

Academy of European Law
ANNUAL CONFERENCE ON EUROPEAN CONSUMER LAW 2011
Trier, 13 October 2011

**CURRENT DISCUSSIONS ON CONSUMER REDRESS:
COLLECTIVE REDRESS AND ADR**

Professor Dr Christopher Hodges¹

The two topics of collective redress and ADR might, at first sight, appear to have little in common. One is usually thought to relate to a court, judicial procedure and the other to a non-judicial procedure. The first essentially involves coercion and the second its opposite, voluntary agreement. But in fact these two subjects have become closely related, both in practice and politically. This paper will start by summarising the historical development of each procedure, and the debate that surrounds each, showing how the two streams have become merged.

A. Collective Redress

Two facts are widely known. Firstly, that mass problems can occur. There can be arguments over whether bank charges are too high; whether terms and conditions are unfair commercial practice; whether a medicine has caused injuries; whether government actions are illegal. Such issues can affect many people. The interests of economy suggest that similar issues should be dealt with together, so as to achieve coherent, consistent and economical results.

Secondly, the mass technique that is most well known, and widely used, is the American class action, which has been extensively used in the United States of America, particularly since the 1960s. Various governments around the world have introduced rules on mass judicial procedures that are broadly based on the U.S. class action. Yet many European governments have been notably tentative about introducing a class action. This may have occurred politically as a result of pressure from business, but the underlying concern is about what Europeans perceive to be the ‘abuse’ that is associated with the U.S. class action.²

But the debate in Europe has moved in directions that may surprise many observers. Essentially, if we ask what we are trying to achieve, and then ask what options exist for achieving the real goals, we end up with a different approach. This involves putting to one side the assumption that the courts offer the only technique that can deliver redress. It involves looking afresh at all available options. That is where ADR

¹ Head of the CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford; Erasmus Professor of the Fundamentals of Private Law, Erasmus University, Rotterdam; Solicitor.

² Many leading politicians have referred to ‘abuse’ produced by U.S. class actions, see below: recently see Commissioner Almunia in the hearing on collective redress for competition damages at the Economic and Monetary Affairs Committee of the European Parliament in Brussels on 22 September 2011.

comes in, in a new matrix of techniques. A judicial class action on its own may be seen as an old fashioned technique.

Distinguishing the Goals and Architecture of Legal Systems

One very important point has to be understood about the role that class actions play in different legal systems – because the same technique plays different roles in different systems, and realising this fact has huge implications for making a selection between the available techniques.

In general, the architecture of the entire legal system in the U.S.A., almost uniquely around the world, strongly emphasizes private enforcement [of both private rights and public norms],³ and Americans distrust enforcement by public authorities, especially federal agencies, which they regard as being captured by the Executive.⁴

On the other hand, European legal systems adopt both public enforcement and private enforcement, often separating them for public norms and private rights respectively. European courts do sometimes need to manage the processing of multiple claims – but far less frequently than occurs in America, since class actions are used more frequently there as *regulatory enforcement* mechanisms, on an opt-out model. That is why:

- Continental civil law jurisdictions do not have discovery: instead, their substantive law aligns the definition of rights and breaches so as not to require evidence in most situations.
- The loser pays rule is almost universal.⁵ Contingency fees (percentages of damages or recovery) are banned in almost every European jurisdiction, although success fees are widely permitted.
- ‘Class actions’ for damages are very new in about half of the member states, and they are not widely used even where they exist.

Further, the prevailing theory of enforcement in USA is based solely on deterrence: imposing high costs on business, *ex post*, to deter future conduct. In contrast, Most European agencies (apart from DG COMP) adopt an enforcement policy that is not solely based on deterrence, such as responsive regulation, risk-based enforcement, and others. It has been argued that, a deterrence theory *alone* is less effective and more expensive than other enforcement policies.⁶ For one thing, reliance solely on an *ex post* deterrence theory requires imposition of huge penalties, to take into account the *ex post* effect and the probability of detection: since *ex ante* control is not relied on.

³ An influential analysis was H Kalven Jr. and M Rosenfield ‘The Contemporary Function of the Class Suit’ (1941) 8 *University of Chicago Law Review* 684-687.

⁴ See CJS Hodges, ‘Objectives, mechanisms and policy choices in collective enforcement and redress’ in J Steele and W van Boom (eds), *Mass Justice* (Edward Elgar, 2011).

⁵ C Hodges, S Vogenauer and M Tulibacka, *The Funding and Costs of Civil Litigation. A Comparative Perspective* (Oxford, Hart Publishing, 2010).

⁶ C Hodges, ‘A Market Based Competition Enforcement Policy’ in [2011] *European Business Law Review* 261.

If you want to encourage the use of a private action technique, you would:

- a. Remove or reducing barriers to a claimant
- b. Place incentives for claimants and intermediaries (lawyers) to investigate possible wrongdoing and institute litigation.

These barriers and incentives are principally economic. There are several familiar levers:

- a. No cost to the claimant (intermediary supplies funding);
- b. No loser pays rule;
- c. In some circumstances, a one-way cost shifting rule: claimant does not pay if loses, defendant pays if loses;⁷
- d. High damages, so as to facilitate funding by the claimant's intermediary, and provide deterrence on defendants (see below);
- e. High contingency or court-approved fees for lawyers;
- f. Wide rules on discovery and depositions;
- g. Punitive damages, or triple damages in antitrust;
- h. Jury trials;
- i. Coordination of individual claims: Class actions or Multi-District Litigation rules.

