiring that each plaintiff, or each represented party, have an action against each defendant in multiple-defendant actions.[65] This approach has however not been applied uniformly and has been criticized for defeating the purposes of class actions by potentially requiring that each plaintiff bring a separate action and by putting multiple defendants at an advantage *vis-à-vis* single defendants. Other jurisdictions have favoured a less onerous approach; this includes the United States and Canada.

60. In 2001 it was reported that "[i]n Europe, multi-party litigation seems mostly unknown"[66] and this is reflected in the relative paucity of judicial pronouncements on the matter. No European jurisdiction that has recently introduced class action suits has considered the issue of multiple defendants sufficiently significant to legislate explicitly on it; subsequent reviews by legislators and governments (most notably in Sweden and the United Kingdom) have failed to highlight multiple defendants and the lack of statutory provisions thereon as an issue of concern. Although European case law on class actions and multiple defendants in particular is limited, whenever multiple-defendant cases have been considered by the courts, the issue has not been recognized as significant and has not been addressed specifically. This may indicate that the question of multiple defendants is unlikely

[64] Vince Morabito, 'Standing to Sue and Multiple Defendants Class Actions' (2003) 41 Alta L Rev 295, 295.
[65] *Philip Morris (Australia) Ltd v Nixon* (2000); see [62] below and footnotes.
[66] Christopher Hodges *Multi-Party Actions* (OUP 2001) 1.05.

to have any bearing or impose any additional requirements on class actions in countries new to them.

61. This section firstly seeks to elucidate the problems and possible solutions with standing in multiple-defendant cases in class actions generally; secondly it deals with class action legislation in Europe concentrating on Italy, Nordic countries and finally the United Kingdom. Lastly, it will explain the response from the United States judiciary at Federal level.

2) THE MULTIPLE PARTIES ISSUE

62. The problem of standing in multiple-defendant class actions has been lucidly explained by Prof Rachael Mulheron:

> Where multiple defendants are sued, one of four possible rules about standing may be adopted. Outlining these from most onerous to least onerous: as a first option, it is necessary that every representative claimant and every represented person must assert a cause of action against each defendant. Alternatively, it is necessary that *at least one* representative claimant must have a cause of action against *every* defendant sued in the action. As a third option, it is necessary that, as against each defendant, there is *a* representative claimant who can assert a claim against *that* defendant. As a final option, as against each defendant, there must be *a class member* who has a cause of action, but it is *not* necessary for a representative claimant to have a cause of action against each defendant (subject to the caveat that, if the representative claimant who only has claims against D1 cannot *adequately* represent those class members who have claims against D2, then the court would appoint a representative claimant for that sub-class against D2).[67]

The first option has been criticized, among others, by Gordon and Nichols, who point out that: "[i]f that reading is correct, then to put it bluntly, defendants are

[67] Rachael Mulheron, 'Recent Milestones in Class: Actions Reform in England: a Critique and a Proposal' (2011) 127 LQR 288, 308. Ontario favoured the third approach in *Bendall v McGhan Medical Corp* (1994) 106 D.L.R. (4th) 339 (Gen. Div.), whereas British Columbia favoured the fourth in *MacKinnon v National Money Mart Co* (2005) 33 B.C.L.R. (4th) 21. The attitude in Australia has been mixed. The Federal Court of Australia's decision in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 A.L.R. 487 [126]-[127] (Sackville J, Spender and Hill JJ concurring) interpreted the relevant legislation to the effect that every applicant and represented party must have a claim against the one respondent or, if there is more than one, each of the respondents. The approach in *Philip Morris* was followed in a significant number of cases, most notably the Full Federal Court of Australia's judgment in *Bray v Hoffmann-La Roche* [2003] FCAFC 153 (Carr and Finkelstein JJ, Branson J dissenting). The *Philip Morris* decision has however not been followed by the federal Court of Australia in *King v. GIO Australia Holdings Ltd* [2000] FCA 1543 [6]-[7] (Wilcox, Lehane, and Merkel JJ), which shortly after the decision in *Philip Morris* held without overruling the prior decision that 'a person is a group member if he or she, as a matter of fact, suffered loss as a result of the conduct of *any* respondent. This is necessary to cover the situation of a group member who, although claiming against all respondents, only suffered loss by reason of the conduct of one of the respondents. That person is still to be regarded as a group member and, accordingly, is bound by the result. The fact that a person is ultimately adjudged to be entitled to succeed against only one respondent, does not mean that a person makes a claim against only that respondent. There is a world of difference between a claim and success on the claim.'

more likely to escape liability if by their conduct they cause harm or loss to more people over a greater period of time, and if they do so in concert with others."[68]