Introducing each one of the above levers would facilitate increased levels of litigation, and banning each one would discourage it. There are no other magic safeguards – you just have to play with these levers, depending on whether you want more or less litigation. Most of these levers are within the competence of Member States, not of the EU.

Many people think that all of these levers do not exist in Europe. That is wrong. There are clear trends in several Member States, for example, towards cutting legal aid and replacing it with success fees, introducing contingency fees (in U.K.),⁸ low 'cost shifting' or one-way cost shifting,⁹ and financing litigation by third party funders,¹⁰ several of whom already finance collective claims.

Within the technical rules of a collective court procedure, there are also other levers, such as:

- i. evaluation of the merits;
- ii. certification by the court;
- iii. opt-out or opt-in;
- iv. notice provisions requiring notice to be given to all class members of the existence of an action and/or of a settlement, so they can opt-in or opt-out;
- v. court approval of a settlement;
- vi. court approval of lawyers' fees;
- vii. stand-alone or follow-on model.

⁷ S Farhang, *The Litigation State. Public Regulation and Private Lawsuits in the U.S.* (Princeton University Press, 2010).

⁸ *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. The Government Response* (Ministry of Justice, 2011).

⁹ *Ibid.*

¹⁰ See Report by C Hodges, J Peysner and A Nurse, forthcoming.

However, none of these levers can be calibrated, either individually or cumulatively. You cannot design a system to give ‘just enough’ safeguards and no more. You will end up with either too little or too much enforcement (under-restitution or over-deterrence), and this will vary between types of claim and sectors. If you pull more levers, you will get more—or less—litigation. That is what is happening now, often unplanned and uncontrolled, in some Member States.

In these respects, there is no difference between enforcement of competition law, consumer law, or any other area of law. The procedural levers and their economic effect are exactly the same, but their magnitude will vary from sector to sector.

Major Events

The following is a summary of the major events in the history of collective redress in Europe.¹¹ Firstly, let us look at Member State level. Fourteen of the 27 Member States have judicial collective redress mechanisms in which damages can be claimed,¹² but they have been found to be very different and to have diverse results.¹³ The studies and consultations showed that

the vast majority of the existing collective redress mechanisms tend to have some elements that work, and some that do not. Almost all existing collective redress mechanisms have some added value compared to individual judicial redress and alternative dispute resolution schemes. But their efficiency and effectiveness could be improved. The mechanisms have been applied in relatively few cases.¹⁴

Many of the national models have deliberately been designed conservatively, to avoid introducing large economic incentives for lawyers that might result in unmerited litigation and abusive practices. An example is the recent Polish Class Action Law, which included various safeguard features, such as maintaining the loser pays rule, the ability for a defendant to request an order that the representative claimant post a deposit against the costs, the requirement that all claimants must claim the same amount in damages, the exclusion of non-pecuniary tortious claims, and a limit of 20% on contingency fees.

¹¹ See C Hodges, 'Europeanisation of civil justice: trends and issues' (2006) 1 *Civil Justice Quarterly* 96-123; C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart, 2008); C Hodges, 'From Class Actions to Collective Redress' (2009) CJQ 28: 1, 41-66.

¹² See national reports of the Stanford-Oxford Global Network on Class Actions at globalclassactions.stanford.edu.

¹³ See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Oxford: Hart Publishing, 2008); C Hodges, 'From Class Actions to Collective Redress: A Revolution in Approach to Compensation' (2009) 28 *Civil Justice Quarterly* 41; and F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement* (Intersentia, 2009).

¹⁴ Consumer Green Paper, *supra* note 23, at para. 12.

The European Commission has proceeded carefully, and run into political difficulties. A 2008 consultation on benchmarks¹⁵ was followed by a Green Paper on consumer collective redress,¹⁶ which made no statement on the outcome of the consultation on benchmarks, or on any further or revised proposed benchmarks, but was accompanied by a Questions and Answers document¹⁷ and two studies by external contractors: a Problem Study,¹⁸ which evaluated the problems faced by consumers in obtaining redress, and the economic consequences; and an Evaluation Study,¹⁹ which evaluated the effectiveness and efficiency of existing collective redress mechanisms in the EU.

The Commission concluded in 2008:

“Studies ... have shown that there is no easy answer to the problem. All the current redress systems have their strengths and weaknesses and no single mechanism is ideal for all types of claims.”²⁰

By 2008, the terminology had changed twice. The first change was from ‘class actions’ to a European term ‘collective actions’. This signified a political desire to distance whatever technique might be proposed in Brussels from the ‘U.S. class action’, which had become a ‘toxic term’. Far more significantly, the second change was from ‘collective actions’ to ‘collective redress’. This signified a growing re-examination of the essential underlying policy goals, going back to first principles, and re-examining all available technical options. It was realised that the assumption that a judicial procedure was the only option was not only untrue, and that other options existed, but also that it was the wrong place to start.

By 2008, the debate on collective redress had crystallised in two different economic sectors: consumer redress and competition damages. These are different areas, in which different existing architectures exist for enforcement and redress. But the two areas became intertwined in the political debate. The consumer redress area had a long history, stretching back to the 1960s, in which consumer interests had long called for a class action to be introduced so as to address mass consumer problems.

Debate on the competition side has been about how to deliver damages after breach of competition law. The right to damages was recognised in EU law only in 2001.²¹ It

¹⁵ See online: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Benchmarks>. The benchmarks have been criticized as assuming that the solution would be a judicial solution, and the Commission has privately accepted that view. C. Hodges, ‘Towards Parameters for EU Civil Justice Systems’ in S Vogenauer and C Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Hart, forthcoming).

¹⁶ Green Paper on Consumer Collective Redress, COM(2008) 794, 27.11.2008, online: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

¹⁷ MEMO/08/741, 27.11.08.

¹⁸ Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, by Civic Consulting and Oxford Economics, 2008, online: <http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf>.

¹⁹ Study on the Evaluation of the effectiveness and efficiency of Collective Redress mechanisms in the European Union, by GHK, Civic Consulting and Van Dijk Management Consultants, online: <http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf>.

²⁰ MEMO/08/741, p 3.

²¹ Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

appeared that damages were not widely being paid,²² mainly because of a series of difficulties over bringing claims, such as:

- access to documents to establish liability and quantum, especially those held by the authorities in their enforcement activities. There was concern that the ‘leniency programme’ would be undermined if leniency documents were made available to claimants;
- overcoming the considerable complexities of quantifying losses in competition cases, including the extent to which a ‘passing on’ defence should be available;
- how to deal with multiple similar cases.

These issues were canvassed in a 2005 Green Paper²³ and a 2008 White Paper.²⁴ A central proposal was to introduce two collective procedures, one a representative action and one a class action, clearly very similar to the American model.

Thus, the question on the competition side is: given that the approach to enforcement has been solely to rely on (ever increasing) fines, and it appears that damages have frequently not been claimed under the national legal systems, how can damages be claimed more frequently? The European Commission’s answer to that question has been to leave the public enforcement policy intact, and to propose to ‘bolt on’ a separate system of rules to facilitate a privatised approach for claiming damages in private actions.

These proposals were met with vehement opposition by the German and French governments, the business community,²⁵ and some academic commentators,²⁶ although widely supported by lawyers, and by many competition economists. In the last days of the Commission in 2009, Competition Commissioner Kroes failed in her attempt to table a legislative proposal.²⁷

One aspect that is common to the consumer and competition situations is that mass problems can frequently involve widespread but small losses to many people. No

²² D Waelbroeck, D Slater and G Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Ashurst, 2004).

²³ Green Paper: Damages actions for breach of the EC antitrust rules, COM (2005) 672, 19.12.2005; Commission Staff Working Paper: Annex to the Green Paper ‘Damages actions for breach of the EC antitrust rules’, SEC (2005) 1732, 19.12.2005.

²⁴ European Commission (EC), ‘White Paper on damages actions for breach of the EC antitrust rules’ COM(2008) 165, 2.4.2008. Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404 (‘Staff Working Paper’). Commission Staff Working Document accompanying the White Paper on damages actions for breach of the EC antitrust rules: Impact assessment, SEC(2008) 405 (‘Impact Assessment Report’).

²⁵ Letter from the Presidents of the Association of German Chambers of Industry and Commerce (DIHK), the Association of German Banks (BdB) and the German Insurance Association (GDV) to President Barroso, 8 May 2009.

²⁶ WPJ Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26(3) *World Competition* 473-488; J Kortmann and C Swaak, ‘The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic’ [2009] ECLR 140. The latter is a strong attack on DG COMP’s proposals, arguing that they will lead to ‘overcompensation’ and messing up national rules, especially in relation to ‘passing on’ of loss and limitation periods. They do not see empirical evidence on which to found a proposal.

²⁷ N Tait, ‘Future of European antitrust proposals in doubt’, *Financial Times*, 3 October 2009.

rational individual would institute an individual court proceeding to recover a small sum of money, especially where the issues might be complex. It is rational, therefore, to ask whether mass individual claims can be combined in a procedure that delivers ‘judicial economy’ and thereby increases access to justice. The U.S. class action, largely copied in Canadian Provinces and Australia, provides efficiency by having just a single claimant that represents all other members of the class. In Canada and Australia, however, there is the problem that the representative claimant bears the full risk of liability for opponents’ costs under the loser pays rule. This has a chilling effect on rates of litigation, although the business models and available capital of some Australian ‘third party’ funders can cover with this financial risk.

When the new Commission was in place in 2010, President Barosso instructed his Commissioners for Competition and Consumer Affairs, and joined by the Commissioner for Justice, to collaborate in drawing up a unified policy on collective redress.²⁸ A further consultation paper was issued in 2009,²⁹ in which the Commission said:

‘U.S. style class action is not envisaged. EU legal systems are very different from the U.S. legal system which is the result of a “toxic cocktail” – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures). ... This combination of elements – “toxic cocktail” – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge’s discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.

All the Green Paper options, and in particular a possible EU collective procedure outlined above, reflect EU legal traditions. The Commission seeks to encourage a competitiveness culture e.g. where businesses which play by the rules can realise their competitive advantages, not a litigation culture.’³⁰

The Commission intends to publish a policy statement on collective redress following the 2009 consultation paper. This will be published after the Commission has considered an opinion from the European Parliament, which is expected in late 2011.³¹

Some Empirical Evidence

A threshold issue is to identify what level of need there is for mass redress, and how much of a problem exists with existing techniques. The 2008 Evaluation Study found that the evidence on economic detriment was low. The average consumer detriment recovered per litigant was €41 in those states with collective judicial mechanisms, and

²⁸ *Towards a Coherent European Approach to Collective Redress: Next Steps*. Joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, 5.10.2010, available at <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>.