3) EUROPE

a) United Kingdom

63. The United Kingdom class action provision is encapsulated in section 47B of the Competition Act 1998. This provision does not address multiple defendants. The Department for Business Innovation and Skills is currently seeking to reform the system[69] and has commissioned a review spearheaded by Prof Rachael Mulheron. In examining the issue of multiple defendants, she notes that "the question arises as to whether every representative claimant and every class member has to have a pleadable cause of action against every defendant sued in the action"[70] This question has arisen in Australia, Canada and the United States, where the Courts have taken different approaches. Without expressing favour for any of them, Prof Muhlheron suggests that this issue:

> is one of much interest and relevance to English law-makers, given its variant treatment in other jurisdictions; and given the potential for this type of issue to give rise to interlocutory skirmishes at best, and derailment of the collective action at worst. A sectoral approach to collective actions legislation could foreseeably give rise to unfortunate inconsistencies, were different choices from among the four options to be adopted in different sectors.[71]

64. In *Office of Fair Trading v Abbey National plc* [2009] EWCA Civ 116, [2010] 1 AC 696, a lawsuit was brought by a statutory body enforcing consumer law against eight defendant banks challenging the fairness of bank charges levied by the defendants on their customers. The Court did not address the issue of multiple defendants.

b) Italy

65. Article 140-bis - (Azione di classe) Codice di Consumo as amended by art 49 della Legge 23 luglio 2009 came into force in January 2010 and introduced class actions or 'azioni collettive' in Italy. It does not explicitly address any issues relating to

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[68] 'The Class Struggle' (2001) 48 Plaintiff 6, 10,

[69] 'Private Actions In Competition Law' (April 2012) http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf last accessed 10 May 2012.

[70] 'Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal: Research Paper for submission to the Department for Business, Enterprise and Regulatory Reform' (October 2008), 42.

[71] Rachael Mulheron, 'Recent Milestones in Class: Actions Reform in England: a Critique and a Proposal' (2011) 127 LQR 288, 309.

multiple defendants. It has been reported that a flurry of cases has been brought since its introduction.[72] However it appears that the litigation to date does not involve multiple defendants, therefore the matter remains untested.

c) The Nordic States

i) Sweden

66. In Sweden, class actions were introduced by the Group Proceedings Act of 2002, which, similarly to the Italian provision, does not deal with multiple defendants issues. The Government's review in the "National Report" of 15 November 2006 does not highlight the lack of legislative provision on the matter as a concern.[73] In 2006, the case of *Peter Lindberg* v *Municipality of Järfälla et al ("Stolen Childhood")*[74] was brought by the plaintiff on behalf of himself and other individuals who complained of poor care in municipal orphanages as children. The case was dismissed at first instance and on appeal because the complaint lacked precisions on damages. Once again, the multiple defendants point failed to be addressed.

ii) Denmark, Norway, Finland

67. The class actions law in Denmark[75] and Norway came into force on 1 January 2008.[76] As of 2008, no class actions were filed in Finland, where class action legislation came into force in 2007 and only the Consumer Ombudsman can initiate group proceedings.[77]

d) Europe: Conclusion

68. The European legislators have not addressed the issue of multiple defendants and because the enactments are recent, there is insufficient case law to determine the possible attitudes of the judiciary. It is likely that as far as possible, the standard

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[72] http://www.codacons.it/ last accessed 10 May 2012.
[73] Available at <http://www.juridicum.su.se/jurweb/forskning/publikationer_files/Sweden.pdf>, accessed 10 May 2012.
[74] Stockholm District Court, case number T 9893, 2006.
[75] Section 254 of the Administration of Justice Act.
[76] Per Henrik Lindblom 'Global Class Actions' available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20-08.pdf> last accessed 10 May 2012.
[77] Finnish Group Action Act (Ryhmäkannelaki) Finland (444/2007) and Consumer Dispute Board Act (8/2007) and Consumer Dispute Board Decree (188/2007).

rules of civil procedures will apply to multiple-defendant cases.[78] This may suggest that multiple-defendant cases are not to be dealt with differently from single defendant lawsuits.

4) UNITED STATES

69. Class actions in the United States Federal Courts are governed by the Federal Rules of Civil Procedure Rule 23 and 28 U.S.C § 1332 (d). *La Mar v H & B Loan Novelty Co*[79] is a leading judicial pronouncement on Rule 23 in the United States.[80] *La Mar* was a consolidated appeal of two separate actions. The first case involved an action brought on behalf of a large number of customers of all pawnbrokers licensed to operate in Oregon, where the representative plaintiff had dealt with only one pawnbroker. This suit was certified by the District Court as a plaintiff class action. The second case was a class action brought by a passenger of an airline that challenged the method of calculating fares employed by the defendants and six other domestic airlines. The Court dismissed the proceedings against the other airlines because those defendants had not caused any injuries to the class representative. The Court of Appeal affirmed the District Court's decision with respect to the second action and dismissed the suit against all pawnbrokers that did not have a business relationship with the plaintiff. The reason for the decision was that, in the airline case, the plaintiff was representing all people suffering any injury similar to that the defendants had suffered, but a plaintiff "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury."[81]