²⁹ Online: <http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf>.

³⁰ European Commission DG SANCO, MEMO/08/741, p 4.

³¹ The rapporteur is KH Lehne MEP.

was €18 for all consumers in those states without a procedure. Granted that those figures may not be directly comparable, the *difference* that introduction of a court-based collective procedure might be expected to bring was €23 per consumer per annum. A figure of 10% of collective redress claims having a cross-border element is far from overwhelming, although the effect depends on the total economic detriment. A total of 326 cases in 13 jurisdictions over roughly ten years (which is an over-estimate, since the mechanisms have not existed for that long in some jurisdictions) gives a rough annual average of 32.5 cases per year. That would equate to 3 or 4 cross-border cases a year.

Do collective actions work? Do they deliver mass solutions, quickly, cheaply, and affect defendants' behaviour? It may be too soon to evaluate the collective action rules that have been adopted in the past decade in Member States. But initial results are not encouraging. Collective actions take too long, and are too expensive. The experience of product liability cases in England shows that many failed because of poor merits, and lasted several years.³² The German litigation of Deutsche Telekom investors under the 2005 Capital Investors Class Action Law (KapMuG) is likely to continue for 10 years. In contrast, the Dutch approach, based on incentivising parties to negotiate settlement of their disputes, which are then made binding by the court, has proved to be attractive and largely efficient.³³

Constitutional Issues

Two critical technical issues need to be noted. Firstly, many Continental jurisdictions have inherent resistance to adopting an opt-out model, since this offends the principle of individual determination over legal rights, which is contrary to principles of fundamental rights.³⁴

Secondly, institutional barriers exist to development of an EU enforcement policy, resting partly on the principle of subsidiarity³⁵ but more on that of procedural autonomy.³⁶ The latter upholds a constitutional settlement that competence over

³² C Hodges, *Multi Party Actions* (Oxford University Press, 2001). The largest mass litigation in England in the past decade, over injuries allegedly caused by the MMR vaccine, took 10 years and then collapsed before trial when it was clear that the vaccine was not the cause of the claimants' conditions.

³³ 2005 Class Action Settlement Law (WCAM).

³⁴ See Council of Europe, European Convention on Human Rights (1951); Charter of Fundamental Rights of the European Union (2000) at http://www.europarl.europa.eu/charter/default_en.htm.

³⁵ introduced into EU legislation by the Treaty on European Union, art 5.3.: see http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=en&id=74&ftuId=FTU_1.2.2.html.

³⁶ See E Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (Oxford, Oxford University Press, 2008), p 19; M Andenas, "National Paradigms of Civil Enforcement: Mutual Recognition or Harmonization in Europe?" in M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (London: British Institute of International & Comparative Law, 2005), 7 – 24; W van Gerven, 'Of rights, remedies and procedures' (2000) 37 *CML Rev* 50; S Prechal "Community Law in National Courts: the Lessons from Van Schijndel" (1998) 35 *CML Rev* 681; C Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 *CML Rev* 1389. For limitations to this autonomy, through the principles of equivalence and effective protection, see cases: Case 33/75 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989; Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043. A more recent case: C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* 12 December 2006, OJ C 331 of 30.12.2006, p 5.

enforcement of Community rules lies with Member States: the national obligation is merely to achieve the effect by means that are proportionate, effective and dissuasive.

The New Policy for Enforcement, Redress, and Incentivising Behaviour

Hodges has suggested a new, integrated policy for enforcement and redress, which relies on a three pillar model.³⁷ He suggests that the starting point is to define the basic objectives that society wishes to achieve, which he states as:

1. setting the basic standards of expected behaviour;
2. seeking to prevent things going wrong;
3. putting things right when they go wrong.

It is axiomatic that where there is liability, there must be redress. The issue then is what techniques can be used. The available techniques, and combinations of techniques, should be evaluated against criteria (especially speed, cost and ability to deliver desired outcomes).

In delivering objectives 2 and 3 above, Hodges' model adopts the following three pillars:

Pillar 1: enforcement by public authorities, through use of wide-ranging and powerful sanctions, with both public and private techniques, subject to democratic and court controls.

Pillar 3: enforcement by private actors through use of private actions through the courts.

Pillar 2: direct negotiation and resolution of issues, assisted by independent ADR pathways.

Use of pillar 2 would be incentivised through the existence of pillars 1 and 3. The ability of a regulator or a court to impose a solution (individual or mass) would frequently encourage parties to use ADR services. The pillar 1 power may therefore be rarely used, thereby saving resources. In order to avoid the risk of abusive capture of a pillar 3 pathway by rent-seeking intermediaries, it would only be available where a court considers that its use is reasonable, given the availability of a pillar 1 or 2 option.

The OECD recommends that all states should adopt mechanisms that enable consumers to be able to resolve disputes effectively, whether individually, collectively or through public authorities, and its stressing of a need for a *combination* of mechanisms, and for direct negotiation as the first option.³⁸

³⁷ See C Hodges, 'The European Approach to Justice and Redress' (2001), 53 *Canadian Supreme Court Law Review* (2d), 1.

³⁸ *OECD Recommendation on Consumer Dispute Resolution and Redress* (Paris: OECD, 2007) at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

Experience from the Danish Consumer Ombudsman, and the British telecommunications regulator Ofcom and Financial Services Authority³⁹ shows how quickly, efficiently and effectively a pillar 1 power can deliver both mass redress and behaviour control impacts. Since it should be the primary duty of a regulator to see that markets remain balanced, that duty necessarily includes a duty to ensure that restitution is made, since this is an essential requirement for achieving rectification of balance after a mass infringement has occurred. Accordingly, redress, and rectification of the market, should pre-cede the imposition of sanctions. This is contrary to the system under which EU competition fines are imposed: in concentrating solely on the enforcement policy based solely on deterrence, DG COMP has missed the essential objective.⁴⁰ I anticipate that at least one major Member State will follow Denmark, and diverge from the DG COMP approach to enforcement, by giving its national regulator a pillar 1 collective damages power, and encourage the private sector to construct and operate a viable ADR scheme for competition damages.

We need redress, but the collective action on its own is an old-fashioned tool for delivering this. There are more effective ways of delivering redress and behaviour, which are cheap, fast and effective.

B. CONSUMER ADR

Debate about alternate dispute resolution (ADR) is far more recent than the debate about collective redress, but it has spread quickly. ADR largely first arrived in Europe in the 1990s from the United States (again) and also from use in disputes in Canada, Australia and New Zealand between indigenous peoples and settlers' descendants.⁴¹ The main reason for building an ADR system arises from concern that the courts are too slow and expensive. But other features of ADR systems can influence decisions, such as a desire for confidentiality, greater informality, and other outcomes such as restoring peaceful relationships through a process that is not adversarial or bipolar (one side wins, the other loses) but less aggressive and more consensual. Arbitration of commercial disputes, nationally and internationally, is a familiar long-established ADR technique.

The current over-riding economic imperatives of governments are highly relevant. In order to rescue the economy, governments have to cut public expenditure and incentivise the growth of private business. They do not want to impose unnecessary transactional costs (through *unnecessary* regulation or litigation) on business, but they do want competitive and hence innovative markets, in which the rules are observed.

³⁹ s. 404 of the Financial Services and Markets Act 2000. The enforcement policy, based on 'restorative justice' principles (rather than a deterrence theory) prioritises disgorgement (restitution), discipline (penalties for offenders) and deterrence, in that order. See

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/036.shtml>; FSA consultation paper [CP09/19] on enforcement of financial penalties at http://www.fsa.gov.uk/pubs/cp/cp09_19.pdf.

⁴⁰ C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control. An Integrated Enforcement Policy, Involving Public and Private Enforcement with ADR' (2011) 34(3) *World Competition* 383.

⁴¹ See S Roberts and M Palmer, *Dispute Processes. ADR and the Primary Forms of Decision-Making* (Cambridge University Press, 2005); CJ Menkel-Meadow, 'Dispute resolution' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Studies* (Oxford University Press, 2010).

Increasing emphasis has been placed on extra-judicial dispute resolution, since this may be particularly relevant for small claims by consumers and SMEs.

At EU level, measures started with two recommendations on standards for mediation, and have progressed to more formal structures:

- In 1998 the Commission published a communication on "out-of-court settlement of consumer disputes."⁴²
- In April 2002 the Commission launched a Green Paper on ADR.
- A 1998 Recommendation on the principles applicable to out-of-court settlement of litigation, including (a) minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publicising and transparency of proceedings and (b) the principles of independence, transparency, adversarial, effectiveness, legality and representation.⁴³
- A 2001 Recommendation on the principles for out-of-court bodies involved in consensual resolution of consumer disputes, including the principles of impartiality, transparency, effectiveness, fairness.⁴⁴
- In 2001, an Extra-Judicial Network (EEJ-Net) was launched⁴⁵ and a consumer claim form promulgated⁴⁶ to facilitate consumers' access to ADR providers.⁴⁷ The EEJ-Net consists of national 'clearing houses' that assist consumers to settle possible cross-border disputes with companies, by guiding them towards alternative dispute resolution mechanisms.⁴⁸ From 2006-2009, most complaints tackled by ECCs concerned products and services, and contract terms. The main sector concerned by far over those five years was air transport, and a large number of complaints also concerned on-line transactions (55%).⁴⁹ The total number of complaints handled by ECCs has been between 50,000 and 60,000 annually.
- A separate network of national ADR bodies was established 2001 for financial services, called FIN-NET (Financial Services Complaints Network).⁵⁰ FIN-NET links 50 out-of-court schemes that deal with complaints in the area of financial services and covers the European Union, Norway, Iceland and Liechtenstein. In 2009, FIN-NET handled 1,523 cross-border cases, of which 884 were in the

⁴² http://ec.europa.eu/consumers/redress/out_of_court/commu/index_en.htm

⁴³ Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, [1998] OJ L 155/31, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>>.

⁴⁴ Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, [2001] OJ L 109, 56-61, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:109:0056:0061:EN:PDF>

⁴⁵ Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ C 155/1, 6.6.2000.

⁴⁶ http://www.eejnet.org/filing_complaint.

⁴⁷ http://ec.europa.eu/consumers/publications/factsheet-ECC-Net_en.pdf (accessed 31 March 2011).

⁴⁸ http://europa.eu/legislation_summaries/other/132043_en.htm.

⁴⁹ See the ECC Network website consulted in 2011

http://ec.europa.eu/consumers/ecc/key_facts_figures_en.htm

⁵⁰ See http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm (accessed July 2008).

banking sector, 244 in the insurance sector, 410 in the investment services sector,⁵¹ and 4 that could not be attributed to one sector.