70. Further, the court held that the prerequisites of typicality and adequacy of representation requirements under rule 23(a) were directly relevant: "typicality is

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[78] See, for example, the 'Study Regarding the Problems Faced by Consumers in Obtaining Redress for Infringements of Consumer Protection Legislation, and the Economic Consequences of Such Problems', Final Report, Part I, Annex (available at <http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf>, accessed 10 May 2012) submitted by the Civic Consulting of the Consumer Policy Evaluation Consortium to the European Commission on 26 August 2008, citing the Civil Procedure Rules Part 19 III (in relation to costs) and Part 48 (in relation to practice directions) when reviewing British class action law. Also, the approach of applying standard civil procedure rules seems to have been adopted in a Spanish lawsuit against multiple parties discussed in the Report, 186-187. Further, this approach is compatible with the view that to be that the rules governing individual or traditional litigation should be applied, as far as possible, to class proceedings, expressed inter alia by Burger CJ in *Allee v. Medrano* 416 U.S. 802 at 828-29 (1974).

[79] 489 F2d 461 (9th Cir 1973).

[80] Vince Morabito, 'Standing to Sue and Multiple Defendants Class Actions' (2003) 41 Alta L Rev 295, 323.

[81] *La Mar v H & B Loan Novelty Co* (no 14) 462.

lacking when the representative plaintiffs cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies."[82] It went on to state that "a plaintiff who has no cause of action against the defendant cannot "fairly and adequately protect the interests" of those who do not have such causes of action. This is true even though the plaintiff may have suffered an identical injury at the hands of a party other than the defendant.'[83] The exceptions to the adequacy and typicality approach in multiple defendants cases were judged to be that this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.'[84]

71. The second exception, labelled 'the juridical link' exception, has been frequently applied by Federal courts in multiple-defendant class action cases.[85] An example is *United States v. Trucking Employers Inc*,[86] where the 'judicial link doctrine' allowed certification of a defendant class consisting of all trucking companies that were parties to, or bound by, the National Master Freight Agreement and area supplements. The defendants were accused of engaging in employment discrimination.

72. Morabito argues that *La Mar* was correct in dismissing as irrelevant the issue of standing to multiple defendant class actions initiated by those who do not have personal causes of action against every defendant, as this approach is consistent with the directive of the US Supreme Court in *Ortiz v. Fibreboard Corp*.[87] [88]

5) CONCLUSION

73. The issue of multiple defendants has generally been avoided by legislators and it has rarely been discussed in litigation. The consequence is that primary and

[82] ibid 465.
[83] ibid 466.
[84] ibid.
[85] Vince Morabito, 'Standing to Sue and Multiple Defendants Class Actions' (2003) 41 Alta L Rev 295, 324.
[86] 75 F.R.D. 682 (DDC 1977).
[87] 527 U.S. 815 (1999) 831.
[88] Vince Morabito, 'Standing to Sue and Multiple Defendants Class Actions' (2003) 41 Alta L Rev 295, 325.

inevitably secondary sources are neither comprehensive nor conclusive in setting out the law. This is especially the case in European jurisdictions where class action legislation has been introduced only recently. Other jurisdictions display an inconsistency in addressing the issue. The law is therefore fragmented at a national level and an international consensus is lacking.

QUESTION FOUR: WHAT IS THE METHODOLOGY USED TO QUANTIFY DAMAGES, AND TO DIVIDE THEM AMONG MEMBERS OF A CLASS? (CONSIDER EG TOBACCO LITIGATION IN THE US)

1) METHODOLOGIES USED TO QUANTIFY DAMAGES

74. Under US Federal law, a number of methodologies exist for quantifying damages and dispersing them to a given class. Whether damages are able to be quantified, and how such quantification will be assessed is one aspect important in the certification phase of the class action procedure (see question 2 above). Judges therefore have discretion regarding methods used to calculate and assess damages. Mulheron states:

> "Where liability of the defendant is established upon contested litigation, and monetary awards are necessary to compensate the successful class members for their loss or damage, there are various choices open to a court when it comes to determine the issue of quantum of damage."[89]

75. Broadly speaking, there are two ways to assess damages:

- Individual damages assessment (US, UK-GLOs and, generally, Representative Actions in Portugal);
- Class-wide assessment (US).

These two models are outlined below.

a) Individual Damages Assessment

76. Individual damages assessment entails that the court will assess the amount due to each member of a class "on an individual by individual basis".[90] Mulheron notes that under this method, the quantum of damages is an issue of dispute before the court, to be proven by evidence such as "oral evidence submitted claim forms, Scott schedules prepared by the lawyers, or some other appropriate means".[91] At the conclusion of the case, a "specified or ascertainable amount" is awarded to

[89] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 407.
[90] ibid, 407.
[91] ibid, 407.

each class member.[92] This approach is possible under the Canadian and Australian schemas.[93]

77. In the **UK**, Group Litigation Order claims under CPR Pt 19.III must be resolved individually.[94] This occurs for example through "individual quantum trials once generic liability and causation have been established".[95]

78. In **Italy**, "if the court finds the defendant liable, the court's decision specifies either a damage amount or a uniformly applicable criterion to be applied to all claims to calculate the damage for each individual claim".[96] While Article 140 *bis*, para 4 mentions that "[i]f possible, the court shall determine the minimum amount of money each consumer or user shall be granted", it appears that the more likely approach adopted by Italian courts will be to calculate the damages on an aggregate basis.

79. In **Portugal**, Article 22 of the Class Action Law distinguishes between compensation for injury to *identified* and *unidentified holders* of interests.[97] According to Antunes, Art 22(3) states that damages for identified holders of interests are "calculated under the general terms of civil liability", that is, upon furnishing evidence of proof of loss. Conversely, Art 22(2) establishes the "global fixing of compensation for violation of the interests of unidentified holders".[98] The jurisprudence adopted in Portugal will be discussed briefly below, in the context of aggregate damages.[99]

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92 ibid, 407.
93 See discussion in ibid, 407.
94 Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 233.
95 ibid, 233. Gibbons cites *Prudential Assurance Co v Newman Industries* [1981] Ch. 257 as an example of 'a traditional, bifurcated approach in multi-party actions'.
96 Dr Renzo Comolli, Dr Massimiliano De Santis and Dr Francesco Lo Passo 'Italian Class Actions Eight Months In: The Driving Forces' <http://works.bepress.com/massi_de_santis/5>., citing Art 140-bis Consumer Code, paragraph 12.
97 This account is drawn from Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)' available at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> accessed 10 May 2012.
98 ibid.
99 ibid.

b) Class-Wide, Global

80. There are two different approaches that courts may adopt with respect to the global assessment of damages. These are:

> a) averaging assessment; and
> b) aggregate assessment.

Under both these models a central fund is established from which individual claimants will ultimately be paid out.[100] As a result, under either model "class members are not required to individually prove their loss or damage in separate trial proceedings".[101] While there are practical advantages to this approach, Gibbons notes:

> [I]t may be far from easy for the group's lawyers or the court to devise a fairly balanced mechanism to apportion damages. It by no means follows that individual claimants will receive anything like their proper due.[102]

Gibbons cites the Agent Orange case[103] as an example of the pitfalls of this approach – many claimants were excluded altogether from recovery so that others could receive bigger payouts.[104] The case highlights the controversy that remains in jurisdictions such as the US where global assessment approaches are often used.

i) Averaging assessment

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[100] Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 234.
[101] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 408.
[102] ibid, 234.
[103] ibid, 234. Gibbons summarises this scenario: "Arguably, a telling illustration of imbalance through a lack of adequate protection for certain group members' rights is the judicially-mandated settlement of the US Agent Orange litigation in 1984. This huge mass tort class action was brought on behalf of approximately 2.4 million Vietnam veterans and their relatives for serious maladies (including cancers, genetic damage and birth defects) allegedly caused by exposure to phenoxy herbicides during the Vietnam war. The litigation settled on the first day of the jury trial, after the trial judge, Judge Weinstein, exerted overwhelming pressure over the parties. He approved a US $180 million settlement plan, and delegated allocation of the damages among the claimants to a special master." Gibbons cites "Agent Orange" Prod. Liab. Litig., Re 597 F Supp 740 (EDNY, 1984) (approving settlement plan); "Agent Orange" Prod. Liab. Litig., Re 611 F Supp 1396 (EDNY, 1985) (approving distribution plan). Upheld on appeal, "Agent Orange" Prod. Liab. Litig., Re 818 F 2d 179, 183-4 (2d Cir., 1987), and refers to P.H. Schuck, "The Role of Judges in Settling Complex Cases: The Agent Orange Example" (1986) 53 University of Chicago Law Review 337.
[104] Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 234.

81. Under averaging assessments, all claimants typically receive an equal share of damages based on a 'hypothetical' average damage claim.[105] Gibbons notes:

> In situations where class groups are very large, the particularities of individual claims are too onerous, expensive or complex to assess accurately, or the precise class membership remains uncertain (as may occur under opt-out class action devices [...]) damages calculations sometimes are based on an estimate of the "hypothetical average" claimant's damages.[106]

Under this model, the "hypothetical average" is "multiplied by the total number of claims to produce a global lump sum payable to the group".[107] An example of this approach in the US is the *Silicone Gel Breast Implants* litigation[108] where all claimants stood to receive an equal per capita share, irrespective of the diverging sizes and merits of their claims.[109]

ii) Aggregate assessment

82. Aggregate assessment results in an award of damages to the complainants as a group, without requiring "precise evidence that each putative victim has suffered loss and how much".[110] It differs from averaging assessment in that the lump sum award need not be calculated by reference to hypothetical average damage to an individual claimant. Aggregate assessments may be made in a number of jurisdictions, such as the US federal system, Quebec and Ontario in Canada, and the Australian federal system.[111]