- In 2002 SOLVIT⁵² was created as a free-of-charge on-line problem solving network in which EU Member States work together to solve without legal proceedings problems caused by the misapplication of Internal Market law by public authorities. There is a SOLVIT centre in every European Union Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help with handling complaints from both citizens and businesses. They are part of the national administration and are committed to providing real solutions to problems within ten weeks. From 2002 to 2010 SOLVIT resolved more than 1300 problems encountered by citizens and businesses due to incorrect application of EU rules by national authorities. It accepts around 60 new cases per month, around 80% of which are resolved, most of them within the deadline of ten weeks.
- A 2004 Voluntary European Code of Conduct for Mediators, covering:
 - Competence, appointment, fees of mediators.
 - Independence and impartiality.
 - Ensuring the understanding by the parties, fairness, informed consent over any agreement reached, parties' freedom to withdraw.
 - Confidentiality.⁵³
- The European Small Claims Procedure, for cross-border claims under €2,000, in force from January 2009, which does not require representation by a lawyer but in which the loser must pay costs.⁵⁴ This regulation eliminates the intermediate step of requiring the recognition of the case and its enforcement in another state. However, a 2007 study has shown that the cost, length or complexities of these procedures are still too high to allow effective access to justice.⁵⁵
- The Directive on mediation, in force from 21 May 2011, which promotes voluntary mediation as a viable alternative to litigation in providing access to justice, and includes requirements on confidentiality of processes, and enforceability of agreements.⁵⁶ However, it applies to cross-border mediation only.

⁵¹ This number is based on the reporting from 38 members of FIN-NET in 2009.

⁵² http://ec.europa.eu/solvit/site/index_en.htm

⁵³ Online: <http://europa.eu.int/comm/justice_home/ejn/adr_ec_code_conduct_en.pdf>.

⁵⁴ EC, *Commission Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, [2007] O.J. L 199/1, see art 2 and Annex 1 art. 7. The legal basis under art. 61 EC for coverage of domestic disputes as well as cross-border ones was a matter of debate. Art 16 provides that the court shall not award costs to the extent that they were unnecessarily incurred or are disproportionate to the claim. See G Haibach, The Commission Proposal for a Regulation establishing a European small claims procedures: an analysis, *ERPL* 2005, pp. 293-601; E Hondius, "Towards a European Small Claims Procedure", in: L Thévenoz & N Reich (eds), *Liber amicorum Bernd Stauder, Consumer Law*, (Geneva: Schulthess, 2006), p. 131 *et seq.*; J Baldwin, "Is there a limit to the expansion of small claims?", in: MDA Freeman (ed), *Current Legal Problems*, vol. 56, (Oxford: Oxford University Press, 2004), pp. 313-343; CJ Whelan (ed), *Small claims courts - A comparative study*, (Oxford: Clarendon, 1990), p. 253 *et seq.*

⁵⁵ See J Stuyck, below.

⁵⁶ EC, *Commission Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] O.J. L 136/3.

- In May 2010 a Recommendation introduced an EU-wide method for classifying and reporting consumer complaints to be used by complaint bodies on a voluntary basis.⁵⁷ This Recommendation is part of the gradual planned establishment of an EU harmonized complaint classification system and a Union-wide database of consumer complaints. The harmonised methodology is to be used on a voluntary basis by complaints bodies.⁵⁸

It was realised around the end of the 2000s that ADR can deliver effective redress for consumers, and that ADR systems can deliver mass redress, which goes a long way to solving consumer collective redress problems. There is wide political support for extending consumer ADR, but there remains strong opposition to extending collective actions, so the choice for political leaders is transparently clear.

Various national rules of civil procedure have been amended in the last decade to extend the use of mediation for court-based claims. The influential pioneer was England and Wales in the fundamental reform of the Civil Procedure Rules introduced in 1999.⁵⁹ However, a key feature of the English reform was to combine court procedure with mediation, and make settlement a formal goal of civil process. Those civil law systems that implement the Mediation Directive but fail to integrate it with civil procedure may struggle to realise benefits.

DG SANCO commissioned a series of studies on consumer ADR. A 2005 study led by Professor Jules Stuyck published in 2007 mapped ADR in 28 Member States plus USA, Canada and Australia.⁶⁰ It found that a multitude of ADR methods are used, that every Member State had put in place an unique mix. From this divergence, it was far from self-evident how to come up with one ‘ideal’ ADR system. Gaps were identified in sectoral and geographical coverage,⁶¹ leading to the conclusion that an ADR scheme with general competence and guaranteed geographical coverage was a necessary complement for sector specific mediation and arbitration schemes.

A 2009 study for the Commission found that there are far more ADR systems than most people are aware of:⁶²

- 750 national ADR business-to-consumer (B2C) schemes were identified across the EU. The most were: Germany 247 (many decentralised schemes), Italy 129

⁵⁷ See the recommendation at http://ec.europa.eu/consumers/strategy/complaints_en.htm

⁵⁸ See the recommendation at http://ec.europa.eu/consumers/strategy/complaints_en.htm.

⁵⁸ http://ec.europa.eu/consumers/strategy/complaints_en.htm.

⁵⁹ Pursuant to Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (HMSO, 1995) and Lord Woolf, *Access to Justice: Final Report* (HMSO, 1996).