83. In the UK, as noted above, Group Litigation Orders as well as Representative Actions (which are more similar to a typical class action mechanism) generally require individuals to file separate claims after liability has been established.[112] While this is the general rule, Gibbons notes:

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[105] ibid, 233.
[106] Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 234.
[107] ibid, 233.
[108] Silicone Gel Breast Implants Prods Liab. Litig. No.CV-92 -P-10000 -S, Re, 1994 US Dist. LEXIS 12521 (ND Ala, September 1, 1994), cited in ibid, 233. Gibbons notes in a footnote that this case is discussed in J.C. Coffee Jr, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 Columbia Law Review 1343, 1404-10.
[109] See discussion in Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 233.
[110] ibid, 233.
[111] See ibid, 233, ft 136 and accompanying text.
[112] Susan M.C. Gibbons, 'Group Litigation, Class Actions and Lord Woolf's Three Objectives–A Critical Analysis' (2008) 27 Civil Justice Quarterly 208, 233.

> However, in *EMI Records Ltd v Riley,*[113] a representative party action under CPR Pt 19.II [...], Dillon J. authorised an inquiry as to damages suffered by all members of the represented class on an aggregate basis, to avoid the inconvenience of multiple separate proceedings. Importantly, he could see no objection to aggregate damages awards in principle, so long as the evidence is reliable and a reasonable degree of accuracy can be achieved in determining the total damage suffered by the group as a whole. The Scottish Law Commission favoured precisely the same approach for multi-party actions.[114] The Law Society, too, could see "no very strong argument for banning" lump sum global settlement offers–despite noting the potential for conflicts of interest between claimants–based on the public interest in securing the swiftest, most cost-efficient resolution.[115] (fts as in original)

84. In the **US,** Rule 23 FRCP does not expressly state whether aggregate assessment of damages payable by a defendant to the class is permitted.[116] Aggregate assessment is however judicially recognised as a legitimate assessment measure under FRCP 23 in 'suitable cases'.[117] However, there continues to be contention in the US courts about limiting the use of aggregate assessment of damages. Mulheron writes:

> While some courts have expressed the view that aggregate assessment should be the exception rather than the rule,[118] the decision in *In re Cardizem CD Antitrust Litig*,[119] for example, shows a more robust view being adopted. In response to the defendant's claims that the use of an aggregate approach to measure class-wide damage was inappropriate, the District Court approved of Newberg's commentary that: "[a]ggregate computation of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis".[120] It also noted that aggregate judgments had been widely used in antitrust, securities, and other class actions;[121] and to the extent that individual variations had to be accounted for in the plaintiffs' damage analysis, techniques could be adopted by which to estimate damages. (fts as in original)

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[113] *EMI Records Ltd v Riley* [1981] 1 W.L.R. 923.

[114] Scottish Law Commission, *Multi-Party Actions* (Scot. Law Com. No.154) (HMSO: Edinburgh, July 1996), paras 4.96-4.97; Scottish Law Commission Discussion Paper No.98, *Multi-party Actions: Court Proceedings and Funding* (November 1994), paras 7.66-7.71.

[115] Law Society, *Group Actions Made Easier: A Report by the Law Society's Civil Litigation Committee* (London: Law Society, September 1995), para. 6.17.4.

[116] Cf Australian federal regime and British Columbia and Ontario courts, as discussed in Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 408.

[117] See ibid, 408, citing: *Allapattah Services Inc v Exxon Corp,* 157 F Supp 2d 1291, 1304 (SD Fla 2001); *Six (6) Mexican Workers v Arizona Citrus Growers,* 904 F 2d 1301, 1306 (9th Cir 1990); *Robinson v Metro-North Commuter RR Co*, 267 F 3d 147, 162, fn 6 (2nd Cir 2001) (acknowledging that "some cases may require class-wide, rather than individualized, assessments of monetary relief"); *Catlett v Mo Highway & Transport Comm,* 828 F 2d 1260, 1267 (8th Cir 1987).

[118] *Robinson, ibid; Shipes v Trinity Indus,* 987 F 2d 311, 318 (5th Cir 1993) ("Where possible, there should be … a determination on an individual basis as to which class members are entitled to [recovery] and the amount of such recovery"); *In re Fibreboard Corp*, 893 F 2d 706, 710 (5th Cir 1990) (rejecting trial court's aggregation of asbestos damages as a "surrealistic cast").

[119] 200 FRD 297, 324 (ED Mich 2001).

[120] *Newberg* (3rd), 10.05.

[121] Citing *In re NASDAQ Market-Makers Antitrust Litig,* 169 FRD 493, 525 (SDNY 1996).

85. In **Portugal,** Article 22 of the Law of Class Action states that "compensation for the violation of rights not individually assigned is fixed at the overall level" (paraphrasing by Gouveia and Garoupa).[122] Gouveia and Garoupa write:

> [The Law of Class Action] does not establish the exact criteria for this overall determination, but it has been deemed necessary to find some criteria in order to limit judicial discretion. Thus, the compensation must be calculated as a function of the total damage generated, and not by looking at individual liability.[123]

However, what is clear is that "the compensation must be calculated as a function of the total damage generated, and not by looking at individual liability."[124] The purpose of class action damages is to return the injured parties "to the position [they] occupied before [they were] affected by a wrongful conduct".[125] Punitive damages are not an aspect of Portuguese class action law and should not be awarded as an aspect of the aggregate award.[126] However, there is a danger that they may be imported given the difficulty of calculating compensatory damages.[127]

86. There is divergent opinion in Portugal as to the scope of when aggregate assessment of damages should apply. Antunes writes:

> There are those who restrict the global compensation to violation of collective or diffuse interests,[128] or, at least, to situations where the amount due to each of the injured parties is of a small amount, not justifying the costs inherent in calculating the individual harm.[129] (fts as in original)

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122 Mariana Franca Gouveia and Nuno Garoupa, 'Class Actions in Portugal' in Jurgen G Backhaus, Alberto Cassone and Giovanni B Ramello, 'Class Actions for Europe: Perspectives from Law and Economics' (Edward Elgar Publishing Inc, 2012) 342, 346.

123 ibid.

124 Mariana França Gouveia and Nuno Garoupa, 'Class Actions in Portugal' in Jurgen G Backhaus, Alberto Cassone and Giovanni B Ramello, 'Class Actions for Europe: Perspectives from Law and Economics' (Edward Elgar Publishing Inc, 2012) 342, 346.

125 José Luís da Cruz Vilaça et al, 'Portugual' available at <http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/portugal_en.pdf> accessed 11 May 2012, 15.

126 Mariana Franca Gouveia and Nuno Garoupa, 'Class Actions in Portugal' in Jurgen G Backhaus, Alberto Cassone and Giovanni B Ramello, 'Class Actions for Europe: Perspectives from Law and Economics' (Edward Elgar Publishing Inc, 2012) 342, 346.

127 ibid.

128 One can read in the Judgment of the Supreme Court of Justice of 7 October 2003: "Although the interpretation of this legal rule [Article 22 (3) of Law 83/95] gives rise to many doubts, it seems clear to us that the compensation in question only takes place when the interests violated are actual diffuse interests and not, as in the present case, homogeneous individual interests (interests of entitled persons who, if unidentified, may perfectly be identified: the subscribers to a fixed telephone service who, during the period considered, had paid the activation charge)" (in <http://www.dgsi.pt/jstj.nsf>).

129 Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, [Lisboa, 2003] page 170 et seq.

In such contexts, it is "legitimate to index the compensation to the profits of the agent". [130]

87. In **Italy**, under Article 140 *bis* of the Consumer Code the court may either:

- "quantify the damages due to each member of the class with an equitable decision (*i.e.* without a full assessment of circumstances in each single case); or
- establish in its decision uniform criteria based on which damages suffered by the members of the class shall be quantified (should no agreement be reached between the losing defendant and single members of the class, it is not clear whether the latter has to bring a further, individual claim to quantify the loss, or the amount of loss may be directly determined in the enforcement phase, based on the abovementioned criteria)".[131]

88. Article 140 *bis*, para 4 clarifies that:

> [i]f possible, the court shall determine the minimum amount of money each consumer or user shall be granted. Within sixty days of the judgment having being served, the undertaking may serve on each consumer or user a written offer for a specified sum of money; the offer must be filed with the court.[132]

If the defendant fails to settle the quantum of the disputed damages within 60 days, the "President Judge of the court shall set up a single conciliation chamber for the calculation of the amount of money to be awarded or returned to the consumers or users who joined the collective action or adhered to the lawsuit, provided that they submit an application to this end".[133]

iii) Specific issues with respect to global damages

89. It has been held in some jurisdictions that the use of statistical evidence is appropriate in ascertaining the extent and amount of aggregate damages.[134] For

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130 Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portguese Report)', available at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> accessed 10 May 2012.

131 Summary of Italian law provided by GLG, 'The International Comparative Legal Guide to: Class and Group Actions 2011, A practical cross-border insight into class and group actions work' available at <http://www.iclg.co.uk/khadmin/Publications/pdf/3978.pdf> accesed 13 May 2012.

132 Translation by Elisabetta Silvestri, in Silvestri, 'The Italian 'Collective Action for Damages': An Update', available at<http://globalclassactions.stanford.edu/sites/default/files/documents/Italian_Collective_Action_for_Damages.pdf>, 3.