⁶⁰ J Stuyck and others, *Commission Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, January 17, 2007, issued April 2007), available at: http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

⁶¹ Examples quoted at para 118 include no coverage for air transport disputes, car rental, sports centres and computer stores in the Netherlands despite the existence of 30 sector specific arbitration schemes there. Ombudsman in UK are said to be quite popular but are mainly present in the services sector and not goods.

⁶² Civic Consulting, *Study on the use of Alternative Dispute Resolution in the European Union*, 16 October 2009 http://ec.europa.eu/consumers/redress_cons/adr_study.pdf 2 December 2009

and UK 43, France 35. Civic say that ADR is clearly more relevant in Belgium, UK, Spain, Sweden, Austria, Ireland, Netherlands, Denmark and Malta than elsewhere. UK seems to have the highest number of cases for any individual scheme, with the Financial Ombudsman Service (FOS) often handling over 100,000 cases a year – most large schemes handle 5,000 to 20,000 pa. There seemed to be 530,000 cases in the EU in 2008, and this increased from 410,000 in 2006.

- Schemes have a high degree of diversity, as between public and private origins, and over the extent to which a decision or recommendation is binding on one or both parties. Several types of collective ADR procedures are in use, notably involving investigations, single representative procedures, and Scandinavian ombudsmen. Concerns over the functioning of collective cases include (a) the complexity of the procedure and related costs and (b) the non-binding nature of the decision.
- ADR schemes are low-cost and quick for consumer disputes. The vast majority are free or minimal cost to consumers (below €50) and are settled within a short period of time (an average of 90 days⁶³). ‘The analysis shows that many problems connected with court proceedings can be solved by effective ADR schemes, such as cost, duration of proceedings and formality.’

ADR is assuming increasing importance in EU law. In addition to the Mediation Directive mentioned above, measures that *encourage* Member States to establish ADR schemes are:

- the E-commerce Directive⁶⁴
- the Postal Services Directive⁶⁵
- the Markets in Financial Instruments Directive (MiFID)⁶⁶

EU legislative frameworks that *require* that adequate and effective ADR schemes are put in place:

- the telecom sector⁶⁷
- the energy sector⁶⁸
- the Consumer Credit Directive⁶⁹
- the Payment Services Directive.⁷⁰

The Services Directive⁷¹ requires service providers to provide consumers with information if they are members of an ADR scheme.

⁶³ Ibid, p. 33.

⁶⁴ Directive No 2000/31/EC; OJ, L 178, 17.7.2000 p. 1.

⁶⁵ Directive No 2008/6/EC ; OJ L 52 27.02.2008 p.3.

⁶⁶ Directive No 2004/39/EC; OJ L 145/1, 30.4.2004, p. 33.

⁶⁷ Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37.

⁶⁸ Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

⁶⁹ Directive No 2008/48/EC; OJ L 133, 22.5.2008, p.66.

⁷⁰ Directive No 2007/64 /EC; OJ L319/1, 5.12.2007 p.32.

⁷¹ Directive No 2006/123/EC; OJ L 376, 27.12.2006, p.36.

The number of ADR schemes that already exist is surprisingly large. Such schemes operate primarily within individual sectors (such as financial services, holidays, energy, telecoms) and have, therefore, arisen largely unnoticed except outside their particular sector. But the result is startling. Over 100,000 financial services claims in the U.K. do not go to court annually but are processed by the Financial Ombudsman Service. Around 11,000 claims are processed annually by the 50 sectoral dispute Boards in the Netherlands. In Finland, Sweden, Norway and Denmark, virtually no medical negligence or product liability litigation has appeared in the courts for many years, since the introduction of no fault compensation schemes.⁷² And so on. This raises the issue of what the residual function may be for the courts.

In January 2011 the Commission issued a consultation on ADR and on possible ways in which the use of ADR within the EU could be improved,⁷³ noting that

‘ADR has, however, not yet achieved its full potential. In 2009, 6.6% of the cross border complaints received by the European Consumer Centre network were transferred to an ADR scheme.’

SANCO aims to propose two legislative measures in late 2010: one on consumer ADR and the other on ODR for e-commerce. Meanwhile, Commissioner Reding has said that use of the proposed DCFR on contract law will engage an ADR pathway for any disputes that arise, and the Commission is starting to look at B2B solutions for ADR. Many Member States use ADR also for disputes between the public sector and its contractors and citizens.

There is still widespread confusion about what *consumer* ADR actually is. Forthcoming research from Oxford identifies that mechanisms involve consumer ombudsmen or similar service providers (not mediation attached to the court process, and not usually separate arbitration).

The current tasks are:

1. To review the essential requirements that are contained in the 1998 and 2001 Recommendations, and update them. Are the principles of independence, impartiality, transparency, fairness, hearing both sides, effectiveness, legality, liberty and representation still the right ones?
2. To evaluate all ADR schemes against those criteria, and to facilitate or ensure that all schemes observe the essential requirements and adopt best practice.
3. To address structural issues, notably: how to encourage business to join and fund ADR schemes; how to extend the coverage of ADR schemes to more sectors; how to provide effective cross-border solutions.

⁷² C Hodges, 'Nordic Compensation Schemes for Drug Injuries' *J Consumer Policy* (2006) 29: 143-175.

⁷³ Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union (European Commission, January 2011), available at

http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf

An example of issue 2 is: Can private sector dispute resolution schemes be independent and unbiased? Techniques have developed to achieve this. They rely first on applying the essential requirements through combinations of vertical scrutiny by regulators and customers, and horizontal scrutiny by competitors, the market and the media. Leading examples are the criteria and systems established in the United Kingdom for the telecommunications sector by Ofcom and general consumer sector by the Office of Fair Trading,⁷⁴ and established in the Netherlands by the Stichting Geschillencommissie.