133 Para 6, Art 140 bis Consumer Code (translation by Elisabetta Silvestri, ibid).

134 Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 420.

instance, in the US, consistent with the Federal Rules of Evidence,[135] courts have been "willing to admit statistical material as evidence".[136] To this end, Mulheron notes that courts have[137]

> approved the computation and distribution of aggregate class damages through reliably accepted statistical methods[138] and by use of representative samples.[139] (fts as in original)

Mulheron further explains that[140]

> [s]tatistical computation for aggregate awards of monetary relief has been held to be useful where, for example, calculation by manual examination of the circumstances of each class member would be cumbersome, expensive and ultimately almost impossible to determine.[141] By corollary, however, where the type of harm suffered by the class members varied substantially, that will make statistical calculation of the average damages suffered impermissible, and certification will be denied.[142] (fts as in original)

Recently, the Ontario Court of Appeal has indicated it may be open to using statistical evidence to establish liability.[143]

iv) Are punitive damages permissible?

90. In the US, punitive (or exemplary) damages are permissible. This approach is not generally followed in other jurisdictions. The divergence highlights that US and EU

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[135] Federal Rules of Evidence (US) 703, 1006.
[136] ibid.
[137] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 420.
[138] *In re Domestic Air Transport Antitrust Litig*, 137 FRD 677, 690, 692 (ND Ga 1991); *Windham v American Brands Inc,* 565 F 2d 59, 68 (4th Cir 1977). For further authorities, see: K Roosevelt, "'Defeating Class Certification in Securities Fraud Actions" (2003) 22 *The Review of Litigation* 405, 432, fn 154.
[139] *Long v Trans World Airlines Inc,* 761 F Supp 1320, 1323-25 (ND I11 1991) (class proof of aggregate damages permissible using statistical sampling proofs); *In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions,* 333 F Supp 278 (SDNY 1970). As the OLRC explained, sampling statistics are based upon information gathered about a smaller number of individuals or objects within the universe (the class), for the purpose of estimating particular characteristics of the universe as a whole: *OLRC Report,* 830.
[140] ibid, 420-421.
[141] *Eovaldi v First National Bank of Chicago,* 71 FRD 334, 336-37 (ND I11 1976) (note that it was the *defendant* here and not the class action advocate who favoured the use of statistical evidence; judicially approved, because mailed questionnaire would lead to speculative or perjured responses and would be expensive, and plaintiff's mechanical formula would arrive at mere estimate; thus, other practical options would produce no better results than the statistical computation used by the defendant's expert).
[142] *Contintental Orthopedic Appliances Inc v Health Ins Plan of Greater NY Inc,* 198 FRD 42, 47 (EDNY 2000) (certification of antitrust case denied; damages not susceptible to common proof using a formula or economic model); *Broussard v Meineke Muffler Shops Inc,* 155 F 3d 331, 343 (4th Cir (NC) 1998) (average loss of individual plaintiffs improper where substantial variation; actual losses necessary); *In re Fibreboard Co,* 893 F 2d 706, 710-12 (5th Cir 1990) (denying certification of 2990 asbestos victims where type of harm varied substantially; statistical calculation of average damages impermissible), and see Roosevelt, *ibid,* with further relevant authorities and discussion, at 432 and fn 159.
[143] See discussion of Ontario Court of Appeal case – *Chadha v Bayer Inc* (2003), 233 DLR (4th) 158, 63 OR (3d) 22 (CA) [51] in Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), Chapter 11, Monetary Relief, 421.

class action laws have fundamentally different rationales. As Christopher Hodges explains:

> A key assumption for present purposes is that, from a European viewpoint, private enforcement is primarily aimed at delivering damages, whereas public enforcement is primarily about behaviour control. It is suggested, however, that that assumption does not apply in the United States. The primary enforcement mechanism in the United States is that of private enforcement, rather than public enforcement, and it applies to enforcement of *both* private norms and public norms.[144]

91. It is also important to note that in the UK, for example, decisions on liability and quantum in civil cases are made by judges, not juries.

2) HOW ARE DAMAGES DIVIDED AMONGST MEMBERS OF A CLASS?

a) Direct Distribution to Class Members

92. In the US, pursuant to FRCP 23, "if class members' damages entitlement could be assessed on the basis of the defendant's records, then distribution by the defendant (or the court) via use of those same records will be effective".[145] Mulheron explains that

> [i]n such cases, it is possible and practicable for class members to be compensated for the precise amount of their loss of damage from an aggregate award, whether by payment of monies or by abatement or credit. … [U]se of the defendant's records for distribution eliminates the requirement for proof of claims or for any other record of individual entitlement.[146]

93. If compensation to class members by these methods is not feasible, alternative approaches have been adopted by various courts.[147] For instance, alternatives may include permitting "class members to receive an 'average' or 'proportionate' share

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[144] C Hodges, 'Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress' in J Steele and W van Boom (eds), *Mass Justice* (Edward Elgar 2011), 103.

[145] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), 424. Mulheron notes that this method has been extensively approved, citing inter alia *Tenuto v Transworld Systems Inc v Reliance National Indemnity Insurance Co,* 202 FRD 484, 489 (SD Tex 2001) (settlement approval provided, inter alia, that "defendant shall pay $255,000 to be distributed equally among all class members who submitted claim forms before the date of the fairness hearing"; defendants shall pay the remaining costs of administration including distribution of payment checks to class members').

[146] ibid, 425.

[147] ibid, 425

of the award".[148] This may be appropriate if class members are identifiable or can be made identifiable, but nonetheless they cannot ascertain each individual's loss on available evidence.[149]

94. In **Portugal**, the relevant legislation is silent on what system should be used for sharing of global compensation between injured parties.[150] To this end, one commentator has noted that:

> it seems to us that de iure condendo (in law as it should be) the payment should be made by resorting exclusively to arbitration, setting up a highly specialized court or arbitration committee alongside the court in question which processes the payment of all the indemnities. This process would thus be relatively simple, non-litigious, informal, and with low costs and would increase the number of injured parties that would come to court to receive compensation.[151]

95. In **Portugal,** Article 31 (2) of the Securities Code provides that "a decision in favor of the plaintiffs in a popular action must indicate the entity charged with receiving and managing the damages due to persons not individually identified".[152] A number of entities may be charged with distributing aggregate damages, including:

> a guarantee fund, an association for the protection of investors or one or several holders of rights to damages who have been identified in the action.[153]

Antunes notes that this rule "is linked, inextricably, to homogeneous individual interests".[154]

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148 ibid, 425. See also ibid, ft 254, which reads '*White v Carolina Paperboard Corp,* 564 F 2d 1073, 1084 (5th Cir 1977); *In re Chicken Antitrust Litig American Poultry*, 669 F 2d 228, 240 n 20 (5th Cir 1982) ("Although admittedly unusual, this arrangement seems to be a fair response to the particular difficulties that this class would have in gathering and presenting evidence of damages. In addition, because of fear that the costs of gathering such proof would exceed the amount received, the state attorneys general insisted upon this feature before relinquishing their claims against defendants")'.

149 ibid.

150 Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)', 27 available at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> accessed 10 May 2012.

151 António Payan Martins, *Class Actions em Portugal, Lisboa, 1999,* 122, cited in ibid.

152 See Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)', 27, available at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> (accessed 13 May 2012.

153 ibid.

154 ibid, citing Vide J. Oliveira Ascensão, A Acção Popular e a Protecção do Investidor, in "Cadernos do Mercado de Valores Mobiliários", no. 11, August 2001, page 65: "The holders of rights who are not individually identified are the parties who are individually harmed that did not take part in the action. This is confirmed by Paragraph 3: damages which are not paid as a result of the statute of limitations or the impossibility of identifying the respective holders revert to the guarantee fund. Only individual parties may be unable to be identified".

96. In the UK, according to s.47B(6) of the Competition Act 1998, "[a]ny damages or other sum (not being costs or expenses) awarded in respect of a consumer claim included in proceedings under this section must be awarded to the individual concerned; but the Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual)." The only claim brought under the act was settled (JJB Sports and Which?) and so this section has never been applied.

97. The GLO, being more of a mechanism for handling similar claims rather than a class action, has no special rules for damages: the normal principles of civil litigation apply. The calculation of costs is far more complex. Costs are normally divided between "generic" and "individual" costs. The court will normally order that the costs of a lead or test case will be treated as generic costs, as they are for the purpose of advancing the whole group's cases.

b) Non-direct (Cy-Pres) Distribution

98. A Cy-Pres distribution is an aggregate award or settlement that is applied "in a way which may reasonably be expected 'to compensate or benefit class members, where actual division and distribution of the award among the class members is impossible or impracticable.'"[155] Mulheron states:

> cy-pres distributions have been utilised where class members are difficult to identify, or where they change constantly, or where the claims of the individual class members are so small in quantum that they will not be pressed or economically distributed.[156]

99. Mulheron notes that "[p]rice reduction under FRCP 23 has been judicially noted (and academically approved) to be 'particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals.'"[157] She notes that overcharging is an "oft-cited example" of cy-pres distribution.[158]

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[155] Rachael Mulheron, 'The Class Action in Common Law Legal Systems: A Comparative Perspective' (Hart, 2004), 426, citing South African Law Commission, *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995), 45.
[156] ibid, 426, citing inter alia *In re Matzo Food Products Litig,* 1566 FRD 600 (D NJ 1994).
[157] ibid, 427, citing *Democratic Centre Committee of District of Columbia v Washington Metropolitan Area Transit Comm,* 84 F 3d 451, 455 (DC Cir 1996) and *Bebchick v Public Utilities Comm,* 318 F 2d 187, 204 (DC Cir 1963).
[158] ibid, 427, ft 264 (citing to GD Watson, "Ontario's New Class Action Legislation" [1992] *Butterworths J of Intl Banking and Financial Law* 365, 366).