A topical issue is whether ADR can be mandatory, or whether this infringes the right of access to the courts under art 6 ECHR. An interesting case⁷⁵ was decided by the Court of Justice in relation to Italian implementation of the the Universal Services Directive (USD),⁷⁶ requiring that Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, and the general principle of effective judicial protection were compromised by the Italian law which made mandatory an initial out-of-court dispute resolution procedure before a dispute was admissible in the ordinary court process. The Court ruled that the USD does not set out the precise content or the specific nature of the out-of-court procedures that have to be introduced at the national level. The only criteria were those set out in article 34 of the USD: the principles of effectiveness, legality, liberty and representation. The Court held that none of these principles limited the power of the Member States to create mandatory out-of-court procedures for the settlement of telecoms disputes between consumers and providers.⁷⁷ The only requirements are the maintenance of the *right* to bring an action before the courts for the settlement of disputes and for ensuring that the Directive remains effective.

Almost all of the ADR systems use one or more of the same basic dispute resolution *techniques* of mediation, conciliation and arbitration. Many systems are designed to integrate several techniques within a tiered sequence, so as to enable different forces to act together within a pyramid structure within which claims can be resolved first in the quickest and cheapest fashion, whilst allowing progression to more adjudicatory (and hence more costly and slower) techniques involving adjudication by arbitrator(s) or judge(s):

- (a) direct negotiation between the parties;
- (b) conciliation or mediation assistance from a trade association, ombudsman or independent party;
- (c) the option of referral to a binding decision by an independent third party through arbitration (by an arbitrator, dispute resolution board, or ombudsman), as an alternative to starting a judicial procedure.

Those involved in stages (b) and (c) have sector-specific expertise, and the ability to adopt proportionate procedures, thereby delivering expert, swift and low cost outcomes. Sectoral Boards, such as travel/holidays, financial services,

⁷⁴ See *Mapping UK consumer redress. A summary guide to dispute resolution systems* (Office of Fair Trading, May 2010), http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf.

⁷⁵ See J Davies and E Szyszczak, 'ADR: Effective Protection of Consumer Rights?' (2010) 35 E.L. Rev. October 2010-11-19.

⁷⁶ Directive 2002/22 [2002] OJ L108/51.

⁷⁷ *Alassini* (C-317/08, C-317/08, C-319/08 and C-320/08) March 18, 2010 at [42].

telecommunications, motor vehicles, and so on, can be structured so as to satisfy requirements of independence and absence of capture.

A significant percentage of initial consumer complaints (varying from sector to sector) are requests for information about how to use products and services appropriately or better, rather than disputes. If such inquiries are not dealt with well, they can escalate into disputes. There is, therefore, a need for an early information service and support function, and this is usually best provided by business entities.

Another challenge for Europe is to enhance the existing national ADR systems and create a powerful *unified* pan-EU mechanism. A good precedent exists in the Netherlands, where a unified national system of sectoral complaint Boards exists. What is needed is a single model that can be applied in every business sector. That would increase consumer knowledge of the existence of trustworthy dispute resolution systems, increase throughput, and pressure business sectors to establish schemes and pressure traders to join them. Cross-border claims can be handled by joining up national ADR systems through building on the existing ECC-NET and FIN-NET networks.

Importantly, the best ADR systems can also provide *regulatory* information and effects, if designed properly. The dispute resolution procedures can deliver valuable information on types of claims, trends and issues, and how well sectors and individual businesses are performing, both in relation to substantive issues such as breach of law, or commercial information on how to improve products and services, as well as whether there is a need to improve the dispute handling process itself. This can improve standards and provide a powerful mechanism for behaviour control. The requirement is that the dispute resolution system should capture the data, and make it transparent and available to the market, customers and regulators. Economies of scale can also be achieved in combining dispute resolution systems within quality control and regulatory systems. Hence, the dispute resolution system can operate also as a Quality Management System, reinforcing and improving virtuous behaviour.

The discussion above has focussed on influencing the behaviour of the private sector. A word should be added that many European States have extremely effective Ombudsmen for disputes between citizens and the public sector. Such Ombudsmen are effective because they operate directly under Parliamentary authority and mandate, thereby enabling them to behave with great discretion rather than in an authoritarian fashion, and they have built personal reputations of the highest integrity. They do not just resolve individual disputes but (as seen with the private sector TQS principle) can investigate systemic problems and behaviours. The Ombudsmen in the Nordic States, the Netherlands and the United Kingdom have had considerable effect on building a respectful style of relationships between the state and citizens.

ADR systems have huge potential to deliver not only effective, cheap and quick solutions to B2C disputes, thereby solving access to justice issues, but also to provide valuable market information that will enhance competition, innovation and safety. ADR systems thereby challenge the traditional role of the courts. Some may be

concerned at this.⁷⁸ But others will support the development of a new relationship and function between the courts and private sector ombudsmen. One model would be that courts decide issues of law, and ombudsmen apply settled law to the facts of individual disputes. Hence, there should be a rational transfer of cases between courts and ADR providers. In the 21st century, the civil justice system may change dramatically.

⁷⁸ See the critical stance of PH Lindblom, ‘ADR – The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden’ [2008] 1 *European Review of Private Law* 63-93.